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# JUDGES

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<sup>1</sup>Elected June, 1893.

<sup>2</sup>Appointed July 25, 1893.

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**WERTZ et al. v. JONES.**

(Supreme Court of Indiana. May 12, 1893.)

**MARRIED WOMEN—ESTOPPEL IN PAIS—REVIEW ON  
APPEAL—SUFFICIENCY OF EVIDENCE.**

1. Plaintiff and her husband, who owed defendant money on notes, represented, when such notes fell due, that the husband was ready to pay them; that plaintiff wanted to borrow the money due defendant to use on her separate estate, on which she would give a mortgage to secure the loan. Defendant thereupon took her note and mortgage, and, by mutual agreement, defendant surrendered the notes to the husband, directing him to pay the money to plaintiff, who, together with her husband, agreed to the arrangement. *Held*, that plaintiff was bound by such representations, and estopped from denying the truthfulness thereof in order to avoid the mortgage; Rev. St. 1881, § 5117, providing that a married woman shall be bound by estoppel in pais like any other person.

2. The appellate court will not disturb a finding where there is some evidence tending to support it.

Appeal from circuit court, Henry county; E. H. Bundy, Judge.

Action by Louisa C. Wertz and another against John A. Jones. From a judgment for defendant, plaintiffs appeal. Affirmed.

Smith & Cambern, for appellants.  
Hanley & Guffin and Cullen & McGee, for appellee.

**OLDS, J.** The appellant Louisa C. Wertz, her husband joining with her, brought this suit against the appellee, asking the cancellation of the mortgage. She alleged in her petition that she was the owner, in her own right, of certain real estate; that on the 27th day of August, 1886, her husband, Hiram Wertz, was indebted to appellee, Jones, in the sum of \$1,236.35; that to secure this debt of her husband she gave her note and a mortgage on her separate real estate; that the mortgage was assigned, acknowledged, and recorded; that she was a married woman at the time; that no money was loaned to her, nor was the money used to improve her separate real estate; that there was no other or different consideration for the execution of said note and mortgage than the surrender of the notes evidencing the debt of her husband; that said mortgage is void as to her, and asking the cancellation of it. No question is made as to the sufficiency of the complaint. Issues were joined on the complaint and a trial had, result-

ing in favor of the appellee. The appellee answered in three paragraphs: The first, a general denial. The second alleged: "That on and prior to the 27th day of August, 1886, Hiram Wertz, who was and is the husband of the plaintiff, was indebted to this defendant in the sum of \$1,236.35, for which he held the notes of said Hiram Wertz. That on said day the said Hiram and his wife came to him, and represented to him that said Hiram was ready, and had the money, to pay off said notes, but that his said wife was the owner of a certain tract of real estate in Rush county, Ind., (which defendant knew was true,) and that she would like to borrow the money for her own separate use, and to improve her said real estate, and if said defendant would loan her the money she would execute to him her note and a mortgage on her said real estate, in which her husband would join. That these statements were made by both the plaintiffs, Hiram and his wife, to said defendant; both Hiram and his wife being present, and both making said statements. That thereupon said defendant said to them that he did not need the money, and if it was made secure to him he would loan it to her. That thereupon said defendant and said Hiram and the plaintiff went to the law office of Smith & Henley, where the same statement was made by the plaintiff in the presence of said Henley, to wit, that if the said defendant would loan her the money now in the hands of her husband for her separate use, and to improve her separate real estate, she would execute to him her individual note, secured by a mortgage upon her said real estate, and thereupon executed the following instrument in writing, and swore to the same before a notary public, to wit: 'State of Indiana, Rush county: Louisa Wertz, being duly sworn, upon her oath says that the money borrowed of John A. Jones on this day, to wit, \$1,236.35, and for which I have given my note this day, due in one year, with the privilege of extending the said note from year to year for five years, was borrowed by me for my own separate use, and for the improvement of my separate estate and land.' (Signed and sworn to.) That defendant relied upon the statements, affidavit, and representations of said plaintiff, and would not have loaned her the money but for them, and he loaned her the money in

good faith, fully relying upon what she so represented and swore to. That, as a part of the same transaction, and at the same time, she did sign the note for said money, and executed, together with her husband, the mortgage to secure the same. That as a part of said transaction, and in her presence, the defendant surrendered to said Hiram his note for said sum of money, canceling the same, and accepted the note and mortgage of the plaintiff, and directed him to pay the money to her, which he said he would do, and which she said was all right." That subsequently plaintiff paid the interest at different dates up to August 27, 1889. Wherefore, etc., she is estopped from charging that the note and mortgage is her own act, and for her own separate use.

A demurrer was filed to this second paragraph of answer, and overruled, and exceptions reserved, and the ruling is assigned as error, and is the first alleged error discussed. Counsel for the appellant state their objection to this paragraph as follows: "It is by way of estoppel. This paragraph does not allege that the appellant Mrs. Wertz was ever paid any money by Jones, or by her husband. The answer does not state facts sufficient to constitute an estoppel. Jones, the appellee, did not part with any right, property, or money. There is no allegation that Mrs. Wertz ever received a single dollar of the money. On the contrary, the pleader contents himself with the averment that the appellee directed the payment of the money by Mr. Wertz to the appellant Mrs. Wertz; that Mr. Wertz agreed to pay it, and appellant said it was all right. The answer shows that the consideration of the note secured by the mortgage was to pay the debt of the husband, and is therefore void." Section 5117, Rev. St. 1881, provides that a married woman shall be bound by an estoppel in pais like any other person, and our decisions affirm this doctrine. A married woman cannot bind herself as surety for her husband, but she may bind herself upon her individual contract, made for her own benefit. If the answer shows the contract to be one made in her own behalf, and for her own use and benefit, or if it shows that she, by her representations, led the appellee to believe it was such a contract, and induced him, by her representations, to believe it was such a contract, and upon the faith of such representations he, in good faith, parted with the thing of value constituting the consideration of the contract, she will be estopped from denying the validity of the contract which she induced by her representations. Ordinarily a party is estopped when he makes representations, with knowledge of the facts, when the party to whom they are made is ignorant of the truth of the matter, when the representations are made with the intention of having the other party act upon them, and the other party is induced by the representations to act. *Roberts v. Abbott*, 127 Ind. 83, 26 N. E. Rep. 565. This paragraph of answer shows affirmatively that the appellant Mrs. Wertz and her husband came to the appellee, whom the hus-

band was owing \$1,236.35, and each of them represented to him that the husband had the money on hand with which to pay the debt, and stated that Mrs. Wertz wanted to borrow it, treating it as the appellee's money,—it being due him from the husband,—and represented that she wanted to borrow the money for her own individual use, to expend in making improvements on land held in her own right, upon which she would give a mortgage, her husband joining, to secure the repayment of the money; that Mrs. Wertz put these representations in writing, and signed and swore to them; that appellee relied upon the representations, and believed them to be true, and in good faith took her note and mortgage for the amount; that instead of formally receiving the money from the husband, and passing it over to the wife, this formality was dispensed with, and by mutual agreement appellee surrendered the notes to the husband, and directed him to pay the money direct to the wife, which the husband agreed to do, and she agreed to it. By reason of the new contract with the wife, and relying upon her representations, the appellee parted with the notes for the amount of the loan, which presumably was of that value, and, according to the representations of both Mr. and Mrs. Wertz, the husband had in his possession at the time the money to pay the note, and the appellee believed that he had, and was induced by her representation to believe that the money would be at her disposal, the same as if he had paid it over to her, and it was as satisfactory to her as if he had done so, for this was a mutual arrangement, and under it appellee surrendered the notes. The representations did not relate to her capacity to contract. It was known that she was a married woman. The representations related to the character of the contract, and as to the fact of her husband having the money with which to make payment of the note due to the appellee, or to pay over to the appellant Mrs. Wertz. These were facts within her knowledge. The facts in relation to the purpose for which she wanted the money, at least, were exclusively within her knowledge, and the fact as to her husband having the money. The answer avers that she represented that he had, and none of the facts represented were such as the appellee is supposed to have any special knowledge of, other than the representations; and it is averred that he relied upon them, and was induced thereby to make the same, in good faith. The representations are of such a character as it has been held by this court that the wife has the right to make, and that she will be bound by them, and estopped from denying the truthfulness thereof in order to overthrow the contract induced to be made by reason of such representations. *Ward v. Insurance Co.*, 108 Ind. 801, 9 N. E. Rep. 361; *Bouvey v. McNeal*, 126 Ind. 541, 26 N. E. Rep. 896; *Maxon v. Lane*, 124 Ind. 592, 24 N. E. Rep. 683; *Cummings v. Martin*, 128 Ind. 20, 27 N. E. Rep. 173; *Security Co. v. Arbuckle*, 119 Ind. 69, 21 N. E. Rep. 469. This paragraph of an-

swer is sufficient to withstand a demurrer.

A demurrer was also filed to the third paragraph of answer, and overruled, and this ruling is the next alleged error assigned and discussed. This alleged all the facts alleged in the second, and in addition alleged that the husband paid over, or agreed to pay over, to his wife, Louisa, the money, and that the money was used in paying off liens and improving her separate real estate. This paragraph was clearly sufficient. It is shown that the wife received the benefit of the money; that it was paid out and used in accordance with the agreement, and for the purposes for which she represented she wanted it.

The next question presented relates to the ruling of the court in overruling the motion for new trial. It is contended that the evidence does not support the finding. No good purpose will be subserved in taking up the evidence in detail, and discussing it. We have read the evidence sufficiently to be satisfied that there is some evidence to support the material averments of the second paragraph of the answer. The evidence, it is true, is not very strong upon some points; but under the rule that this court will not weigh the evidence, and will not disturb a finding where there is some evidence reasonably tending to support the finding, we do not feel justified in interfering with the finding of the court. If Mr. Wertz did not in fact have the money at the time, there is nothing appearing in the evidence to justify this court in saying that the appellee knew that he did not, or that appellee did not rely upon the representations. The evidence fully supports the conclusion that appellee believed that he did have the money. If any fraud was practiced by reason of Mr. Wertz not having the money, the court might have reasonably come to the conclusion that the wife knew at the time whether or not her husband did in fact have the money. If she knew her husband did not have the money, and knew that appellee relied upon the representations that he did have it, and was entering into the contract, and surrendering his note, in the belief that he did have it, and was dealing in good faith with her, she was practicing a fraud upon the appellee in acquiescing in the representations made in her presence, and allowing appellee to act upon representations which she knew to be false, and she could have disclosed the truth either by speaking, or insisting upon the formal delivery of the money to appellee, and from appellee to her. If the evidence indicates that there was any collusion between any of the parties to the transaction, it would tend to show that such collusion was between the husband and wife, rather than between the husband and appellee. We do not wish to be understood to hold that by simply obtaining a written affidavit of a married woman as to the object of the loan, or by procuring her to make representations for the purpose of estopping her, simply to avoid the law,—the other contracting party engineering a scheme to entrap her,—that she would be estopped, or that he

could avail himself of the estoppel. Parties contracting with married women, and procuring liens upon the land, must act in good faith, as must she in procuring others to surrender rights which they possess. Nor do we intend to hold that parties can avoid the law by doing indirectly what the law forbids being done directly. There is no such failure of proof as authorizes a reversal of the judgment. Judgment affirmed.

(134 Ind. 324)

# HAMRICK v. STATE ex rel. HAMRICK.

(Supreme Court of Indiana. April 27, 1893.)  
MENTAL UNSOUNDNESS — OPINION EVIDENCE—INSTRUCTIONS.

1. In an action involving the issue whether a person is of "unsound mind and incapable of managing his estate," presented by Rev. St. 1881, § 2545, a witness may state his opinion as to the mental unsoundness of the person or the manifestations thereof, but not as to whether the degree of incapacity has been reached; that being the question for determination of the jury.

2. An instruction declaring a person within the issue of the statute, if found incapable of conducting the ordinary business affairs of life with reasonable prudence, "and reasonable safety from his own folly and the fraud of others," is not erroneous on account of the clause quoted, although it would also have been substantially correct had the clause been omitted.

Appeal from circuit court, Hendricks county; J. W. Hadley, Judge.

Proceeding on relation of Thomas E. Hamrick for appointment of a guardian for Porlena Hamrick. Judgment, from which the said Porlena appeals. Reversed.

Cafer & Hadley, Harding & Hovey, and Daniel Wait Howe, for appellant. Brill & Harvey, for appellee.

HACKNEY, J. This appeal is from an adjudication that the appellant is of unsound mind, and incapable of managing her estate. The proceeding in the circuit court was for the appointment of a guardian. In the course of the trial the court permitted the following questions and answers of witnesses on behalf of the appellee: "From your acquaintance with Mrs. Hamrick, and the facts you have related to the jury, state whether or not, in your opinion, she is or is not a person of unsound mind to that degree as to render her incapable of conducting the ordinary affairs of life, and render her subject to her own folly or the fraud of others. Answer. To that extent, I will answer 'Yes.'" On the cross-examination by the appellee of a witness for appellant, this question and answer were permitted: "I will ask you if you don't believe this woman is liable to be euchred out of her property by being imposed upon by her children or others, if she is left without any one to assist her in managing her property. Answer. I think such thing might be." It is no longer an open question in this state that a nonexpert witness may express an opinion as to the soundness of mind of the person under inquest, but we have found no case in the reports of the state permitting the

opinion of a witness upon the capacity of such person to conduct the ordinary affairs of life. The issue in a case like this is, under section 2545, Rev. St. 1881, is the subject "of unsound mind, and incapable of managing his own estate?" Mere unsoundness of mind is not sufficient, but it must include or be of that degree that the subject is not capable of managing his estate. The court has permitted these witnesses to state to the jury that, in the case of this subject, the degree of incapability required has been reached. In permitting an opinion by a nonexpert witness as to sanity or insanity, the rule is said to grow out of the necessity arising from an inability of the witness to describe the appearance, the action, the language, and the manner of the subject with such precision and minutest detail as to possess the jury of all the knowledge of the witness, and thereby enable the jury to form that opinion, instead of receiving the opinion of the witness. In this state it is so well and so often decided as to need no citation of the cases, that this opinion of the witness must proceed from the facts and circumstances which the witness shall have given to the jury of his acquaintance with and observation of the subject, not including, of course, those observations not susceptible of description. The ordinary affairs of life, and the capacity essential to transact them, are not subjects involving any rule of science or art. They are within the comprehension and common observation of that class of men who constitute the jury. They do not require a particular knowledge of the person whose capacity is under investigation. Whether that capacity exists or not is peculiarly a question for the jury. It is the very question to be passed upon by the jury. When the particular phases of unsoundness of mind, the special characteristics of the individual, are given, the jury must raise the standard, and determine if the essential capacity exists. It would be hardly contended that the abstract question of what is sufficient mental capacity to transact the ordinary affairs of life could be made the subject of testimony; much less can it be made the subject of opinion evidence from those whose station in life and business occupations give them no better means of knowledge than the jurors possess. The character of the derangement being made known to the jury by the witnesses, it then becomes the privilege and the duty of the jury to determine whether that degree of capacity remains which is essential to the demands of the ordinary business affairs. An opinion may not be given upon the point which it is the duty of the jury to determine. *Railroad Co. v. Modesitt*, 124 Ind. 212, 24 N. E. Rep. 986; *Yost v. Conroy*, 92 Ind. 464. We would not be understood as holding that the opinion of the witness as to the unsoundness of mind may not be given, nor do we say that it is improper to inquire as to the form of insanity, and the peculiarities of the derangement; but what we do say is that it is an issue in this case as to whether, from the form of insanity, or the peculiar characteristics of derangement, if any, under which this lady suffers, she

is "incapable of managing her estate." We have said that this issue was for the jury, and that opinion evidence was not competent to go to the jury upon which to make a decision of this issue. The authorities sustain this view. In *Goodwin v. State*, 96 Ind. 550, a prosecution for murder, it was proposed to prove by a nonexpert witness that the accused could not control his appetite for intoxicating liquor; the question of insanity being an issue. The court said: "It is not competent to ask a witness whether a man has capacity to do, or to refrain from doing, a particular thing. It is proper to inquire generally as to mental capacity, but it is not proper to inquire whether there is or is not capacity to do a specific act, as, for instance, to execute a will, make a contract, or commit a designated crime." In *Staser v. Hogan*, 120 Ind. 207, 21 N. E. Rep. 911, and 22 N. E. Rep. 990, involving testamentary capacity, the witness was called to prove that the testator, acting as an attorney, had tried a cause "well and shrewdly." The court rejected the offer, and this court said the action was not error; that "it called for the mere opinion of the witness. The witness was allowed to detail all that the deceased did in the management of the cause, and to give his opinion as to the condition of the testator's mind at that time. That was all the appellants were entitled to." See 2 Tayl. Ev. 1229; *Dyer v. Dyer*, 87 Ind. 13. In *Farrell's Adm'r v. Brennan's Adm'r*, 32 Mo. 328, the question asked was: "From your knowledge of him, would you think his mind sound enough to make a will?" The court said: "The question is objectionable, as tending to elicit from the witness his opinion of the quantum of intelligence or mental capacity that is necessary to enable a party to make a legal disposition of his estate; in other words, it involves a question of law for the court to determine, and not the witness." In *Runyan v. Price*, 15 Ohio St. 1, the question asked was: "State what your opinion was, on the evening Bowen called upon you to witness the will, as to the sanity or insanity of William Runyan, or his capacity to make a will." The court said, (page 14:) "The question called upon the witness to state what his opinion was as to the capacity of the testator to make a will. This branch of the inquiry involved a question of law and fact, and, to the extent that capacity was involved in the issue, the very question to be determined by the jury." In *De Witt v. Barly*, 17 N. Y. 340, the question at issue was the mental capacity of a grantor. In the course of the opinion by Selden, J., it is said of *Gibson v. Gibson*, 9 Yerg. 329: "There, upon an inquiry as to the competency of a testator to make a will, this question was put to a witness, viz.: 'Whether, from the situation in which he saw the old man on that morning, and from the facts just stated to the jury, he believed the old man was then in his senses, and capable of making a will;' was rejected. *Reese, J.*, in delivering the opinion of the court, said: 'The latter part of the question, "capable of making a will," as it involved a question of law and fact, and the very ques-



tion to be determined by the jury, was entirely illegal." The opinion then proceeds: "Let us now see what was really decided by this court when this case was before it upon a previous occasion, (9 N. Y. 371.) The only exceptions then presented to this court, which could be supposed to involve the question we are considering, were those taken to the decisions of the court below in overruling objections to the inquiries whether, in the opinion of the witness, Mr. De Witt, the grantor—First, 'was capable of managing his affairs and business;' and, secondly, 'had capacity to comprehend and transact business.' Did not these questions embrace the whole law, as well as facts, of the case? If it can be justly said of a person that he is incapable of managing his affairs, or that he has not capacity to transact business, the law adjudges that all his business transactions are void. The degree of mental imbecility which will warrant this conclusion is a question of law, and one which has given rise to much discussion. *Stewart v. Lisenard*, 26 Wend. 255. An inquiry whether a man is capable of managing his affairs or has capacity to transact business, to have any sensible meaning at all, must mean whether he is possessed of the lowest degree of intelligence which would justify his being held legally competent to transact business, because no person is utterly destitute of intelligence; and in one sense a man can transact business as long as he can sign his name or give a verbal direction or assent. Such an inquiry is precisely equivalent to asking, in legal phraseology, whether the person is *compos mentis*. This is clearly a mixed question of law and fact; and, before it can be answered, the degree of intelligence essential to legal competency must first be determined." Clearly, we think, the distinction lies in permitting opinions as to what the capacity is, as a question of fact, and not upon what is legal capacity, as a question of law, or mixed law and fact. The witness gives the capacity, the court expounds the law to the jury, and the jury applies the law to the facts, and determines the existence or nonexistence of legal capacity. We conclude that the questions asked and answered invaded the province of the jury.

The court's third charge to the jury was as follows: "But on the other hand, if you find that, from old age, continued vexation, or any other cause, her mind, has become so impaired as to leave her in a condition mentally too weak to resist the entreaties of others in cases where her judgment does not approve, or incapable of conducting the ordinary business affairs of life with reasonable prudence and reasonable safety from her own folly and the fraud of others, then you should find her a person of unsound mind, and incapable of managing her own estate." This charge involves two definitions of that degree of unsoundness which incapacitates for the management of one's own estate, viz.: First, where the impairment of mind is such that she cannot resist the entreaties of others where her judgment does not approve; second, where, from the impairment, she is incapable of conducting the ordinary

business affairs of life with reasonable prudence and reasonable safety from her own folly and the fraud of others. The first of these definitions is not criticised, but it is insisted that the second erects an erroneous standard of intelligence, in that it requires the jury to find legal incapacity where there is not immunity from one's own folly and the fraud of others. We think the instruction not subject to this criticism. If the second definition had omitted the words "and reasonable safety from her own folly and the fraud of others," it would have been substantially correct. If, from any cause, "her mind has become so impaired as to leave her in a condition mentally \* \* \* incapable of conducting the ordinary business affairs of life with reasonable prudence," the case is made out. *McCammon v. Cunningham*, 108 Ind. 545, 9 N. E. Rep. 455; *Fiscus v. Turner*, 125 Ind. 43, 24 N. E. Rep. 662; *Wray v. Wray*, 32 Ind. 126. In the first of the above cases it is said: "It may be proper to add that the jurisdiction of the court to appoint a guardian is not confined to cases of insanity, idiocy, or lunacy, strictly so called, but to extend to every case of mental unsoundness or imbecility which has reached such a degree, from whatever cause, as renders its subject incapable of conducting the ordinary affairs of life, and leaves him in a condition to become the victim of his own folly, or the fraud of others." If this holding is correct, (and we do not doubt it,) the instruction is clearly right. The fact that it requires more to be found than is necessary to the cause stated in the petition is not the subject of complaint by the appellant. The words "and reasonable safety from her own folly and the fraud of others" do not limit the presiding elements of the second definition; they do not shorten the standard of mental capacity already defined. We are urged to consider the evidence, and reverse the judgment on the supposed absence of evidence to support the verdict. There was a sharp conflict in the testimony, and we are not at liberty to pass upon its weight. The judgment should be reversed for the improper admission of evidence; and it is therefore ordered that said judgment be reversed, and that the circuit court be directed to sustain appellant's motion for a new trial.

(123 Ind. 301)

CITY OF COLUMBUS v. STRASSNER.<sup>1</sup>

(Supreme Court of Indiana. April 25, 1893.)

CHANGE OF VENUE—EFFECT OF STIPULATION—WAIVER OF COURT RULE—ACTION BY MARRIED WOMAN.

1. A stipulation that on filing a sufficient affidavit a change of venue may be allowed, does not waive the court rule regarding time of application for a change of venue.

2. In an action by a married woman for personal injuries she may recover medical expenses, though her husband is liable therefor.

3. In such action it will not be presumed as a matter of law that the physician employed was reasonably skillful, or that plaintiff followed his directions.

Appeal from circuit court, Decatur county; J. W. Study, Judge.

Action by Mattie Strassner against the

<sup>1</sup> Rehearing denied, 37 N. E. 719.

city of Columbus to recover damages for personal injuries. Plaintiff had judgment, and defendant appeals. Reversed.

C. J. Kollmeyer, for appellant. Frank E. Gavin and John C. Orr, for appellee.

**COFFEY, C. J.** This was an action by the appellee against the appellant to recover damages sustained by the appellee on account of a personal injury suffered by reason of a defective and unsafe sidewalk. No question is made as to the sufficiency of the pleadings in the cause. A trial by a jury resulted in a verdict for the appellee, upon which the court, over a motion for a new trial, rendered judgment. The assignment of error calls in question the correctness of the ruling of the circuit court in overruling the appellant's motion for a new trial. It is contended by the appellant that the circuit court erred—First, in overruling an application for a change of venue; second, in admitting improper and incompetent evidence to go to the jury on behalf of the appellee; third, in its instructions to the jury.

The parties entered into an agreement to the effect that if the appellant filed an affidavit sufficient to entitle it to a change of venue the cause should be sent to the Shelby circuit court. The affidavit was not filed until it was too late, under the rules of the court, and the application for a change of venue was refused for that reason. It is contended by the appellant that by reason of the agreement the court erred in this ruling, but we think otherwise. The affidavit was not sufficient to entitle the appellant to a change of venue, for the reason that it failed to state any legal excuse for a failure to make the application within the time fixed by the rules of the court.

The court did not err in admitting the evidence of which the appellant complains. While it is generally true that a physician's bill for treating the wife is the debt of the husband, we perceive no reason why she may not treat it as her own debt and pay it. If the appellant was liable at all in this case, it was liable for the medical bill rendered necessary by the appellee's injuries. It can make no difference to it whether it pay such bill to the wife or to the husband. If the wife paid it out of her own separate means, the husband cannot recover it, so the appellant is in no danger of being compelled to pay it more than once.

The appellant contends that the court erred in giving to the jury instructions numbered 4, 5, 6, 25, 28, and 29. We think all the instructions of which complaint is made, except 28 and 29, state the law correctly. Twenty-nine states the law too favorably to the appellant. Instruction 28 is as follows: "(28) If the plaintiff called a physician regularly engaged in the practice of his profession, to treat her injuries, (if she was injured,) the presumption would be that he was a reasonably skillful one, and that she followed his instructions in her conduct and use of her limb; and in such case she should not be held responsible for any mistakes he may

have made in the treatment of her case; nor should her damages, if you find that she is entitled to recover damages, be reduced thereby." In giving this instruction to the jury we think the circuit court erred. There was a controversy between the appellant and the appellee as to whether the latter had exercised ordinary care in the selection of a physician to treat her injuries. There was much evidence introduced by the appellant tending to show that the physician mistook the nature of the appellee's injuries, and as a consequence did not properly treat her. Under these circumstances, we think the question as to whether the physician was skillful, and the question as to whether the appellee followed his directions, should have been left to the jury. As to whether a physician in regular practice is to be presumed skillful or otherwise we think must necessarily depend on circumstances. If he should lose all his patients, the presumption perhaps would arise that he was not skillful; while, on the other hand, if his practice should be attended with success, the presumption of skill would arise. From the fact a physician was in regular practice, if nothing to the contrary appeared, the public would perhaps have the right to presume the further fact that he was skillful. So, for the reason that the patient would be likely to incur additional pain by ignoring the instructions and directions of his physician, it is fair to presume as a fact that he will obey such instructions and directions. But the law indulges no presumptions upon the subject. They are presumptions of fact, and not of law. It is the province of the jury to draw presumptions of fact from the evidence, or from a given state of facts, and it is error for the court to instruct it as to what inferences they shall draw. In the case of *Insurance Co. v. Buchanan*, 100 Ind. 63, it was said by this court: "It is not proper for the court to instruct the jury as to mere inferences of fact which it is their duty to make from the evidence. Instructions should state legal principles, not declare inferences of fact. They may be declarations of law, but not commentaries upon evidence. The law is for the court; the facts are for the jury. Inferences from proven facts must be made by the triers of issues of fact." In the same opinion the court quoted with approval from *Thompson on Charging the Jury*, the following: "It is therefore merely a repetition of what has already been said to say that it is for the jury, and not for the judge, to draw presumptions of fact; and that for the judge to tell the jury what presumptions of fact they ought to draw from a given fact or series of facts is a usurpation of their functions." Upon this subject our cases seem to be uniform. *Woollen v. Whitacre*, 91 Ind. 502; *Garfield v. State*, 74 Ind. 64; *Millner v. Eglin*, 64 Ind. 197; *Newman v. Hazelrigg*, 93 Ind. 73; *Finch v. Bergins*, 89 Ind. 360. Upon an examination of the entire record, we cannot say that this instruction did not injuriously affect the appellant. Judgment reversed, with directions to the circuit court to grant a new trial.

(134 Ind. 493)

McDONALD et al. v. CORYELL et al.

(Supreme Court of Indiana. May 10, 1893.)

APPEAL—REVIEW OF FINDINGS—CONFLICT IN EVIDENCE—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—DILIGENCE—CUMULATIVE EVIDENCE.

1. Where, in an action for partition, the evidence is conflicting, the findings of the trial court will not be disturbed.

2. Where the diligence required to be set forth in an application for a new trial on the ground of newly-discovered evidence consists in making inquiries, and such application fails to state the time and place of making such inquiries, and the circumstances under which they were made, it is insufficient.

3. A new trial will not be granted on the ground of newly-discovered evidence which is merely cumulative.

Appeal from circuit court, Jackson county; S. B. Voyles, Judge.

Action by Margaret J. McDonald and others against Cora Coryell and others for the partition of certain real estate. From a judgment for defendants, plaintiffs appeal. Affirmed.

Wm. K. Marshall, for appellants. O. H. Montgomery, for appellees.

COFFEY, C. J. This was an action in the Jackson circuit court, by the appellants against the appellees, for the partition of the lands described in the complaint. The appellants are the children of Hiram Marling, Sr., who died seised of the land, and the appellees are his grandchildren. The only controverted question in the case relates to an alleged advancement made by the said Hiram Marling, Sr., to the father of the appellees. Upon the issue involving this question the court found for the appellees. The assignment of error calls in question the propriety of the ruling of the circuit court in denying the appellants a new trial. The evidence on the issue involved was conflicting, and under such circumstances we cannot disturb the finding of the circuit court.

In addition to the claim that the finding of the circuit court is not supported by the evidence, it is contended by the appellants that the court erred in refusing them a new trial on account of newly-discovered evidence. The newly-discovered evidence consists of admissions made by the father of the appellees many years prior to the date of the trial, and is, we think, merely cumulative. Furthermore, we are of the opinion that the affidavits of the appellants does not show sufficient diligence on their part to discover the evidence in time to use it on the trial. Applications for a new trial on account of newly-discovered evidence are regarded by the law with distrust and disfavor. In such cases the diligence used must be fully set forth in the application. If it consists in making inquiries, the time, place, and circumstances must be stated, to the end that the court may know that such inquiries were made in the proper quarter, and in due season. In this respect the application before us is defective. *Morrison v. Carey*, 129 Ind. 277, 28 N. E. Rep. 697; *Graham v. Payne*, 122 Ind. 403, 24 N. E. Rep. 216; *Schnurr v. Stults*, 119 Ind. 429, 21 N. E. Rep. 1089; *Hines v.*

*Driver*, 100 Ind. 327. The court did not err in overruling the motion of the appellants for a new trial. Judgment affirmed.

(134 Ind. 494)

PEDEN v. CAVINS et al.

(Supreme Court of Indiana. May 11, 1893.)

PARTITION—STATUTE OF LIMITATIONS—IMPROVEMENTS—RENT—SET-OFF—JURY TRIAL—FINDINGS OF FACT—HARMLESS ERROR.

1. Where a tenancy has existed for over 15 years, and thereafter one tenant prosecuted an ejectment suit against his cotenant, and established his title to the land, the mere fact that he failed to assert his right to partition during that period does not bar his right to partition and to have his portion of the land set aside to him.

2. Where a cotenant in possession of land has received all the rents accruing therefrom for a number of years, his cotenant is entitled, on partition of such land, to offset the rent due him against the value of improvements made by such tenant.

3. A set-off is barred by the statute of limitations only when the original claim is barred.

4. A demand for a jury trial on all the issues joined in an action was properly refused as to all the issues where some of them were only triable by the court, since a motion must include only such relief as the party making it is entitled to.

5. Where the findings show the receipt by defendant of a much larger sum for rent during his occupancy than was due him for improvements and sums paid by him, he cannot complain that the court did not conclude there was a sum due him.

Appeal from circuit court, Daviess county; D. J. Heffron, Judge.

Action by Aden G. Cavins and others against Thomas A. Peden. Judgment for plaintiffs. Defendant appeals. Affirmed.

Gardiner, Taylor & Gardiner, for appellant. A. M. Hardy and Moffett & Davis, for appellees.

OLDS, J. This is a suit for the partition of certain real estate situate in Greene county, Ind. The suit was instituted in the Greene circuit court, and the venue afterwards changed to the Daviess circuit court, where there was a trial by the court, a special finding of facts and conclusions of law stated, and judgment in favor of the appellees, from which judgment this appeal is prosecuted. The complaint is in form an ordinary complaint in partition. It appears that one Hughes East and wife conveyed all of the lands to the appellant in 1866, and put the appellant into possession of the same. In 1883 one Rebecca East asserted her ownership in the undivided one-half of the land, and at that time prosecuted an action in ejectment against the appellant, and recovered a judgment in said cause, establishing her title to the one-half of the land, and for \$460 damages, which appellant paid. Afterwards Rebecca East and her husband conveyed her one-half interest in the land to the appellees, Aden G. Elijah and William Cavins, who instituted this suit against the appellant for partition. Exceptions were taken to various rulings of the court, and properly preserved and as-

signed as error, and which are discussed by counsel.

The second paragraph of answer to the complaint is the 20-years statute of limitations, and the third paragraph pleads the 15-years statute of limitations. These two paragraphs of answer are each a general plea of the statute of limitations. The third paragraph of reply to these two paragraphs of answer pleaded the judgment in the ejectment case of Rebecca East. To this paragraph of reply the appellant demurred, and the court overruled the demurrer, and this ruling is the first alleged error discussed. The 20-years statute of limitations is not applicable to an action in partition. *McCray v. Humes*, 116 Ind. 103, 18 N. E. Rep. 500. Indeed, neither of the paragraphs of answer was good as pleaded. It has been held that the 15-years statute of limitations was applicable to a partition suit in the case above cited. When one cotenant holds possession to the exclusion of the others, claiming to own the whole, and holding it adversely to the other cotenants, then an action for partition by a cotenant would be barred; but when cotenants own land, and neither holds possession adversely to the others, the fact that they hold the lands as tenants in common for more than 15 years does not bar the right of either to partition, though they may have enforced that right at any time from the date when they so became tenants in common in the land. To make a plea of the statute of 15 years a good defense to a suit for partition, it must show a holding adversely for 15 years. The answer in *McCray v. Humes*, supra, showed a holding adversely under claim of title for 15 years, and the holding in that case was correct. To the same effect is the holding in the case of *Nutter v. Hawkins*, 93 Ind. 280. It would be an anomalous doctrine to hold that when, as in this case, a tenancy had run over 15 years, and after that one tenant had prosecuted an action in ejectment against his cotenant, and established his title to the land, that he could not then maintain an action in partition, and have his portion of the land set apart to him. In *Jenkins v. Dalton*, 27 Ind. 78, it was held that a failure to assert the right for partition for a period of 20 years will not bar an action for partition. The court, in speaking of the partition of lands, says: "In such a case the right to the partition exists from the date of the tenancy. It may or may not be exercised, in the discretion of the tenants. All the tenants have an equal right to possession, and may all be satisfied to enjoy the estate in common. Partition may not be desired by any one or more of the tenants for a period of time greater than that prescribed by any statute of limitation, and the fact that such a period is suffered to elapse does not in any manner affect the right of one or more of the tenants to have partition." *Freem. Coten. § 491*. There was error in overruling the demurrer to this paragraph of reply. A bad reply is good to a bad answer, so that, whether it is sufficient for a good answer or not, it was not error to overrule a demurrer to it, as the answers were bad.

The appellant filed a cross complaint, alleging that he had been the owner of one-half of the land for 25 years; that he had made valuable and lasting improvements thereon, and paid taxes on all of the land, aggregating \$1,000. The appellees answered the cross complaint, and in the fourth paragraph of the answer alleged that appellant had been in possession as tenant in common with their grantor long before he made the improvements, and had received the rents and profits for all the land, amounting to \$3,000, one-half of which belonged to the cotenant, and had received and converted to his own use walnut trees and other valuable timber growing thereon of the value of \$500, which sums they asked to have taken into account and offset as against any sum allowed appellant on his claim for improvements and taxes; to which fourth paragraph of answer appellant demurred, and the demurrer was overruled, and this ruling is the next alleged error discussed. *Freem. Coten. § 510*, lays down this doctrine: "As the allowance of compensation for improvements is in all cases made not as a matter of legal right, but purely from the desire of the court to do justice, the compensation will be estimated so as to inflict no injury on the cotenant against whom the improvements are charged. He will therefore be charged, not with the price of the improvements, but only with his proportion of the amount which at the time of partition they add to the value of the premises. From this amount he will also be entitled to deduct any sum to which he may have a just claim for use and occupation of his moiety enjoyed by the cotenant making the improvements." In *Alleman v. Hawley*, 117 Ind. 532-538, 20 N. E. Rep. 441, this court says: "The appellant's right to compensation for her improvements is not a legal right, depending upon a statute, but is a right resting upon equitable principles, and one which a court of equity will enforce." The cross complaint pleaded a state of facts in relation to the occupancy of the land and the making of the improvements which gave him an equitable right to compensation for them, and the answer, not controverting the manner of his occupancy, pleaded the fact that while so occupying he had received the rents and had taken and used valuable growing trees, stating the amount and value of each. This, we think, was sufficient to make a good answer of the counterclaim that it might be taken into account, and adjusted in determining what amount, if anything, was due the appellant for improvements and taxes alleged to have been made and paid by appellant. It would be inequitable to hold, where a cotenant in possession of the whole land has received the rents for a number of years, and while he so holds the share of rents due his cotenants he makes improvements, that when partition was sought the tenant in possession could recover the full value of the improvements made without deduction for the rents received by him, due his cotenants; and we think that, where a tenant asks an allowance for improve-

ments made while in possession, an answer setting up the facts as to the receipt of the rents due the cotenant, showing, as in this case, that he had received the rents prior to the making of the improvements, it states a good defense as a counterclaim or set-off to the action to authorize the court to take into account the rents in making the adjustment. The cross complaint alleges a state of facts in relation to the possession of the land and the making of improvements which in equity entitles the occupying tenant to compensation for the improvements, and the answer sets up additional facts showing that while so occupying the land the tenant received rents belonging to his cotenants, from which he seeks to recover compensation for the improvements made, which in equity and good conscience should be taken into account in determining what amount, if anything, should be charged against the other tenant for improvements. It would be manifestly unjust and inequitable to allow the occupying tenant to retain the share of the rents received by him, belonging to the other joint owners, and permit him to collect from them the full amount and value of the improvements made. We are cited to *Carver v. Coffman*, 109 Ind. 547, 10 N. E. Rep. 567, as holding that such an answer must allege the holding adversely and the ouster of the tenant. The answer in that case alleged that fact, and it was held good, but that decision we do not think in conflict with our conclusion. Were it an independent action to recover rents, it would present a different question, but this seeks only to offset the rents, or rather to have the rents taken into account in fixing the amount, if anything, that the tenant out of possession ought to pay for improvements, and the answer, we think, is good for that purpose.

The next ruling of the court complained of is in sustaining the demurrer to the second and third paragraphs of reply to the fourth paragraph of answer to the cross complaint. These paragraphs of reply pleaded the 6 and 15 years' statute of limitations to the answer of set-off. There was no error in this ruling. The life of a set-off is equal to that of the original claim, and is only barred when the original claim is barred. *Hyatt v. Cochram*, 85 Ind. 231.

The next alleged error discussed relates to the ruling of the court in refusing to allow a trial of the whole case by jury. At the proper time the appellant "moved the court for and demanded a jury to try the issues joined." This demand was for the trial of all the issues joined by a jury. We are cited by counsel for appellant to the decision in *Kitts v. Willson*, 106 Ind. 147, 5 N. E. Rep. 400, as supporting the right of appellant to a trial by jury. The decision of *Kitts v. Willson*, supra, was modified to some extent in the case of *Martin v. Martin*, 118 Ind. 227, 20 N. E. Rep. 763. Whatever may be the rule in relation to the right to trial by jury in partition where there is involved the simple question of the right to partition or the quieting of the title, this case presents a different question. In this

case issues are also joined on a cross complaint. The cross complaint and issues joined thereon involved matters of exclusive equitable jurisdiction. It is an application for an accounting between the tenants. It is an equitable right, which appellant seeks by his cross complaint to have enforced, and an allowance made to him for the value of improvements made under such circumstances as he in equity is entitled to compensation for. The issues joined on the cross complaint were triable by the court. The demand being for a trial of these issues as well as those joined on the complaint, it covered more than appellant was entitled to, and it was properly overruled. Had appellant demanded a trial of the issues joined on the complaint by a jury, it would have presented a different question. The statute (section 409, Rev. St. 1881) makes some issues triable by the court and some triable by the jury, even when joined in the same action; and a demand for a jury should only include a demand for the trial of such issues as are triable by a jury; and, when several issues are joined in a cause, some triable by jury and some by the court, and a demand for a jury to try all of the issues is made, it is not error to refuse it. It is a well-settled rule that a motion must include only such relief as the party making it is entitled to, else it will not be error to overrule it. There was no error in refusing the appellant's demand for a jury to try the issues joined.

It is contended that the court erred in its conclusions of law, for the reason that the court finds the improvements made by appellant to be of a certain value, and that he paid the judgment to Mrs. East, and that there is no conclusion giving to either party any sum due them. The findings show the receipt by appellant of a much larger sum for rent during his occupancy than is due him for improvements and sums paid by him, and the appellant cannot complain that the court did not conclude there was a sum due him.

Finally, it is contended that the court erred in overruling appellant's objections to the report of the commissioners, and motion to vacate the same. This alleged error is based on the contention that the commissioners included in their report other lands than those embraced in the order of the court, and setting the same off to the appellant; that is to say, it is contended that the commissioners embraced in their report other lands than those described in the proceedings and order, and in dividing the land they set apart to the appellant, and included in the description of the land set apart to him, lands other than those which were being partitioned, and which were not included in the partition proceedings; but in this counsel are in error. The descriptions in the record correspond; at least it is not affirmatively made to appear that they do not, which is necessary to show error. The descriptions in the pleading and order are general, the land being designated by governmental subdivisions, one of which is fractional. No number of acres is stated, and no metes and bounds are given; while in the report the land is di-

vided and described by metes and bounds. There is nothing to show affirmatively that the two descriptions do not correspond. They appear to do so. There is no error in the record.

Judgment affirmed.

(134 Ind. 442)

**BURNS v. WEESNER et al.**

(Supreme Court of Indiana. May 12, 1893.)

**DEED—CONSTRUCTION—INJUNCTION—PROHIBITION OF TRANSFER OF PURCHASE-MONEY NOTES—ACTION BY GRANTEE IN POSSESSION.**

1. A deed recited that the grantors "convey and warrant" to B. "a life estate in the following real estate," (describing it,) and "hereby convey the said real estate to the said B., to be held, used, and occupied for and during the natural life of the said B., and at the death of the said B. to the children of the body of the said B. in fee simple." *Held*, that such deed conveyed to B. life estate only, since "children" is a word of purchase, and not of limitation.

2. Where an insolvent nonresident, owning a life estate only in land, fraudulently represents to her grantee that she owns it in fee simple, and receives in cash the full value of her life estate, a court of equity will enjoin the transfer by the grantor of unmaturing purchase money notes in possession of a resident of this state, though plaintiff is in possession of such real estate, since he is entitled to possession during the life of the grantor, and the same is not adverse.

Appeal from circuit court, Wabash county; J. D. Conner, Judge.

Action by Anderson W. Burns against Robert Weesner, Elizabeth S. Brady, and John M. Brady to enjoin the transfer by defendant Elizabeth S. Brady of certain notes executed to her by plaintiff in consideration of certain land conveyed by her to him, and to cancel such notes and a mortgage given to secure the same. From a judgment for defendants, plaintiff appeals. Reversed.

Kidd & Hunter, for appellant. C. W. Wesner, for appellees.

**COFFEY, C. J.** On the 22d day of March, 1875, Johiel Weesner and wife executed to the appellee Elizabeth S. Brady a deed of conveyance, the material parts of which are as follows: "This indenture, made this day, witnesseth that Johiel Weesner and Nancy Weesner, his wife, of Wabash county, in the state of Indiana, convey and warrant to Elizabeth S. Brady, of the same county and state, for and in consideration of natural love and affection, a life estate in the following real estate in Wabash county, in the state of Indiana, to wit: The north half of the south half of the northeast quarter of section 5, township 26 north, of range 6 east. The said Johiel and Nancy Weesner hereby convey the said real estate to the said Elizabeth S. Brady to be held, used, and occupied for and during the natural life of the said Elizabeth S. Brady, and at the death of the said Elizabeth S. Brady to the children of the body of the said Elizabeth S. Brady in fee simple." On the 15th day of August, 1889, Elizabeth S. Brady and her husband, John M. Brady, sold and conveyed by warranty deed to the appellant the entire S.  $\frac{1}{2}$  of the N. E.

$\frac{1}{2}$  of section 5, in township 26, range 6 E. This action was brought by the appellant against the appellees to enjoin them from transferring certain of the notes executed by the appellant to Elizabeth S. Brady for a part of the agreed purchase price of the land, payable in a bank in this state, and to obtain a decree canceling such notes and a mortgage executed to secure the payment of the same. It is alleged in the complaint, among other things, that the appellee John Brady was the owner in fee of one 40 of the 80-acre tract above described, while his wife, Elizabeth S. Brady, was the owner of a life estate in the remaining 40 acres, with a remainder over to her children; that the appellant purchased from John Brady the land so owned by him for the agreed price of \$1,500, and paid him therefor in cash; that the said Elizabeth falsely and fraudulently represented to the appellant that she was the owner in fee of the other 40-acre tract, and that he, being ignorant of the facts, and not having the means of knowing them, relied on such representation, and, believing it to be true, and relying thereon, purchased said 40-acre tract from her at the agreed price of \$1,700, paying thereon the sum of \$750 in cash, and executing his notes for \$950, the remainder of the purchase price, payable in a bank in this state; that said John and Elizabeth Brady executed to him a general warranty deed for the whole of said 80-acre tract of land; that said Elizabeth had no title to said land, except such as was conveyed to her by the deed above set out; that three of the notes executed for the land above named are not due, and that the said Elizabeth is about to transfer them to innocent purchasers for value; that the appellee Weesner has the notes in his possession, and is a resident of the state of Indiana, while the said Elizabeth and John Brady are nonresidents of the state; that the \$750 so paid by the appellant to Elizabeth is the full value of her life estate in said land, and that she has three children who own the fee in the 40 acres so sold and conveyed by her to the appellant; that the appellant has often demanded a surrender of said notes, which has been refused, and, if he is compelled to pay the same, it will be a total loss to him, as the appellees are nonresidents of the state, and are insolvent. Prayer that Elizabeth be enjoined from transferring the notes until the title to the land be perfected, or until appellant be secured against loss. The appellant also offers to reconvey the land and account for the rents and profits upon a return of the money paid by him. To this complaint the circuit court sustained a demurrer, and, the appellant electing to stand upon his complaint, the appellees had judgment for costs.

The propriety of this ruling presents the only question for our consideration. We are of the opinion that the deed above set out did not convey to Elizabeth S. Brady a fee-simple interest in the land therein described. It was evidently the intention of the grantors to limit her interest to a life estate only, leaving the fee to her children. The words "heir" or "heirs of the body" are words of limitation, but

the words "child" or "children" are words of purchase. *Andrews v. Spurlin*, 85 Ind. 262; *Tinder v. Tinder*, 181 Ind. 381, 30 N. E. Rep. 1077; *Jackson v. Jackson*, 127 Ind. 346, 26 N. E. Rep. 897; *Owen v. Cooper*, 46 Ind. 524; *Mining Co. v. Beckleheimer*, 102 Ind. 76, 1 N. E. Rep. 202; *Shimer v. Mann*, 99 Ind. 190. The deed under immediate consideration is not governed by the rule in *Shelley's Case*. The general rule is that a purchaser of land, while he remains in possession, cannot resist the payment of the agreed purchase price on the ground that the title attempted to be conveyed to him is imperfect, for the reason that such title may become perfect under the statute of limitations. This case, however, is not governed by the general rule, for the appellant has no adverse possession. He is entitled to the possession of the land during the natural life of Elizabeth S. Brady, and such possession is not adverse to the owners of the fee, who are her children. They have no right to the possession of the land during her life. If it be true, as alleged in the complaint and admitted by the demurrer, that the appellant, by means of a fraud practiced upon him by Elizabeth S. Brady, was induced to purchase from her the fee to this land, when in fact she owned a life estate only; that he has fully paid her for the value of her life estate; and that she and her husband are nonresidents of the state, and are insolvent, so that the payment of any further sum will be a total loss to the appellant,—he should have relief. Before he is required to pay any further sum, equity and good conscience require that he should be secured against loss, and in the mean time Elizabeth S. Brady should be enjoined from transferring the notes to an innocent purchaser. *Crowfoot v. Zink*, 30 Ind. 446; *Traster v. Snelson*, 29 Ind. 96; *Fehrle v. Turner*, 77 Ind. 530; *Wimberg v. Schwegeman*, 97 Ind. 528. In our opinion, the circuit court erred in sustaining the demurrer to the appellant's complaint in this case. Judgment reversed, with directions to the circuit court to overrule the demurrer of the appellee to the appellant's complaint, and for further proceeding not inconsistent with this opinion.

(135 Ind. 205)

ELKHART CAR-WORKS CO. et al. v.  
ELLIS et al.<sup>1</sup>

(Supreme Court of Indiana. May 11, 1893.)

QUIETING TITLE—RES JUDICATA.

An action to quiet title to lands conveyed on conditions subsequent, because of a breach of such conditions, was dismissed without prejudice, on the ground that the complaint stated the date of re-entry as preceding the date of the breach. *Held*, that such action and judgment therein do not bar another action for the same relief, alleging a subsequent breach and re-entry.

Appeal from circuit court, Elkhart county; J. S. Frazer, Special Judge.

Action by John W. Ellis and others against the Elkhart Car-Works Company and others to quiet title. Plaintiffs had judgment, and defendants appeal. Affirmed.

<sup>1</sup>Rehearing denied.

Baker & Baker, for appellants. Wilson, Davis & Wilson, for appellees.

HACKNEY, J. The error assigned is in the conclusions of law upon the facts specially found. The facts so found are, in substance, as follows: On the 1st day of December, 1881, Jacob B. Ellis and others owned a tract of land within the city of Elkhart, and on that day conveyed 15 acres thereof to the appellants for the consideration alone of the defeasance stated in the deed of conveyance as follows: "This deed is executed on condition that if the grantee or her grantee or assignees shall at any time within three years from this date fail, neglect, or refuse to use said real estate for the manufacture of cars for the term of six consecutive months at a time, said real estate shall revert to the grantors. This deed is also executed upon the condition that none of said real estate shall be used for the erection of tenant or residence houses within fifteen (15) years from this date." The deed of conveyance was recorded, the appellate company went into possession, expended \$22,000 in building and machinery, cast 3,000 car wheels, and on the 3d day of July, 1882, completed one hand car. On said day said company had become insolvent, and on the 10th day of that month all of its property was seized upon writs of attachment in favor of various creditors, and was thereafter sold for the payment of its debts. Since July 10, 1882, said company has done no business whatever, and has had no officer residing within this state, but has ever since said date wholly abandoned said 15 acres for all purposes. That on the 11th day of July, 1882, said grantors, by agent, re-entered upon said premises, and demanded of the secretary and treasurer of said company—the only officer thereof upon the premises—a reconveyance of said premises according to the conditions in said deed, and by reason of the failure of said company to comply with said conditions. That said agent was thereupon informed by said officer that said company could no longer perform said conditions, owing to its insolvency, but that he, said officer, was unable to deliver possession or execute a deed of said lands. Thereafter, and on said day, appellees filed their cause—No. 564—against said company for possession and to quiet the title to said lands under said conditions, and the alleged failure to comply with said conditions. On September 30, 1882, Charles W. Fish became receiver of said company without the consent of appellees, and he was thereafter, on petition, made a defendant in said cause No. 564, but has at no time taken possession of said lands, nor has he performed any act as receiver, excepting the defense of appellees' several suits. In the action so commenced a demurrer was sustained to the complaint, from which ruling the appellees herein appealed to the supreme court, and secured a reversal for the error in said ruling. *Ellis v. Car-Works Co.*, 97 Ind. 247. On the 28th day of April, 1883, the appellees again entered upon said premises to demand possession and recon-



veyance because of the breach of said conditions, but found no one upon the premises or elsewhere from whom to make such demand, and thereupon they asserted their right to possession and ownership of said premises. Thereafter, and on said day, appellees herein commenced another action—No. 923—against these appellants to quiet title and for damages, and while the same was pending it was, on the 6th day of March, 1886, mutually agreed between the parties that said cause No. 564 should be dropped from the docket until and to abide the final disposition of No. 923. Upon a trial of cause No. 923 the appellees succeeded, and said appellants appealed to the supreme court, where said judgment was reversed for a clerical error found in the complaint, (*Car-Works Co. v. Ellis*, 113 Ind. 215, 15 N. E. Rep. 249,) and by direction of the supreme court said judgment was arrested. Thereafter, on March 7, 1888, said causes No. 564 and No. 923 were dismissed without prejudice, and later, on the same day, appellees again re-entered upon said premises for the purpose of demanding possession and reconveyance of said lands, but again found no one from whom to make such demand, and they again asserted their claim of ownership to said lands, and thereafter, by leave of the proper court, brought this action,—No. 2,818. It is further found that from July 11, 1882, said John W. Ellis had been in possession of said lands for the purpose of taking care of the same until the title could be finally adjudged, and that he has paid the taxes thereon; that the said 15 acres were at no time separated and fenced apart from the other portions of appellees' farm, but while occupied by said company were used by appellees, and during the last three or four years they have plowed and used parts of them for a garden patch. At all times since April 28, 1883, appellees have claimed the right to be in possession of said 15-acre tract on account of the condition in said deed, the failure of the company to comply therewith, and because of said abandonment thereof. It is further found that neither of the appellees at any time ever deforced from said premises said car-works company, or any one representing said company, nor have they at any time or in any manner interfered with the occupancy, use, or control of by said company, or any one acting for it, of said lands, further than as herein found. Said lands are worth \$6,000, independent of the buildings, which buildings have gone into decay, and are of little value, if any. Since the 28th day of April, 1883, no suit has ever been brought for the breach of said conditions, and no judgment in favor of the appellants was ever rendered on a trial of the merits. It is concluded that, as a question of law upon said facts, appellees are entitled to possession, and to have their title to said lands quieted.

The appellants insist that the pendency of cause No. 564, and the claim therein that the forfeiture occurred on the 11th day of July, 1882, estopped the appellees to bring any other action claiming the

forfeiture at some later date during the pendency of said action. It will be seen that no action was pending when this cause was instituted, and no recovery had ever been secured or trial had upon the merits of the controversy between the parties. Causes No. 564 and No. 923 had been dismissed without prejudice before the complaint herein was filed. The issue was made by general denial to a complaint asserting a forfeiture by failure to make cars during each period of six months from the 1st day of December, 1881, up to December 1, 1884. No plea of former adjudication or other action pending was filed, and no issue of estoppel was tendered. In the first action the court finds, and we believe correctly, that the appellees stated in their complaint a good cause of action, and that the circuit court erred in sustaining appellants' demurrer to it. The second action failed because the complaint erroneously stated the date of the alleged re-entry as preceding the date of the breach of the condition subsequent, as found by the court. The case as reported in 113 Ind. 215, 15 N. E. Rep. 249, is in harmony with that finding. This court, in that case, intimated that if it should appear that the re-entry preceded the breach of the condition subsequent, and that if it further appeared that by such re-entry such breach was inevitable, the grantor could not regain the estate. There only a question of pleading was in review, while here it appears that the demand and re-entry were both long after the breach, and there is no finding that any claim of the appellees precipitated the appellants' failure or the breach of the condition subsequent. We must therefore presume against the existence of any such fact. It is earnestly urged that the assertion of antagonistic claims as to the time of the forfeiture precludes the appellees; that having, in the first cause, alleged the breach on the 11th day of July, 1882, they cannot now allege and recover upon a later breach; that to permit such a course would give sanction to the practice of "blowing hot and cold in the same breath." We are aware of the rule, in support of which appellants' authorities stand, that one may not recover upon one theory, or upon one construction of his contract, and then repudiate the recovery and his own construction of the contract, and pursue another remedy or a different construction of the same contract. As was said in *Birch v. Wright*, 1 Term R. 378, it "would be blowing both hot and cold at the same time, by treating the possession of the defendant as that of a trespasser and that of a lawful tenant during the same period." So in *Jones v. Carter*, 15 Mees. & W. 718, the lessor sued in ejectment on the ground of alleged forfeiture of the lease, and, pending that action, sued for rents subsequently accruing under the lease. Nothing is clearer than that he could not at one time stand upon the forfeiture and enforce the lease in its fullest effect. These cases, and others of the class, are not in point here, as it appears that the appellees occupy no such inconsistent positions. To give full effect to the rule sought to be here enforced



would establish such narrow technicality in pleading that to pursue an erroneous remedy without recovery, and without detriment to the adversary, would involve the loss of the proper remedy, and the reaping a rich harvest by the adversary whose liability is defeated by the harmless mistake of the claimant. Fortunately our Code has more liberal objects, and the practice tolerates no such harsh penalties for the inadvertences and mistakes of the pleader. We find no error for which reversal should be had, and the judgment of the lower court is affirmed.

(134 Ind. 421)

## CLARK et al. v. HILLIS.

(Supreme Court of Indiana. May 10, 1893.)

DEED—CONSTRUCTION—ESTATE CONVEYED—JUDGMENT—VALIDITY—NOTICE.

1. Under a conveyance of land to the grantee to hold "during the term of her natural life, and after her death to revert to me and my heirs," the fee in the land remains in the grantor; and where the grantor dies before the grantee the land may be sold, subject to the life estate, to pay the debts of the grantor.

2. Where the record in proceedings for the sale by an administrator of a decedent's land shows notice by publication and posting of the pendency thereof, the absence from the files of the notice will not defeat the presumption that it was the proper notice.

3. Where the record recites facts showing that legal notice was given of the sale of a decedent's land, the fact that the court erroneously directed sale without notice does not affect the validity of the sale.

4. Notice by publication to "— Clark" of the pendency of proceedings is not binding on "Helen I. Clark," and she may attack the proceedings collaterally.

Appeal from circuit court, Clinton county.

Action by James M. Clark and others against Benjamin F. Hillis. Defendant had judgment, and plaintiffs appeal. Reversed in part only.

J. N. Sims & Son, for appellants. P. W. Gard, for appellee.

HACKNEY, J. On the 28th day of July, 1853, James Clark was unmarried, and then owned an 80-acre tract of land in Clinton county, of which he made conveyance to his mother, Catherine Clark, a widow. The deed of conveyance contains the following description of the estate in said lands conveyed: "To have and to hold unto the said Catherine, for the consideration aforesaid, during the term of her natural life, and after her death to revert to me and my heirs." Thereafter said James intermarried with Lorinda Collum, and by her he had the following children: Amasia, James M., Malinda, Dolcena A., Helen I., and Eliza J. Later said James and wife were divorced, and still later said James died intestate in said county. After the death of said James, said Amasia departed this life intestate, with no other heirs than his mother and his said brother and sisters. On the 18th day of February, 1871, the administrator of the estate of said James petitioned the proper court to sell said lands, subject to a life estate in said Catherine Clark, for the payment

of the debts of said James, deceased. Said petition set out the names of the surviving children of said James as Amasia, Malinda, Eliza Jane, Dolcena Alice, James, Minerva, and James Marion Clark, and ——— Clark, including Jane Minerva and ——— Clark, not his children, and omitting Helen I., his daughter. The record recites that at a subsequent term of court the administrator made proof of the publication and posting of notices of the pendency of said petition. Appraisers were appointed and sworn, and reported an appraisement of said lands at \$1,600. The administrator was ordered to file an additional bond in double the appraised value of said lands, and the record recites the filing and approval by the court of such bond, with Jeremiah K. Clark as surety. Thereupon the court ordered a private sale of said lands without notice. At a subsequent term of court the administrator reported under oath that he had given notice of the time, the terms, and lands to be sold by publication of three weeks successively in a named weekly newspaper of said county, and by posting printed notices in five public places in said county, three of which were in the township where said lands were situated; and that pursuant thereto he sold said lands to Andreville Hillis for the appraised value. The sale was approved, the deed executed and confirmed, and the purchase money paid. Catherine Clark died October 21, 1887. The appellants, the five living children of said James Clark, and said Lorinda Clark, mother of said children, seek to recover said lands, and to quiet the title thereto in themselves. The appellee claims under Andreville Hillis, and succeeded in the lower court. No question is properly made in this court as to the sufficiency of the pleading, but the errors assigned are upon the overruling of the joint motion of all of the appellants for a new trial, and of the separate motion for a new trial by Helen I. Clark.

It is contended by the appellants that James Clark, at his death, held no title, legal or equitable, in said lands, subject to sale for the payment of his debts; and that the sale by the administrator was void, even if said James held an interest subject to sale for the payment of his debts. The argument upon the first contention is, as we understand it, that the deed by James to his mother suspended the fee during her lifetime, and, after vesting a life estate in her, conferred such remainder at her death upon said James and his heirs; that the death of James before the extinction of the life estate took him out of the line of the "reversion," and left only such of his "heirs" as survived his mother to take the "reversion." Numerous authorities are cited as supporting this argument, but we believe them to be inapplicable to the necessary construction of the deed in question. The deed conferred no title on James. He held the fullest title known to the law, and from it he carved a life estate, and conferred that upon his mother. He had no "heirs," and upon the expiration of the life estate nothing remained to revert, because nothing more had passed. The remainder never

passed from James, but continued in him until his death, when, it is found, he had heirs to inherit that remainder, and hold it subject to said life estate, and subject to the payment of the debts of said James. There is little room for the contention that such interest of James was a "contingent remainder." The case of *Stephens v. Evans*, 30 Ind. 39, cited by counsel, defines a contingent remainder as "an interest in remainder, limited to take effect either to a dubious and uncertain person or upon a dubious and uncertain event." If the deed had been from another to Catherine for life, with the remainder over to James, expressed in the form we find it in the deed of James, we could doubt its construction as conferring upon James a contingent remainder. There are no expressions of contingency in the deed. It has often been held that a bequest to one "if living," means if living during the life of the testator. But here the estate parted with is but a life estate, and the remainder in fee continues in James, and is dependent upon no contingency. The expression, "to revert to me and my heirs," is not a granting term, and cannot, therefore, create a limitation. The law favors vested remainders, and ignores the rule that the fee may stand in abeyance or be suspended. *Amos v. Amos*, 117 Ind. 37, 19 N. E. Rep. 543. In *Boone on Real Property* (section 18) it is said that the law does not permit estates to be in abeyance, except in cases of necessity, and it has been said that the doctrine of a fee in abeyance is not now the law of real property. *Shelfield v. Ratcliffe*, Hob. 338; *Buckaport v. Spofford*, 12 Me. 492; *Donovan v. Pitcher*, 53 Ala. 411; *Fearnle, Rem.* 351, 361; *Williams, Real Prop.* 256; *Sands v. Lynham*, 27 Grat. 291; *Moore v. White*, 6 Johns. Ch. 360, 365.

The validity of the sale by the administrator is attacked upon the following grounds: (1) The name of Helen I. Clark was not stated in the petition for an order of sale. (2) The sale was ordered without notice, the land being valued at \$1,600. (3) That no additional bond is on file. (4) All of the appellants except Lorinda Clark were minors when the order was made. (5) No guardian ad litem was appointed for the minors. (6) No notice was given of the pendency of the petition. (7) Appellants were not called, and defaulted in said proceeding to sell. (8) There was no legal appraisalment.

We have stated the substance of all of the evidence in the cause, which consists of agreed facts and the record of the proceedings to sell by said administrator. From the record of the proceedings to sell Helen I. Clark is not named as an heir of said James, but the other children are named, and must be treated as parties. If the record were silent on the subject of notice to those who were parties to the proceeding, it would be presumed that such notice had been given. *Doe v. Harvey*, 8 Ind. 104; *Gerrard v. Johnson*, 12 Ind. 636; *Hawkins v. Ragan*, 20 Ind. 193; *Abdil v. Abdil*, 33 Ind. 463; *Ayers v. Harshman*, 66 Ind. 291; *Crane v. Kimmer*, 77 Ind. 215; *Horner v. Doe*, 1 Ind. 130; *Bank v. Ault*, 102 Ind. 322, 1 N. E. Rep. 562. Here it appears express-

ly that notice was given by publication and posting of the pendency of the proceeding. The absence from the files of the notice so found will not defeat the presumption that it was the proper notice. If the infirmity for which a judgment is attacked do not appear from the face of the record of a court of competent jurisdiction, the judgment is not void. *Palmerton v. Hoop*, 131 Ind. 23, 30 N. E. Rep. 874; *Earle v. Earle*, 91 Ind. 27. The absence from the files of the proof of notice of sale should not affect the validity of the sale, for the reasons stated as to the notice of the pendency of the proceeding. But it is insisted that the court ordered the sale without notice, when, from the appraised value of the land, notice was required by law. The statute did not require the order of sale to direct the giving or withholding of notice, and, while notice was required, and while the court did the unnecessary act of directing the sale without notice, the administrator did his duty in the giving of notice, as we find from the record. While there might be some doubt of the presumption of notice as against the order of sale without notice where we find that notice was given, the order as to notice will be disregarded. The record ordered the administrator to execute an additional bond, and it appears that he did so, though the bond is not in the record. That he gave no such bond will not be presumed, as we have shown. However, the failure to execute such bond has been held not to invalidate a sale, where it does not appear that the proceeds of the sale were misappropriated. *Foster v. Birch*, 14 Ind. 445; *Dequindre v. Williams*, 31 Ind. 444; *McKeever v. Ball*, 71 Ind. 398; *Marquis v. Davis*, 113 Ind. 219, 15 N. E. Rep. 251.

In this action we may infer that the appellants, excepting Lorinda Clark, were minors at the time the lands were ordered sold. This may be inferred from the knowledge we get by the admitted facts that in July, 1853, James was not a married man; that he thereafter married Lorinda Collum, by whom he had said children, and that the sale was made in 1871. These facts do not appear of record in the proceeding to sell. The court there acted, so far as its record discloses, without knowledge of their infancy. Without question, that record does not disclose this infirmity. Hence the judgment for that cause is not void, and the failure of the court to appoint a guardian ad litem was at most collateral to that error. The practice then prevailing was not of such nature as to require parties named in the petition as heirs to be defaulted upon failure to appear. It was required by statute that the petition should state the names of the heirs, but it did not require, as the present statute seems to, an adversary proceeding, though, under the practice, the parties named were permitted to interpose, and show why a sale should not be ordered. In the absence of such interposition the court ordered, as the statute directed, a sale of the property. No defect in the appraisalment is pointed out, and we observe none. The second and third paragraphs of complaint clearly present

collateral attacks upon the probate proceedings. In *Cully v. Shirk*, 131 Ind. 76, 30 N. E. Rep. 882, it was said that any attack upon a judgment for want of jurisdiction in the court to render it, predicated upon a matter dehors the record, is collateral. *Harman v. Moore*, 112 Ind. 221, 13 N. E. Rep. 718; *Gain v. Goda*, 84 Ind. 209; *Lantz v. Maffett*, 102 Ind. 23, 28 N. E. Rep. 195; *Earle v. Earle*, supra; *Railway Co. v. Harmless*, 124 Ind. 25, 24 N. E. Rep. 369. It is not so clear that a proceeding to review a judgment is a direct attack in the sense that matters dehors the record may be made the ground of attack. The appellants' learned counsel gives true character to the form of this action when he says: "If the order of sale and the proceedings thereon were void, the plaintiffs, appellants, are entitled to recover possession, and have their title quieted, on either the second or third paragraphs of their complaint. If the proceedings are not void, but erroneous, they are entitled to relief under their first amended paragraph, which, among other things, prays for a review of judgment." We feel constrained to hold, for the reasons given, that the sale, as to the heirs of James Clark other than Helen I. Clark, was not void, and if they can recover it must be upon the theory of a direct attack upon the proceedings of the probate court. The second and third paragraphs of complaint, as we have seen, do not admit of such a theory. Does the first amended paragraph constitute a direct attack upon the proceedings of the probate court? An action to review a judgment is given by statute, and the causes therefor are: (Rev. St. 1841, § 616:) "For any error of law appearing in the proceedings and judgment, \* \* \* or for material new matter discovered since the rendition thereof." The review here sought is not for material new matter discovered since the rendition of the judgment. It can only be for error appearing in the proceedings and judgment, for error apparent on the face of the record. *Rice v. Turner*, 72 Ind. 560; *Richardson v. Howk*, 45 Ind. 451; *Train v. Gridley*, 38 Ind. 241; *Preston v. Sandford*, 21 Ind. 156; *Shoaf v. Joray*, 86 Ind. 70. Review may be had only when the same relief might be had by appeal from the judgment sought to be reviewed. *Baker v. Ludlam*, 118 Ind. 87, 20 N. E. Rep. 648; *Insurance Co. v. Gibson*, 104 Ind. 336, 3 N. E. Rep. 892; *Shoaf v. Joray*, supra; *Insurance Co. v. Carpenter*, 85 Ind. 350; *Tachau v. Fiedelvey*, 81 Ind. 54. In the last of the cases cited, as in many others, it is made manifest that, though a direct attack, the proceeding to review is not for errors to be established dehors the record. The proceeding has for its object the correction of some error upon the face of the proceeding and judgment by invoking the power of the court committing such error. It is a substitute for the remedy by appeal, and is of the same nature. *Insurance Co. v. Carpenter*, supra. The appellants use the remedy to introduce matters not apparent upon the face of the record, so far as all are concerned excepting Helen I. Clark. As to her, the face of the record discloses that the court had no jurisdiction over her person. She was not

in court; not a party to the proceeding. Notice to ——— Clark by publication is not binding upon Helen I. Clark, and she may attack the proceeding collaterally, because void as to her, the record expressly showing the infirmity as to her. *Schissel v. Dickson*, 129 Ind. 139; 28 N. E. Rep. 540; *Hawkins v. Hawkins*, 28 Ind. 66. In the last-cited case it was held that a sale upon proceedings disclosing that heirs were not served with process is void, and is not aided by the confirmation of the sale by the court. The appellee insists that the appellant Helen I. Clark cannot succeed here, because the complaint is joint as to her and the other appellants, and does not, therefore, state a cause of action in her behalf alone. The sufficiency of the pleadings is not raised by assignment or other method, and is not before us. It is also insisted that the appellants are estopped to attack the sale because of their having received the proceeds of the sale. While, under *Palmerton v. Hoop*, 131 Ind. 23, 30 N. E. Rep. 874, that might be a good estoppel, the facts constituting the estoppel are not shown by the record, and we cannot presume their existence. We conclude that the court erred in overruling the separate motion of Helen I. Clark for a new trial. The judgment is reversed as to Helen I. Clark, and is in all things affirmed as to the other appellants.

(126 Ind. 460)

PENNSYLVANIA CO. v. SEARS.<sup>1</sup>

(Supreme Court of Indiana. May 10, 1893.)

RAILROADS—NEGLIGENCE—LOW OVERHEAD BUILDING—BILL OF EXCEPTIONS—CONTENTS—JOINT ASSIGNMENTS OF ERROR.

1. Where a railroad knowingly maintains a bridge over its track so low as to endanger any one standing on a refrigerator or other high car, and a brakeman, passing at night, without knowledge of the danger, is struck and injured, the company is liable.

2. The integrity of a bill of exceptions cannot be assailed by statements of the clerk, embodied in the return, showing that certain parts were placed in the bill merely without being fastened. *McCabe, J.*, dissenting.

3. Reference in a bill of exceptions to the "following depositions," without other designation as to the proper place for insertion of such depositions, and without the same being copied, but with the originals merely placed inside the paper on which that part of the bill is written, is not enough to constitute such depositions part of the bill.

4. A joint assignment, including a number of instructions, can be maintained only by showing that all the instructions are incorrect.

Appeal from circuit court, Allen county.

Suit by Oliver B. Sears against the Pennsylvania Company. Judgment for plaintiff. Defendant appeals. Affirmed.

J. Brackenridge and Allen Zollers, for appellant. L. M. Ninde, for appellee.

MCCABE, J. Appellee sued appellant, a railway company, for a personal injury resulting from the alleged negligence of the appellant. Trial by jury; verdict for appellee, upon which judgment was rendered over a motion for a new trial. The errors assigned here, and not waived by failure to argue the same, are overruling appellant's

<sup>1</sup> Rehearing denied, 36 N. E. 353.

demurrer to the appellee's complaint, and overruling appellant's motion for a new trial. The material allegations of the complaint are as follows: "That for the last ten years the defendant has possessed and operated the Pittsburgh, Ft. Wayne & Chicago Railroad extending from Pittsburgh, in said state of Pennsylvania, through the city of Ft. Wayne, Indiana, to Chicago, Illinois. Plaintiff further avers that from the 16th November, 1887, to the 8th May, 1888, inclusive, he was employed by the defendant as brakeman on the division of its said road between said Ft. Wayne and the city of Chicago. That on said 8th day of May he left Chicago as brakeman on the defendant's train No. 76, for said Ft. Wayne. And the plaintiff avers that between the town of Wheeler and the city of Valparaiso, in said state of Indiana, the defendant, for the period of, to wit, five years last past, has carelessly, negligently, and recklessly maintained an unlawful and dangerous overhead bridge over its said railroad, and unlawfully, carelessly, and negligently maintained said bridge so low that when a brakeman passed thereunder standing upon a refrigerator car or other highest cars used by the defendant on its said road his head would come in contact with and strike against said bridge. And the plaintiff further avers that, although the defendant so unlawfully, carelessly, and negligently maintained said bridge in a dangerous condition as aforesaid, yet it carelessly, negligently, and unlawfully failed, neglected, and refused to keep proper, suitable, and safe guards up at either side of said bridge, in such a position, or of such a kind or character, as would with reasonable safety caution or warn brakemen upon its train that they were approaching and about to pass under said bridge, and the defendant during said period also carelessly, negligently, and unlawfully neglected and refused to keep proper, safe, and suitable lights or lamps upon said bridge in the nighttime to notify or warn brakemen upon its freight trains of the presence of said bridge, and of their approach thereto. And plaintiff avers that, to wit, on said 8th May, in the nighttime, while it was dark, he was engaged as such brakeman by the defendant on its said train No. 76 in running said train eastward upon said road and under said bridge so negligently maintained as aforesaid, and upon and about which bridge the defendant negligently and carelessly failed at the time said plaintiff was approaching and passing said bridge upon said train as aforesaid to keep, place, or have any lights upon or about said bridge to warn or notify him that he and said train were approaching and about to pass said bridge; and the defendant also negligently and carelessly neglected, failed, and refused at the time the plaintiff was approaching said bridge and about to pass the same as aforesaid upon said train to place or keep upon or near said bridge any suitable or proper guards or ticklers to give the plaintiff notice that he was approaching or about to pass said bridge. And he avers that after said train passed said

town of Wheeler he was diligently and carefully engaged in his duties as such brakeman, and without any fault or lack of care and due diligence on his part, and without any knowledge on his part that he was approaching and about to pass under said bridge, said train upon which he was so diligently, carefully, and faithfully braking, as aforesaid, ran past and under said bridge, and carried the plaintiff, without any fault whatever on his part, under and against said bridge, and whereby, and without any fault on his part, his head was brought in collision with said bridge above said train, and his head collided with said bridge above said train with great violence, whereby his skull was fractured, his head and face were bruised, mangled, and crushed, and his lip cut through and greatly injured, and whereby he became and was insensible and helpless, and his shoulder, neck, and body became and were bruised and greatly injured, and whereby he was thrown to ground upon said railroad track, and the cars ran over him and crushed his leg from his foot to his thigh, so it became necessary to amputate the same, which was done, by means of which injuries he became sick, sore, and distressed, and suffered great pain and anguish, both mentally and physically, and his life was for a long time, to wit, for six months, despaired of, and he became and was and is wholly disabled from ever again following his business or profession, and from ever again earning his living, and he was compelled to lay out and expend, to wit, \$500, in nursing, medicines, and medical and surgical attendance in being treated for said injuries; and he avers that he was so injured, as aforesaid, without any fault whatever on his part. That he had not, at or before he was so injured, any knowledge or notice whatever that said bridge was so low that it would come in collision with his head, or any part of his body, or that it was low enough to touch him as he passed under the same; and he avers that all said injuries were caused by the negligence and carelessness of the defendant, as aforesaid, to his damage in the sum of fifteen thousand dollars, for which he sues and demands judgment."

The first objection urged against this complaint is that it does not state what part of the train appellee was on when he was injured, and that it is not averred that he was standing on any one of the cars when his head came in contact with the overhead bridge. If it was material or important to appellant to have a more specific statement as to the particular place in the train appellee occupied when the alleged injury occurred, the appropriate remedy was a motion to require greater certainty in that respect, and not a demurrer for want of sufficient facts. As to the other point, the complaint shows that on the 8th day of May he was engaged as brakeman for appellant on train No. 76 going east from Chicago, and, after the same passed the town of Wheeler, he was diligently engaged in his duties as such brakeman. Said train ran past and under said bridge, whereby his head was brought

in collision with said bridge above said train. From this language we think it appears that the only place appellant could have occupied at the time the bridge came in contact with his head was on top of some one of the cars in that train. Whether it was a refrigerator or other highest car was not essential to the sufficiency of the complaint. It is fairly inferable from the complaint that it was only refrigerator cars and other highest cars that would not admit a brakeman to stand erect thereon and pass under said bridge in safety, and that all other cars would admit such passage. Much useless verbiage in the complaint has obscured the statement of these facts to some extent, but not to the extent of destroying them. The unavoidable conclusion to which the language employed leads is that the ordinary cars in use on said road would admit such passage. It is also claimed that the complaint is bad for the reason that it appears therefrom that appellee was not free from contributory negligence. The contention is that, as it appears from its averments that appellee was engaged for appellant as brakeman from the 16th day of November, 1887, until the 8th day of May, 1888, he had ample opportunity of knowing all about the dangerous character of the bridge, and that, therefore, he assumed the risk of such employment. The complaint "averts that from the 16th November, 1887, to the 8th May, 1888, inclusive, he was employed by defendant as brakeman on the division of its said road between Ft. Wayne and Chicago." What train he had been braking on during that time, whether freight or passenger, is not stated. If it was either material or useful to appellant's rights to have the complaint specify the particular train, the only remedy was a motion asking the trial court to require such specification, and not a demurrer for want of facts sufficient. No such motion was made. It is afterwards averred in the complaint that appellee had not at or before he was injured any knowledge or notice whatever that said bridge was so low that it would come in collision with his head or any part of his body, or that it was low enough to touch him as he passed under the same. From this language it clearly enough appears that he in fact did not know of the dangerous character of the bridge, and the demurrer admits that fact. Nor does it appear from the facts stated that he might have known of such danger, because it does not appear that he was ever braking on a freight train for appellant prior to the occasion on which the alleged injury was received; and, if that did appear, still there is nothing in the complaint to indicate that he had ever known of or seen "refrigerator or other highest cars" pass under said bridge, either with or without a brakeman standing thereon, or that any other facts existed within his knowledge to warn him of the dangerous character of the bridge.

This analysis of the complaint upon the point in question makes the long list of authorities cited by appellant's counsel in support of his contention inapplicable. It is true, as stated in *Pennsylvania Co. v. Whitcomb*, 111 Ind. 216, 12 N. E. Rep. 380,

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cited by appellant, "that no one is bound to remain in a service which he is informed is dangerous, and, if an employe does voluntarily continue in the master's service after notice of its dangers, he assumes all risks arising from the known dangers. \* \* \* The risks which the employe assumes are, however, such as are incident to his service, and such as arise in cases where ordinarily safe machinery and appliances are provided. If machinery of an unusual and more dangerous character is provided, and the employe has no notice of the danger, then he does not assume the risk attendant upon its use." To the same effect are *Railway Co. v. Adams*, 105 Ind. 151, 5 N. E. Rep. 187; *Railway Co. v. McCormick*, 74 Ind. 441; and many other cases cited by appellant. We do not think the danger of an overhead bridge maintained by a railroad company so low that it may come in contact with the heads of its brakemen while engaged in their duties on the top of its cars as they pass under such bridge is one of the dangers incident to such service. There are a thousand and one dangers incident to the service of all railroad operative employes that ordinary prudence cannot be expected to guard against, and for which the master is not liable, and the risk of which is assumed by the employe; but the maintenance of an overhead bridge so low as to fracture the skulls and endanger the lives of brakemen is not one of them. The precise question here under consideration was decided by this court in *Railroad Co. v. Rowan*, 104 Ind. 88, 3 N. E. Rep. 627, where this court, appropriating the language of the supreme court of Massachusetts, said: "He who engages in the employment of another for the performance of specified duties and services for compensation takes upon himself the natural and ordinary risks and perils incident to the performance of such service. But," says this court, "there are well-defined exceptions to this general rule, one of which arises from the obligation or duty of the master not to expose the servant while conducting his business to perils or hazards which might have been provided against by the exercise of due care and proper diligence upon the part of the master. \* \* \* A railroad company is bound to provide suitable and safe materials and structures in the construction of its road and appurtenances, and if, from defective construction of its road and appurtenances, an injury happen to one of its servants, the company is liable for the injuries sustained." This court held in that case that a complaint in all respects substantially the same as the one at bar was good on demurrer, and expressly repudiated many of the authorities cited by appellant in this case to the contrary. That case was cited and reaffirmed by this court in *Railway Co. v. Wright*, 115 Ind. 378, 16 N. E. Rep. 145, and 17 N. E. Rep. 584, a case involving the sufficiency of the complaint on demurrer for an injury received by a brakeman on account of an overhead bridge being too low. The latter case is a stronger one in support of the sufficiency of the complaint here than the former. In the latter case it appeared that no full-grown man could stand erect

on any box car and pass under the bridge without striking it; that the plaintiff had been in the employ of the defendant as brakeman over that part of the road where the bridge was from the 5th October to the 4th of November, 1881, and that during that time he passed with his train under said bridge from 8 to 10 times in the daytime and that many times in the night. He was again employed as brakeman over that part of the road on the 11th or 12th of January, 1882, and he was injured on the night of the 13th of that month, and from his first employment to the time of his injury he had passed under the bridge from 17 to 20 times, one-half of the number being in the night; and yet it was held in that case that these facts did not destroy or overthrow the allegation and the finding that he was ignorant of the dangerous character of the bridge, though it was found by the jury in answer to interrogatories that the danger was an open and obvious one in the daytime, but not at night. And, quoting from the first case above, this court said in the latter case that "it seems to us that a railroad company is, and ought to be, required to construct and maintain its roadway and appendages, and its overhead structures, in such a manner and condition that its employe or servant can do and perform all the labors and duties required of him with reasonable safety; and, applying the language from *Railroad Co. v. Love*, 10 Ind. 554, said: "If a defect existed in the road which was known to the company, but which it was impossible for them to remove or remedy, and in consequence thereof the road was unsafe, but not impassable, and yet they should place an employe upon the road, and suffer him, in ignorance of said defect, to attempt to operate it, and injury should thereby result to him, certainly there would be a liability." To the same effect are *Pennsylvania Co. v. Brush*, 130 Ind. 347, 28 N. E. Rep. 615; *Nordyke & Marmon Co. v. Van Sant*, 99 Ind. 188; *Car Co. v. Parker*, 100 Ind. 181; *Krueger v. Railway Co.*, 111 Ind. 51, 11 N. E. Rep. 957; *Bradbury v. Goodwin*, 108 Ind. 286, 9 N. E. Rep. 302; *Railway Co. v. McCormick*, 74 Ind. 440. And applying to that case the principles laid down by the supreme court of Illinois in *Railroad Co. v. Welch*, 52 Ill. 188, this court, in *Railway Co. v. Wright*, supra, said: "The railroad track at Mendota was about eighteen inches from the edge of an awning which projected from the station house; so that, when a freight car stood upon the track, the inside edge of the car was about even with the outer edge of the awning. The awning was about eighteen inches higher than the car. There being a signal for brakes, the plaintiff in the case, a brakeman, ran up on the ladder on the side of the car, and before reaching the roof was struck by the awning and injured. It was insisted in behalf of the railway company that there could be no recovery, for the reason that the brakeman had assumed the risks incident to the service, and had an opportunity to know of the danger from the awning. In answer to that contention that court said: "There are many freight depots and sta-

tion houses upon the line of the Central Railway, and it would be preposterous in us to say, or ask a jury to say, that a brakeman engaging in the service of the company must be held to know whether or not there may be one among them whose roof or awning so projects over the line of road that a brakeman on a freight train, in the performance of his duties, would be liable to be swept from the train by a collision with it." "He was required," said this court, "to observe ordinary care for his own safety, but he was not required to go over the road upon a tour of inspection, looking for defective bridges or faulty track, before engaging in the service." This, we may add, was a duty which the law devolved upon the company, and an employe has a right to presume that the company had done its duty in that respect, and, if such inspection revealed any defective bridge or bridges liable to endanger the lives or limbs of their employes operating the road, that the company would give them timely warning thereof. It is averred that the bridge had been negligently maintained by appellant for five years immediately preceding the injury. Though there is no allegation charging the company with knowledge of the dangerous character of the bridge, yet in the able brief of the distinguished counsel for appellant no objection to the sufficiency of the complaint is made on account of that omission, for the good reason, we presume, that they thought, as we think, that such objection could not be successfully made. It is true, one of the conditions of the liability of the appellant is that it had knowledge of the defect, or that the circumstances were such that it ought to have known of the defect. The circumstances stated in the complaint speak for themselves, and prima facie raise the presumption that the appellant had knowledge of the defect, or, if it did not, that it was guilty of negligence in not acquiring such knowledge. The occurrence of the injury under the circumstances alleged and admitted by the demurrer raises the presumption of negligence on the part of the appellant. *Railroad Co. v. Rainbolt*, 99 Ind. 551; *Shear. & R. Neg.* §§ 59, 60; *Thomp. Neg.* p. 1229, § 8; 16 *Amer. & Eng. Enc. Law*, 449, 450. See, also, *Railway Co. v. Walker*, 118 Ind. 196, 15 N. E. Rep. 234; *Railway Co. v. McCartney*, 121 Ind. 385, 28 N. E. Rep. 258; *George H. Hammond & Co. v. Schweitzer*, 112 Ind. 246, 13 N. E. Rep. 869. Appellant, however, could not very well have maintained the bridge for five years previous to the injury without any knowledge of its dangerous character. The court below did not err in overruling the demurrer to the complaint.

The next alleged error is the denial of the motion for a new trial. The first point made in support of this assignment is that the evidence shows contributory negligence on the part of appellee. This contention is first met by the appellee's claim that no such question is presented by the record, because, it is contended, the evidence is not in the record. That claim is founded upon the facts disclosed by the return of the clerk to the writ of cer-

tiorari. It appears from the statements of the clerk and his deputy, embodied in that return, that the formal beginning of the bill of exceptions, designed to incorporate the longhand manuscript of the stenographic report of the oral evidence and its incidents, etc., was found by him soon after the bill purported to have been signed and deposited in the clerk's office, placed in and between the upper cover of said manuscript, and immediately preceding the beginning of the evidence therein, but was not otherwise fastened. Copies of each portion of the original bill of exceptions are embraced in the return. That the next part of the original bill was designed to incorporate the depositions, and the return shows that a space was left therein for depositions, and said depositions were placed inside of said bill of exceptions at said point, but not otherwise fastened; that the other portions of said bill—being those parts designed to incorporate the instructions given and exceptions thereto, and those refused and exceptions thereto—were placed in and between the leaves of said longhand manuscript of said evidence at the close of the evidence, and the same was signed by the trial judge. The members of this court other than the writer are of the opinion that the integrity of the bill of exceptions, as it appears in the transcript, cannot be assailed and destroyed by the statements of the clerk and his deputy, as is attempted in this case; that nothing short of a return to a writ requiring the original bill of exceptions to be certified, and its actual production before this court, can authorize the inquiry sought to be made in this case. And a majority of the court hold that, if the facts stated in the return were established by competent and legal evidence, it would not be sufficient to destroy the integrity of the bill. They regard the practice adopted in this case too loose to be encouraged, if it may not be condemned. The writer differs very widely from the conclusion reached on both points by the other members of the court, and believes, therefore, that the bill of exceptions is invalid. There is another reason why the writer is of opinion the bill of exceptions is invalid, and that is that the bill ought to have been made up by a direction to "here insert" the longhand manuscript and its incidents. That method was held not authorized by the statute by this court in *Wagoner v. Wilson*, 108 Ind. 210, 8 N. E. Rep. 925, and many cases following that case, but the writer is of opinion those cases were erroneously decided, and is therefore in favor of overruling them; but in this the other members of the court do not concur, therefore *Wagoner v. Wilson*, supra, is adhered to. The return of the clerk to the certiorari shows that that part of the bill of exceptions designed to incorporate the depositions into the bill reads as follows: "And be it further remembered that upon and immediately following the close of his oral evidence the plaintiff introduced in evidence and read to the jury the following depositions of witnesses taken by him on the 11th day of January, 1889, before

Matthew W. Wyeth, a justice of the peace of Porter county, Indiana, which said depositions are as follows;" and no other designation or direction was contained in the bill as to where the depositions were to be inserted, or whether they were to be inserted at all or not, and they were not copied into the bill, but the originals thereof were placed inside of the paper on which that part of the bill was written. It has often been held by this court that, "in order that written instruments shall constitute a part of a bill of exceptions, they must either be copied into it at full length, before it is signed, or appropriately referred to, and the proper place for insertion designated by the words "Here insert." *Clay v. Clark*, 76 Ind. 161; *Woolen Factory Co. v. Brodhecker*, 130 Ind. 339, 28 N. E. Rep. 185, and 30 N. E. Rep. 528; *Endsley v. State*, 76 Ind. 467; *Irwin v. Smith*, 72 Ind. 482; *Kesler v. Myers*, 41 Ind. 543; *Sidener v. Davis*, 69 Ind. 336; *Insurance Co. v. Johnson*, 46 Ind. 315; *State v. Railroad Co.*, 44 Ind. 350; *Burdick v. Hunt*, 43 Ind. 381; *Harman v. State*, 22 Ind. 331. We therefore hold that the depositions referred to are not a part of the record, and hence the record shows that the evidence is not all in the record, and therefore we cannot consider the evidence for any purpose. *Clay v. Clark*, supra; *Millikan v. State*, 70 Ind. 310; *Powers v. Evans*, 72 Ind. 23.

The fourth ground assigned in the motion for a new trial is that the court erred in its refusal to give the jury instructions Nos. 1, 2, 3, and 4. And the fifth ground is that the court erred in giving to the jury instructions Nos. 1, 2, 3, 4, 5, 8, and 9. It has been held by this court that, where a motion for a new trial stated "that the court erred in giving to the jury instructions numbered from one to seventeen, inclusive, \* \* \* joins all the instructions together in general terms, without separating or pointing out any one or more as erroneous. Such an assignment, like a joint demurrer to separate paragraphs of a pleading, can only be maintained by showing that all the instructions are incorrect." *Railway Co. v. McCartney*, 121 Ind. 385, 26 N. E. Rep. 258; *Wallace v. Bank*, 126 Ind. 205, 26 N. E. Rep. 175; *Jones v. Layman*, 123 Ind. 569, 24 N. E. Rep. 363; *Bowman v. Phillips*, 47 Ind. 341. Appellant's counsel, in their able brief, have not contended that any of the instructions given, except the 1st, 2d, 3d, and 4th were erroneous; the correctness of the 5th, 6th, 7th, and 8th are not questioned in this court, and we see no objection to them. About the only objection urged to the others is that they were not applicable to the evidence. As the evidence is not all in the record, the presumption is that they were applicable to the evidence actually introduced, and this presumption cannot be overcome until the evidence is in the record, from which it shall appear that the instructions were not applicable thereto. *Stevens v. Stevens*, 127 Ind. 560, 26 N. E. Rep. 1078. But, if the evidence was all in the record, the invalidity of the assailed instructions could not be determined, because the motion for a new trial, as we have seen, can



only prevail in case all of the seven instructions are bad. The same is true of the instructions refused. The refusals to give numbers 1 and 2 are not assailed in this court as errors. It is sufficient to say that, in the absence of all the evidence, it must be presumed that the whole four were refused, if for no other reason, because they were not applicable to the evidence. But we have examined the first and second, and think they are correct in the abstract, and hence it was not error to overrule the motion for that cause, if any part of such instructions was correctly refused. We have examined all the errors assigned and not waived, and find no available error in the record.

The judgment is affirmed.

(134 Ind. 343)

OHIO & M. RY. CO. v. LEVY.

(Supreme Court of Indiana. May 12, 1893.)

NEGLIGENCE — ACTION FOR PERSONAL INJURIES — EVIDENCE.

1. In an action against a railroad company for personal injuries caused by falling into an unguarded pit adjoining defendant's track, evidence of admissions of defendant's solicitor respecting notice of the existence of the pit, in the absence of evidence that he had authority to make them, is inadmissible, and is not rendered harmless by the fact that there was also circumstantial evidence of notice. McCabe, J., dissenting.

2. In order to prove notice of the existence of the pit it was reversible error to admit in evidence an affidavit made by defendant on a motion for a change of venue, though there was also circumstantial evidence of notice. McCabe, J., dissenting.

On rehearing.

For former report, see 32 N. E. Rep. 815.

Geo. F. Lawrence, Miller & Gavin, M. & R. Maxwell, and Edward Barton, for appellant. Korbly & Ford and A. G. Smith, for appellee.

MCCABE, J. A rehearing is asked in this case on the ground that the errors on which the judgment was reversed were harmless. The complaint seeks to recover for personal injuries alleged to have been sustained by appellee in falling into a pit or hole on appellant's right of way where it crosses one of the streets of the city of North Vernon. The erroneous evidence admitted over appellant's objection was the affidavit of appellant, upon which a change of venue of the cause from Jefferson to Jennings county was granted, and the declarations and admissions of the general solicitor of appellant concerning the existence of said hole or pit, tending to show, as it is claimed, that the company had knowledge of its existence. There is no conflict in the evidence as to the existence of the pit; that the appellant kept the way planked up to the pit; and that it had remained there for 20 years; and that, when the plank decayed, at least on one occasion, the company put down new plank in such a manner as that a person traveling over that part of the street at night and in the dark would be liable to be misled by the plank in walking thereon in supposed safety, and step off into the

pit. The evidence, without any conflict, showed that appellee, in company with a companion, was walking over that part of the street where the railroad crossing was, on a dark night, and that, while walking on the plank at the crossing mentioned, which plank extended up to the pit, and that while walking slowly, carefully, and cautiously, and without any knowledge that she was nearing the pit, and being unable from the darkness to see it, she fell into it, and sustained very serious personal injuries, crippling her for life. The evidence, aside from that which was incompetent, fully warranted the finding of the jury, and, wholly disregarding the incompetent evidence, the jury could not have been warranted or justified in finding any other way than for the appellee. It is claimed that the affidavit must have produced a prejudice in the minds of the jury, and therefore influenced their verdict, if not as to which party they would find for, at least in the amount of damages they would assess. The evidence shows without a conflict that the injury was a painful one, and that it permanently lamed the appellee for life. The amount of damages assessed—\$1,662—was fully justified by the legal competent evidence. But it is difficult to see how such an affidavit could prejudice the jury. The affidavit was not only incompetent evidence, but the act of the appellee's counsel in offering it, and the court in receiving it, meets with unqualified condemnation. But it is beyond the power of this court to emphasize that condemnation by changing the course of justice. If the illegal evidence is clearly shown not to have harmed the complaining party, it ought not to reverse. The affidavit had not the slightest bearing or relevancy to the question of the right of recovery, or the amount thereof. As the verdict was what it ought to have been under the legitimate evidence, excluding from consideration the affidavit, it appears clearly enough that the error of its admission was harmless; and in such a case it has often been held that such error cannot reverse. *Parker v. State*, 8 Blackf. 292; *Manchester v. Doddridge*, 3 Ind. 360; *Bush v. Seaton*, 4 Ind. 522; *Bank v. Adams*, 91 Ind. 280; *Rhoads v. Jones*, 92 Ind. 330; *Railroad Co. v. Pierce*, 95 Ind. 496; *Auldencamp v. Smith*, 96 Ind. 328; *Forbing v. Weber*, 99 Ind. 588; *Sage v. Railroad Co.*, (Ind. Sup.) 33 N. E. Rep. 771, (decided at this term.) The evidence of the declarations of the general solicitor as to the existence of the pit was inadmissible, because not binding on the company; but the only bearing it could have was to establish knowledge of the existence of the pit on the part of appellant. The facts already recited are such that the law raises the presumption that the company knew of the existence of the pit. In *Reed v. Northfield*, 13 Pick. 396, the court said: "Notice may be inferred from the notoriety of the defect, and from its continuance for such a length of time as to lead to the presumption that the proper officers of the municipality did in fact know, or, with proper vigilance and care, might have known, the fact." 9 Amer. & Eng. Enc. Law, 405, and authorities



there cited; *Pennsylvania Co. v. Sears*, 84 N. E. Rep. 15, (at this term,) and authorities there cited. The writer is of opinion that a rehearing ought to be granted, but in this the other members of the court do not concur.

The petition is therefore overruled.

(8 Ind. App. 239)

**BANK OF WESTFIELD v. INMAN et al.<sup>1</sup>**  
(Appellate Court of Indiana. May 13, 1893.)

**ACTION ON NOTE—EVIDENCE—INSTRUCTIONS—  
PRESUMPTIONS ON APPEAL.**

1. In an action by a bank on a note given by a depositor for a supposed overdraft, defendant answered that there was no overdraft, and that by reason of overcharges and omissions in his account there was a balance due him, and a bill of particulars was filed. Several hundred items were given in evidence, and the court charged that defendant could not recover on any item not included in the bill of particulars. *Held*, that it would be presumed, in the absence of evidence to the contrary, that the jury included in the verdict no items not set out in the bill of particulars.

2. An objection that an item admitted in evidence was not included in the bill of particulars cannot be first raised on appeal.

3. Evidence of a payment not included in the bill having been admitted without objection, it was not error to admit the check with which defendant made such payment, since, where a principal fact is given in evidence without objection, it is not error to receive evidence of a subsidiary or corroborative fact.

4. There were numerous disputed items in the account, but the court charged, in regard to three notes given to the bank, that if they had been paid, and no credit given by the bank, "these are all the matters proper for you to consider" in determining whether the bank was indebted to defendant. There were also several charges as to other disputed matters. *Held*, that the above instruction was erroneous and misleading.

Appeal from circuit court, Hamilton county; J. T. Cox, Judge pro tem.

Action on a note by the Bank of Westfield against Robert C. Inman and others. From a judgment for defendants, plaintiff appeals. Reversed.

Kane & Davis, for appellant. Fertig & Alexander, for appellees.

LOTZ, J. The appellant sued the appellees upon a promissory note. The appellees answered jointly that the note was executed without any consideration. The appellee Robert C. Inman filed a separate answer of two paragraphs. The first paragraph of his separate answer alleged that he was the principal, and the other appellees were his sureties; that the appellant was at the time of the execution of the note and at the time of filing his answer indebted to him in the sum of \$1,500 for money had and received for his use, and which had been converted to the use of appellant. The second paragraph of the separate answer averred that he executed the note as principal for an alleged overdraft; that in fact there was no overdraft, but that, by reason of divers errors, overcharges, and omissions in his account as a customer and depositor in said bank, there was \$1,500 due him, for which he prayed judgment. A

bill of particulars was filed with each of these paragraphs, in which certain errors were specifically pointed out, and it was also stated that there were other errors in the account which appellee was then unable to specify. No question is raised as to the sufficiency of the answer. There was a trial by jury, and a general verdict for all the appellees on the complaint, and a verdict for \$1,076.92 in favor of the appellee Robert C. Inman on his separate answers. There were no interrogatories submitted to the jury. A motion for a new trial was filed, and overruled. After this ruling and at the same term of the court, appellant filed another motion for a new trial on the ground of newly-discovered evidence. The ruling upon each of these motions is assigned as error. Appellant earnestly insists that the verdict is not supported by the evidence, and that there is error in the assessment of the amount of recovery in favor of appellee Robert C. Inman. It appears from the evidence that the appellee Robert C. Inman was engaged in buying and selling live stock, and that he did business through appellant bank; borrowed money, discounted notes, made deposits there, and gave checks upon it. The business extended over a period of more than two years, and in the aggregate a large sum of money was deposited and checked out of said bank. The whole account of the dealings between them was given in evidence. We have looked into the evidence, and, while we may have doubts as to the correctness of the verdict, yet, under the familiar rule, when there is any evidence tending to support the verdict the appellate courts will not disturb the judgment on such grounds. Appellant insists that it is apparent that the jury included one item of \$750 in the verdict which was not contained in the bill of particulars; that this was erroneous, and renders the amount of recovery too large. Whether or not, under the pleadings, the appellee was confined to the items specifically designated in the bill of particulars, we need not decide. The whole account of debit and credit, including several hundred items, was given in evidence without any objection except as to a few items. In this condition of the evidence it is difficult to determine what items were or were not considered by the jury in reaching the verdict. The court expressly instructed the jury that "the defendant would not be entitled to a verdict against the plaintiff on any item not included in such bill of particulars." In the condition of the evidence this court will presume that the jury followed the instruction given, and that the verdict contained only such items as were set out in the bill of particulars.

Another cause assigned for a new trial is that the court erred upon the trial in allowing the appellee Robert C. Inman to testify relative to the execution of a note for \$750 about the time of a purchase of a lot of hogs from one Roberts, and the payment of said note, for which he claimed he did not receive credit or money. This item was not embraced in

<sup>1</sup> Rehearing denied, 34 N. E. 670. See 32 N. E. 835.

the bill of particulars, and for that reason it is contended that the evidence was erroneously admitted. At no time on the trial was the objection raised that this item was not in the bill of particulars. The record shows that the appellee testified that he had made a note to the bank for \$750, which should have been, but was not, credited to his account, and that he drew a check to Roberts on the same day for the amount, and paid the note off within a day or two afterwards, but received neither credit for the note nor for the money paid in its discharge. He then offered the check in evidence. To this the appellant objected on the ground that the check was not in controversy. The principal fact to which the appellee's testimony related upon this point was that he had made his note and paid it off, and had not received credit, although the note was charged against him in the account. Where the principal fact is given in evidence without objection, it is not reversible error to give in evidence a subsidiary or corroborative fact.

Another cause for which a new trial was asked is that the court erred in giving to the jury a certain instruction prepared and asked by the appellee Robert C. Inman. The instruction is in these words: "If the defendant R. C. Inman executed his note to the plaintiff bank for \$950, and received credit on his deposit account for such note in the sum of \$949, being the amount of said note, less the discount, and afterwards paid off said note in full by the payment of cash into the bank, for which he received no credit on said deposit account, and the amount of note, \$950, was afterwards charged against him along with checks drawn on said account, or if the defendant executed a note to said bank for \$750, and did not receive any money thereon, and did not receive credit therefor on his deposit account, nor otherwise, and afterwards paid the said note in cash to the bank, and received no credit for the money so paid, and, in like manner, if the defendant made a note to said bank for \$123.52, for which he received no credit for the money so paid, these are all the matters proper for you to consider in arriving at a conclusion as to whether the defendant Robert C. Inman was indebted to plaintiff at the date of the execution of the note in suit, and as to whether the plaintiff is now in fact indebted to the defendant Robert C. Inman." Appellee's learned counsel have not favored us with a discussion of this alleged error, and we are left in the dark as to their theory of its correctness. These three items—the \$950 note, the \$750 note, and the note for \$123.52—are singled out by the instruction, and the jury are told that "these are all the matters proper to consider" in determining whether Robert C. Inman was indebted to the plaintiff, or whether the plaintiff was indebted to Robert C. Inman. The use of the phrase "these are all the matters" conveys the idea of exclusiveness; that is to say, the only matters.

If this is the proper construction to be put upon the instruction, standing alone, we do not see upon what theory it can be upheld. There were many matters given in evidence; there were several hundred items of account, various conversations, notes, and bank checks introduced by both parties without objection; and yet the jury are told that it is proper to consider only three matters. If the article "the" before the word "matters" was omitted, we see no objection to it, for it would then say to the jury "these are all matters proper for you to consider." But the definite article "the" before the word "matters" conveys the idea that the jury must consider only these three matters or things, and none other. To determine whether or not this instruction was misleading, it must be considered in connection with all the other instructions given in the case. There were a number of other instructions that directed the jury's attention to many other matters, and under such circumstances the jury could hardly be given to understand that these three notes were the only matters to be considered by them. The idea intended to be conveyed by the instruction, when considered in connection with the other instructions, no doubt was that there were only three items in the set-off that were in controversy, and that it would be unnecessary for the jury to consider any other. When a fact or facts are admitted or are undisputed, the court has the right in instructing the jury to treat them as proved, without invading the jury's province. But as we understand the evidence there were many other disputed items. Appellee's counsel in their brief assert that it was another and different item than the \$750 note, to wit, the \$700 received from the express company, that went to make up the verdict. Again, they say in their brief that "the whole account was involved in the controversy. The ultimate question was not as to any particular items of debits or credits, but as to the final balance." We do not think the instruction can be justified upon any theory. If it was intended to convey the idea to the jury that there were only three items of evidence proper for them to consider, or only three matters in controversy, then it is clearly bad, in the light of the record of this case, for it usurps the functions of the jury. Nor will it do to say that the instruction limited the jury's consideration to three items in the answer of set-off, for one of the three items—the \$750 note—is not found in the bill of particulars; and, further, if this was the intention, it is squarely contradictory of the other instruction from which we have above quoted. This conclusion renders it unnecessary to pass upon the other questions discussed by counsel for appellant. Judgment reversed, with instructions to grant a new trial.

DAVIS, J., having been of counsel, did not participate in this decision.

(6 Ind. App. 683)

CLIFFORD et al. v. MEYER et al.

(Appellate Court of Indiana. May 11, 1893.)

BROKERS—COMMISSIONS—JOINT LIABILITY OF CO-TENANTS.

1. Where land is owned by two tenants in common, and is placed in charge of one, who sells it through a broker, the owners are jointly liable for the broker's commissions.

2. In an action for brokers' commissions on a sale of land, where the complaint alleges that the land was conveyed to two persons, and the finding is that it was conveyed to one of them, the variance is not a material one.

3. Defendants placed with plaintiffs, who were real-estate brokers, land to sell at a given price, but stated that they would consider a smaller offer; that the property had been in the hands of other agents, who did not seem to be doing anything with it; and that they wanted plaintiffs to take hold and sell it. They also told plaintiffs that they could disclose the names of owners, as defendants would see that plaintiffs were protected in their commissions if a purchaser was found. Plaintiffs advertised the property, and in response to the advertisement one R. called at their office, and was shown the property, given the price, and asked to make an offer. R. asked the name of the owner, and plaintiffs gave it to her. Shortly afterwards she called at the office of one of defendants, who was out. She told her business, and was referred to one C., who occupied the office with such defendant, but had no business connection with him. C. took her to the property, and she made an offer for it, which was afterwards accepted; the price being less than that given by plaintiffs. Afterwards, and before the property was conveyed, plaintiffs notified defendants that R. was their customer, and they would claim a commission if she bought the property. The sale to R. was consummated, and the defendants paid a commission to C. as broker. *Held*, that plaintiffs were the procuring cause of the sale, and entitled to commissions on same, and that the payment to C. did not affect plaintiffs' claim.

4. Where a real-estate agent is instructed by the principal to send persons inquiring about property to the latter, the agent is not required to notify the principal of the fact that he has sent persons to him.

Appeal from superior court, Marion county; N. B. Taylor, Judge.

Action by Henry Meyer and others against Miles Clifford and another for commission on sale of real estate. Judgment was rendered in justice's court for plaintiffs, and on appeal the action was tried in the special term of the superior court, which rendered judgment in favor of plaintiffs, and defendants appeal. Affirmed.

Vincent G. Clifford and Wilber F. Browder, for appellants; Merrill Moores, for appellees.

REINHARD, C. J. The appellees, who are real-estate agents in the city of Indianapolis, instituted this action against the appellants before a justice of the peace to recover a commission for procuring a purchaser for certain real estate of the appellants. The cause was appealed to the superior court, where at a special term there was a trial, and special finding by the court, resulting in a judgment in favor of appellees for \$75.

The first assignment of error at general term was the insufficiency of the complaint to state a good cause of action. The com-

plaint is sufficient to withstand the attack thus made upon it. It avers that the appellants were the owners of the real estate for the sale of which the commission is claimed; that the appellees were real-estate brokers in the city of Indianapolis, where the said real estate was situated, and that appellants, about July 1, 1889, placed said real estate in the hands of appellees for sale; that appellees duly advertised the same for sale by notices published in the daily newspapers of said city; that thereafter, and in response to said advertisements, one Roxanna Robertson, wife of William Robertson, called upon the appellees, and requested to be shown said property, and to be told the price of the same; that appellees took said Roxanna Robertson to said property, and showed it to her, and stated the price at which it was for sale, and at her request gave her the name of the appellant Vincent G. Clifford, one of the owners of said real estate; and that afterwards, to wit, on the 30th day of October, 1889, said Roxanna purchased said property from the appellants for the sum of \$2,100, the said property being conveyed by the appellants to said William and Roxanna Robertson. Appellees aver that they are entitled to a commission of \$75 for finding a purchaser for said property, as aforesaid, but that said appellants have not paid them anything whatever for their services. Wherefore they demand judgment. In actions commenced before justices of the peace, if the complaint contain sufficient substance to apprise the adverse party of the nature of the demand, and to bar another action for the same thing, it is sufficient, even on demurrer. *Milhollin v. Fuller*, 1 Ind. App. 58, 27 N. E. Rep. 111; *Watson v. Conwell*, 3 Ind. App. 518, 80 N. E. Rep. 5; *Smith v. Heller*, 119 Ind. 212, 21 N. E. Rep. 657; *Anderson v. Lipe*, 114 Ind. 464, 16 N. E. Rep. 853. The complaint would be sufficient if drawn in the form of an ordinary merchant's account, thus: "Miles Clifford and Vincent G. Clifford, Dr., to Henry Meyer and William Gordon, for services rendered as real-estate brokers in finding a purchaser for the sale of a house and lot in the city of Indianapolis between July 1, 1889, and October 30, 1889, \$75.00." *Rev. St. 1881, § 1461; Milholland v. Pence*, 11 Ind. 208. The above statement, and more, may easily be extracted from the complaint, and it therefore sufficiently conforms to the statutory requirement. The only error assigned in this court is that the superior court, in general term, erred in affirming the judgment of the court in special term. One of the errors assigned in the superior court was that the court in special term erred in its conclusions of law on the special findings of the facts.

It appears from the facts found specially that on July 1, 1889, the appellants were the owners in fee simple, as tenants in common, of the premises described in the complaint, and the appellees were associated together in business as real-estate brokers in the city of Indianapolis, Ind. That on or about said day the appellant Vincent G. Clifford (who had charge of said property, and controlled the same for himself and his coappellant) went to the

office of the appellees, and placed said property in their hands for sale. He informed Gordon that the price for which they wished to sell it was \$2,300, but that they would consider a smaller offer; that the property had been in the hands of other real-estate agents for sale, but, as these did not appear to be doing anything with it, he and his brother wanted the appellees to take hold of it and sell it. He also told appellees that they need have no hesitancy in telling inquirers the names of the owners, as he would see that appellees were protected as to their commissions, in case they should find a purchaser. The appellants permitted the property to remain on the books of other real-estate agents for sale, but the appellees supposed they had the sole charge of its sale. The appellees entered the property for sale on their books, and advertised it at their own expense in the city newspapers. Roxanna Robertson, noticing the advertisement, went to the appellees' office to make inquiries with a view to purchasing. Appellees told her the price asked, and showed her the property, requesting her to make an offer for it. She asked who owned the lot, and was told by appellee Meyer that Vincent G. Clifford was one of the owners. Meyer called upon Mrs. Robertson several times for the purpose of selling her the property, but she made no offer for it directly to him, nor did she tell him that she intended to call on the owner with a view to purchasing. Miles Clifford is a resident of the state of Washington, and Vincent G. Clifford is, and then was, an attorney at law, with a law office on Washington street in the city of Indianapolis. The office of Clifford was also occupied by William F. Crawford, who had no sign outside of the office upon the door or window, but who did some real-estate and collecting business in the office, but had no connection with Clifford, other than as an occupant of the same office rooms. Mrs. Robertson called at Clifford's office shortly after the conversation with Meyer in which she had been told Clifford was one of the owners, and shortly after she had been shown the premises by the appellees, and asked to see Vincent G. Clifford. She was asked by said Clifford's law partner the nature of her business with Mr. Clifford, and stated she wished to inquire about his property on North West street, which she understood was for sale, and was informed that Mr. Clifford was not in the office, and that the property was in charge of the said Crawford, to whom she was referred by Browder, the law partner. Crawford took her to see the lot, and she gave him a written offer of \$2,100 for the property, which offer had been prepared by said Vincent G. Clifford. This offer was accepted by appellants about the middle of October, 1889, and within a day or two afterwards the appellees for the first time informed the said Vincent G. Clifford that Mrs. Robertson had come to their office in response to their advertisement to inquire about said property, and that appellees had shown it to her, and told her that Vincent G. Clifford was one of the owners thereof, and the price asked, and had requested her to make an offer for the same,

and claimed the commission for the sale in case it was consummated. A deed was prepared by the appellants, and executed and delivered to said Roxanna Robertson October 30, 1889, conveying the property to her for the consideration of \$2,100, which was paid by her. After the delivery of said deed, and about two weeks after notice from appellees of their claim for commission for the sale to Roxanna Robertson, the appellants paid said Crawford a commission of \$37 for selling said property, and it was before said deed was delivered by appellants to Mrs. Robertson, and before the payment of said sum by the appellants to Crawford, that appellees notified appellants as above found, and stated and demanded their commission for services in procuring said purchaser. The appellees' services in procuring the purchaser for said lot are of the value of \$73, no part of which has been paid.

From these facts, the court drew the following conclusions of law: (1) That the appellants are liable to the appellees for the commission in the amount for which the property was sold to Roxanna Robertson; (2) that the appellees are entitled to recover from the appellants the sum of \$73, the amount found by the court to be the value of the commission on said sale, or the value of the services of appellees in procuring said purchaser; (3) that the appellants are also liable for the costs of this action. To each of these conclusions the appellants excepted, and over their motion for a new trial judgment was rendered on the findings.

It is contended by appellants' counsel in argument that in no event could there have been a joint liability of the appellants, for the reason that they were tenants in common, and that the only liability they could have incurred concerning their real estate is a separate one, and to the extent only of the interest each had in the premises. The position is not tenable. While it may be conceded that a marked distinction exists in the legal status of partners, and that of cotenants, we know of no reason why such cotenants may not bind themselves jointly in any financial transaction concerning their lands. This might be done, we apprehend, even by persons owning different tracts of land separately. If the employment was a joint obligation, of course the liability is the same, and the fact that the parties are tenants in common will not impair their right to enter into a joint contract in a matter concerning their real estate. The court had ample warrant for holding the appellants jointly liable, if liable at all.

It is next insisted that a fatal variance is shown between the complaint and the finding, from the fact that the conveyance, according to the finding, was made to Roxanna Robertson, while the complaint alleges that it was executed to Roxanna and William Robertson. The variance is not a material one. The gist of the action is for the services rendered in finding a purchaser. It makes but little difference to whom the conveyance was actually made, if the appellees were the procuring cause of the sale, or furnished

the purchaser. The conveyance is but an incident to the transaction. If it were essential that the proof should conform exactly to the allegation in this particular, it being a mere technical matter, the court below would have permitted the appellees to amend their complaint so as to meet the facts proved. When that is the case, this court will deem the amendment made, rather than reverse a cause upon a point like this, as no possible harm could have come to the appellants by reason of the error, if it be such.

It is further urged that the conclusions of law are "inconsistent." Counsel's statement on this point is that "the first conclusion finds defendants liable to plaintiffs for the commission on the amount for which the said described lot was sold; the second conclusion finds the value of such commission to be \$73." We confess our inability to discover any inconsistency in these conclusions. The one follows logically upon the other, and it is apparent on their face that the point is not well taken.

It is further contended that the special findings show the appellees to be entitled to recover a less amount, if anything, than that fixed by the court. The contention is that, as the sale was consummated by another agent, whom, by special contract, the appellant paid \$37 commission, this amount should have been deducted from the allowance of \$73. While the special findings disclose that Crawford did close the sale between these parties, the consequences claimed do not necessarily follow. As between appellees and appellants, there was no agreement that the former should do the work for any specified amount, nor does it appear that appellees adopted the agreement made by appellants with Crawford as part of their contract with the appellants, and we are unable to see how the transaction between the appellants and Crawford can affect the dealing between the appellants and the appellees. However honestly the agent Crawford may have earned his commission, as between him and the appellants that fact cannot affect the right of the appellees to recover their commission, if they have legally earned it, nor lessen the liability of the appellants to the appellees, until it is shown that the latter have in some way forfeited such right of recovery, or become bound to accept a less amount by some act of estoppel or agreement on their part. The appellees' right of recovery, we think, all hinges upon the question whether or not they, in a legal sense, as between them and the appellants, were the procuring cause of the sale, or furnished a purchaser. If not, they cannot recover anything; but, if the affirmative be the proper answer, no arrangement or dealing by the appellants with Crawford to which the appellees were not parties can prevent or reduce their recovery.

It is next claimed that there can be no recovery, because it is shown by the special findings that the appellees did not notify the appellants that they had shown the property to Roxanna Robertson until after the latter had contracted for it with

the appellants, through their agent, Crawford, and had become liable to the latter for his commission. Under the facts of this case, we do not think notice was necessary. The appellees did all they contracted to do. They found a purchaser in Mrs. Robertson, and if the appellees did not themselves consummate the sale with her it was because the appellants, through their other agent, (Crawford,) took the matter out of the hands of the appellees, reduced the price of the property, and closed the trade, thus reaping the benefit of the work of the appellees. We are reminded by appellants' counsel that Crawford was not connected with Clifford as a business partner, but that they only occupied the same office in common, and that Crawford, as real-estate agent, had the property in his hands before the appellees received it. Granting this to be true, it only shows that the appellants were unfortunate in placing their property in the hands of too many agents, and the fact still remains that the appellees had done all they had agreed to do, and were prevented from consummating the transaction by the fault of the appellants. Mrs. Robertson did not go to Mr. Crawford in response to any advertisement of the property he had made. She visited the office of appellants to inquire of the owner concerning the property, and with a view of purchasing it, because of the announcement she had seen in the newspapers, placed there by the appellees, and because the appellees had told her that Clifford was one of the owners; and she went there to find Clifford, and not Crawford. The appellants had told the appellees not to withhold the owners' names from inquirers, and that, if sale was made to a purchaser found by the appellees, the appellants would protect them in their commission. Appellants' counsel argue that these things were not sufficiently proved. But we must take the facts as found by the court, and, if there was a conflict in the testimony of witnesses, it is not in our power to reconcile it. Our duty is to adopt the finding made by the court as the correct one, if there is any evidence whatever to support it. The facts set out justified the court in finding that the appellees procured the purchaser to whom this property was sold. The appellants are estopped to deny this when it is shown that the only reason the appellees did not close the sale with Mrs. Robertson was that the appellants, through another agent, took the business out of their hands, reduced the price, and wound up the trade with the very purchaser the appellees had sent them. See *Lane v. Albright*, 49 Ind. 275; *Insurance Co. v. Williams*, 98 Ind. 403; *Pape v. Wright*, 116 Ind. 502, 19 N. E. Rep. 459. All the broker engages to do in such a case is to make reasonable efforts to procure a purchaser. If he fails, he can recover no commission, unless there be a special contract. But if the purchaser is found through his efforts, though the sale be made by the owner himself or another agent, the first broker is entitled to pay. *Sussdorff v. Schmidt*, 55 N. Y. 319. In *Lane v. Albright*, supra, the court said: "In the next place, the

scheme of employing a great and really indefinite number of persons in the same community to act as agents, without any co-operation with each other, in the sale of a single farm, was, in any event, a hazardous one, as regards the amount of commissions which might have to be paid. That misunderstanding and litigation and consequent payment of a double commission should result from the promotion of such a scheme ought not to be the cause of surprise to any experienced business man, and especially to the men who manage the immensely large business transacted by the insurance company which prosecutes this appeal." The appellants, having authorized and requested the appellees to furnish seekers after property the names of the owners, were bound to take notice that such persons, the customers of appellees, might come to such owners to make inquiries concerning the property, and they should have acted with a view to this fact. Had Mr. Clifford been present in his office when Mrs. Robertson came to see him, he would in all fairness and justice, under the circumstances, have been required to ask her if the property had been shown her by the appellees. This obligation he assumed when he directed the appellees, in effect, to let their customers deal with him directly, and assured them that appellees would be protected in their commissions. The fact that he left an agent in his office, to whom he had also intrusted the sale of his property, and that such agent closed the sale, cannot change his obligation to the appellees. He should have informed his last-named agent of the arrangements he had with appellees, and put such agent upon his inquiry. The facts that the agent Crawford occupied the same office with Mr. Clifford; that Crawford had no sign upon the door or windows announcing that he was a real-estate broker; that Mrs. Robertson did not call at the office to see him, but that she was there to interview Clifford,—are not without significance and force. So far as the facts show, the only knowledge that Mrs. Robertson had of the agency of Crawford, or that he was a real-estate broker at all, was that derived from Browder and Crawford in the office. This tends strongly to prove that she was induced to go there through the instrumentality of the appellees, and that she went, not to see Crawford, but Clifford. A previous notice to Clifford that appellees had shown the premises to Mrs. Robertson would not have been notice to Crawford, and would, therefore, not have kept Crawford from dealing with her. The agreement that appellants would protect appellees in their commissions if they would give the owners' names to those making inquiries about the property absolved the appellees from the duty of giving notice to the appellants that they had shown the property to certain ones, if any such notice was otherwise necessary. It was said by the court of appeals of New York in *Sussdorf v. Schmidt*, supra: "Nor is it indispensable that the purchaser should be introduced to the owner by the broker, nor that the broker should be personally acquainted

with the purchaser; but in such case it must affirmatively appear that the purchaser was induced to apply to the owner through means employed by the broker." This, as we have seen, was done here by the information which was furnished Mrs. Robertson by the appellees that Mr. Clifford was one of the owners, and which was the only inducement, so far as the facts disclose, that prompted her to go there. Had Mrs. Robertson gone to Crawford in response to the latter's advertisement of the property, and negotiated the purchase with him, instead of going to find Clifford, and incidentally finding Crawford by the direction of Clifford's partner, or had not Clifford directed appellees to give to inquirers the names of the owners, and agreed, in effect, to pay them their commissions, even if the sale should be made by the owners themselves, a different question might be presented.

Appellants' counsel insist that appellees had abandoned the sale when the same was closed between the parties. The special findings, however, determine otherwise, and by these we must be guided, if there is any evidence to support them. Much stress is laid by counsel upon the circumstance that Mrs. Robertson, the purchaser, never made the appellees any offer of \$2,100 or any other sum for the property; but we do not see how this fact would relieve the appellants from liability if the appellees induced Mrs. Robertson to seek out the owners, and make the offer to them directly, or to another agent found by her at the place of business of one of such owners. To be the procuring cause of the sale, it was not necessary that appellees should themselves have conducted all the negotiations culminating in the sale of the property. It was enough if they set in motion the machinery by which the work was done. That they did this we think sufficiently appears from the special finding of facts. Appellants' counsel also think a demand should have been made before suit for the commissions of appellees. We do not agree with counsel in this. If the services were rendered as agreed, and the debt had thereby matured, as we think it had by the sale of the property, it was the duty of the appellants to pay it without a demand. The doctrine that where a sum is payable on the happening of a certain contingency, and the same has arisen, the debtor must be notified thereof, and the money demanded of him before an action is begun, is not applicable. Here the parties were all familiar with the facts, the appellants being as fully apprised of the work done by appellees, and that the sale was made, as were the appellees. Besides, the finding shows, as we have seen, that before the deed was delivered, and the commission paid to Crawford, the appellees notified the appellants that Mrs. Robertson was their customer, and that they would claim their commission if the sale was consummated.

The last error assigned in general term was the overruling of the motion for a new trial. Some claim is made that the evidence fails to support the finding, but no particular infirmity is pointed out, and

we have found none. The evidence tends to sustain the finding. Further discussion of the evidence would not be productive of any particular good.

Judgment affirmed.

(6 Ind. App. 653)

**STATE v. MILLER.**

(Appellate Court of Indiana. May 11, 1893.)

**INDICTMENT—IMPANELING GRAND JURY—RECITAL OF TIME.**

An indictment need not state when the grand jury was impaneled, and where such date is imperfectly given it will be considered surplusage, and disregarded.

Appeal from circuit court, Boone county; Stephen Neal, Judge.

William H. Miller was indicted for malicious trespass, and a motion to quash the indictment was sustained. The state appeals. Reversed.

Patrick H. Dutch, for the State. Ralston & Keele, for appellee.

**GAVIN, J.** The appellee was indicted for malicious trespass. His motion to quash the indictment was sustained, and he was discharged. From this action of the court the state appeals. The indictment appears to contain all the requisites of a good indictment, and to be in all things regular, except that it begins as follows: "The grand jurors for Boone county, in the state of Indiana, duly and legally impaneled, charged, and sworn, in open court, at the November term of the Boone circuit court of said state for the year A. D. 189-, to inquire," etc. Because of the statement that the grand jury was impaneled in the year A. D. "189-", the indictment was held bad, as we are informed by appellant's brief, which is our only source of information upon this subject. Such a defect is not sufficient to make the indictment bad. The allegation as to the time when the grand jury was impaneled is entirely unnecessary, and may be regarded as surplusage. The form of indictment is provided for in section 1732, Rev. St. 1881, as follows: "The indictment may be substantially in the following form, (after first giving the caption and title): 'The grand jury of the county of — upon their oath do present that A. B., on the — day of —, 18—, at the county of —, (here set forth the act charged as an offense.)' Section 1756, Rev. St., provides that no indictment shall be quashed for—"Sixth, any surplusage or repugnant allegation, when there is sufficient matter alleged to indicate the crime and person charged." Section 1755, Rev. St., declares that, so far as the finding of the indictment is concerned, an indictment is sufficient if it can be understood therefrom—"First, that the indictment was found by the grand jury of the county in which the court was held." The statement of the time being, then, entirely unnecessary, the fixing of a time which is plainly a clerical error, and is only an imperfect statement, may be considered as surplusage, and disregarded. It has been held by our supreme court that the statement of the time of an offense as the year

A. D. 188- may be considered as the statement of no time whatever, or is simply an imperfect statement, which may be disregarded. *State v. Sammons*, 95 Ind. 22; *State v. Patterson*, 116 Ind. 45, 10 N. E. Rep. 289, and 18 N. E. Rep. 270. The judgment is reversed, with instructions to overrule the motion to quash.

(6 Ind. App. 646)

**EVANSVILLE & T. H. R. CO. v. MAROHN.**  
(Appellate Court of Indiana. May 11, 1893.)

**SPECIAL FINDINGS—CONFLICT WITH GENERAL VERDICT—ACCIDENT AT RAILROAD CROSSING.**

1. Where the facts found in answer to special interrogatories, when taken together, can be reconciled with the general finding, the latter must stand.

2. A person on a highway crossing a railroad has the right to presume that the servants of the railroad company will apprise him of an approaching train by giving the statutory signals.

Appeal from circuit court, Daviess county; J. H. O'Neil, Special Judge.

Action by John Marohn against the Evansville & Terre Haute Railroad Company to recover damages for injuries sustained in a collision at a railroad crossing. Judgment was rendered for plaintiff, and defendant appeals. Affirmed.

John E. Iglehart, Edwin Taylor, and Gardiner & Taylor, for appellant. Cullop & Kessinger and L. A. Meyer, for appellee.

**LOTZ, J.** On the 8th day of May, 1890, the appellee was traveling upon a highway in Knox county, Ind., and at a point where said highway crossed appellant's main track, he was struck by the locomotive engine attached to a passenger train, and himself, his wagon, and horses were injured. He brought this action to recover damages for the injuries sustained. His complaint is in three paragraphs. The gravamen of the first is that the train approached said crossing at an immoderate and dangerous rate of speed, and that appellant's employee in charge failed and omitted to ring the bell or sound the whistle, or to give any signal of its approach of any kind whatever. The second paragraph differs from the first only in that it charges a failure to stop the train at Purcell's station, in the immediate vicinity of said crossing. The third paragraph charges the same facts set out in the first and second, and, in addition thereto, charges that the appellant caused a locomotive engine and train of cars to be switched and to stand on a sidetrack near said crossing, thereby obscuring and preventing a plain view of the main track and of trains thereon approaching said crossing; that said locomotive so standing on said track blew off steam, thereby creating such a noise as to prevent the hearing of an approaching train, or the signals by it given; and also failed to station any person to give notice of an approaching train; and caused large quantities of old rails and rubbish to be burned, producing smoke around said crossing, so as to obscure sight and the approach of said train. The cause was put at issue by an answer



of general denial. There was a trial by jury, and a general verdict for appellee, assessing his damages in the sum of \$1,500. The jury also, at the request of both appellant and appellee, returned with their general verdict answers to various interrogatories. The appellant moved for a judgment in its favor upon the special findings of the jury, notwithstanding the general verdict. This motion was overruled. There are several assignments of error, but the only one discussed by counsel for appellant is the overruling of the motion for a judgment notwithstanding the general verdict. There is no bill of exceptions presenting the ruling of the court on this motion, but no bill is necessary for that purpose. *Railroad Co. v. Clark*, 73 Ind. 168. Neither is the evidence in the record, but in reviewing the ruling of the lower court for a judgment non obstante this court cannot look to the evidence; hence it is unnecessary that the evidence be in the record. *Pennsylvania Co. v. Smith*, 93 Ind. 42; *Cox v. Ratcliffe*, 105 Ind. 374, 5 N. E. Rep. 5.

The question here presented must be determined upon the complaint, the interrogatories, and the answers thereto. The general verdict covers all the issues in the case. (*Hereth v. Hereth*, 100 Ind. 35.) and the main purpose that the interrogatories and answers serve is to test the correctness of the general verdict. It is well settled that when the special findings are inconsistent with the general verdict, so that both cannot stand, the former controls the latter, and it is the duty of the court to give judgment accordingly. *City of Indianapolis v. Cook*, 99 Ind. 10; *Fleetwood v. Machine Co.*, 95 Ind. 491; *Hartman v. Flaherty*, 80 Ind. 472; *Railway Co. v. McCormick*, 74 Ind. 440; *Railroad Co. v. Boyd*, 65 Ind. 526. But in attempting to overthrow the general verdict by the special findings there are certain well-settled rules that must be borne in mind. Before the general verdict will yield to the special findings they must so antagonize each other that by no reasonable hypothesis can they be reconciled. It is then, and then only, that the findings control. *Rev. St. 1881, § 547*; *Railroad Co. v. Stout*, 53 Ind. 143; *Alexander v. University*, 57 Ind. 466. If, however, there be any reasonable hypothesis by which they can be reconciled, the judgment must follow the general verdict. *Railroad Co. v. Clifford*, 113 Ind. 460, 15 N. E. Rep. 524; *Railroad Co. v. Ellison*, 117 Ind. 234, 20 N. E. Rep. 135; *Redelsheimer v. Miller*, 107 Ind. 485, 8 N. E. Rep. 447. And every reasonable presumption will be indulged in favor of the general verdict, and nothing will be presumed in support of the special findings. *Rice v. Manford*, 110 Ind. 596, 11 N. E. Rep. 283; *McComas v. Haas*, 107 Ind. 512, 8 N. E. Rep. 579; *Sanders v. Weelburg*, 107 Ind. 266, 7 N. E. Rep. 573; *Redelsheimer v. Miller*, supra; *Railroad Co. v. Rowan*, 104 Ind. 88, 3 N. E. Rep. 627. So, also, where the answers to interrogatories contradict each other, the general verdict must prevail. *Hereth v. Hereth*, 100 Ind. 35.

The right to a recovery in this case, if any there be, is based upon two facts, which must exist: (1) That the appellant

was negligent; and (2) that appellee was free from any negligence contributing to the injury. Appellant contends that all the facts stated in the special findings, when construed together, show that the appellee was not free from contributory negligence. The special findings seem to cover the material facts in the case, and from them it appears that Purcell's station is about six miles south of the city of Vincennes; that the main track of appellant's railroad at that place ran in a north and south direction; that there was a side track on the east side and parallel with the main track, which was used for switching purposes, and for trains to pass each other. East of said station was a highway, the line of which extended from the east towards the west until it came to within 60 feet of the railroad track, and then turned south, and continued parallel with said track for the distance of 300 feet. It then turned to the west, and crossed the main track of the railroad at the point where the plaintiff was injured. It was about the hour when the south-bound passenger train was due at said station. A south-bound freight train had been side-tracked to allow the passenger train to pass, and was standing upon the side track, with the locomotive engine headed to the south. It was 215 feet from the highway crossing to the locomotive attached to the freight train. The passenger train approached said crossing at the rate of 30 miles per hour. The signal whistle for the approach to the station was given, but no whistle was given, and no bell rung, or any signal of any kind given, for the crossing. The appellee was a teamster, and lived in Vincennes, and was familiar with this crossing. On the day of the accident he was traveling upon the highway in a wagon to which were attached two gentle horses. He was traveling at the rate of two miles per hour. As he approached from the east, and turned southward, he saw the freight train standing on the side track. The freight train obstructed the view in the direction of the station and of the main track. Appellee continued southward with said highway, and turned to the west. When from 40 to 75 feet east of the crossing he brought his team to a stop, and looked and listened for an approaching train, and continued to look and listen in each direction, until it was too late to avoid a collision. Appellee was in the possession of all his faculties. His eyesight and hearing were good, and he was agile and active. The engine standing on the side track was making a loud noise from escaping steam, and a large volume of steam and smoke was escaping, which prevented appellee from seeing or hearing the approaching train until it got within 215 feet of the crossing. There was no obstruction on the main or side track between the crossing and the engine attached to the freight train. The railroad was straight for about a mile north of the crossing. A person on the highway 40 feet east of the crossing could see only 33 feet beyond the engine on the side track. When the appellee saw the approaching train he did all he could to prevent a collision,



and when the engineer of the passenger train saw appellee driving on the crossing he applied the air brakes, and reversed the engine, and did all he could to stop the train and prevent a collision. By the decisions of the supreme court of this state it is settled that one about to cross a railroad track must approach the crossing under the apprehension that a train of cars is liable to pass at any moment, and that, the greater the probable danger, the greater the degree of care to be observed. *Railroad Co. v. Butler*, 103 Ind. 85, 2 N. E. Rep. 188. Whether wisely or unwisely decided, it is not for us to say, but it is equally well settled that "the fact that a person traveling on a highway comes in collision with a train on a railroad crossing is of itself sufficient to suggest a presumption of contributory negligence against him in a suit for compensation." *Railway Co. v. Greene*, 106 Ind. 279, (285,) 6 N. E. Rep. 603; *Railway Co. v. Hammock*, 113 Ind. 1, 14 N. E. Rep. 787; *Railway Co. v. Stommel*, 126 Ind. 35, 25 N. E. Rep. 863; *Railway Co. v. Howard*, 124 Ind. 280, 24 N. E. Rep. 592, and cases cited. Under these decisions the appellee starts into this case not only charged with the burden of showing that he was free from contributory negligence, but with the presumption against him that he was negligent. The law accounts it negligence for any one to drive heedlessly or recklessly upon a railroad at a crossing, or to cast himself upon a known peril, unless under compulsion. *Railway Co. v. Hill*, 117 Ind. 56, 18 N. E. Rep. 461; *Morrison v. Board*, 116 Ind. 481, 19 N. E. Rep. 316; *Railway Co. v. Pinchin*, 112 Ind. 592, 13 N. E. Rep. 677. The failure to sound the whistle and to ring the bell or to observe the statutory signals will not avail one who by his own acts contributed to the injuries. Because one party to an action is negligent is no excuse for negligence in the other party. *Railway Co. v. Hammock*, supra; *Railway Co. v. Brannagan*, 75 Ind. 490; *Railway Co. v. Hedges*, 118 Ind. 5, 20 N. E. Rep. 530.

Appellant asserts that the facts found show that the appellee attempted to make the crossing when he knew it was perilous; that he failed to exercise that degree of care which the dangerous surroundings required of him; and that, applying the rules of law as above stated, it was the duty of the trial court to have sustained its motion for a judgment non obstante. We agree with appellant that the conditions at the crossing were such as to make it highly dangerous, and that such conditions were known, or could have been known, by appellee by the exercise of his organs of vision; but we do not think that the facts show that he rushed heedlessly and recklessly upon a known peril. He was not required to forego travel upon the crossing because appellant had rendered it highly dangerous. He had the right to presume that the appellant's servants would apprise him of an approaching train by giving the statutory signals, and, if he used that degree of care commensurate with the perilous surroundings, he is exonerated from the charge of contributory negligence. The noise of the

escaping steam prevented hearing, and the smoke and steam prevented seeing, the train until it was within 215 feet of the crossing. At what point the appellee was upon the highway when the train came in view is not found. At the rate in which the train was going it would reach the crossing within four or five seconds. The appellee must have been near to or upon the crossing at the moment the train came in sight, for it is implied from the general verdict that he did all he could to prevent a collision. There are cases which hold that there may be a recovery although the plaintiff may have gone upon the track without looking and listening for approaching trains,—as where, by the negligence or misconduct or wrongful acts of omission, the plaintiff is thrown off his guard, or when defendant acts as to invite him to go upon the track, or creates the impression that there is a less degree of danger than actually exists. *Beach, Contrib. Neg.* § 23; *Pennsylvania Co. v. Marion*, 104 Ind. 239, 3 N. E. Rep. 874; *Railway Co. v. Hill*, 117 Ind. 62, 18 N. E. Rep. 461. As before said, the appellee was not required to forego his privilege of traveling upon the highway; and, as everything must be presumed in support of the general verdict, it will be presumed that the appellee, while in the lawful exercise of his right, was lured within the danger line and to the fatal spot by the appellant's omission to give the statutory signals. We do not think the court erred in overruling the motion. Judgment affirmed.

(8 Ind. App. 655)

#### JORDON v. MUTH et al.

(Appellate Court of Indiana. May 12, 1893.)  
BILL OF EXCEPTIONS—REVIEW OF EVIDENCE ON APPEAL.

Where the bill of exceptions does not contain all the evidence, but refers to another part of the record for the omitted evidence, no question as to the sufficiency of the evidence will be considered by the appellate court.

Appeal from circuit court, Marion county; E. A. Brown, Judge.

Action by August Muth and another against Arthur Jordan. From a judgment for plaintiffs, defendant appeals. Affirmed.

Griffith & Potts, for appellant. Josh E. Florea, for appellees.

ROSS, J. The only questions presented by this appeal arise on the ruling of the court on appellant's motion for a new trial; and the only questions argued by counsel for appellant, arising upon this motion and ruling, relate to the sufficiency of the evidence to sustain the finding of the court. It is contended by counsel for appellant that "the evidence in the case consists solely of the agreed statement of facts, together with the correspondence between the appellant, doing business in Indianapolis, and the appellees, doing business in Pittsburgh," while counsel for the appellees contend that the facts were not agreed upon, and that there is no bill of exceptions in the record, containing either an agreed statement of the facts, or the

evidence. The clerk of the Marion circuit court certifies to the filing of a bill of exceptions by the appellant, and sets out in the record such bill, which, after giving the title of the cause, reads as follows: "Bill of Exceptions. Agreement as to Evidence. The evidence in this cause consists of letters and telegrams, drafts, and check between the plaintiffs and defendant, and the indorsement of the payment of the check thereon; receipt from the railroad for the goods; and the sworn, itemized statement of the plaintiffs and their candler, showing the loss to the plaintiffs, for which this action is brought. It is therefore agreed by and between the plaintiffs and defendant herein that said letters, telegrams, drafts, bank check, receipt, and indorsement of the payment of the check thereon, and the sworn, itemized statements showing lost and rotten eggs, shall be treated and considered as the evidence herein, and that the plaintiffs' witnesses would testify to the several matters and claims as set forth in the said letters and telegrams written by the plaintiffs to the defendant; the sworn, itemized statement of spoiled eggs; the issuance of the bank check for \$413.40 in payment of the defendant, drawn in favor of Schnull & Co.; that its payment was stopped on account of the eggs losing so in candling, and that the defendant's witnesses would testify to the several matters and claims as set forth in said letters and telegrams written by the defendant to the plaintiffs; and that he, the defendant, filled the plaintiffs' order, in every particular, and delivered the eggs to the railroad company in good condition, and promptly, in exact accordance with the contract. Josh E. Florea, Atty. for Plffs. Griffith & Potts, Attys. for Dft." And following this agreement are copies of numerous letters and telegrams, a draft, bank check, and a receipt from the railroad company. Then follows this statement: "For itemized 'bill of particulars' herein, see complaint." Then follow copies of more letters, following which is the statement, "And this was all the evidence given in the case." Then follows the concluding part of the bill, in these words: "And thereupon the court, having heard the evidence, and being duly advised in the premises, found for the plaintiffs for the sum of \$163.60, as heretofore set out in the record. Whereupon the defendant moves the court for a new trial, as heretofore set out in the record, and the same was overruled. The judgment heretofore set out in the record was rendered, and the defendant excepted, and prayed an appeal to the appellate court, which was granted on the terms set out in the record, and 50 days' time was given to prepare and file a bill of exceptions. And said defendant now here, within the time, tenders this bill of exceptions, and prays that the same may be signed and sealed, and made a part of the record, which is done this 8th day of January, 1892." To this is appended the signature of the judge of the Marion circuit court. So far as the bill of exceptions itself is concerned, there is nothing in it indicating that the letters, telegrams, etc., copied into the bill were ever introduced in evidence, unless the agreement above set out, and

which precedes such letters and telegrams, is to be considered as sufficient for that purpose. There is no recital of any kind in the bill that they were either offered or introduced in evidence. It is settled that a bill of exceptions purporting to contain the evidence introduced on the trial of the cause must contain the certification of the judge that it contains all the evidence given on the trial, and, even where the judge has so certified, yet, if it appears from the bill itself that it does not in fact contain all the evidence, this court will not reverse the judgment on any question arising on the evidence. *Eichel v. Bower*, 2 Ind. App. 84, 28 N. E. Rep. 192; *Collins v. Collins*, 100 Ind. 266; *Lyon v. Davis*, 111 Ind. 384, 12 N. E. Rep. 714; *Manufacturing Co. v. Hinkle*, 119 Ind. 47, 21 N. E. Rep. 542, and cases cited. In this case the bill of exceptions shows on its face that it does not contain all the evidence, and refers to another part of the record for the omitted evidence. All the evidence not being in the record, there is no question presented for which the judgment can be reversed.

Judgment affirmed

(7 Ind. App. 475)

KOEHRING et al. v. AULTMAN, MILLER & CO.<sup>1</sup>

(Appellate Court of Indiana. May 12, 1893.)  
CHattel MORTGAGES—DESCRIPTION OF PROPERTY  
—CONVERSION—PLEADING—ESTOPPEL.

1. A refusal to strike out portions of a complaint is not reversible error.

2. The following description of the chattels in a chattel mortgage: "One sorrel horse, twelve years old, called 'Tom,' and one iron gray horse, four years old, called 'Hurk,'"—though the situation thereof is not named, is sufficient, and, when recorded, the mortgage is notice to all purchasers, whether they have actual notice or not.

3. Where in a suit for conversion actual conversion is alleged, a demand before suit need not be alleged.

4. A junior mortgagee recovered possession of the mortgaged chattels in replevin against the mortgagor. In a subsequent action by the senior mortgagee against the junior mortgagee for conversion of the property, the complaint stated that in the replevin suit the senior mortgagee was "present in court." Held, that the senior mortgagee not being a party in the replevin suit, nor in privity with the mortgagor, the above allegation did not cause him to be concluded, as to the title to the property, by the judgment in replevin.

Appeal from superior court, Marion county; J. W. Harper, Judge.

Action by Aultman, Miller & Co. against Bernard Koehring and others. From a judgment for plaintiff, defendants appeals. Affirmed.

Wm. V. Rucker, for appellants. Hammond & Rogers, for appellee.

REINHARD, C. J. The appellee, a foreign corporation, instituted this action for the recovery of the value of certain personal property upon which it was alleged in the complaint the appellee held a chattel mortgage, but which was converted by the appellants to their own use, and placed beyond the appellee's reach. In the trial court the appellee recovered

<sup>1</sup> Rehearing denied, 35 N. E. 30.

judgment for \$70, the appellants having previously offered to allow judgment for \$50.

The first ruling complained of is the refusal of the trial court to strike out certain portions of the complaint. Such a ruling does not constitute reversible error. *Lewis v. Godman*, 129 Ind. 359, 27 N. E. Rep. 563; *Sprague v. Pritchard*, 108 Ind. 491, 9 N. E. Rep. 416; *Walker v. Larkin*, 127 Ind. 100, 26 N. E. Rep. 684; *Jussen v. Board*, 95 Ind. 567; *Gwynne v. Ramsey*, 92 Ind. 414; *Rowe v. Major*, Id. 206; *Railway Co. v. Kinsey*, 87 Ind. 514; *Morris v. Stern*, 80 Ind. 227.

The overruling of the demurrer to the complaint is another alleged error. It is insisted that the complaint is defective for two reasons: (1) Because of the insufficiency of the description of the property in the chattel mortgage; (2) because no demand for the property before the commencement of the action is alleged. The complaint undertakes to state the facts at length upon which a recovery is sought, and in doing so sets out the substance of the mortgage which forms the basis of the claim, and also a verbatim copy of the description of the property contained in the mortgage. The description is as follows: "One sorrel horse, twelve years old, called 'Tom,' and one iron gray horse, four years old, called 'Hurk.'" There was no statement as to where the property was situated when the mortgage was executed. It is contended that the description is insufficient as far as it affects an innocent purchaser of the property, such as the appellants are claimed to be. We do not think this position can be maintained. Reasonable certainty in the description of mortgaged chattels is required, but under the rulings of our supreme court parol evidence is admissible for the purpose of identification; and where, by the aid of such parol evidence, the property is reasonably susceptible of identification, the description will be held sufficient. The case of *Tindall v. Wasson*, 74 Ind. 495, upon which the appellants largely rely, does not sustain them. That was an action in replevin much like the present case, to recover possession of the mortgaged property. The vendee of the mortgagor, who was the defendant in the action, answered that the only description of the property contained in the mortgage was "two mule colts, one year old next spring." There was a demurrer to this answer, and it was overruled, which ruling was affirmed on appeal, the court holding that, in the absence of any showing which would make the description more certain, the answer was sufficient. The question was one purely as to the sufficiency of the answer, and it was expressly declared in the opinion that the court confined itself to the precise question presented by the answer, without attempting to lay down any general rule. In the course of the opinion the court say: "There are no circumstances of identity stated; neither locality, ownership, nor anything else affording means of identification. The description we have given stands alone and unaided. \* \* \* If it were aided by any circumstance or matter of identification which would enable the description

to be made certain by parol evidence, it would be otherwise." In the case at bar the description is contained in the complaint, and it is aided by circumstances of identification. True, it is not stated where the property was when the mortgage was executed, but it is described as "one sorrel horse, twelve years old, called 'Tom,' and one iron gray horse four years old, called 'Hurk.'" Here we have the color, the age, and the names of the horses,—all marks of identity. Nor will the fact that there may be other horses of the same age or color or names add strength to the appellants' position. The marks stated are sufficient, by the aid of parol evidence, to identify the property, and the description is such as to put a third person upon his inquiry. In *Burns v. Harris*, 66 Ind. 536, the description "a dark bay mare" was held not a void description, and such a one as might be rendered sufficiently certain by the aid of parol testimony. It was there held that the description given in the mortgage is not the only means of identifying the property, but that parol evidence may be employed to make it certain of identity, if it can be done. As in the case cited, so in the case at bar, there can be no room for doubt as to the identity, as it might very properly be rendered certain by parol testimony. This being so, the description must be held sufficient, and the case of *Tindall v. Wasson*, supra, does not stand in the way. In further support of the sufficiency of the description, see *Buck v. Young*, 1 Ind. App. 553, 27 N. E. Rep. 1106; *Duke v. Strickland*, 43 Ind. 494; *Ebberle v. Mayer*, 51 Ind. 235; *Bank v. Brown*, 112 Ind. 474, 14 N. E. Rep. 358. We are of the opinion that the description was sufficient, and the fact that the appellants stand in the position of vendees to the mortgagor adds no force to their contention that they are not bound by it. The mortgage was duly recorded, and was notice to the world. It contained enough of description of the property to put them upon their inquiry, and they are bound by it, whether they had actual notice of the mortgage or not. *Ross v. Menefee*, 125 Ind. 432, 25 N. E. Rep. 545.

This brings us to the consideration of the other objection urged against the sufficiency of the complaint, that a demand for the property is not averred as having been made before the bringing of this action. It is shown by the averments of the complaint that both the appellants and appellee held mortgages on the property in controversy, the appellee as senior and the appellants as junior mortgagees. It is further averred that the appellants obtained possession of the property by virtue of a replevin suit against the owner thereof before a justice of the peace, based upon their said junior mortgage, and that while said suit was pending before said justice, and during the trial thereof, appellee notified appellants of its senior mortgage, and exhibited it to them and their attorneys, as also the note it was made to secure, thereby giving the appellants actual notice of the appellee's mortgage, and that after the appellants had been awarded judgment for the possession of the said property they took the same, converted it

to their own use and sold it, and have put said property beyond the reach of the appellee, and that said appellee has been and still is unable to secure possession of the same. All this is alleged to have occurred before the beginning of this action, and the appellee asks judgment for damages on account of such conversion. These allegations, we are convinced, are sufficient to excuse a demand, if one was necessary. It is well settled by the decided cases that when an actual conversion is alleged, a demand before suit need not be averred. *Proctor v. Cole*, 66 Ind. 576; *Bunger v. Roddy*, 70 Ind. 20; *Snyder v. Baber*, 74 Ind. 47; *Terrell v. Butterfield*, 92 Ind. 1. It is maintained, however, that other allegations in the complaint, in effect, destroy the averment of a conversion. It is stated in the complaint that in the replevin suit before the justice the appellee was "present in court," and the appellants' learned counsel insists that, as the title to the property was there involved, the appellee is concluded by the judgment. In that action the present appellee was not a party; the suit was between the present appellants and the owner and mortgagor. The mere expression "present in court" cannot be construed so as to bind the appellee by the judgment there rendered. It does not appear from the complaint that any issue was there made between the present parties as to their respective rights; and as between the defendants in that action and the appellee here there was no privity.

The complaint was sufficient, and the court committed no error by overruling the demurrer. The last error assigned in the superior court was the overruling of the motion for a new trial. Twenty-five reasons are assigned in the written motion for a new trial, and each of these is argued at length and with much apparent force and plausibility by the learned counsel for appellants. Some of these relate to the alleged misconduct of the presiding judge in the interrogation of witnesses and interruptions of counsel while conducting the examination. Others have reference to the introduction and rejection of testimony, etc. We have examined all these alleged reasons, and have given the matters involved in this appeal a careful examination. The result reached by the judgment impresses us as a just and proper one, and, if any errors were committed, they were of a technical nature, and have not harmed the appellants, inasmuch as the judgment is quite as favorable to them as they had a right to ask, and, we will be pardoned for suggesting, only \$20 more than the amount the appellants offered to confess judgment for.

The point most confidently relied upon by the appellants seems to be that the appellee had defended the replevin suit before the justice of the peace, to which said appellee was confessedly not a party, but in which it is urged it acted for the mortgagor and owner of the property. The facts are far from showing that appellee is concluded by that judgment. There was no issue in that case as to any claim on account of appellee's mortgage, and the appellants did not even offer to show any arrangement between the defendants in

that suit and the present appellee, in pursuance of which the appellee conducted the defense. The record shows that the judgment in question was rendered by default, and no appeal could have been taken from it by the appellee in the present case, and it is not conclusively shown that appellee did anything there by virtue of which the judgment is binding upon it. There was no available error.

Judgment affirmed.

(6 Ind. App. 658)

### PEIGH v. HUFFMAN.

(Appellate Court of Indiana. May 12, 1893.)

NEGOTIABLE INSTRUMENTS — HOLDERS FOR VALUE — VENIRE DE NOVO — APPEAL — DISCRETION OF TRIAL COURT.

1. One to whom a note is indorsed as collateral security for a pre-existing debt is not a holder thereof for value, and takes subject to the equities between the original parties.

2. A motion for a venire de novo will not be sustained unless the verdict is so defective or uncertain that a judgment cannot be rendered thereon.

3. The refusal of the trial court to allow amendments to a pleading on the trial is such an exercise of discretion as will not be reversed on appeal unless an abuse of discretion is shown.

Appeal from circuit court, Huntington county; E. C. Vaughn, Judge pro tem.

Action by Henry Peigh, executor, against Jacob Huffman on three promissory notes. Judgment was rendered for defendant, and plaintiff appeals. Affirmed.

Jas. C. Branyan, Spencer & Branyan, and George A. Yopst, for appellant. C. W. Watkins, for appellee.

DAVIS, J. This was an action instituted by appellant against Jacob Huffman and William Frances on three notes of \$200 each, signed by them on the 20th day of January, 1880, payable to Samuel Stump, and by him indorsed to said Catherine Peigh, then in life. The record recites that the defendants appeared by attorneys, but we find no answer in behalf of Frances. Huffman filed cross complaint, and also answers. The substance of his special pleas is that the notes were never executed, but that, when signed, they were placed in the hands of an escrow on certain conditions, which are specifically stated, but which, on the questions sought to be presented, we do not deem it necessary to set out at length. The issues were submitted to a jury for trial, and a special verdict was returned, on which judgment was rendered against appellant. The errors assigned are: (1) That the court erred in overruling appellant's motion for judgment in his favor upon the special verdict of the jury; (2) that the court erred in overruling appellant's motion for a venire de novo; (3) that the court erred in overruling appellant's motion for judgment in his favor on the pleadings; (4) that the court erred in overruling appellant's motion for leave to file additional paragraph of reply; (5) that the court erred in overruling the motion for a new trial.

The substance of the special verdict

may be summarized as follows: That the notes in suit were signed by Huffman for balance due Stump on real estate, and were placed in the hands of Perry Stump, a son of Samuel, to hold in escrow until the liability, if any, of Huffman on the bond of said Samuel as administrator of the Shultz estate should be ascertained; and, in the event said Huffman should be compelled to pay any sum as such surety, then whatever sum should be so paid was to be credited on the debt evidenced by the notes, and that said notes should not go out of the hands of said Perry without Huffman's consent, and that Huffman, as such surety on the bond of Samuel, was compelled to and did pay \$935.40; and that said Stumps, without the knowledge or consent of Huffman, assigned and transferred the notes to said Peigh as collateral security for a pre-existing debt which they owed her; and that no part of the said liability and deficit on said bond which it is found existed when the notes were signed, and which was afterwards paid, as before stated, by Huffman, has ever been paid or secured to him; and that said Stumps have been ever since insolvent. The verdict is in substantial harmony with the facts pleaded in the answer and cross complaint, and, as the amount paid by Huffman as surety on the bond exceeds the amount of the notes, we are not able to see on what theory appellant was entitled to recover judgment. The notes were not payable in bank. The said Catherine held them as collateral security for a pre-existing debt owing her by the Stumps, and, on the facts as found, the equities, as between her estate and Huffman, were in favor of Huffman. So far as appears, she parted with nothing in the transaction; while, on the contrary, Huffman has more than paid the debt in discharge of his liability as surety on the bond.

The second error assigned brings in question the ruling of the court on appellant's motion for a venire de novo. The practice is well settled that a motion for a venire de novo will not be sustained unless the verdict is so defective or uncertain that a judgment cannot be rendered thereon. The verdict in this case was clear and certain in all essential respects. There was no error in overruling this motion. *Adams v. Main*, 8 Ind. App. 232, 240, 29 N. E. Rep. 792; *Knight v. Knight*, (Ind. App.) 38 N. E. Rep. 456, and authorities there cited.

No error has been pointed out in overruling motion for judgment on the pleadings.

The fourth error assigned, in relation to the refusal of the court to allow appellant during the trial to file additional paragraph of answer, brings in review a question involving the discretion of the court below, and no such abuse of that discretion in this instance is shown as would warrant this court in reversing the judgment of the trial court on account of that ruling. Several reasons are urged in support of the motion for a new trial. Among others, it is insisted that Samuel Stump was, under the statute, an incompetent witness. He was not a party.

Section 498, Rev. St. 1881. Neither does he come within the class of persons disqualified by section 502, *Id.*

It is contended also that the evidence does not sustain the verdict. The evidence is in some respects contradictory. The testimony of some of the witnesses is uncertain and indefinite, and their statements and expressions cannot in all instances be harmonized and reconciled, so as to make a clear and consistent story, but there is ample evidence in the record fairly tending to support the verdict on every material point; and, as it was the peculiar province of the jury to weigh the evidence, to reconcile conflicting statements when they could, and to believe that which they deemed most worthy, and to disbelieve that which, in their opinion, was least worthy, where it could not be harmonized so as to believe all of it, this court will not disturb the verdict on the evidence. We do not find any reversible error in the record. In this connection it is proper to remark that it is doubtful whether any question is technically presented to this court for decision. In the first place, Frances is not made a party on appeal. In the next place, there are no marginal notes on the transcript. In the third place, the notes in suit are not, so far as we have been able to discover, embraced in the bill of exceptions in which the evidence purports to be incorporated. But, disregarding these deficiencies, we have examined the record, and have found nothing therein to justify the conclusion that the cause was not fairly tried and determined in the court below. Judgment affirmed.

(145 Ill. 418)

#### ATKINSON CAR-SPRING WORKS v. BARBER.<sup>1</sup>

(Supreme Court of Illinois. May 9, 1893.)

##### REVIEW ON APPEAL—PRESUMPTIONS—WAIVER.

1. Where an action at law is tried by the court without a jury, and no propositions of law are submitted to the court, it will be presumed on appeal that the trial court correctly applied the law to the facts. *Montgomery v. Black*, 15 N. E. Rep. 28, 124 Ill. 62, followed.

2. The rejection of offered evidence is not assignable as error where the evidence rejected is afterwards offered again and admitted.

Error to appellate court, first district.

Assumpsit by O. M. Barber against the Atkinson Car-Spring Works upon a promissory note. Plaintiff obtained judgment, which was affirmed by the appellate court. Defendant appeals. Affirmed.

G. W. & J. T. Kretzinger, for appellant. Miller & Starr, for appellee.

WILKIN, J. This is an action of assumpsit, begun in the circuit court of Cook county, wherein appellee was plaintiff, and appellant was defendant. The declaration is upon a promissory note, made by the defendant, payable to one C. H. Holbrook, and by him assigned to the plaintiff. The defense set up by several

<sup>1</sup>Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

special pleas was a failure of the consideration, for which said note was given, and notice thereof to plaintiff before the assignment to him. The trial was by the court without a jury, and judgment rendered for the plaintiff for \$1,024.83, the amount of the note sued on and costs of suit. The appellate court having affirmed that judgment, the defendant below prosecutes this appeal.

The judgment of affirmance in the appellate court has conclusively settled all controverted questions of fact, necessary to support the judgment of the circuit court adversely to appellant. No propositions were submitted to the trial court to be held as the law of the case, and it will therefore be presumed that the law was correctly applied to the facts by that court in rendering its judgment in favor of the plaintiff. *Montgomery v. Black*, 124 Ill. 62, 15 N. E. Rep. 28, and cases cited. Therefore the only errors assigned here which can be considered are those questioning the ruling of the trial court on the admission and exclusion of testimony. It is not contended in the argument that improper testimony was admitted. F. M. Atkinson, being sworn as a witness for the defendant, was shown the note sued on, and asked what it was given for. Plaintiff's counsel objected to the question, and thereupon the court inquired of counsel for the defendant what he expected to show. In response to that inquiry an extended statement was made as to what the defendant proposed to prove. Counsel for the plaintiff objected to the introduction of the proposed proof, and the court sustained the objection. To this ruling an exception was taken, and it is now insisted that the court erred therein. The bill of exceptions shows that immediately after the sustaining of said objection counsel for the defendant proceeded by direct interrogatories to Mr. Atkinson to prove just what he had previously stated he expected and proposed to show, and objections to each of such interrogatories by plaintiff's attorney were overruled, and the witness allowed to answer. The defendant, therefore, had the full benefit of all the testimony it desired to introduce, and suffered no injury whatever from the ruling of which it now complains. Even if it could be said that all that was stated in the proposition of counsel was not covered by the subsequent examination of the witness, the answer would be, the defendant alone is responsible for the omission, because the court overruled every objection to questions asked. It is clear that the judgment of the appellate court is the only one which could be properly entered upon this record. Affirmed.

(145 Ill. 420)

**SMITH v. BARBER.**

(Supreme Court of Illinois. May 9, 1893.)

Appeal from appellate court, first district.

G. W. &amp; J. T. Kretzinger, for appellant. Miller &amp; Starr, for appellee.

**PER CURIAM.** This is a suit in assumption on a guaranty indorsed on the note sued on in the preceding case, 34 N. E. Rep. 33.

The questions involved are identical with those passed upon in that case. The judgment of the appellate court will therefore be affirmed in this case for the reasons stated in that.

(145 Ill. 177)

**PALTZER et al v. NATIONAL BANK OF ILLINOIS et al.<sup>1</sup>**

(Supreme Court of Illinois. May 9, 1893.)

**ATTACHMENT—EXECUTION—PRIORITY.**

Where two attachment suits are begun, returnable to the same term of court, and the writs are levied on personal property, and the first suit is dismissed at the instigation of a judgment creditor who levied an execution on the property after the levy of the first attachment writ, and before the levy of the second attachment writ, and the second attachment suit is prosecuted to judgment at a subsequent term, the lien of said execution is superior to that of the second attachment and judgment, since Rev. St. 1891, c. 11, § 37, which provides that all judgments in attachment against the same defendant returnable at the same term shall share pro rata, has no application to such case. 41 Ill. App. 443, affirmed.

**Error to appellate court, first district.**

Petition by Charles A. Paltzer, Horace W. Chase and Davey S. Pate, copartners under the firm name and style of C. A. Paltzer & Co., against the National Bank of Illinois, Canute R. Matson, sheriff of Cook county, James B. Johnson, and Spencer J. Johnson, for an order directing said sheriff to pay petitioners \$1,023.03 out of certain funds in his hands. The petition was denied, and the order denying it was affirmed by the appellate court. Petitioners bring error. Affirmed.

The other facts fully appear in the following statement by WILKIN, J.:

This is an appeal (coming through the appellate court) from an order of the superior court of Cook county distributing certain funds in the hands of the sheriff of that county. The facts as shown by the record are as follows: On the 25th and 26th days of June, 1890, judgments were entered by confession against James B. and Spencer J. Johnson in said court as follows: One in favor of Frank V. Gage for \$5,940.50; one in favor of Sarah Johnson for \$6,200.61; one in favor of George W. Williams for \$3,700; and one in favor of Peter Dudley for \$1,695.60. Upon these judgments executions were immediately issued, and delivered to the sheriff of said county, and by him on the above-named dates levied upon certain personal property of said Johnsons. On the 26th day of June, 1890, but after the levies in the foregoing cases, the John Spry Lumber Company sued out of said court a writ of attachment returnable to the July term, 1890, on proper affidavit based on a valid indebtedness of \$2,293.32, and delivered the writ on that day to the sheriff to execute, and he at once levied it upon the same property theretofore levied upon under said execution, but subject thereto. After the levy under said attachment writ, on the same day, the National Bank of Illinois, this defendant in error, entered judgment

<sup>1</sup> Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

by confession against the said Johnson in said superior court for the sum of \$19,502.35, and caused execution to immediately issue thereon, and delivered the same to said sheriff, and he on the same day, but subsequent to said prior levies, levied it upon the same property theretofore levied upon, as above stated, subject to those levies. On the 17th day of June, 1890, plaintiffs in error had begun a suit in assumpsit against said Johnsons in said superior court by summons returnable to the following July term, and on July 2d sued out a writ of attachment in aid thereof, which was also made returnable to said July term. One of the grounds for this attachment was the same as that upon which the writ in the John Spry Lumber Company attachment was based. The last-named writ of attachment was immediately delivered to said sheriff, and on the day of its date levied upon the same property theretofore levied upon as above stated. On August 1, 1890, defendant in error the National Bank of Illinois purchased the John Spry Lumber Company claim, and thereupon dismissed the suit and attachment of that company. No judgments were rendered against said Johnsons at said July term of said court. At the following August term, plaintiffs in error recovered a judgment against them in assumpsit and also on their attachment. The sheriff sold all of the property levied upon, and realized therefor a large sum of money, out of which he paid in full the four judgments first above mentioned, with interest and costs, and still had in his hands about \$11,000. Out of this amount he paid defendant in error the National Bank of Illinois \$9,000, and retained in his hands \$2,000, to abide the result of this controversy. Plaintiffs in error filed their petition in said court setting up, in substance, the foregoing facts, and praying for an order upon the sheriff to pay them the sum of \$1,023.03, due them. This the court refused to do, but ordered said sheriff to pay the funds in his hands to defendants in error. That order having been affirmed by the appellate court, this writ of error is prosecuted.

Joseph Wright, for plaintiffs in error.  
Gardner G. Willard and Wm. W. Evans, for defendants in error.

WILKIN, J., (after stating the facts.) Upon the facts stated, the only question for our decision is, was defendant in error the National Bank of Illinois entitled to the fund in the hands of the sheriff, to the exclusion of plaintiffs in error, or had the latter a prior right thereto, to the extent of their judgment? Plaintiffs in error base their claim to the fund upon section 37 of the attachment act. Starr & C. St. p. 325. That section, so far as needed for the purposes of this decision, is as follows: "All judgments in attachment against the same defendant, returnable at the same term, and all judgments in suits by summons, capias, or attachment against such defendant, recovered at that term or at the term when the judgment in the first attachment upon which judgment shall be recovered is rendered, shall share pro rata,

according to the amount of the several judgments in the proceeds of the property attached, either in the hands of a garnishee or otherwise." Counsel for plaintiffs in error in his argument proceeds upon the theory that the levy of the writ of attachment in the John Spry Lumber Case held the property levied upon until the plaintiffs in error had prosecuted their suit in attachment to judgment. The language of section 37, supra, is "all judgments in attachment against the same defendant, returnable at the same term," etc. If the general assembly, in passing said section, had intended that the mere levy of the writ of attachment should have the effect of holding the property for the benefit of subsequent attaching creditors, it would certainly have used language to that effect. Suppose the John Spry Lumber Company attachment had come to trial, and the attachment had failed, or that the plaintiff in that suit had failed to maintain its cause of action against the defendants, could the plaintiffs in error have still relied upon that former attachment as a basis for their claim to a distribution of the fund in question? It would scarcely be so contended. It is, however, admitted that no judgment was rendered in the lumber company's case, but the same was dismissed. The effect of that dismissal was as fatal to the claim now made by plaintiffs in error as though the same result, in effect, had been reached upon a trial of the case, no judgment having been rendered. The case of *Reeve v. Smith*, 113 Ill. 47, upon which counsel for plaintiffs in error rely, is not in point. In that case several persons brought suit by attachment against the Clinton Bridge Company, a nonresident corporation, and summoned the Chicago & Alton Railroad Company as garnishee. Subsequently the bridge company sold and assigned to one of the attaching parties all its claim against the railroad company, and it was held "that the attachment debtor could not dispose of its property to one creditor, to the disadvantage of the other creditors." In that case all the attachments were prosecuted to judgments. It is clear that the question involved in that case and decided has no pertinency to the issue here involved. It is true that it was no fault of plaintiffs in error that judgment was not rendered in the lumber company case. It is also probably true that the bank bought that claim with the intention of dismissing the suit, and preventing a judgment thereon, but we know of no rule of law forbidding a bona-fide creditor pursuing such a course to collect his debt. The rights of the parties here in issue are governed entirely by the attachment act. Its language being clear, nothing is left to construction. The court can only give effect to its provisions as declared by the legislature. They have no power to depart from the plain language and requirements of the statute, for the purpose of establishing, as they may suppose, a more equitable rule. *Rucker v. Fuller*, 11 Ill. 229. This case, we think, upon principle fully sustains the views herein expressed. The judgment of the appellate court will be affirmed.



(145 Ill. 388)

MASON et al. v. MULLAHEY.<sup>1</sup>

(Supreme Court of Illinois. May 9, 1893.)

NOTICE OF EQUITABLE TITLE TO LAND—POSSESSION.

1. A purchaser of land, who before purchase has seen the deed to his grantor, in which the consideration named is much less than the value of the land, and who has been informed that a third person owned the land, is chargeable with notice of said third person's equitable right to the land.

2. Cutting timber from a tract of woodland, and paying the taxes thereon, is sufficient possession to constitute notice of title.

Error to circuit court, Henderson county; A. A. Smith, Judge.

Bill by Michael Mullahey against William T. Mason and Effie Mason to reform certain deeds, and to have certain other deeds declared void. Complainant obtained a decree. Defendants bring error. Affirmed.

Kirkpatrick & Alexander, for plaintiffs in error. Pepper & Scott, for defendant in error.

WILKIN, J. Prior to the 9th of March, 1880, James L. Junkin and three other parties owned, as tenants in common, the W. 60 acres of the S. E.  $\frac{1}{4}$  of section 23, township 12 N., range 4 W., in Henderson county, this state. By mutual agreement about that date, partition was made of said real estate, the S. 15 acres thereof, designated as "Lot 1," being set off to said James L. Junkin, and a quitclaim deed by the other parties executed and delivered to him, which was intended to convey said lot 1, but by mistake in the description a like number of acres was conveyed in the S. W.  $\frac{1}{4}$  of said section. On the 24th of April, 1882, said Junkin executed and delivered to one Herbert J. Erick, and he, January 16, 1886, to this defendant in error, deeds of conveyance also intended to convey lot 1, but the mistake in the deed first mentioned was continued in each of said last-mentioned conveyances. On the 25th of January, 1887, one Charles Eckley obtained from said James L. Junkin and the other tenants in common with him, or a part of them, a quitclaim deed to said lot 1, by correct description, and on the 21st of the following month conveyed the same to his sister Sara Eckley, who on the 25th of the following May deeded it to the plaintiff in error William T. Mason. To the August term of the circuit court of Henderson county, defendant in error filed his bill against plaintiff in error and others to correct said mistake in his deed, and those through which he claims title, and to set aside said adverse conveyances. On the hearing the circuit court entered a decree according to the prayer of the bill, from which this appeal is prosecuted.

The only substantial ground of reversal urged is that the evidence fails to support the decree. That the deeds to James L. Junkin, from him to Erick, and from the latter to defendant in error, were each intended to convey the 15 acres in the S. E.  $\frac{1}{4}$ , and that none of the grantors therein

named owned, or ever claimed to own, any lands whatever in the S. W.  $\frac{1}{4}$ , is established beyond all controversy. As between the parties to those conveyances, a court of equity would, on the evidence in this record, unhesitatingly correct the mistake in these deeds, and make them conform to the intention of the parties. *Lindsay v. Davenport*, 18 Ill. 381; *Mills v. Lockwood*, 42 Ill. 111. The only question, then, which can be seriously entertained in the decision of this case, is, can that relief be properly decreed against plaintiff in error,—a subsequent purchaser? It is a familiar principle of equity jurisprudence that if one obtains a conveyance of property with notice of an equity in relation thereto, binding upon his grantor, he will also be bound. Only innocent purchasers without notice of a mistake can be heard to object to its correction. *Preston v. Williams*, 81 Ill. 176. Nor is it necessary, to bind him, that such notice be actual. If he has knowledge of such facts as ought to put a prudent man upon inquiry as to the title, he is chargeable with notice of all facts pertaining thereto to which diligent inquiry and investigation would have led him. *Merrick v. Wallace*, 19 Ill. 486; *Erickson v. Rafferty*, 79 Ill. 209; *Bent v. Coleman*, 59 Ill. 364; *Bank v. Dayton*, 116 Ill. 257, 4 N. E. Rep. 492. It is not pretended, as it certainly could not be, with seriousness, that, upon the evidence in this record, Charles Eckley is to be treated as a bona fide purchaser of said land, without reference to his knowledge of the equities of defendant in error. He obtained his deed without consideration, by false and fraudulent representations. Neither can it be said that his sister was a purchaser from him in good faith. The consideration in his deed to her is but \$50, although it conveyed, in addition to this 15 acres, another tract, of 4  $\frac{1}{2}$  acres, while all the evidence tends to show that the 15 acres alone were worth three times that amount. Plaintiff in error admits that before the conveyance to him he saw the deeds to Charles and Sarah Eckley,—the first naming only a consideration of \$1; and the latter, \$50. Two witnesses testified upon the hearing that they told him before he bought the land that defendant in error owned it. Defendant in error swore that some two months prior to the date of Mason's deed the latter proposed to purchase the land of him, and this testimony is corroborated by that of a disinterested witness. Plaintiff in error contradicts all these witnesses, and swears positively that he had no notice whatever of defendant in error's claim to said land when he purchased it from Sarah Eckley; but the chancellor was certainly justifiable, from all the testimony, in disbelieving him, and giving credence to the testimony of other witnesses. We think the clear preponderance of the testimony is that plaintiff in error was not an innocent purchaser, without notice of the rights of defendant in error, but had both actual and constructive notice of the same. That possession of land is sufficient to charge all others with notice of the rights, legal or equitable, of the possessor, is too well settled to call for the citation of authorities. The rule has been many

<sup>1</sup> Reported by Louis Boisot, Jr., Esq., of the Chicago bar.



times applied, by this court and others, to cases of this kind.

It is true that to constitute such notice, as against a bona fide purchaser, the possession must be open, visible, and exclusive; but it may be evidenced by any acts which clearly show an appropriation of the property to the use of the person claiming the same. The lot in question is woodland, and there is no conflict in the testimony as to the fact that both defendant in error and Elrick, from the time they obtained their respective deeds, cut timber therefrom, and paid all taxes assessed against it. Their acts of ownership seemed to have been sufficient to apprise the neighbors and adjoining owners generally that they claimed to own it, and it is manifest, if plaintiff in error did not also know that fact, it was because he preferred to remain ignorant, when the law made it his duty to seek information. We think the decree of the circuit court in this case is eminently just and proper, and it will be affirmed.

(145 Ill. 189)

# BERNSTEIN v. ROTH.<sup>1</sup>

(Supreme Court of Illinois. May 9, 1893.)

## JUDGMENT OF APPELLATE COURT—REVIEW.

A judgment of affirmance by the Illinois appellate court conclusively settles all questions of fact in favor of the appellee, even though the opinion handed down in the appellate court contains intimations at variance with the verdict, since the opinion is no part of the record.

Appeal from appellate court, first district.

Action by Samuel Roth against Abraham Bernstein for personal injuries. Plaintiff obtained judgment, which was affirmed by the appellate court. Defendant appeals. Affirmed.

Blum & Blum, for appellant. Joseph B. David and John C. King, for appellee.

**WILKIN, J.** This action was brought by appellee against appellant, in the superior court of Cook county, to recover damages for a personal injury. The cause of action set up in the declaration is that on the 9th day of July, 1888, while plaintiff was riding in his carriage on one of the streets in the city of Chicago, a wagon belonging to the defendant was so carelessly driven by his servant that "the shaft of the said wagon of defendant" struck plaintiff's carriage, thereby throwing plaintiff upon the ground with such violence as to seriously injure him. The plea was not guilty. Two trials were had in the superior court. Upon the first the jury returned a verdict for the plaintiff, fixing his damages at \$4,500. On motion of the defendant that verdict was set aside, and a new trial ordered. On the second trial a verdict for the plaintiff was again returned, and the damages fixed at \$2,500. On the last verdict, judgment was entered, and the defendant appealed to the appellate court of the first district,

and there the judgment below was affirmed.

The only controverted question of fact on the trial was whether Shimrik, the person driving the defendant's team at the time of the alleged injury, was the servant or employee of the defendant. Upon the last trial the court instructed the jury, at the request of the defendant, to find, specifically, and to answer, the following question: "At the time of the occurrence of the accident which resulted in the plaintiff's injury complained of in this case, was Shimrik, the man who drove the wagon in question, in the employ as a servant of the defendant Bernstein?" To this question the jury answered, "Yes." The judgment of the appellate court is in the usual form of a judgment of affirmance, without any recital of facts found by that court.

We have so often held that such a judgment must be treated by us as conclusively settling all controverted questions of fact, necessary to support the judgment affirmed, adversely to the appellant or plaintiff in error, that we forbear to cite the cases. The only ground of reversal urged by counsel for appellant is that the evidence fails to establish the fact that the driver of the wagon which collided with the appellee's carriage was the employee of appellant. Unquestionably the law is as contended by counsel,—that a person is not responsible for the wrongful act of another, not his agent, servant, or employee; but, unfortunately for appellant, he is deprived of all benefit of that principle by the conclusive finding of the fact that the one guilty of the negligence here complained of was his servant. It is not claimed that the trial court erred in its rulings as to the admission or exclusion of evidence, the giving or refusing of instructions, and under section 89 of the practice act, and the repeated decisions of this court in pursuance thereof, the affirmance of the judgment of the appellate court is inevitable. An attempt is made to avoid this result by insisting that the opinions prepared by two of the justices of the appellate court show that it found the facts different from the finding of the circuit court. This contention amounts to no more than saying the conclusion reached by that court is inconsistent with the statement in one of those opinions that "the jury ought not to have found as they did," and the grave doubt on that subject expressed in the other; but certainly it will not be seriously contended that, even if that were true, this court would thereby be authorized, in the teeth of the statute, to review the evidence, and pass upon the facts of the case. Moreover, these opinions are in no sense a part of the record of the appellate court, and cannot be resorted to for the purpose of ascertaining its finding of facts. *Coal Field Co. v. Peck*, 98 Ill. 145; *Cable Co. v. Lathrop*, 131 Ill. 575, 23 N. E. Rep. 583; *Pennsylvania Co. v. Versten*, 140 Ill. 637, 80 N. E. Rep. 540. It is clear that there is no error in the record which can be availed of in this court. The judgment of the appellate court will be affirmed.

<sup>1</sup> Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

(145 Ill. 85)

**BOSTWICK v. BLAKE.**<sup>1</sup>

(Supreme Court of Illinois. May 9, 1893.)

**FRAUDULENT CONVEYANCE—EXECUTION SALE—PLEADING.**

1. Where the owner of land procures one of his creditors to levy an execution on the land, buy it in at execution sale, and hold the land for his secret benefit, such conveyance is void as against creditors.

2. Where a creditor has levied on such land, and the execution purchaser intervenes in the suit, claiming title to the land, the fact that he holds it under a fraudulent arrangement with the former owner may be shown without any special plea to that effect, since a conveyance in fraud of creditors is void, and not merely voidable.

Appeal from circuit court, Cook county; S. P. McConnell, Judge.

Attachment by Christine Blake against Barnum Blake. An interpleader was filed by John M. Bostwick, on which judgment was rendered against him, and he appeals. Affirmed.

Doolittle, Palmer & Tolman, for appellant. Millard & Boyesen, for appellee.

**WILKIN, J.** On the 12th of October, 1889, appellee brought an action of debt against Barnum Blake, her former husband, in the circuit court of Cook county on a judgment for alimony rendered in October, 1888, and sued out an attachment in aid thereof. The writ was levied on lot 6, block 95, Elston's addition to Chicago, and thereafter appellant filed an interpleader claiming said property. No formal traverse of the plea was filed, but the parties stipulated that the issue of the interpleader should be set down for hearing, etc., and afterwards waived a jury, and agreed that the same should be tried by the court. The finding of the circuit court was that said property, at the time of the levy of said writ of attachment, belonged to Blake, and appellant had no beneficial right, title, or interest in the same, but that he held the naked legal title thereto in trust for said Blake. It was therefore adjudged that appellant should take nothing by his plea. From that judgment this appeal is prosecuted.

The following facts appeared in evidence: In December, 1873, Barnum Blake, being the owner of said lot, mortgaged it to secure a debt of \$40,000. At the August term of the superior court of Cook county, 1874, the firm of Murphy & Favorite recovered a judgment against Blake for \$10,064, and in pursuance thereof levied an execution on said lot, and the same was bid off at \$100. At the February term, 1876, of said superior court, this appellant took a judgment against Blake for \$2,077.64, and caused execution thereon to be issued, and levied upon the same lot, in redemption of said former sale, and bid off the property at \$118.46, the amount of redemption money, interest, and cost, and on August 16, 1876, received a sheriff's deed therefor. Under this sheriff's deed he claims title to said lot. The \$40,000 mortgage was paid off by Blake, but re-

mained unsatisfied of record, at least until after appellant took his sheriff's deed. The contention of appellee (plaintiff in the attachment) is that appellant obtained his sheriff's deed in pursuance of an arrangement with Barnum Blake, and held the same in secret trust for the latter at the time of the levy of her writ of attachment. If this position is supported by the evidence, the conveyance is fraudulent in law, and void as to creditors of Blake. It was held in *Moore v. Wood*, 100 Ill. 451, on the authority of numerous previous decisions of this court, as well as other authorities, that "a debtor cannot convey real estate to another, to be held, wholly or in part, in secret trust for himself, so as to cut off the rights of existing creditors, for although, as was observed in *Lukin v. Aird*, 6 Wall. 78, 'such a transaction may be upon a valuable consideration, but it lacks the element of good faith, for, while it professes to be an absolute conveyance on its face, there is a concealed agreement between the parties to it, inconsistent with its terms, securing a benefit to the grantor at the expense of those he owes. A trust thus secretly created, whether so intended or not, is a fraud on creditors, because it places beyond their reach a valuable right, \* \* \* and gives to the debtor the beneficial enjoyment of what rightfully belongs to his creditors.'" *Mitchell v. Sawyer*, 115 Ill. 650, 5 N. E. Rep. 109; *Beldler v. Crane*, 135 Ill. 92, 25 N. E. Rep. 655. In such cases the conveyance is void both as to existing and subsequent creditors. The fraud is a continuing one, and may actually operate as such, as well in reference to debts contracted after as before the conveyance. *Bump, Fraud. Conv.* 319; *Giffin v. Bank*, 74 Ill. 259; *Jones v. King*, 86 Ill. 229; *Gordan v. Reynolds*, 114 Ill. 118, 28 N. E. Rep. 455. While the property in question was not conveyed to appellant by Blake in person, yet if the steps taken by the former to obtain the title thereto were by the consent and procurement of the latter, with the secret understanding that the property was to be held for Blake, it is not, and could not be, successfully contended that the case does not fall within the foregoing rule. We are of the opinion, then, that the correctness of the judgment below depends solely upon the question of fact as to whether appellant obtained the title to said lot under an arrangement by which a secret trust was created in appellant for Blake's use. We shall not extend this opinion by reviewing the evidence bearing upon this question. In our opinion it abundantly supports the finding of the court below. No one can read it without being forced to the conclusion that it was understood between the parties that, although the title was in the appellant, the property in fact belonged to Blake. The conduct of both in relation to the property, as shown by the undisputed evidence, is wholly inconsistent and irreconcilable with any other understanding.

It is, however, earnestly contended that under the issue formed on appellant's interplea, treating it as traversed, the legal title to the property in question only was involved, and no question of the existence

<sup>1</sup> Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

of equitable interests in the debtor could arise; and it is said that "if the attaching creditor desires to present the question of the existence of an equitable interest in the debtor, which is subject to his writ, he must bring it to the attention of the court in some appropriate manner, and a distinct, traversable issue must be formed thereon, capable of being submitted to a jury." This position is based upon what is said in the case of *Bank v. Keeler*, 103 Ill. 425. That case has no application here, for the reason appellee is not seeking to reach a mere equitable interest in Barnum Blake to the attached property, but the entire property. The interpleader having been filed, alleging that said lot was, and still is, the property of the said John M. Bostwick, and that allegation having been treated as traversed, it was the duty of the court, under section 29 of the attachment act "to direct a jury to be impaneled to inquire into the right of property." The right of interpleader, under this statute, extends to real as well as personal property attached. *City Ins. Co. v. Commercial Bank*, 68 Ill. 351. In either case the question to be inquired into is "the right of property." Appellee insists that the property in question here, when levied upon by her, was that of Barnum Blake, and that the title thereto in appellant was fraudulent and void as to her. The moment she levied her writ of attachment upon it as the property of her debtor, her election to treat the conveyance to appellant as void was declared, and her attachment became a lien against the property, with the same effect as if the deed to appellant had never been made. *McKinney v. Bank*, 104 Ill. 183. The theory of the law is that a fraudulent transfer passes nothing, as against creditors. For all purposes of appropriating the property to the satisfaction of their demands, it is to be deemed vested in the debtor. *Bump, Fraud. Conv.* 465. A conveyance of real estate, made in fraud of creditors, is void, and not merely voidable. We are satisfied, after a careful examination of this record, and the argument of counsel, that the proceedings in the court below were in conformity with the law, that it ruled correctly upon each of the propositions submitted to it, and that its judgment is right. Affirmed.

(145 Ill. 339)

**CAMPBELL v. JACOBSON et al.<sup>1</sup>**

(Supreme Court of Illinois. May 9, 1893.)

**MECHANIC'S LIEN—CONTRACT—ESTOPPEL—FILING CLAIM.**

1. A mechanic contracted with one whom he supposed to be the owner of certain land, but who was in fact the husband of the owner, to erect a building on the land. It was not shown that the husband had any authority to act for his wife, and she denied that she gave any orders in regard to the building. It appeared, however, that she mortgaged the property to raise money to pay for the building, and that she allowed her husband to collect the rents without accounting to her. Her deed was on record before the contract was

made. *Held*, that the contractor was not entitled to a lien, since his work was not done "by contract with the owner," as required by *Rev. St. 1891, c. 82, § 1*.

2. The mere fact that a married woman permits her husband to erect buildings on her land, her title being of record, does not estop her, as against one claiming a mechanic's lien, from denying that the land belongs to her husband, or from denying that he contracted for the buildings as her agent.

3. Under *Rev. St. 1891, c. 82, § 4*, which provides that every person claiming a mechanic's lien shall file with the clerk of the circuit court "a just and true statement or account or demand due him, after allowing all credits, setting forth the times when such material was furnished or labor performed," a statement which merely alleges that there is due the mechanic a certain sum for which he holds an architect's certificate of a certain date, without giving the date or dates of furnishing the materials, or performing the labor, or stating any matters from which those facts can be ascertained, is fatally defective.

4. *Rev. St. 1891, c. 82, § 28*, which declares that no creditor shall be allowed to enforce a mechanic's lien to the prejudice of any other creditor, incumbrancer, or purchaser, "unless a claim for a lien shall have been filed with the clerk of the circuit court, as provided in section 4 of this act, within four months after the last payment shall have become due and payable," does not dispense with the necessity of filing such claim where the lien is sought to be enforced only against the owner of the premises.

Appeal from appellate court, first district.

Petitions by Archibald Campbell against Fannie Jacobson, Morris Jacobson, Solomon Freehling, Bertha Freehling, H. N. Wheeler, Hugh L. Mason, and Eugenia M. Little, to foreclose mechanics' liens. Defendants obtained a decree, which was affirmed by the appellate court. Petitioner appeals. Affirmed.

The other facts fully appear in the following statement by BAILEY, C. J.:

On the 10th day of December, 1890, two separate petitions, which were afterwards consolidated, were filed by Archibald Campbell against Fannie Jacobson, Morris Jacobson, Solomon Freehling, and others for the establishment and foreclosure of mechanics' liens upon two adjoining lots, known as 3142 and 3144, Shields avenue, Chicago, for labor and material furnished by Campbell in the construction of buildings thereon. The labor and material for which the liens are claimed were furnished under and in pursuance of a written contract bearing date May 7, 1890, purporting to have been executed by Campbell, of the first part, and Morris Jacobson, of the second part, under their respective hands and seals. The lots upon which the buildings were erected belonged to Fannie Jacobson. The petitions allege, in substance, that on the day of the date of the contract, Fannie Jacobson and her husband, Morris Jacobson, applied to the complainant to erect the buildings in question; that thereupon the petitioner and Fannie Jacobson, by her husband and agent, Morris Jacobson, entered into a written contract, being the contract above mentioned, and that, in compliance with the terms of such contract, the petitioner commenced work thereunder, and erected the buildings in

<sup>1</sup> Reported by Louis Boiesot, Jr., Esq., of the Chicago bar.

accordance therewith, on the lots above mentioned, Fannie Jacobson being, at the date of the contract, the owner of the lots; that the petitioner in all respects complied with and performed the contract, and procured from the architect and superintendent of the buildings named in the contract a certificate in writing, one-half to apply on each building, for \$2,565.80, that being part only of the amount due on the two buildings, one-half of which, or \$1,282.90, was to apply on each building; that in addition to the work done for which he holds the certificate, he did extra work, by order of Fannie Jacobson, by Morris Jacobson, her agent, amounting to \$150 on each building, and for which he applied to the architect to grant him a certificate; that he also applied to the architect for a certificate that he had completed his part of the contract, according to its terms, but the architect refused both certificates, on the ground, as alleged by him, that he had been discharged by Fannie Jacobson; that immediately after the completion of the buildings, to wit, on November 1, 1890, Fannie Jacobson occupied and took possession thereof; that there is now due the petitioner a balance of \$1,432.90 on each building; that he has requested her to pay such balance, but that she has neglected so to do; that such payment not being made, the petitioner, on December 16, 1890, filed his statement and claim for a mechanic's lien in the office of the clerk of the circuit court of Cook county, showing \$1,432.90 due and unpaid on each building, as required by statute, by means whereof the petitioner is entitled to a lien upon the premises for the amount so remaining due. The petitioner further alleges, on information and belief, that Fannie and Morris Jacobson, on or about September 30, 1890, conveyed the premises to Solomon Freehling, and that he and the other defendants have or claim some interest in the premises as purchasers, mortgagees, judgment creditors, or otherwise, the precise nature of which is unknown to the petitioner, but that such interests, if any there are, have accrued since and are subject to the petitioner's lien. Morris Jacobson and Fannie Jacobson answered separately, each denying the equities alleged in the petitions. Freehling answered, claiming an interest as mortgagee, under a warranty deed executed by the Jacobsons, but intended as a mortgage. The other defendants also answered, claiming as incumbrancers under a deed of trust in the nature of a mortgage. A replication being filed, the cause was referred to a master to take proofs and report the same with his conclusions, and the master, on the evidence taken before him, found and reported all the material issues in favor of the petitioner, and that there was due the petitioner on each building the sum of \$1,432.90, and that the petitioner was entitled to mechanics' liens on each building for that amount. Exceptions were filed to the master's report, and, the cause coming on for final hearing in the superior court, the exceptions were sustained, and on August 12, 1891, a decree was entered dismissing the petitions at the peti-

tioner's costs, for want of equity. On the day the decree was entered, the petitioner filed his motion, supported by an affidavit and exhibits, to set aside the decree and for a rehearing, and for leave to introduce further evidence, and such motion was continued from term to term until November 9, 1891. On that day, the motion coming on to be heard, a further motion was interposed by the petitioner for leave to amend the petition, and upon the latter motion, by consent of the defendants, leave was given the petitioner to amend his petition *nunc pro tunc*, as of the day prior to the one on which the decree was entered, but without prejudice to the decree. The motion for a rehearing and to be permitted to introduce further evidence was thereupon denied.

The amendment to the petition, filed in pursuance of the leave thus given, added to the petition allegations, in substance, as follows: That on or about October 7, 1890, after the completion of the work, the petitioner made out, gave, and furnished to the owner of the premises in question, viz. Fannie Jacobson, or to her agent, as required by the statute, a statement under oath of the number and names of every subcontractor, mechanic, or workman in his employ, and persons furnishing materials, giving the names and the rate of wages and terms of the contract, and how much was then due or to become due to them and each of them and each and every of them for work done and materials furnished, in accordance with the statute, and that the petitioner did, prior to the commencement of his suit, and within the time prescribed by the statute, give, serve upon, and furnish to the owner of the premises each and every notice, and did and performed every act, required in such case by the statute; also, that on December 13, 1890, the petitioner duly filed with the clerk of the circuit court of Cook county two certain statements, accounts, and demands due him, verified by his affidavit, one applicable to each of the buildings in question. A copy of these statements was appended to his amendment as exhibits. They are identical in their language, except that one applies to the building on the lot known as No. 3142, and the other to the building on lot No. 3144. The statement applicable to No. 3142 is as follows: "Archibald Campbell, being first duly sworn, on oath deposes and says that he is the contractor for carpenter labor and material on the flat building known as No. 3142 Shields avenue, situated upon the premises hereinafter described, of which M. Jacobson is the owner, and that there is due him as such contractor the sum of \$1,432.90, of which he holds the certificate of John J. Kountz, the architect of said building, for the sum of \$2,565.80, \$1,282.90, or one-half, to apply upon 3142 Shields avenue, and one-half to apply on another contract, and the balance of said amount of \$1,432.90 being for extra work ordered by the said Jacobson and the said architect, and for which deponent has been unable to get a certificate, owing to the fact that the said Jacobson has discharged said architect, and said architect therefore declines to act further in the matter, or to

issue any certificates; that the date of said certificate for \$2,565.80 is October 7, 1890, and the amount of \$1,432.90, together with the interest from October 7, 1890, is due from said M. Jacobson for and on account of said work performed under said contract, and that the above is a just and true statement of the account due him as aforesaid from said M. Jacobson for work, labor, and material furnished and used in said two buildings, and which amounts are due and payable to him from said M. Jacobson from and after the respective dates thereof. And affiant says that the work, labor, and material contributed by him as aforesaid were used in the construction and improvement of the said flat building aforesaid, situated upon the following described premises, [describing them.] And affiant says that there is now due and owing to him from said M. Jacobson, at whose request said work, labor, and materials were furnished as aforesaid, after allowing to him all just credits, deductions, and set-offs, the sum of \$1,432.90, for which amount affiant claims a lien upon the above-described premises." The petitioner having taken the record to the appellate court by writ of error, the decree was there affirmed, and the present appeal is from the judgment of affirmance.

Miller & Starr, for appellant. Blum & Blum, for appellees.

BAILEY, C. J., (after stating the facts.) The first section of the statute in relation to mechanics' liens provides that any person "who shall, by contract, express or implied, or partly expressed and partly implied, with the owner of any lot or piece of land, furnish labor or material" in erecting a house or other building on such land, shall have a lien upon the lot or piece of land and upon the building for the amount due him for such labor and material. It thus appears that the first and indispensable requisite is that the labor and material for which the lien is sought to be enforced shall have been furnished by the petitioner under and in pursuance of a contract with the owner of the land. The petitioner in this case alleges and relies upon an express contract between him and Fannie Jacobson, the owner of the land. He avers in his petition that this contract was executed on behalf of Fannie Jacobson by Morris Jacobson, her husband and agent, and a copy of the contract is exhibited and made a part of the petition. On referring to the contract itself, we find a document which makes no reference whatever to Fannie Jacobson, but which purports to be a contract between Archibald Campbell, party of the first part, and Morris Jacobson, party of the second part, and the contract is executed by these parties under their respective hands and seals. In the body of the contract, Morris Jacobson is referred to as the owner of the premises upon which the proposed buildings were to be erected. Unless this can be held to be in fact the contract of Fannie Jacobson, the petitioner has manifestly no title under the statute to a lien, at least upon the case

made by his pleadings. At the time the contract was executed, Fannie Jacobson was not present, nor had she taken any part in the negotiations out of which the contract grew. The petitioner at that time had no actual knowledge that she was the owner of the lots upon which the proposed buildings were to be erected, but supposed that they belonged to Morris Jacobson, and the contract was entered into by him on that basis. He treated with Morris Jacobson as a principal contracting party, and not as the agent of his wife, and, upon the face of the contract as executed, Morris Jacobson appears to be a principal. The only theory upon which Fannie Jacobson can now be substituted in place of her husband as a party to the contract is that she was an undisclosed principal, and that her husband, in entering into the contract, really acted as her agent. The petitioner having alleged and relied upon a contract thus executed under seal by Morris Jacobson as the ostensible principal, there may perhaps be difficulty, on technical common-law grounds, in holding Fannie Jacobson liable thereon as an undisclosed principal. But, waiving that point, it is very clear that the burden of showing that the relation of principal and agent existed between Fannie Jacobson and her husband, and that he had authority to enter into a contract on her behalf for the erection of buildings on her lots, is on the petitioner. After carefully considering the evidence bearing upon this question, we are brought to the conclusion that the chancellor who heard the cause was justified in holding that the preponderance of the evidence on this point was against the petitioner. No direct evidence was offered of any authority on Morris Jacobson's part to act as his wife's agent in the premises. She testifies positively that she never gave him such authority, and that she did not even know that the contract was made, or that the erection of the buildings was in contemplation, until at least a month after the date of the contract, nor until the buildings were well under way. She further says that when she learned of the enterprise she strongly objected to it, and made such objections repeatedly afterwards; that she was at the buildings, as she thinks, but once or twice while they were in process of erection, and that was when they were nearly finished. Morris Jacobson testifies that, in executing the contract, he was acting for himself, and not in any way for his wife; that he did not represent her, and had no authority so to do; that in his negotiations with the petitioner her name was not mentioned; that she had nothing whatever to do with the construction of the buildings, and knew nothing about what he was going to do; and that he merely went to work with his own money, and erected the buildings. One of the witnesses, who was the petitioner's foreman, testifies that about October 21st, and when the buildings were nearly completed, Mrs. Jacobson came there, and that he, at her request, explained to her what the "trim" was to be, she saying at the time that Mr. Jacobson had already explained it to her; that she

said she was well pleased with the "trim" they were putting on; that she was not at all pleased with the other, and was glad that Mr. Jacobson had had it changed, and that she had ordered it to be changed. Mrs. Jacobson, on the other hand, positively denies that she made these statements, or that she ever gave any orders or directions in relation to any changes or alterations in the buildings. Another circumstance relied upon by the petitioner to show the agency of Mr. Jacobson is that, during the construction of the buildings, Jacobson negotiated a loan, in order to get the means to complete the buildings, and that to secure the loan Mrs. Jacobson joined with him in the execution of a deed of trust on these lots, with the understanding that the money borrowed should go into his hands to be used for that purpose. This she did, as she explains, upon his telling her that he wanted to go on finishing the buildings, and that, unless he had more money to go ahead with, he would lose what he had already invested; that he wished her to go his security, and that, to relieve him of his embarrassment, she consented to do so, and executed the deed for that purpose. It also appears that after the buildings were completed Mrs. Jacobson permitted her husband to collect the rents therefor, without accounting to her for the same. The foregoing are substantially all the facts relied upon as tending to charge Mrs. Jacobson as an undisclosed principal upon the contract entered into by her husband. We are of the opinion that, when all the evidence is considered, these circumstances are insufficient to produce that result. None of them seem to us to be necessarily inconsistent with the theory supported by the testimony of Mr. and Mrs. Jacobson that the erection of the buildings, though on Mrs. Jacobson's property, was an enterprise undertaken by Mr. Jacobson for himself, and in his own interest, and without his wife's sanction or authority. And if that theory is correct, the buildings cannot be said to have been erected in pursuance of any contract with the owner of the lots, so as to entitle the petitioner to a lien thereon.

But it is urged that Mrs. Jacobson, by standing by and permitting her husband to hold himself out as the owner of the lots, and by allowing him to enter into a contract with the petitioner for the erection of buildings thereon, is guilty of such fraudulent conduct as should preclude her from disavowing her husband's acts, or alleging that the lots were not in part his. It might perhaps be a sufficient answer to this contention to say that the petitions are not framed on any such theory. They contain no allegations of fraudulent conduct on the part of Mrs. Jacobson, nor do they set out any facts calling for an application of the doctrine of estoppel. They allege an express contract between the petitioner and Mrs. Jacobson, entered into on her behalf by her husband as her agent, and the petitioner must stand or fall by the case thus made by his petitions. But we are unable to find anything in the conduct of Mrs. Jacobson, as disclosed by the evidence, which calls for an applica-

tion of the doctrine of estoppel. Long before the date of the contract relied upon, the evidence of her title had been placed on record. The petitioner was thereby charged with constructive notice that she was the owner of the lots, and he was bound by such notice. But without examining the public records, as every person seeking to acquire an interest in lands is required to do, he chose to assume that Mr. Jacobson was the owner, and to base his action upon that assumption. We fail to find any evidence in the record of any act on the part of Mrs. Jacobson upon which the petitioner had a right to rely as tantamount to a representation on her part that the title was in her husband. If Mr. Jacobson, at the time the contract was executed, or afterwards, claimed or held himself out to be the owner, there is not a syllable of evidence tending to show that she was apprised of that fact. It is true she stood by and permitted him to put up the buildings on her lots, in the sense that she did not positively forbid, or take legal means to prevent, his doing so, but having no knowledge that he was holding himself out to be the owner, her mere nonaction, after having given notice of her rights to all the world by placing her title on record, cannot have the effect of precluding her from denying that her husband was in fact the owner. If she had withheld her deed from record until after the contract had been entered into, as was the case in *Schwartz v. Saunders*, 48 Ill. 18, thus placing it in the power of her husband to hold himself out to the world as the owner of the property, or if she had fraudulently permitted her husband to represent himself as such owner, as appeared to be the case in *Coal Co. v. Pasco*, 79 Ill. 170, the case would doubtless have been different. But nothing of that kind is shown. If the petitioner has been defrauded, the fraud is one for which she is not responsible, and we find no warrant, either in the pleadings or in the evidence, for holding her estopped to deny that her husband's representations that he was the owner of the lots, if such were made, were true.

But the decree of the superior court denying the petition for a lien may be sustained upon another ground. The fourth section of the statute in relation to mechanics' liens, as amended by act of May 31, 1887, is as follows: "Every creditor or contractor who wishes to avail himself of the provisions of this act shall file with the clerk of the circuit court of the county in which the building, erection, or other improvement to be charged with the lien is situated a just and true statement or account or demand due him, after allowing all credits, setting forth the times when such material was furnished or labor performed, and containing a correct description of the property to be charged with the lien, and verified by an affidavit. Any person having filed a claim for a lien as provided in this section may bring a suit at once to enforce the same by bill or petition, in any court of competent jurisdiction in the county where the claim for a lien has been filed." It was proved at the hearing that the petitioner, on the

13th day of December, 1890, filed in the office of the clerk of the circuit court of Cook county two sworn statements, one in relation to the building erected on lot 8142, and the other in relation to the building on lot 8144, such statements being the same as those appended to the amendment to his petitions filed *nunc pro tunc* by leave of the court, a copy of one of which is set forth at length in the statement preceding this opinion. Those statements make no reference to Fannie Jacobson, but allege that M. Jacobson is the owner of the premises upon which the lien is claimed, and that there is due the petitioner from M. Jacobson for work, labor, and material furnished under a contract with him the gross sum of \$1,432.90 on each building. It is, to say the least, very doubtful whether a statement, in which the owner of the property is not named, or in which no claim is made against the true owner, but in which the indebtedness is claimed to be due from another party, is a sufficient statement to answer the requirements of the foregoing section. Especially is this so in view of the provisions of section 53 of the statute, which requires the clerk of the circuit court where the lien has been filed to indorse upon the statement the date of filing, and make an abstract thereof in a book kept for that purpose, containing the name of the person filing the lien, the amount of the lien, the date of filing, and the name of the person against whom the lien is filed, together with a description of the property charged with the lien. It is manifest that in this case the statement was not sufficient to enable the clerk to enter in his abstract the name of Fannie Jacobson as the person against whom the lien was filed.

But a more serious difficulty with the statements is that they wholly failed to set forth "the times when such material was furnished or labor performed." That it should set forth these facts seems to be an imperative requirement of the statute. The statements were merely that there was due the sum of \$1,432.90 on each building, and that the petitioner held an architect's certificate, dated October 7, 1890, for \$2,565.80, one-half of which was due on each building, and that there was due a further sum of \$150 on each building, for extra work, for which he had not been able to obtain a certificate. But there is no attempt to give the date or dates of furnishing the material, or the performance of the labor, nor is there anything in the statements from which those facts can be ascertained. A mechanic's lien does not exist and is not enforceable of common right, but it is purely a statutory lien, and can be maintained only upon those conditions which the statute imposes. And the statute having required every creditor or contractor who wishes to avail himself of the provisions of the statute to file in a public office a sworn statement of a particular character, that requirement must be at least substantially complied with, and, unless that is done, his lien cannot be enforced.

The point, however, is made by counsel for the petitioner that the provisions of section 4 are intended solely for the benefit

and protection of purchasers, incumbrancers, and other creditors, and that a failure to file the statement therein provided for does not concern the owner of the premises. There is nothing giving countenance to that view in the language of the section, its provisions being that every creditor or contractor wishing to avail himself of the provisions of the statute should file the statement. But the conclusion contended for is sought to be based upon section 28, which provides that no creditor shall be allowed to enforce a lien to the prejudice of any other creditor, incumbrancer, or purchaser, "unless a claim for a lien shall have been filed with the clerk of the circuit court, as provided in section 4 of this act, within four months after the last payment shall have become due and payable." And it is provided that suit shall be commenced within two years after the filing of the claim, or the lien shall be vacated. We are unable to give this section the force contended for. It is essentially a statute of limitations, and its effect is to bar relief as against other creditors, incumbrancers, and purchasers, unless the claim is filed within four months after the maturity of the last payment. But it has not the effect of dispensing with the filing of the claim, where the lien is sought to be enforced only against the owner of the premises. We are of the opinion that the decree denying the lien and dismissing the petitions was proper, and the judgment of the appellate court affirming the decree will be affirmed.

(145 Ill. 199)

IRWIN et al. v. BROWN.<sup>1</sup>

(Supreme Court of Illinois. May 9, 1893.)

## MORTGAGE—AGREEMENT TO RELEASE—INTEREST CONVEYED.

1. An agreement by a mortgagee to release his mortgage whenever it should appear that the one personally liable on the mortgage debt would suffer loss unless the same was released does not entitle the latter to a release because the mortgage is about to be foreclosed, since he could not be said to suffer loss by a foreclosure.

2. The owner of an undivided two-thirds interest in land conveyed a one-third interest to her brother, who failed to record the deed. She then, at her brother's request, and for his benefit, mortgaged a one-third interest in the land. *Held*, that the mortgage was a lien on the third remaining in her, and not the third conveyed to her brother.

Appeal from appellate court, first district.

Suit by Flora A. Brown against Alice L. Irwin, Fairfax Irwin, and William A. Paulsen to foreclose a mortgage. Complainant obtained a decree, which was affirmed by the appellate court. Defendants appeal. Affirmed.

The other facts fully appear in the following statement by WILKIN, J.:

This proceeding was begun in the superior court of Cook county by appellee against appellants to foreclose a real-estate mortgage, and brought to this court by appeal from the appellate court

<sup>1</sup> Reported by Louis Bolsot, Jr., Esq., of the Chicago bar.



of the first district. The bill alleges that on the 25th day of June, 1886, the complainant and William A. Paulsen, one of the defendants named in the bill, adjusted all differences then existing between them, and signed an agreement in writing as follows: "Agreement. All matters in dispute are settled on the following basis: Said Flora A. Brown is to deed to Paulsen, or person designated by him, the five houses on corner of Scott and Astor streets, Chicago, subject to a mortgage, \$22,000, and contractors' claims. Paulsen to give complainant one note, \$1,000, due in three years, and one note, \$12,500, due in ten years, interest on both five per cent., semiannually; also his bond, \$10,000, to indemnify Flora A. Brown and Lewis A. Brown from claims arising from the construction of said houses. Notes to be secured by mortgage executed by Alice L. Irwin and her husband on undivided one-third of all those parts of lot eleven in North addition to Chicago, and the land lying between said lot eleven and North Clark street, which were owned by Augusta Paulsen at the time of her death. Said mortgage to be a first lien except as to a mortgage made by Augusta Paulsen. Paulsen may pay rent and get partial release. Said Flora A. Brown to advance Paulsen \$1,000 to pay interest on \$22,000 mortgage and taxes on property. The \$1,000 note is for this advancement. Said Flora A. Brown is to surrender a \$500 note of his to Paulsen. Paulsen may use Flora A. Brown's name to recover money from Clifford, Anthony, and Paulsen, for his benefit and at his expense; and said Paulsen is to defend mechanic's lien suits on said five houses. The Augusta Paulsen mortgage may be renewed. Notes shall be marked 'Nonnegotiable.' [Signed by:] Flora A. Brown, Lewis A. Brown, W. A. Paulsen." That the complainant complied with all the terms of said agreement on her part, and, in pursuance thereof, Alice L. Irwin and Fairfax Irwin, her husband, executed and delivered to complainant their certain deed of mortgage dated on said 25th day of June, 1886, upon the undivided one-third of lots 7 to 12, inclusive, in Edison's subdivision of lot 11, in North addition to Chicago, and lot 1, block A, in County Clerk's addition, etc., in the city of Chicago, to secure the payment of two promissory notes made by said William A. Paulsen, payable to complainant, bearing even date with said mortgage,—one for \$1,000, due on or before June 25, 1889, and the other for \$12,500, due on or before June 25, 1896, each bearing 5 per cent. per annum interest, payable half yearly. Under a provision of the mortgage to that effect, for a default in the payment of an installment of interest due on said notes the whole indebtedness was declared due, and this bill filed to foreclose for the same. The bill further alleges that said Paulsen, on April 20, 1886, had conveyed by quitclaim deed to said Alice L. Irwin an undivided one-third of said real estate, which was recorded on the 26th of the same month, but that his wife did not join therein; that on the 24th of the same month, said Alice L. Irwin and husband reconveyed the same premises to said Paul-

sen by warranty deed, but that the same was not recorded until February 4, 1887; that by reason of said reconveyance Alice L. Irwin had title to but one undivided one-third of said real estate at the time she executed said mortgage to complainant, and that the same is a valid lien upon said one-third, subject only to a lien of the United States Mortgage Company, (being the mortgage mentioned in said agreement made by Augusta Paulsen.) The prayer is for a decree of foreclosure, etc.

The joint answer of Alice L. Irwin and her husband admits the conveyance to Alice L. by William A. Paulsen, and the reconveyance by her and her husband as alleged in the bill, and the execution of said mortgage, but alleges that no consideration moved to or from them in connection with any of said conveyances, but that they were made for the accommodation of said Paulsen solely. They further aver that the quitclaim deed from Paulsen to Alice L., and the reconveyance to him, the recording of the first and failing to record the second, was a scheme of said Paulsen to cover up his own one-third interest in said property, and that, upon his representation that they could execute said mortgage without in any way affecting the one-third interest of said Alice L. in her own right, they, the defendants, executed the same, understanding and intending to thereby convey only the interest of said Paulsen; that complainant knew that it was so understood and intended, and consented thereto. The answer of William A. Paulsen admits the execution of the notes and mortgage described in the bill, but denies that the latter was intended to be a lien upon any other than his interest in said real estate. He denies that the complainant performed on her part the agreement set up in the bill, and denies that he is legally indebted to her on either of said notes. He also filed a cross bill, in which he sets up at great length transactions alleged to have been had between himself and appellee prior to the date of the agreement set out in the bill, and avers that at the time it was entered into he and appellee made another agreement by parol, which was, on the 11th day of November following, reduced to writing, a copy of which is attached to and made a part of his cross bill, as follows: "Memorandum of agreement made between William A. Paulsen and Flora A. Brown, both of Cook county, Illinois, to wit: In consideration of a desire to protect the interests of my nephew, the said William A. Paulsen, against harm or loss in the matters now in dispute between him and his sister, Alice L. Irwin, growing out of mortgages or trust deeds executed by her to secure notes of said Paulsen to me; and in further consideration of said Paulsen promising speedy payment of the note secured on the Lake View farm, known as the 'fourteen acres;' and because of verbal agreement heretofore made between us, as an inducement to said Paulsen to make the settlement heretofore made of matters in dispute between us, in which verbal agreement said Flora A. Brown agreed to give said Paulsen every aid in her power to carry on the lit-



igation of said Paulsen against Manske and others, and, in case of his ultimate defeat, to assist him in borrowing money to pay any decree rendered against him in said litigation, and wherein said Flora A. Brown had further agreed to hold the large note of said Paulsen until its maturity, then give it gratis to said Paulsen, or provide for its payment or cancellation in her will, in case of death, and because of a fear that such will might not hold good, or of a serious complication with her sister on account of the said mortgage executed by her and her husband to secure said large note,—it is agreed that said Flora A. Brown, her heirs, administrators, or assigns, are to execute a lawful, proper release of said mortgage, executed by the said Alice L. Irwin and Fairfax Irwin, her husband, bearing date June twenty-fifth, 1886, (25th, 1886,) and recorded in book 1,949, recorder's book, page 315, on the eleventh of August, 1886, and conveying the undivided one-third of the south thirty (30) feet of lot six, (6,) and the undivided one-third of lots seven (7) to twelve, (12,) inclusive, all in Edison's subdivision of lot eleven, (11,) in North addition to Chicago; also the undivided one-third of lot one, (1,) in block A, County Clerk's division of lands lying between the west line of North Clark street and the east line of said North addition, upon demand of said Paulsen, whenever it shall appear that he will suffer loss unless same is released. It is agreed by both parties hereto that the said small note shall be paid and mortgage released within six (6) months from this date, and this agreement shall be kept secret until its use becomes necessary for the purpose above set forth. Witness our hands and seals on this 11th day of November, A. D. 1886.  
 [Signed] Flora A. Brown. [Seal.]  
 [Signed] William A. Paulsen. [Seal.]  
 Attest: [Signed] Edward J. Judd."

To this cross bill appellee filed her answer, and among other things denied that she made last-mentioned agreement, or in any way or manner authorized the making of the same, but avers that the same shows upon its face that it was without consideration and of no effect. Replications to the several answers having been filed, the cause was heard upon the pleadings and proofs, and a decree entered as prayed in the original bill, the cross bill being dismissed at the cost of the complainant therein. That decree was affirmed by the appellate court.

Black & Fitzgerald and Clifford & Brown, for appellants. F. J. Crawford, for appellee.

WILKIN, J., (after stating the facts.) Upon the errors assigned two grounds of reversal are urged, viz.: First, the superior court erred in dismissing the cross bill, and, second, in holding the interest of Alice L. Irwin in the land described in the bill, subject to the lien of said mortgage. To have sustained the cross bill the complainant therein would have been required to establish by a preponderance of proof that the agreement therein set forth of November 11, 1886, was entered into by

appellee as alleged. The evidence on that subject is conflicting, but we think the weight of it is against the allegations of the bill. The writing upon its face purports to evidence a most singular and unusual business transaction, and is not calculated, in and of itself, to impress the legal mind with its genuineness. Appellee swears positively that she did not execute it, and it is quite satisfactorily shown by her own evidence and that of other witnesses that, at the time it purports to have been entered into, she was not in Chicago, where it appears to have been signed and acknowledged. Counsel for appellants say that fact does not disprove its execution, because the true date of the agreement may have been another than that written. Presumably it was executed, if at all, on the day it bears date. No one says it was not, and the notary's certificate relied upon in part to prove its execution expressly states that it was signed and acknowledged on that day. There are other facts in proof tending to corroborate appellee, and we think the finding of the chancellor in her favor on the issue as to the genuineness of said agreement is in accordance with the weight of the evidence. The contract, even if its execution had been proved, would not, under the evidence in this record, entitle the complainant in the cross bill to the relief prayed. According to its terms, appellee only agreed to release said mortgage upon demand of said Paulsen, whenever it should appear that he would suffer loss unless the same was released. The indebtedness, to secure which the mortgage was given, is shown by the evidence to have been an actual, existing debt due from said Paulsen to appellee, and all that this bill seeks to do is to enforce payment of that indebtedness. How then can it be said that he will in a legal sense suffer loss? We are also of the opinion that the writing shows no sufficient consideration for the agreement. The cross bill was properly dismissed.

On the second point, it must be conceded that the mortgage purports to convey the one-third interest in the mortgage premises owned by Alice L. Irwin in her own right, there being nothing therein to show that she intended to convey the interest of any other person. When she made the mortgage she held the title to but one undivided one-third interest in the premises. Long prior thereto she had reconveyed to William A. Paulsen all the title she had previously received from him. It is true that reconveyance had not been recorded but no one will deny that the title passed by the execution and delivery of the deed as effectually without its being recorded as with it. It must be presumed, in the absence of proof to the contrary, that Mrs. Irwin knew this, and therefore that she mortgaged her own interest, knowing that she could legally mortgage no other. Prior to the 25th of June, 1886, the title to William A. Paulsen's interest in the mortgaged premises had been deeded back to him, and yet on that day he deliberately contracted with appellee that Mrs. Irwin and her husband

"should execute a mortgage on the undivided one-third," etc. He certainly knew at that time that Mrs. Irwin could not legally mortgage his interest in said premises. The only ground, then, upon which it could be successfully contended that the mortgage in question did not in equity convey the interest of Mrs. Irwin would be that, availing himself of the fact that the reconveyance to him had not been recorded, William L. Paulsen by fraudulent representations induced his sister to believe, as she states in her answer, "that she and her husband could execute such mortgage without in any way affecting the one-third she inherited from her mother;" and that appellee so far participated in such fraud or consented thereto as to be bound by the same. It is clear that such a fraudulent representation would not be, in law, one upon which a party would have a right to rely, and therefore it could not be made the basis of a prayer for relief in equity. But the evidence in this record wholly fails to connect appellee with any such fraud. All that Mrs. Irwin claims in her testimony is that appellee's attorney told her that the mortgage would cover only the interest of Paulsen, and this the attorney denies. The complainant below made a case entitling her to the decree rendered by the introduction in evidence of the notes and mortgage described in her bill, and we think it clear that no sufficient evidence was offered by the defendants to overcome that case. The judgment of the appellate court will be affirmed.

(146 Ill. 169)

**DEXTER v. HARRISON.**

(Supreme Court of Illinois. May 9, 1893.)

**SLANDER—EVIDENCE—HARMLESS ERROR.**

1. In an action for slander, a witness, who had testified that the defendant uttered the words set out in the declaration, stated that the conversation referred to the plaintiff, and that he knew that defendant was talking about the plaintiff. *Held* sufficient proof that the slanderous words were spoken of the plaintiff.

2. Where the slanderous charge is of an aggravated character, and was false, and made in malice, a judgment for the plaintiff will not be reversed for the error of the court in refusing to allow defendant to ask a witness, on cross-examination, whether he ever had a conversation with the plaintiff in regard to the matters testified to by him, and in allowing the plaintiff to show the number of persons composing her family, that she was an orphan, and that the defendant had insulted her brother, her sister, and herself.

Appeal from appellate court, first district.

Action on the case by Callie S. Harrison against Albert J. Dexter. Plaintiff obtained judgment. Defendant appeals. Affirmed.

Abbott & Baker, for appellant. Dabms & Langworthy, for appellee.

**CR AIG, J.** This was an action on the case for slander brought by Callie S. Har-

rison against Albert J. Dexter. Without repeating the words averred in the declaration to have been spoken, it was in substance averred that the defendant falsely accused the plaintiff of unchastity. To the declaration the defendant pleaded the general issue, and, on a trial before a jury, plaintiff obtained a verdict for \$5,000. A remittitur of \$2,500 was entered, and judgment rendered by the court for the remainder. On appeal to the appellate court the judgment was affirmed.

It is claimed by appellant, as ground for reversing the judgment, that the record contains no legal evidence tending to show that the words alleged to have been spoken were spoken of or concerning the plaintiff. But one witness, M. D. Bunn, was called to prove the speaking of the words alleged in the declaration. The witness testified: "Knew the parties. Had conversation with the defendant in October, 1889, on Dearborn street. I think the first conversation had or words uttered was by Dr. Dexter, (the defendant,) who asked me if I had been making a statement to Mr. McCloury, another attorney here in Chicago, relative to him. After listening to him for a few moments, I told him that I had never mentioned his name to Mr. McCloury to my knowledge. He claimed that I did. Then the conversation turned upon the divorced wife, the plaintiff. In speaking of her he used the language uttered by the complainant. Question. State what was said." Then follow the words set out in the declaration. On cross-examination the witness, in answer to the following question, "Was the name of the plaintiff mentioned?" said, "My impression is it was mentioned." In answer to a further question the witness said: "I will not state. Certainly, I knew he was talking about her." This evidence refutes the position of counsel that the witness merely stated his conclusion that the defendant was speaking of the plaintiff. The witness, after giving the conversation between the defendant and himself when they first met, relating to another subject, then in plain language said the conversation then turned upon the divorced wife, the plaintiff. This is not the conclusion of the witness, but the statement of a fact which he knew. If the witness was not stating a fact, but merely giving an opinion that the words spoken by the defendant referred to the plaintiff, on cross-examination the defendant had a full opportunity to set the matter at rest. But a reference to the cross-examination confirms rather than deducts from the evidence given in the examination in chief. But if the witness had testified that he understood from the language used by the defendant that he was speaking of the plaintiff, under the rule established in *Nelson v. Borchenius*, 52 Ill. 236, the evidence was competent. There, after reviewing the authorities bearing on the question, in conclusion, the court said: "Greenleaf, in the second volume of his Evidence, (section 417,) says, from the nature of the case, witnesses must be permitted in these cases to state to some extent their opinion, conclusion, and belief: leaving the grounds of it to be inquired into on cross-examination."

<sup>1</sup>Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

We are satisfied this is the true rule, and in accordance it has been the general practice in this state on the authority of what was said in *McKee v. Ingalls*, 4 Scam. 33."

It is next claimed that the court erred in sustaining an objection to a question asked witness Bunn on cross-examination, if witness had ever had any conversation with plaintiff in reference to the conversation testified to. We think this question was proper on cross-examination, and the court ought to have permitted an answer. But, suppose the witness had a conversation with the plaintiff, that fact could have no special bearing on the question involved in this case, and, unless the defendant was injured in some manner by the ruling, the judgment should not on that account be reversed. A sister of the plaintiff, Lucia Harnsen, testified, over the objection of the defendant, as to the number of persons composing the family, that the father and brother were dead, and that the defendant had insulted her brother. She also testified that defendant, on certain occasions, had been guilty of disorderly conduct by "calling out" to her and the plaintiff in the street. This testimony was not admissible. Who composed plaintiff's family, how many were dead or living, was foreign to any issue in the case. The insults in the streets testified to were also incompetent evidence. A repetition of the slanderous words averred in the declaration may be proved in aggravation of damages, as held in *Hatch v. Potter*, 2 Gilman, 725, but this issue did not fall within that rule. But while this evidence was not admissible unless its admission was prejudicial to the defendant, the judgment ought not to be reversed. The charge that the defendant made against the plaintiff, who had formerly been his wife, was one of an aggravated character, one made in malice, and without the semblance of truth. The plaintiff's right of recovery was therefore beyond question, and, while slight errors have intervened, we do not regard them of sufficient magnitude to authorize a reversal of the judgment. It will, then, be affirmed.

(146 Ill. 421)

GOODWIN et al. v. BISHOP et al.<sup>1</sup>

(Supreme Court of Illinois. May 6, 1893.)

EQUITY PLEADING—ANSWER—USURY—EXCEPTIONS  
—MORTGAGE—FORECLOSURE—SOLICITOR'S FEES  
—PRACTICE.

1. In a suit to foreclose a trust deed, an answer that defendants "did not, nor did either of them, receive the full sum of \$5,000 from said complainants at the time of making said loan, nor at any time, nor did they receive any money at the date of said notes and trust deed, and so these respondents say that the amount claimed by said complainants is largely tainted with usury," is not sufficiently definite as a charge of usury.

2. Where an answer is not under oath, exceptions thereto will not lie, since an unverified answer is not evidence. *Supervisors of Fulton Co. v. Mississippi & W. R. Co.*, 21 Ill. 366, followed.

3. Money deducted from a mortgage loan, and paid to attorneys, at the mortgagor's request,

for examining the title to the mortgaged property, and money deducted therefrom, and paid as commission to the agent who secured the loan for the mortgagor, do not constitute usury.

4. It is proper to allow a solicitor's fee of \$250 for foreclosing a \$5,000 mortgage, where the mortgage expressly provides for a 5 per cent. solicitor's fee.

5. Where the court modifies a master's report in a foreclosure suit by deducting an item from the amount found due, it is proper for the court to compute interest that has accrued since the date of the report, and add it to the findings, without referring the case back to the master.

Appeal from appellate court, first district.

Bill by H. E. Lowe and E. F. Bayley against Caleb Goodwin and Elizabeth Goodwin to foreclose a trust deed. By amendment to the bill, Alexander Bishop was made party complainant. There was a decree of foreclosure, which was affirmed by the appellate court. Defendants appeal. Affirmed.

Lyman M. Paine, for appellants. Marston, Augur & Tuttle, for appellees.

CRAIG, J. This was a bill in equity, brought by H. E. Lowe, trustee, and E. F. Bayley, successor, to foreclose a certain trust deed executed by Caleb Goodwin and Elizabeth Goodwin to secure seven promissory notes, made payable to themselves, and indorsed to Alexander Bishop,—one note for \$5,000, due in three years after date, and six interest notes for \$175 each. The note of \$5,000 was given for a loan of that amount of money loaned by Bishop to Goodwin, and the defense attempted to be set up in the answer was that the transaction was usurious. The answer, setting up usury, is as follows: "And these respondents say that they did not, nor did either of them, receive the full sum of \$5,000 from said complainants at the time of making said loan, nor at any time; nor did they receive any money at the date of said notes and trust deed, and so these respondents say that the amount claimed by said complainants is largely tainted with usury." If a party to a bill in equity desires to set up and rely upon the defense of usury, he must allege the facts showing wherein the usury consists. A general charge of usury in an answer is not sufficient. *Mosier v. Norton*, 83 Ill. 519. The allegation of the answer may be true, and it by no means follows that the contract between the parties was usurious. The gist of the answer is that the defendants did not secure the full sum of \$5,000, nor did they secure any money at the date of the notes. Suppose, however, the next day after the notes were executed, they secured \$4,999, and allowed the mortgagee to retain \$1 to pay for recording the mortgage, this would be in harmony with the facts disclosed in the answer, and yet usury could not be established in such a state of facts. Where the defense of usury is relied upon, the facts constituting the usury should, as a general rule, be clearly set up in the answer, and proved as alleged.

But it is said, if the answer was insufficient, the complainant ought to have filed

<sup>1</sup>Reported by Louis Boissot, Jr., Esq., of the Chicago bar.

exceptions. It is a rule of chancery practice, where an answer is defective, it must be excepted to; a demurrer is not allowable. *Stone v. Moore*, 28 Ill. 165. But, where the answer is not under oath, exceptions will not lie, because such answer is not evidence for the party making it. *Supervisors of Fulton Co. v. Mississippi & W. R. Co.*, 21 Ill. 366; *Brown v. Mortgage Co.*, 110 Ill. 238.

But, even if the answer was sufficient, we do not think that the evidence established usury. Bishop loaned Goodwin \$5,000, for three years, at 7 per cent. interest. Lowe testified that the money was disposed of as follows: "Out of this loan Mr. Goodwin received \$110.65 in cash. I paid Mr. Ward \$4,640.41 on May 8, 1889, to take up his mortgage on this property. I paid the taxes,—\$73.94. I paid Bayley & Waldo \$50, for examination of title, etc., by the direction of Mr. Goodwin, and Mr. Goodwin paid me a commission of \$125." These items make up the \$5,000 loaned by Bishop, and it will be borne in mind that, at the time the loan was made, 8 per cent. was a legal rate of interest. In order, therefore, to make out that a greater rate was exacted than 8 per cent., it was necessary to prove that Bishop or his agent received the \$50 and the \$125 mentioned by Lowe in his evidence. As to the \$50, it was paid by the direction of Goodwin to attorneys, for an examination of title to the property mortgaged; and under *Ammondson v. Ryan*, 111 Ill. 506, that was a legitimate transaction, and not usurious. As respects the other item, Goodwin paid that sum to Lowe, for his services in procuring the loan. Lowe did not secure the money for Bishop, nor did Bishop, so far as appears, have any knowledge that Lowe secured the money. If Goodwin has seen proper to pay money to Lowe for his services, that did not render the loan made by Bishop usurious. *Balinger v. Bouland*, 87 Ill. 513; *Cox v. Insurance Co.*, 113 Ill. 386.

The court allow a solicitor's fee of \$250, and this is claimed to be erroneous. The deed of trust contains a provision that, in case of suit or proceeding for foreclosure, the proceeds of sale shall, among other things, be applied to pay an attorney's fee of 5 per cent. upon the amount secured. Under this clause of the deed of trust, the court allowed the amount complained of, and we think the action of the court was fully authorized.

In computing the amount due on the notes, the master in chancery computed interest from the date of the notes, while it appeared from the evidence that the money was not paid over until a few days after the notes were executed. Objection being made, the court, on March 8, 1892, modified the report, and deducted \$11.72 for excess of interest computed. At the same time, as the amount found due by the master was computed only to the time the report was filed, November 30, 1891, the court added \$95, to make up the interest from November 30, 1891, to the date of decree, March 8, 1892. As interest had accrued after the report was filed, the court had the undeniable right to re-

fer the cause to the master to determine the amount then actually due, or the court could, if it saw proper, compute the interest without a reference. Either course might be pursued, and, as the court chose to pursue the latter, we perceive no objection to the action of the court. The judgment of the appellate court will be affirmed.

(145 Ill. 192)

**AMES & FROST CO. et al. v. STACHURSKI<sup>1</sup>**

(Supreme Court of Illinois. May 9, 1893.)

INSTRUCTIONS—NEGLIGENCE—INJURY TO EMPLOYEE.

1. An instruction in the following form: "Now come the defendants, by their attorneys, and request the court to instruct the jury that the evidence is insufficient to maintain the plaintiff's case as charged in its declaration, and therefore the verdict must be for the defendants,"—is sufficient in form to be given to the jury.

2. In an action for personal injuries by defendant's negligence, the evidence showed that plaintiff was a boy employed in defendant's shop, where there was a boring machine, whose cogwheels and gearing were protected only by an unfastened sheet-iron cover; that as plaintiff walked by the machine his foot slipped, the floor being slippery, and he threw out his hand, striking and knocking off the cover, and injuring his hand in the cogs. *Held*, that the evidence justified a submission of the case to the jury.

Appeal from appellate court, first district.

Action by Frank Stachurski against the Ames & Frost Company and others. Plaintiff obtained judgment, which was affirmed by the appellate court. Defendants appeal. Affirmed.

Edwin Walker and Arthur J. Eddy, for appellants. Gibbons, Kavanagh & O'Donnell, for appellees.

BAILEY, C. J. This was an action on the case, brought by Frank Stachurski, a minor, by his next friend, against Charles L. Ames, Abel H. Frost, and the Ames & Frost Company, a corporation, to recover damages for a personal injury. The declaration alleges, in substance, that the defendants were possessed of a certain factory and the machinery therein, for the manufacture of spring beds; that the machinery used by the defendants for such manufacture was so constructed with cogwheels, that when left unguarded and uncovered, it became and was dangerous for children and persons of tender years to be permitted to work around, at, or near the same; that the plaintiff, a person of tender years, without knowing or appreciating the danger, was employed by the defendants to work in their factory, around, at, and near said machinery; that it was then and there the duty of the defendants to see that said machinery was properly guarded and covered, so that the plaintiff would not be exposed to danger, and to see that he was fully instructed in regard to such danger, and warned to avoid the same, yet the defendants, in utter disregard of their duty in that behalf, did not

<sup>1</sup>Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

see that said machinery was properly guarded and covered, and that the plaintiff was instructed as to the danger to which he was exposed, and warned to avoid the same; and that, by means of such carelessness and negligence of the defendants, the plaintiff, while in the employ of the defendants, and in the exercise of all due care and caution for his own safety, came in contact with and struck and fell against the cogwheels and gearing of one of the machines so used by the defendants, which was then and there improperly and insecurely guarded and covered, while the same was being operated by the defendants, and thereby the plaintiff's left hand was caught therein, and so severely crushed, bruised, lacerated, and wounded that it became necessary to amputate the same. The defendants pleaded not guilty, and at the trial, which was had before the court and a jury, the defendants, at the close of the plaintiff's evidence in chief, moved the court to instruct the jury to find for the defendants. This motion being overruled, the defendants proceeded to introduce evidence to maintain the issues on their part, and at the close of the evidence, as the record recites, they requested the court to give the following instruction: "Now come the defendants, by their attorneys, and request the court to instruct the jury that the evidence is insufficient to maintain the plaintiff's case, as charged in the declaration, and therefore the verdict must be for the defendants." But the court refused to instruct the jury as requested, and to such refusal an exception was duly preserved by the defendants. The jury then retired, and afterwards came into court with their verdict, finding the issues for the plaintiff, and assessing his damages at \$1,500. The defendants thereupon entered their motion for a new trial, basing their motion solely upon the following grounds: "First. The court erred in refusing to direct a verdict for defendants at the close of the plaintiff's testimony, as requested by the defendants. Second. The court erred in refusing a verdict for defendants at the close of all the evidence in testimony, as requested by defendants." But the court overruled the motion thus made, and rendered judgment in favor of the plaintiff for his damages as assessed by the jury, and for costs. To these rulings, also, the defendants duly preserved exceptions.

The only errors assigned in the appellate court or in this court are those which call in question the refusal of the trial court to instruct the jury to find a verdict for the defendants, and its refusal to award a new trial. There can be no doubt that, under the rule laid down in *Railway Co. v. Velie*, 140 Ill. 59, 29 N. E. Rep. 706, the request for an instruction, interposed by the defendants at the close of the plaintiff's evidence in chief, was waived and abandoned by their election to introduce evidence on their part, instead of abiding by their request as made. The ruling of the court on that request then cannot be assigned for error, and need not be considered.

The only question therefore open for discussion here arises upon the refusal of the court to instruct the jury, after all the evi-

dence was in, that the evidence was insufficient to sustain the plaintiff's case, and that their verdict should be for the defendants. We are unable to concur in the view which seems to have been adopted by the appellate court, to the effect that the instruction was not presented to the court, or requested in any form in which the court could properly have given it to the jury. It is true that it was prefaced by a recital that the defendants, by their attorneys, requested the court to instruct the jury, etc., but that recital does not seem to us to vitiate it as an instruction. Admitting it to be the rule, established by our statute in relation to written instructions, that it is not sufficient for counsel to request the court to instruct the jury upon a given point, even though he indicate the precise tenor of the instruction which he desires to have given, but that he must draw up and hand to the court the instruction itself,—a question upon which we do not now express any opinion,—we think the written request drawn up in this case, and presented to the court, contained all the elements of a proper written instruction to the jury to find a verdict for the defendants. If it had been given to the jury just as it was written, they could have been in no doubt as to its meaning, or its binding effect upon them. Although it was in form a request for an instruction, the court, if he had marked it "Given," and handed it to the jury, would thereby have said to them, in effect, "I instruct as requested;" and the jury would doubtless have so understood it. But we are of the opinion, in view of the evidence in the case, that the instruction was properly refused. The request for a peremptory instruction to find a verdict for the defendants, being in the nature of a demurrer to the evidence, operated as an admission on the part of the defendants, not only of every fact proved, but of every inference favorable to the plaintiff fairly arising from the evidence. And in determining the propriety of such request conflicting evidence cannot be considered. Conflicts in the evidence are proper matters for the jury, and cannot be settled by the court on demurrer. If, then, there was any evidence in the case, having a substantial tendency to sustain the plaintiff's cause of action, it was the duty of the court to submit it to the jury. The evidence shows that the plaintiff, at the time he was injured, was a boy about 16 years of age, and that he then had been working for the defendants about 3 years. There were at the time in the defendants' shop two boring machines and five matchers and stickers. The plaintiff was working on one of the boring machines, his machine being about 12 feet from the matcher, in the gearing of which his hand was caught and injured. The cogwheels and gearing of that machine were covered and protected only by a sheet-iron cover, which was set over them, but not fastened, and liable to be knocked off or moved out of place by anything hitting or pushing against it. The evidence tends to show that, just prior to the injury, the plaintiff and a boy with whom he was working went out and got a truck, and

placed it by the boring machine which they were working. While it was standing there, one of the boys who were working the other machine came over and stole one of the stakes out of the plaintiff's truck, and carried it off, and slipped it under his machine, which was standing between two of the matchers. The plaintiff thereupon followed the boy who had taken away the stake, going, as he testified, not on a run, but on a fast walk. The place where the stake had been put was about three feet from the matcher, and, as the plaintiff was near the matcher, the floor at that place being slippery, his foot slipped, and he threw out his hand, and hit the cover over the cogwheels, knocking it off, and catching his hand on the cogs, and thereby receiving the injury complained of. We think it clear that this evidence tended to show negligence on the part of the defendants in the matter of adequately guarding and covering the gearing of the matcher, so as to make it reasonably safe for employees who might, in the performance of their duties, have occasion to be in the vicinity of that machine. It cannot be doubted that if the cover over the cogwheels had been fastened in some way, as it probably might have been, the injury to the plaintiff would not have happened. It was therefore a fair question for the jury whether the cogwheels were so protected as to furnish the employees of the defendants a reasonably safe place in which to do their work. The slippery condition of the floor at that point is also to be considered in the same connection. It is true that the defendants' conduct in allowing their floor to become slippery at that point is not charged in the declaration as negligence, and it cannot therefore be relied upon as a substantive ground for recovery. But it is manifestly a circumstance to be taken into account in determining whether the defendants exercised due care in covering and guarding their machinery. If by reason of the slippery condition of the floor there was greater danger of employees losing their footing, and falling against the machine, there was greater occasion for care and diligence in so guarding the machinery as to make it safe for their workmen to be about it. But the principal contention, as we understand it, is that the evidence establishes contributory negligence on the part of the plaintiff of such a character as should be held to bar his right to recover. If he were proved to have been guilty of negligence per se, and which could be pronounced such as a legal conclusion, and not as a mere deduction from the evidence, there might be much force in the contention. But whether he was negligent or not was a question of fact, and there is no such clear and indisputable evidence of negligence contributing to the injury as would have justified the court in holding that negligence was proved, and in instructing the jury on that basis. The matter was properly left to the jury to be determined as a question of fact. There was no contention in either the circuit or appellate court that, if the evidence was sufficient to require a submission of the case to the jury, their finding was not

justified. The only point made on motion for a new trial, or in the appellate court, or here, is that the trial court erroneously refused to take the case from the jury, and direct a verdict for the defendants. As that point, in our opinion, is not well taken, and as no other error is assigned, it follows necessarily that the judgment of the appellate court must be affirmed.

(145 Ill. 127)

# NORTHWESTERN BREWING CO. v. MANION.<sup>1</sup>

(Supreme Court of Illinois. May 9, 1893.)  
REVIEW ON APPEAL—ACTION FOR RENT—RES  
JUDICATA.

1. Under 2 Starr & C. St. c. 110, § 88, which provides that findings of fact made by the appellate court shall be final, the only question to be determined by the supreme court upon appeal from a judgment based on findings made by the appellate court is whether the facts found justify the judgment.

2. In an action for rent, a finding that plaintiff and defendant executed a lease providing for rent at a specified rate; that defendant entered into possession under the lease, and paid rent for four months; that he failed to pay rent for the next two months; that he was sued therefor, and defended the suit on the same grounds set up in the present suit, and that judgment was rendered against him, which is still in full force,—is sufficient to justify a judgment against the defendant for rent for the residue of the term.

Appeal from appellate court, first district.

The facts fully appear in the following statement by CRAIG, J.:

This was an action of debt brought by John Manion, the appellee, in the superior court of Cook county against the Northwestern Brewing Company on a lease to recover several installments of rent claimed to be due thereon. To the declaration the defendant pleaded nil debit and several special pleas, upon which issue was formed. The parties by agreement waived a jury, and a trial was had before the court, and upon the evidence introduced the court found the issues for the plaintiff as follows: "That the defendant owes and is indebted to the plaintiff in the sum of \$21,280, and assess the plaintiff's damages at the sum of \$2,300. Thereon judgment was entered as follows: 'That the plaintiff do have and recover of and from the defendant his said debt of \$21,280; also his said damages of \$2,300, in form as aforesaid by the court found due and assessed, together with the costs and charges. It is further ordered that said debt be discharged upon the payment of the damages, interest thereon, and costs of suit.'" The defendant appealed to the appellate court, where the judgment was reversed, and the following judgment entered: "It is further adjudged and considered by the court, from the facts found from said transcript of record, that appellee should have judgment entered in his favor in this court against appellant for the several installments of rent declared for in his declaration in this cause, and amounting, as herein found by the

<sup>1</sup>Reported by Louis Boissot, Jr., Esq., of the Chicago bar.

court, to the sum of twenty-four hundred (\$2,400) dollars, as his debt, together with lawful interest thereon up to the present time, amounting to the sum of two hundred and sixty-six (\$266) dollars, as his damages for the detention of his said debt. It is therefore considered and adjudged by the court that the said John Manion, appellee, do have and recover of and from the Northwestern Brewing Company, appellant, the sum of two thousand six hundred and sixty-six (\$2,666) dollars, in form as aforesaid found due, together with his costs in this behalf expended, to be taxed, and that he have execution issued by the clerk of this court therefor." Upon the reversal of the judgment the appellate court made a special finding of facts, and incorporated the facts as found in its final judgment, as follows: "That by a certain indenture of lease and agreement in writing dated the 27th day of March, A. D. 1890, duly executed and delivered by appellant to appellee, in and by which said indenture of lease and agreement in writing appellant, in consideration of the demising and leasing by appellee to appellant of certain premises in the city of Chicago, county of Cook, and state of Illinois, and known and described as follows, to wit, 'the first floor of a part of the premises situate and known as No. 7 Dearborn street,' from the 1st day of April, A. D. 1890, to the 30th day of April, A. D. 1901, appellant covenanted and agreed to pay appellee as rent for said demised premises the sum of twenty-one thousand two hundred and eighty (\$21,280) dollars for said term, payable in monthly installments of one hundred and sixty (\$160) dollars each for each month of said lease, in advance, upon the 1st days of each and every month of said term of lease aforesaid. That appellant entered upon said lease, and paid to appellee the installments of rent reserved in said lease for the months of April, May, June, and July, A. D. 1890, and that appellant made default in the payment to appellee of the installments of rent reserved in said lease for the months of August and September, A. D. 1890; and that appellee, at the October term, A. D. 1890, of the superior court of Cook county, Illinois, pleaded appellant in an action of debt to recover from appellant the said installments of rent reserved in said lease for the months of August and September, A. D. 1890; and that appellant was duly summoned, appeared to and pleaded in such action, and defended against a recovery and judgment against it, the appellant, in said action, and alleged and gave evidence and insisted on the trial of said cause that before said September, A. D. 1890, installment of rent accrued and was due upon said lease; that appellant had, by the fault of appellee, been evicted from said premises in said indenture of lease mentioned, and that appellant had surrendered up said premises to appellee, and that said indenture of lease was not the deed of appellant; and that thereupon such proceedings were had in said cause as that afterwards, to wit, at the November term, A. D. 1891, of said superior court, a judgment was rendered by said superior court against appellant for the sum of three hun-

dred and twenty (\$320) dollars, being for the said August and September, A. D. 1890, installments of rent due and accruing under and by virtue of said indenture of lease aforesaid, and which said judgment of the said superior court still remains unreversed. The court further finds from the evidence in said transcript of record in this cause that the several defenses of non est factum, eviction, and surrender which were interposed and are pleaded and set forth in the several pleas of appellant in this cause in bar of a recovery and judgment against appellant for the several installments of rent sued for in this action are, and each of them are, the same matters and defenses in fact which were theretofore interposed, tried, litigated, and determined against appellant in the said suit in the said superior court brought by appellee against appellant to recover from appellant the said August and September, A. D. 1890, installments of rent aforesaid, and which resulted in a judgment against appellant at the November term, A. D. 1891, of the said superior court, aforesaid, and that the several defenses of non est factum, eviction, and surrender, pleaded and set forth in the several pleas of appellant in the present action, became and were merged in the same judgment so rendered as aforesaid against appellant for the recovery of said August and September, A. D. 1890, installments of rent aforesaid, and that appellant is precluded and estopped from setting up said defenses in bar of this action. The court further finds that at the time of the commencement of the present suit by appellee in the court below there was and is now due and owing from appellant to appellee, under said indenture of lease aforesaid, the installments of rent for the months of October, November, and December, 1890, and the months of January, February, March, April, May, June, July, August, September, October, November, and December, 1891, amounting to the sum of twenty-four hundred (\$2,400) dollars, and that the same is due and unpaid, and that appellant is owing to appellee several installments of rent last mentioned, and that appellee is entitled to recover from appellant said installments of rent, amounting to \$2,400, with interest at 5 per cent. from time each installment became due under the lease, amounting to \$266."

Knight & Brown, for appellant. Nelson Monroe, for appellee.

CRAIG, J., (after stating the facts as above.) As appears from the foregoing statement, the appellate court reversed the judgment of the superior court, and incorporated in its judgment a finding of the facts. Section 88 of the practice act (2 Starr & C. p. 1842) provides: "If any final determination of any cause as specified in the preceding sections shall be made by the appellate court as the result wholly or in part of the finding of the facts concerning the matter in controversy, different from the finding of the court from which such cause was brought by appeal or writ of error, it shall be the duty of such appellate court to rectify in its final order, judgment, or decree the facts as



found, and the judgment of the appellate court shall be final and conclusive as to all matters of fact in controversy in said cause." Under this section of the statute we are not at liberty to review the facts found by the appellate court, and incorporated in its final judgment, but the judgment of the appellate court is conclusive as to all matters of fact in controversy in the case. The only question to be determined is whether the judgment, conceding the facts as found to be correct, was authorized by the facts as found by the appellate court. Upon this question there can be no ground of controversy. From the finding it appears a lease was executed by the parties providing for the payment of rent at a specified rate and at a specified time; that appellant entered into possession of the premises under the lease; paid rent for four months; that appellant failed to pay rent for August and September, 1890; that he was sued by appellee in the superior court of Cook county for the rent thus due; that appellant appeared and defended the action, setting up the same defenses relied upon in this action; that the evidence was heard, and a judgment rendered against appellant, which is still in full force. The court also found that at the time of the commencement of this action there was due and owing from appellant to appellee on the lease the amount for which a judgment was entered. These facts fully sustain the judgment of the appellate court.

It is claimed in the argument of counsel that the court erred in denying his application to exclude plaintiff's evidence from the court after plaintiff had closed his case. Where the appellate court reverses the judgment of the circuit court, and incorporates a finding of facts in its judgment, as was the case here, we can only look to the facts as found by the appellate court. Regarding, therefore, the facts incorporated in the judgment of the appellate court as the facts established by the evidence before the superior court, the superior court did not err in overruling the demurrer of appellant to the evidence, as it was sufficient to authorize judgment for the plaintiff.

It is also claimed that the damages are excessive. We have carefully examined the facts found by the appellate court, and, without setting out these facts in detail, it is sufficient to say that, in our opinion, the amount of the judgment is fully sustained by these facts.

It is also claimed that the superior court admitted improper evidence. No error in this regard has been pointed out in the argument, and we have discovered none. The judgment of the appellate court will be affirmed.

(145 Ill. 115)

SAUR v. FERRIS et al.<sup>1</sup>

(Supreme Court of Illinois. May 9, 1893.)

SPECIFIC PERFORMANCE—EQUITY PRACTICE.

Where, in a suit for specific performance of a contract for the sale of land, it appears

<sup>1</sup> Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

that the vendor had conveyed the land to an innocent third person, and that the vendee knew that fact before he began his suit, it is proper for the court to dismiss the suit altogether, leaving the vendee to his remedy at law for damages.

Appeal from circuit court, Cook county; O. H. Horton, Judge.

Bill by Prudence B. Saur against U. B. Ferris and others to enforce specific performance of a contract for the sale of land. Bill dismissed. Complainant appeals. Affirmed.

Rich & Stone, for appellant. Ira W. Buell, for appellees.

BAILEY, C. J. This was a bill in chancery, brought by Prudence B. Saur against Uriah B. Ferris, Robert A. Brown, and Charles H. Jackson, to enforce the specific performance of a contract entered into by Brown, through Ferris, as his agent, for the sale and conveyance to the complainant of a lot of land situate on the northeast corner of Seventy-Eighth street and Bond avenue, Chicago. The defendants appeared and answered, and, the cause being heard on pleadings and proofs, a decree was rendered dismissing the bill at the complainant's costs for want of equity. To reverse that decree the complainant has now brought the record to this court by appeal.

The facts appearing by the pleadings and proofs are these: Brown, who is a resident of Denver, Colo., being the owner of the property in controversy, and being desirous of making a speedy sale of it, employed and authorized Ferris, who resided near the property, and also the firm of Bowes & Cruickshank, real-estate dealers doing business in Chicago, to sell it. In March, 1889, at very near the same time, each of these agencies negotiated a contract for the sale of the property, and executed to the respective purchasers a memorandum of the sale in writing. Bowes & Cruickshank sold to Jackson, and Ferris to the complainant. The memorandum given by Bowes & Cruickshank to Jackson bore date March 9, 1889, and was placed on record March 16, 1889, while the one given by Ferris to the complainant, and which she now seeks to have specifically enforced, bore date March 12, 1889, and was placed on record March 18, 1889. That memorandum was as follows: "Windsor Park, Ills., Mch. 12, 89. This memorandum is to say that I, Uriah B. Ferris, as agent of R. A. Brown, agrees to sell, and Prudence B. Saur agrees to buy, lot on the N. E. corner of Bond avenue and Seventy-Eighth street, having frontage of 137 feet on Bond and 100 feet on Seventy-Eighth, for the sum of two thousand dollars (\$2,000) cash, paying as earnest money the sum of \$100, and balance, \$1,900, in thirty days, or as soon as the abstract and deed can be furnished. If the second party should fail, the said earnest money to be retained as liquidated damages, and, if first party should fail, the said earnest money to be returned. To retain permission to remove the sand when sidewalk is to be laid. Uriah B. Ferris, Agent. P. B. Saur." Brown, on being informed of what his



agents had done, took such measures as he could to ascertain which purchaser was entitled to priority, and also endeavored to have the matter compromised between them. Being unable to get the matter settled, and being informed, after diligent inquiry, that Jackson's contract had priority both as to the time of its actual execution and as to the date of its being recorded, he executed a deed, bearing date June 21, 1889, conveying the property to Jackson. On the 19th day of September, 1889, which was nearly three months after this conveyance was made, and after the complainant had constructive, and, as we think the evidence tends to show, actual, notice of its execution, the present bill was filed.

The principal controversy at the trial, so far as the facts were concerned, was upon the question whether the contract of sale with Jackson was prior in point of time to the complainant's contract, the contention being that Boies & Cruickshank, having learned of the sale made by Ferris to the complainant, sold the property to Jackson, and, to give their sale the appearance of priority, dated it back to a day prior to the sale to the complainant. We have examined the evidence with care, and, while there may be some circumstances sufficient to furnish a reasonable foundation for a suspicion that the Jackson contract was dated back, yet we are of the opinion that the strong preponderance of the evidence is the other way. At all events, no tenable ground is shown for setting aside the finding of the chancellor, who saw and heard the witnesses, and who was, consequently, in a better position to judge of their relative credibility than we can be. Assuming, then, that the chancellor was correct in his findings as to the facts, it is manifest that no case is made out for the specific enforcement of the complainant's contract. Jackson's purchase being prior in point of time, his equitable right to a conveyance was paramount, and Brown, having conveyed to him, as he was both legally and equitably bound to do, cannot be compelled to convey to the complainant. Where it is out of the power of the defendant to perform the agreement, such fact necessarily constitutes a sufficient reason why the court should refuse to decree specific performance; that is, to enter a decree which would be nugatory, because of the impossibility of enforcing its execution. And this is the case although the defendant may have been in a situation to carry out the contract when he entered into it, but has afterwards deprived himself of the ability to do it by his own voluntary and wrongful act. If, for instance, A., after entering into a valid agreement to sell and convey land to B., should convey it to C., who is a bona fide purchaser for value and without notice, A., by depriving himself of the power to fulfill his agreement with B., deprives B. of the right to a decree for specific performance. *Wat. Spec. Perf.* § 125; *Pom. Spec. Perf.* § 294; *Fry, Spec. Perf.* § 969. And it is equally true where the incapacity to perform arises from a conveyance to another party, who, though having no-

tice of the complainant's contract, has the prior right to a conveyance. The refusal of the court to decree specific performance was therefore clearly right.

But it is contended that the court should have retained the bill for the assessment of damages. The rule is well settled that, where the defendant's incapacity to perform the contract, though caused by his own act, as by his conveyance to a bona fide purchaser, is known to the complainant at the time of bringing suit, the bill will not be retained for the assessment of damages, but will be dismissed, leaving the complainant to his legal remedy for their recovery. *Kennedy v. Hazelton*, 128 U. S. 667, 9 Sup. Ct. Rep. 202; *Doan v. Mauzey*, 33 Ill. 227; *Stickney v. Goudy*, 132 Ill. 213, 23 Sup. Ct. Rep. 1084. But the complainant insists that in point of fact at the time she filed her bill she had no knowledge that the premises had already been conveyed to Jackson. In her testimony she assumes to deny that she had such knowledge, either at the time of filing the bill or at date of the hearing; but, when her testimony is taken all together, her real meaning seems to be that she did not know or believe that a valid conveyance had been executed,—that is, a conveyance which would prevail as against what she supposed to be her paramount right. But in her bill she alleges that Brown had pretended to sell the premises to Jackson, and had pretended to surrender the same to the use of Jackson, his heirs and assigns, and that Jackson had been admitted upon such surrender; and then alleges that Jackson, at the time he paid the purchase money, had some notice of her equitable rights. These allegations, taken in connection with all the other evidence in the case, in our opinion fully warrants the conclusion that at the date of filing the bill the complainant had full knowledge that the premises had been conveyed by Brown to Jackson, so as to be placed beyond the reach of a bill for specific performance. We think the decree is sustained by the evidence, and it will therefore be affirmed.

(145 Ill. 92)

LAWRENCE et al. v. LAYTON et al.<sup>1</sup>  
(Supreme Court of Illinois. May 9, 1893.)

BROKER—SALE OF LAND—FRAUD.

A broker negotiated a sale of plaintiff's land to defendant, but had the deed made out to a third person, who afterwards conveyed to defendant. A few weeks after the sale defendant agreed to let the broker sell the land for him at an advance, the profits to be equally divided between them. Plaintiff did not know at the time of the sale that defendant was the purchaser, and there was then no arrangement or understanding between defendant and the broker as to any resale of the property or division of the profits. *Held*, that there was nothing in the transaction in fraud of plaintiff.

Appeal from circuit court, Cook county; O. H. Horton, Judge.

Bill by Otis R. Glover and Charles H. Lawrence against Reuben P. Layton and

<sup>1</sup> Reported by Louis Boiset, Jr., Esq., of the Chicago bar.

others to enforce a trust. Bill dismissed. Complainants appeal. Affirmed.

Marston, Augur & Tuttle, for appellants.  
Peckham & Brown, for appellees.

BAILEY, C. J. This was a bill in chancery brought by Otis R. Glover and Charles H. Lawrence against Reuben P. Layton, John A. Farwell, and Horace H. Norton, praying for a decree declaring that defendant Farwell held the title to certain land in trust for the complainants, and ordering its reconveyance to them, and for other relief. Defendants Layton and Farwell appeared and answered, and, the cause being heard on pleadings and proofs, a decree was entered dismissing the bill at the complainants' costs, for want of equity. From that decree the complainants have appealed to this court. The facts appearing by the record are in substance as follows: On the 20th day of July, 1886, Lawrence was the owner of a tract of land containing 19 acres, situate near the village of Washington Heights, Cook county, which he was desirous of selling. Glover seems to have had some interest in the land, but the nature and extent of his interest is not material. Layton was then a real-estate broker residing at Washington Heights, and was familiar with the values of real estate and with real-estate transactions in that neighborhood. He and Lawrence were well acquainted and on friendly terms. Shortly prior to the date above mentioned, Lawrence told Layton that he would sell his 19-acre tract for \$300 per acre, and Layton afterwards reported that he had found a purchaser at that price, the terms of sale to be, \$200 payable when the papers were signed, \$1,225 on the delivery of the deed, and the residue in three annual installments, secured by the notes of the purchaser and a deed of trust upon the premises conveyed. These terms were accepted by Lawrence, and it was agreed between him and Layton that the latter should receive \$200 as his commissions for making the sale. The name of the purchaser was given by Layton as Horace H. Norton, and Lawrence, as he claims, asked Layton who Norton was, to which Layton replied that he knew nothing about him except that he was engaged in the railroad business, although he was in fact an employe of the American Express Company, and was a relative of Layton. A contract of purchase and sale between Lawrence and Norton was thereupon duly signed, dated July 20, 1886, and in due time, the title having been examined and approved, Lawrence conveyed the land to Norton, and received the cash payments and the notes and deed of trust securing the residue of the purchase money. During the whole transaction there was no personal meeting between Lawrence and Norton, Layton having taken the notes and deed of trust which Lawrence had prepared to Norton, and obtained his execution of the same, and he himself delivered them to Lawrence, together with the money for the cash payments, in exchange for the deed. The real purchaser of the land was not Norton, but Farwell. Layton, as it seems, did not go to Norton

to sell the land, but to Farwell, and proposed to him to buy it. Farwell claimed that he did not have the necessary funds to pay the entire purchase money in cash, and that, being in the mercantile business, he did not wish to have his notes for purchase money outstanding. He accordingly consented to buy the property, if it could be so arranged as to enable him to furnish the money for the cash payments, and then take the title to the land subject to a mortgage executed by some other party for the deferred payments. Layton thereupon made arrangements with Norton to take the title in his name, and, after executing the notes and deed of trust for such payments, to convey the land to Farwell. This arrangement was carried out, Farwell furnishing the money for the cash payments, and the conveyance was made by Lawrence to Norton, and he, after executing to Lawrence the notes and deed of trust, deeded the land to Farwell. This latter deed expressed a consideration equal to \$450 per acre, but the actual consideration paid by Farwell was only \$300 per acre, a larger nominal consideration being inserted in the deed for the sole purpose of influencing the market price of the land when Farwell should wish to dispose of it. Farwell, as it seems, bought the land as a speculation, and the evidence shows that, within a few weeks after the purchase was consummated, he entered into an agreement with Layton, in substance, that Layton should take charge of the land for him and sell it, and that, in case of sale, Farwell should first be paid the full amount of his investment and 2 per cent. interest thereon, and that the profits, over and above the investment and interest, should be divided equally between him and Layton, the one-half of such profits to be received by Layton in full of his services and commissions for taking charge of and selling the property. At the time the decree was entered, Farwell, as the evidence tends to show, had paid all the purchase money notes executed by Norton, but no sale of the land had been made by him or Layton.

The theory upon which the bill is framed seems to be that Layton, though employed and acting as the agent of Lawrence, and that, too, upon an express contract as to his compensation for his services, was really purchasing the land in part for his own benefit, and that Farwell was not only cognizant of that fact, but actively aided him therein. It is sufficient to say that the evidence fails to support this contention. The fact that the deed from Norton to Farwell recited a much larger consideration than that for which Lawrence agreed to sell the land is fully explained by the evidence, it being shown, beyond controversy, that the actual consideration paid by Farwell was only \$300 per acre. But the ground set up by Lawrence in his bill, upon which his claim to relief is mainly based, is that Farwell bought the land in controversy in pursuance of an agreement between him and Layton, by which Farwell was to advance all the money necessary to pay for the land, and was to hold the title in trust for himself and Layton, and to ac-

count to Layton for one-half of the profits that might be realized from the transaction, Layton in the mean time to pay Farwell interest on one-half of the purchase money. It can scarcely be doubted that, if the case thus made by the bill were sustained by the proof, Lawrence would be entitled to relief. An agent, while in the employ of his principal, cannot act for himself in respect to the same matter, nor will he be permitted to make a profit for his own benefit out of the business which his principal employs him to transact, and, if he makes profits, he cannot hold them, but must account for them to his principal. Furthermore, if, in the purchase of the land in question, Farwell, knowing, as the evidence shows he did, that Layton was Lawrence's agent, entered into an arrangement with him to buy the land ostensibly for himself, but really for the joint benefit of himself and Layton, the transaction was such a fraud upon Lawrence as would enable him, on being apprised of it, to rescind the sale and reclaim the land. But the evidence fails to sustain the allegations of the bill in this respect. There is no evidence tending to show that, in negotiating the sale of the land, Layton reserved any profits to himself, beyond the agreed commission, or that there was any arrangement by which he acquired or was to have any interest in the land or the profits which should be realized upon its sale by Farwell. Farwell is the only witness who testifies on that subject, and he, being put upon the stand by Lawrence, testified that there was no arrangement between him and Layton, at the time he bought the land, by which Layton was to share in the profits which might be realized from its sale, or even a suggestion on Layton's part to that effect. He further testified that the arrangement by which Layton was to take charge of the land and sell it, and receive one-half of the net profits for his commissions, was entered into several weeks, and he thinks about two months, after the deed from Lawrence was executed. We are unable to see any impropriety in such subsequent arrangement. It was a matter with which Lawrence had no concern, and which would in no event prejudicially affect any interest of his. But it is urged that the arrangement, though subsequent to Farwell's purchase, was so close to it in point of time that it should be deemed to be a part of the same transaction. Its following so soon after the purchase may perhaps furnish some ground for a bare suspicion that it was contemplated by the parties at the time the negotiations for the purchase were in progress. But there is nothing in the evidence which would warrant the court in finding that such was the fact. Indeed, the evidence bearing upon the question is all the other way. We are unable to see that Lawrence was in any degree prejudiced by being kept in ignorance as to who the real purchaser of his land was. He received the price which he himself put upon the land, and it is not disputed that the sum thus paid him was at the time its fair cash value. Who the purchaser should be was a matter of indifference to

him, so long as the price which he asked was paid in full. We are of the opinion that the circuit court decided correctly in holding that the bill was not sustained by the evidence, and its decree dismissing the bill for want of equity will therefore be affirmed.

(145 Ill. 163)

ANDERSON v. OLIN et al.<sup>1</sup>

(Supreme Court of Illinois. May 9, 1893.)

MORTGAGE—FORECLOSURE—REDEMPTION—PLEDGE.

1. Where a mortgagee pledges the note and mortgage to secure a loan, and the pledgee forecloses the mortgage, making the mortgagee a party defendant, and obtains a decree foreclosing the rights of all the defendants, and the pledgee buys the property at foreclosure sale, and obtains a deed therefor, he holds title free from any right of redemption on the part of the mortgagee.

2. The fact that the mortgagee failed to defend the suit because he thought it related to other property does not give him any right to file a bill to redeem, where his mistake was not caused by any acts or representations of the pledgee.

Appeal from appellate court, first district.

Bill by Peter W. Anderson against Sven O. Olin and Andrew O. Lindblad. Defendants obtained a decree, which was affirmed by the appellate court. Complainant appeals. Affirmed.

Frank F. Reed, for appellant. Blanke & Chytraus, for appellees.

BAILEY, C. J. This is an appeal from a judgment of the appellate court affirming a decree of the superior court of Cook county sustaining a demurrer to a bill in chancery, and dismissing the bill at the complainant's costs for want of equity. The facts disclosed by the bill are substantially these: On the 8th day of January, 1888, Franz Wallenstein, being indebted to Peter W. Anderson, the present complainant, in the sum of \$1,245, executed to Anderson his four promissory notes,—three for the sum of \$366.66 each, and payable, respectively, in 12 months, 18 months, and 2 years after date; the fourth note being for \$145, and payable on or before 18 months after date; all bearing interest at the rate of 8 per cent. per annum, payable semiannually. To secure the payment of these notes, Wallenstein and wife on the same day executed to Andrew O. Lindblad, as trustee, a trust deed conveying certain premises in Cook county. On the day on which these papers were executed Anderson borrowed of Sven O. Olin the sum of \$366, promising to repay the same on demand, and as collateral security for such payment assigned and pledged to Olin the three notes for \$366.66 and the deed of trust. On the 4th day of August, 1888, Anderson borrowed of Olin the further sum of \$30, payable on demand, and agreed that Olin should hold the three notes and deed of trust as security for that loan also. It subsequently appeared that Samuel Chandler had become and was the

<sup>1</sup> Reported by Louis Boiesot, Jr., Esq., of the Chicago bar.

owner and holder of the note for \$145. By the terms of the deed of trust the party secured was at liberty to pay the taxes on the mortgaged premises, the same, when so paid, to become a charge upon the premises additional to the notes secured; and it was also provided that a solicitor's fee of \$50 should be allowed the complainant's solicitor in case of foreclosure. Default having been made by Wallenstein in the payment of the note for \$366.66 first falling due, and of the interest on all of the notes, Olin, acting under a provision in the deed of trust giving him power so to do, declared all of the notes due and payable, and afterwards, on the 23d day of March, 1889, he filed his bill in the circuit court of Cook county to foreclose the deed of trust. To that bill Anderson, Wallenstein and wife, Lindblad, the trustee, Chandler, the holder of the note for \$145, and others, were made parties defendant. The bill prayed for an accounting; for a decree requiring Wallenstein to pay into court for the use of Olin and such other parties as might appear to have an interest therein whatever sum should be found due from him, including solicitors' fees, and moneys advanced for the payment of taxes and costs; and that, in default of such payment, the mortgaged premises be sold to satisfy the amount due on all the notes, and solicitors' fees and moneys advanced for taxes and costs; and that, in case of sale and failure to redeem according to the statute, the defendants, and all persons claiming through or under them subsequent to the commencement of the suit, be barred and foreclosed of all right and equity of redemption in the premises, and that complainant have execution against defendants Anderson and Wallenstein for any balance that should remain due him in case the sale of the mortgaged premises should fail to produce sufficient to pay the whole of the debt, solicitors' fees, and costs of suit. Anderson was duly served with process, but did not appear, and made no defense, and a decree pro confesso was rendered against him by default. He alleges in his present bill that he was served with summons in that suit, "but did not defend the same, through error and mistake on his part, believing and understanding that the litigation related to another piece of property, in which he was slightly interested, and with reference to which proceedings were begun about that time." Chandler and certain other defendants appeared and answered, and the cause was referred to a master, who reported that there was due from Wallenstein on the deed of trust, including the principal and interest of the four notes, the sum of \$117, paid by Olin to redeem from tax sales, and the \$50 solicitor's fee provided for in the deed, the sum of \$1,411.64; that the money due to Olin, and for which he held the three notes and deed of trust as collateral, consisted of his two loans and interest, amounting to \$440, the \$147 paid by him to redeem from tax sales, and the \$50 solicitor's fee, amounting in all to \$637; also that there was due to Chandler for principal and interest on his note the sum of \$161.61, but that his lien was

subsequent to that held by Olin; that there was another mortgage on the premises, junior to the deed of trust, held by Helen M. Chandler, another of the defendants to the bill, on which \$347.88 was due and unpaid. A decree was thereupon rendered confirming the master's report, and ordering that Wallenstein or some of the defendants within five days pay to the master the sum of \$1,411.64, and pay to the officers of court the costs of suit; that, in casesuch payment should be made, the master pay over to Olin the sum of \$637, and bring the residue into court to await its further order; that, unless such payment should be made, the mortgaged premises be sold by the master in the mode in which sales of that character are required by law to be conducted; that Olin or any of the parties to the suit might become purchasers at such sale; that, if the premises sold should not be redeemed according to law within 15 months, the defendants, and all persons claiming under them, or any of them, since the commencement of the suit, be forever barred and foreclosed of all right and equity of redemption or claim in and to the premises, or any part thereof; and the usual provision was made for the execution to the purchaser by the master of a deed if the premises should not be redeemed according to law. Payment not having been made as ordered by the decree, the mortgaged premises were advertised and sold by the master, and at such sale Olin bid therefor the sum of \$500, and, being the highest and best bidder, the premises were struck off and sold to him for that sum. Out of the money thus realised the master paid the costs of suit and expenses of sale, and applied the residue, which was only \$448.11, upon the principal sum found by the decree to be due to Olin. That left \$188.89 still due, and for that sum Olin obtained a deficiency decree against Anderson, with an award of execution. No deficiency decree against Wallenstein seems to have been applied for, and none was entered. At the expiration of 15 months from the day of sale, the mortgaged premises not having been redeemed, the master executed and delivered a deed conveying the same to Olin.

Anderson, by his present bill, is seeking to redeem from the foreclosure sale. His position is that by the foreclosure proceedings the relation of pledgor and pledgee formerly existing between him and Olin was not changed, but that the effect was merely to vest the legal title to the mortgaged premises in the pledgor, freed from the equity of redemption of the grantors in the deed of trust, but subject to the pledgor's right of redemption; or, in other words, that it merely substituted the land as collateral security in place of the notes and deed of trust, leaving the equitable rights of the parties in all other respects the same as before. The theory seems to be that the suit was not intended to, and did not in fact, operate as a foreclosure of the lien which Olin, as pledgee, held upon the notes and deed of trust, but only of the mortgage lien, so as to cut off the equity of redemption of Wallenstein and those claiming under him. This is clearly a mis-

apprehension of the scope and effect of the proceeding. It cannot be doubted that the primary object of the foreclosure suit was to enforce the lien which Olin held upon the collaterals. It was brought to collect the money which he had loaned to Anderson, and that could be done only by converting the securities into cash by foreclosure and sale of the mortgaged premises. For that purpose a bill for foreclosure was filed, making Anderson, as well as all other parties in interest, defendants; the bill praying that the rights and equities of all the defendants, Anderson included, be barred and foreclosed. The decree awarded a sale, and ordered that, in case the mortgaged premises should not be redeemed within the period allowed by the statute, the defendants, of whom Anderson was one, should be barred and foreclosed of all right and equity of redemption therein. The premises having been sold under the decree, and the statutory period having expired without redemption, there can be no doubt, we think, that by the terms of the decree Anderson's right of redemption is cut off. If a stranger had been the purchaser, no one would have doubted for a moment that such would have been its effect. But it is claimed that because Olin was the purchaser a different rule would apply. The decree, by its terms, authorized any of the parties to become purchasers at the sale, and, Olin having availed himself of that permission, he must be deemed to have purchased in his own right and in hostility to Anderson, and we see no tenable ground for holding that his purchase must be deemed to have been in trust for his pledgor. Anderson's counsel has cited a number of authorities, from which he seeks to deduce the conclusion contended for, viz. that the relation between Anderson and Olin as pledgor and pledgee was not changed by the foreclosure and sale of the mortgaged premises. We have examined the cases cited with care, and find that they entirely fail to establish any such rule. Those upon which he mainly relies decide that, where a mortgage is assigned as collateral security for the debt of the mortgagee, and the assignee, when the mortgage debt falls due, forecloses the mortgage, without making the mortgagee a party to the foreclosure proceedings, and at the sale bids in the mortgaged premises, the title thus acquired by the assignee is held by him only as security for the debt to which the mortgage was assigned as collateral. A review of the authorities cited is unnecessary. It is sufficient to say that in none of them was the pledgor or assignor of the mortgage made a party defendant, nor did the decree in any of them assume to cut off or foreclose his right. The only case to which we are referred by Anderson's counsel where the pledgor seems to have been made a party in any form is *Hoyt v. Martense*, 16 N. Y. 231. There the assignor and assignee of the mortgage joined as co-complainants in a suit to foreclose the equity of redemption of the mortgagor, but there was, so far as appears, no prayer that the assignor's equities should be barred or foreclosed, nor was there any provision to that effect in the

decree. At the foreclosure sale the premises were bought in by the assignee of the mortgage, and it was held that the assignor's right to redeem from the sale was not barred. This conclusion seems to have been reached in reliance upon the authority of *Slee v. Manhattan Co.*, 1 Paige, 48. In that case the mortgage held as collateral was foreclosed by advertisement and sale, as provided by a statute of New York, and not by judicial proceedings, and such foreclosure seems to have been treated as tantamount in its legal effect to a judicial foreclosure without making the assignor of the mortgage a party defendant. But in the more recent case of *Bloomer v. Sturges*, 58 N. Y. 168, the holder of the mortgage assigned as collateral brought suit to foreclose it, making the mortgagee a party defendant, and there, as in the case at bar, the relief prayed for was, among other things, that the defendants be barred and foreclosed of all right, claim, and equity of redemption in the mortgaged premises, and there, as here, the decree ordered that the defendants be barred and foreclosed of all claim, interest, and equity of redemption therein. At the sale the mortgaged premises were purchased by the assignee of the mortgage, and the court, distinguishing the case from *Slee v. Manhattan Co.* and *Hoyt v. Martense*, supra, held that the assignor's equity of redemption in the premises was extinguished.

Some attempt is made by the bill to charge fraud upon Olin, but no facts are stated which can be held to amount to fraud, and we think the superior court very properly ignored them in sustaining the demurrer to the bill. Nor does Anderson show himself entitled to any consideration in this case based upon the fact that he failed to appear in the superior court and make his defense. He was regularly served with process, and his only excuse for not appearing is that he supposed that the bill related to another matter, which he did not care to defend, and that he therefore allowed the decree to go against him by default. There is no pretense that he was misled in the matter by Olin, or that his failure to inform himself as to the scope of the bill was due to anything but his own negligence. Under these circumstances he is in no position to complain of the decree. We find no error in the record, and the judgment of the appellate court affirming the decree must therefore be affirmed.

(145 Ill. 405)

POOLER v. CRISTMAN et al.<sup>1</sup>

(Supreme Court of Illinois. May 9, 1893.)

## CONTEST OF WILL—EVIDENCE—INSTRUCTIONS—TESTAMENTARY CAPACITY.

1. In a suit to contest the will of a widow, her husband's will is not admissible in evidence in order to show the amount of her estate.

2. A settlement between the testatrix's children of a dispute over the provisions of her husband's will, in which settlement the testatrix advanced some of her own money to settle the claim of one of her children, is not admissible.

<sup>1</sup> Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

sible in evidence as tending to show testatrix's incapacity to transact ordinary business.

3. An instruction that the fact that when the testatrix executed the will she was 86 years old, and was suffering from bodily infirmity, would not alone render her incapable of making a will, is not misleading, where the jury are informed in other instructions that weakness of intellect, arising from old age or great bodily infirmity or suffering, might render her incapable of making a will.

4. It is proper to instruct the jury that the fraud and undue influence that would render a will invalid must be connected with the execution of the will, and operating at the time the will is made.

5. An instruction that the fact that the provisions of the will may seem unreasonable is not ground for inferring undue influence, although erroneous, is not reversible error where such instruction concludes with the proviso that the jury believe from the evidence that the testatrix had sufficient mind and memory, at the time of the execution of the will, to understand the business in which she was engaged at the time she executed the will, and a recollection of the property she meant to bequeath, and of the persons to whom she meant to bequeath it, and that she executed the will voluntarily.

**Appeal from appellate court, second district.**

Bill in equity by William Pooler against Philany Cristman and others to set aside a will. Decree dismissing the bill, which was affirmed by the appellate court, and plaintiff appeals. Affirmed.

The other facts fully appear in the following statement by CRAIG, J.:

This was a bill in equity, brought by William Pooler in the circuit court of De Kalb county, against Philany Cristman, Louisa C. Cristman, and Alonzo Ellwood, administrator with the will annexed of the estate of Margaret Pooler, deceased, to set aside the will of Margaret Pooler, deceased. William Pooler, the complainant, was a son, and Philany and Louisa C. Cristman, defendants, were daughters, of the testatrix. It was, among other things, alleged in the bill that Margaret Pooler, of Cortland, De Kalb county, Ill., now deceased, mother of complainant, did, December 23, 1887, at said town of Cortland, execute a written instrument purporting to be her last will and testament. That afterwards, April 15, 1891, she departed this life, leaving, her surviving, as heirs at law, besides complainant, Philany Cristman and Louisa C. Cristman, both widows. That Henry Pooler, husband of said Margaret Pooler, had died prior to her death. That said purported will was as follows: First it directs payment of debts. Second, "I give, devise, and bequeath all the rest, residue, and remainder of my estate, real and personal, of whatever kind or nature, to my daughters, Philany Cristman and Louisa C. Cristman, of said county, in equal portions, share and share alike, and, in case of the death of either of my said daughters prior to my decease, the child or children of such deceased daughter to take the share such deceased daughter would have taken if living, share and share alike." Third clause names executors. It is alleged that said instrument was on October 15, 1891, admitted to probate in the county court of De Kalb county. That

at the time of the executing of said instrument the said Margaret Pooler was not of sound mind and memory, but on the contrary was in her dotage, and her mind and memory were so impaired as to render her wholly incapable of making any proper and just distribution of her estate, and of comprehending the character and effect of any distributions she might make, or attempt to make, or which might be made for her; she being at the time of signing said paper writing 86 years old, and by reason thereof had become childish, and no longer comprehended the ordinary business affairs of life, and was incapable of transacting the ordinary business affairs of life in a proper manner. That said Philany and Louisa C. Cristman, devisees, used and exercised many undue acts and fraudulent practices, and resorted to misrepresentations, and intimidated the said Margaret Pooler, to induce the said Margaret Pooler to execute the said instrument of writing; and the said Margaret Pooler, in executing the same, was in fact under improper restraint and undue influence from the said acts and fraudulent practices of said Philany and Louisa C. Cristman, and was intimidated by the said defendants Philany and Louisa C. Cristman. The defendants put in an answer to the bill, in which they deny the allegation that the testatrix was of unsound mind, or incapable of making a will. The defendants also denied any and all undue influence charged in the bill. An issue of fact was found, and submitted to a jury, and the jury returned a verdict in favor of the defendants. A decree was therefore entered, dismissing the bill, which, on appeal, was affirmed in the appellate court.

Thomas Cliffe, C. A. Bishop, and Carnes & Dunton, for appellant. Jones & Rogers and C. E. Fuller, for appellees.

CRAIG, J., (after stating the facts.) During the progress of the trial, complainant offered in evidence the will of testatrix's husband, Henry Pooler; an inventory of his estate; written articles of settlement between complainant and Philany and Louisa Cristman, to which, it was claimed, testatrix had assented. This offered evidence was objected to by the defendants, the objection sustained, and complainant excepted. This testimony was offered for the purpose of showing the amount of property testatrix had at the time of making the will, and her ability to contract. The will of Henry Pooler, had it been read in evidence, would not show the property possessed by the testatrix at the time she executed the will, nor would the inventory establish that fact. The will of Henry Pooler had been probated in the county court, and his estate had been settled, and the reports of the executor, and the receipts executed by the testatrix, would show, fully and clearly, the amount the testatrix received from her husband's estate, but for some unexplained reason this proof was not offered. We think the executor's reports on file in the county court, and the receipts executed by the testatrix, might have been put in evidence for the purpose of show-

ing the amount of property which went to the testatrix from her deceased husband, if it was thought important to establish that fact; but the will of Henry Pooler, had it gone to the jury, would, in all probability, have brought to the attention of the jury so many matters entirely foreign to the issue involved that the jury might have been prejudiced by the offered evidence. As respects the articles of settlement, the testatrix was not a party thereto. It seems that complainant, after the death of his father, claimed more than he was allowed by the will. After considerable negotiation between him and his two sisters, they bought from him his interest in his father's estate, paying a larger sum than he would receive by the terms of the will; and it was claimed that his mother, the testatrix, paid a portion of this amount from her own money, while she derived no benefit from the settlement. And this transaction, it is argued, was competent to show her incapacity to transact ordinary business. This settlement was so disconnected with, and foreign to, any issues involved in this case, that we think it was properly excluded from the jury. What settlement the sisters of complainant may have made with him had no bearing on the testamentary capacity of the testatrix. Moreover, if she saw proper to aid her two daughters in making a settlement with complainant which prevented a threatened lawsuit over her husband's will, and paid money out of her own pocket for that purpose, we fail to see how that fact had any particular bearing on her testamentary capacity, or her ability to transact ordinary business. Doubtless, she thought it wise to pay money out of her own pocket, rather than be involved in litigation over her husband's will, although she might be the loser financially through the transaction, and we do not think what she did was a proper subject of inquiry in this case.

It is next claimed that the court erred in giving defendants' tenth instruction, as follows: "You are further instructed that the mere fact that a person is of great age creates no presumption against the ability of such person to dispose of property by deed or will; and in this case, although you may believe from the evidence that the testatrix, Margaret Pooler, at the time of executing the paper in question, was of about the age of 86 years, and suffering to some extent from weakness or bodily infirmity, yet such circumstances would not render her incapable of disposing of her property by will as she saw fit." Extreme old age does not, of itself, disqualify a person from making a will, for a man may fully make his testament, how old so ever he may be, since it is not the integrity of the body, but of the mind, that is requisite in testaments. 1 Jarm. Wills, p. 53. In *Van Alst v. Hunter*, 5 Johns. Ch. 148, where the testator was between 90 and 100 years of age when he executed a will, Chancellor Kent said: "The law looks only to the competency of the understanding; and neither age nor sickness nor extreme distress or debility

of body will affect the capacity to make a will, if sufficient intelligence remains." In *Whitenack v. Stryker*, 2 N. J. Eq. 8, it was held that old age and failure of memory do not, of themselves, necessarily take away a testator's capacity. See, also, *Andress v. Weller*, 3 N. J. Eq. 605; *Stevens v. Vencleve*, 4 Wash. C. C. 262; *Bird v. Bird*, 2 Hagg. Ecc. 142; *MacKenzie v. Handasyde*, Id. 211. We think it is a plain proposition, and one, too, well established by both text writers and the decisions of courts, that old age does not, of itself, deprive a person of testamentary capacity. The instruction may not be entirely free from criticism, but the substance of it is that, although the jury found from the evidence that the testatrix was 86 years of age when she executed the will, and suffering from bodily infirmity, such facts, standing alone, would not render her incapable of making a will. We do not see how the jury could be misled by this instruction, especially when considered in connection with the instructions given on behalf of the complainant, the ninth of which reads as follows: "The jury are instructed that, in order to make a valid will, the law requires that a person shall be of sound and disposing mind and memory, as defined in these instructions; and want of testamentary capacity does not necessarily require that a person shall be insane. Weakness of intellect, arising from old age, or great bodily infirmity or suffering, or from all these combined, may render the testatrix incapable of making a valid will, when such weakness disqualifies her from knowing or appreciating the nature, effect, or consequence of the act she is engaged in." So, also, by complainant's eighth instruction, the jury was directed as follows: "The court further instructs you that if you believe from the evidence in this case that Margaret Pooler, at the time of the execution of the will, was so diseased, mentally, that she was incapable, by reason of mental weakness, caused by disease, old age, or other derangement, of acting rationally in the ordinary affairs of life, and of intelligently comprehending the disposition she was making of her property, and the nature and effect of the provisions of said alleged will, then they should find that the writing produced be not the will of Margaret Pooler, deceased."

It is also claimed that the court erred in giving defendants' first instruction, as follows: "The court instructs you that the fraud and undue influence which would render a will invalid must be connected with the execution of the will, and operating at the time the will is made; and the fact that the beneficiaries of a will are those by whom the testatrix was surrounded, and with whom she stood in confidential relations, at the time of the execution of the will, or the fact that the principal beneficiaries had for years control of her estate, or the fact that the provisions of the will were for the benefit of such persons, or may seem unreasonable, yet such facts are not grounds for inferring undue influence; and, in this case, if you believe from the evidence that the



testatrix, Margaret Pooler, had sufficient mind and memory, at the time of the execution of the will in question, to know and understand the business in which she was engaged at the time she executed the will, and a recollection of the property she meant to bequeath, and of the persons to whom she meant to bequeath it, and that she executed the said instrument voluntarily, and of her own free will, then you should find by your verdict that the paper produced is the will of Margaret Pooler." The first clause of the instruction, directing the jury that fraud and undue influence which should render a will invalid must be connected with the execution of the will, and operating at the time the will is made, is sustained by *Brownfield v. Brownfield*, 43 Ill. 147; *Guild v. Hull*, 127 Ill. 525, 20 N. E. Rep. 665; *Reichenbach v. Ruddach*, 127 Pa. St. 564, 18 Atl. Rep. 432. The principal objection is, however, directed to that portion of the second clause of the instruction relating to the provisions of a will which may be unreasonable. As a general rule a person may dispose of his property by will as he may desire. Its validity does not depend upon an equal distribution of the property among those who would inherit had no will been made, but the testator may give one child more than another without invalidating the will. But, while this is true, inequality in the distribution of property may be considered as a circumstance tending to establish undue influence, or unsoundness of mind, but it is not, of itself, sufficient for this purpose. *Salisbury v. Aldrich*, 118 Ill. 199, 8 N. E. Rep. 777; *Schneider v. Manning*, 121 Ill. 385, 12 N. E. Rep. 267. It is true that in the opinion of *Rutherford v. Morris*, 77 Ill. 414, expressions may be found which might authorize that part of the instruction complained of. But what is said in *Rutherford v. Morris* was not concurred in by a majority of the court, and cannot be regarded as authority. We think the second clause of the instruction, considered alone, erroneous, but the objectionable part of the instruction seems to be qualified by the last clause. The evident idea intended to be conveyed to the jury by the instruction, when the second and last clauses are considered together, would seem to be this: The fact that the provisions of the will may seem unreasonable is not ground for inferring undue influence, providing "you believe from the evidence the testatrix had sufficient mind and memory, at the time of the execution of the will, to know and understand the business in which she was engaged at the time she executed the will, and a recollection of the property she meant to bequeath, and of the persons to whom she meant to bequeath it, and that she executed the said instrument voluntarily, and of her own free will." While the instruction was drawn in an awkward manner, and should have been changed in its phraseology before it was given, we do not think the jury could be misled by it. Moreover, by complainant's twelfth instruction, the jury were expressly directed that in determining mental capacity they had a right to look at the provisions of the will, and could consider

the history and relations of testatrix and complainant.

As respects the issue of fact presented to the jury, but little need be said. Much evidence was introduced on the trial by the respective parties. The evidence was conflicting, and we are not prepared to say, after examination of all the evidence, that the verdict is unsupported by the evidence. The judgment of the appellate court will be affirmed.

(146 Ill. 71)

**BURTON et al. v. PERRY et al.<sup>1</sup>**

(Supreme Court of Illinois, April 3, 1893.)

**DECREE—UNKNOWN PARTIES—DEED—FRAUD—SPECIFIC PERFORMANCE—APPEAL—REVERSAL—MORTGAGE—BANKRUPTCY—NOTICE—TAX TITLE—LIMITATIONS.**

1. A decree rendered by default against the unknown heirs of a person supposed to be dead is void where such person is in fact alive at the time the decree is rendered, and is not a party to the suit.

2. A decree rendered by default on service by publication against the unknown heirs of one who has not been heard of for more than 20 years, and who is found by the court to be dead, is valid, in the absence of any proof that he is alive, by virtue of Rev. St. 1891, c. 22, § 7, which declares that interested persons whose names are unknown may be made parties to suits in equity "by the name and description of unknown owners, or unknown heirs, or devisees of any deceased person."

3. Purchasers in good faith from one claiming title through a master's deed executed in pursuance of such decree take good title, as against the grantee of one who claims title through an unrecorded deed from the person found by the court to be dead, where such decree is not attacked during the three years allowed by statute for attacking decrees rendered on constructive service, even though such purchasers bought before expiration of such three years, since the provision of Rev. St. 1891, c. 30, § 30, that unrecorded deeds shall be void as to subsequent purchasers without notice applies also to subsequent purchasers from heirs.

4. A decree is not subject to collateral attack on the ground of fraud merely because it was obtained by means of false evidence, since fraud of that kind does not affect the jurisdiction of the court.

5. A decree enforcing, as against two tenants in common, a contract for the sale of land, is not rendered invalid as to both by the fact that the court has no jurisdiction over the person of one of them, since each of them can perform the contract as to his interest in the land.

6. Where the supreme court reverses a decree, and remands the cause, without directions, only the legal principles announced in the opinion are binding upon the trial court, whatever may be said in such opinion in regard to the weight of evidence being applicable only to the facts disclosed in the record then under consideration.

7. Where land is conveyed with full covenants of warranty, and a purchase-money mortgage given for half the price, the balance being paid in cash, and the grantor had title to only an undivided three-fourths interest in the land, the grantee, in a suit in equity by the assignee of the mortgage to foreclose the same is entitled to a rebate of one-fourth of the purchase price.

8. Upon final settlement of a bankrupt's estate, and the discharge of his assignee, title to

<sup>1</sup>Reported by Louis Boiesot, Jr., Esq., of the Chicago bar.



land formerly belonging to the bankrupt, and never accepted or taken control of by the assignee, reverts to the bankrupt, and another assignee, subsequently appointed in the same proceeding, acquires no title thereto.

9. Where a mortgagor gives the mortgagee a deed of the mortgaged property without consideration, and it appears that the mortgage was not under seal; that the mortgagee is defending a suit brought by third persons to recover such property; that the property is worth more than the mortgage debt; that the mortgagee does not surrender the mortgage notes, and subsequently claims the land in said suit as mortgagee; and that the mortgagor had agreed to make such other transfers, assignments, and writings as might be necessary,—the deed will be regarded as additional security for the mortgage debt, and not as an extinguishment of the equity of redemption.

10. Money advanced by a mortgagee for expenses and counsel fees in setting aside tax titles to the mortgaged property may be recovered by him from the mortgagor in a suit to foreclose the mortgage.

11. Five years before a bank took an assignment of a mortgage the president of the bank had been informed, in a casual conversation, that a third person had an equitable interest in the land. The president was not then acting for the bank, but for a private person. *Held*, that the bank was not affected with notice of the equity.

12. Rev. St. 1891, c. 120, § 216, provides that purchasers at tax sale, before they can be entitled to a deed, shall serve notice on every person in actual possession of the land, also upon the owner, and the person in whose name it was assessed, if they can, upon diligent inquiry, be found in the county, and that if they cannot be so found such notice shall be published three times in a newspaper. *Held*, that notice published in a newspaper is invalid unless the diligent inquiry was made before the first publication.

13. Service of notice on one who is in possession of the land as agent of the tax-sale purchaser is not a compliance with said statute.

14. Under Rev. St. 1891, c. 83, § 4, which limits to seven years the time for beginning actions to recover land "of which any person may be possessed by actual residence thereon for seven successive years, having a connected title, in law or equity, deducible of record from any public officer authorized to sell such land for the nonpayment of taxes," a tax title based upon an affidavit showing that notice of redemption was not properly given is not sufficient title to set the statute running.

15. Possession obtained by either forcing or persuading the tenant of an adverse claimant to attorn does not constitute "actual residence," within the meaning of said statute.

16. In order to constitute title by seven years' payment of taxes, seven years must elapse between the date of the first payment of taxes and the commencement of suit to recover the land.

17. Rev. St. U. S. § 5057, which bars, after two years, suits between assignees in bankruptcy and persons claiming an adverse interest touching any property transferred to the assignees, does not prevent a grantee of an assignee in bankruptcy from bringing suit to set aside a tax title after the lapse of such two years, where such grantee is also the mortgagee of the property, since a mortgagee may bring such a suit. *Miller v. Cook*, 25 N. E. Rep. 756, 135 Ill. 190, followed. *Gage v. Du Puy*, 19 N. E. Rep. 878, 127 Ill. 216, distinguished.

18. Where a decree is remanded with directions to enter a modified decree, the court will not, on rehearing, modify the remanding order so as to allow the introduction of additional evidence, where the litigation has been pending for 18 years, and no good reason is

shown why such evidence was not offered at the former hearing.

Appeal from superior court, Cook county; Henry M. Shepherd, Judge.

Bill by James S. Perry and John N. Henderson against George W. Burton and others for partition. Complainants obtained a decree. Defendants appeal. Reversed.

Wm. Garnett, Jr., and H. S. McCartney, for appellant Louisville Banking Co. Woolfolk & Browning, for appellants Wallace, Burton, and Hansbrough. Edmund S. Holbrook and A. D. Eddy, for appellees Perry and Henderson. Crafts & Stevens, for appellees Mitchell and McCaffery.

MAGRUDER, J. The complainants, Perry and Henderson, file this bill for the partition of 40 acres of land, and claim to be the owners of an undivided half thereof. The defendants deny the ownership asserted by the complainants, and contend that they are themselves the owners of the whole 40 acres. Therefore the first question to be determined is whether the complainants own any interest in the land, and, if they do, what interest.

It is not denied, that, on February 16, 1836, Isaac Cook, then holding the government title to 80 acres, of which the tract of 40 acres now in controversy is the south half, conveyed an undivided half of said 80 acres to Asa W. Chambers and Sheldon Benedict. The complainants claim title through a conveyance from Benedict to Chambers, and three conveyances from Chambers to themselves. Chambers and Benedict left Chicago in 1838. Benedict has never been seen or heard of but once since that time. It is said that in the year 1848 he made a visit to Chambers while the latter was living in the state of Texas, but after remaining with Chambers two or three weeks he disappeared, and all further trace of him has been lost. He paid no taxes upon the property in question after he left Chicago, nor do the records of Cook county, where these premises are located, show that he has ever made any conveyance of the land, or instituted any proceeding, or done any act indicating a claim of ownership, since the year 1838. Chambers, according to his own testimony, was not in Chicago from 1838 to 1872. During a period of more than 30 years his whereabouts were unknown, and were only discovered in the year 1871, or thereabouts, after considerable search by a party acting for, or in concert with, the complainants. After his disappearance, in 1838, he paid no taxes upon the land, nor did he or his grantees thereafter take any steps to assert title thereto until the filing of the bill in this case, in July, 1873. All the facts, however, in the present record, which tend to show laches by reason of delay in beginning suit, were before this court in 1884, and again in 1888. *Perry v. Burton*, 111 Ill. 183; *Id.*, 126 Ill. 599, 18 N. E. Rep. 653. The only witness who testifies that a deed was made by Benedict to Chambers is Chambers himself. The latter swears that after leaving Chicago, in 1838, he remained about 10 months in

Georgetown, Vermillion county, Ill.; that he went to Texas in June, 1841, taking Mrs. Chambers with him; that he lived in Navarro county, Tex., from 1843 to 1872, about two miles from a little town called Mt. Pisgah, containing 15 or 20 houses, 13 miles from Corsicana, the principal town of the county, and about 110 miles from Bryant, Brasos county, where the complainants, Perry and Henderson, who are attorneys at law, reside; that he never saw Benedict, after leaving Chicago, until 1848; that, in November of that year, Benedict came to his house, in Navarro county, "flat broke and afoot," saying that he came through Galveston, and had been in New Orleans and New York, and divers places; that he then sold to Chambers all his interest in this land, and other lands in Illinois, for \$200, of which \$75 was paid in cash, and for the balance he took a saddle horse; that Benedict then made a deed to Chambers of the land; that neither had any papers showing the description, but both remembered the description; that the deed was acknowledged before a justice of the peace, who is dead, and attested by two witnesses, who are both dead; that Benedict then rode away, and Chambers has never seen nor heard of him since, or of any of his relatives, if he had any; that Chambers never recorded the deed, but kept it for 14 years on his place in Texas; that in 1862 he left home, and deposited his papers in a trunk, in the care of a daughter then 25 years old; that the deed was lost during his absence, and he has never been able to find it.

The question as to the execution of the deed from Benedict to Chambers was passed upon by this court in the decision made in 1884. *Perry v. Burton*, 111 Ill. 138. Counsel for defendants refer to many circumstances brought to light by the evidence taken since the first and second hearings of the cause, which are alleged to demonstrate the falsity of the testimony given by Chambers. We do not deem it necessary, however, to enter upon a discussion of this subject, as we have reached the conclusion, for the reasons hereafter stated, that the defendants must be regarded as bona fide purchasers of the one-fourth interest formerly held by Benedict, without notice of the deed said to have been made by him to Chambers, and consequently are entitled to protection, as against the latter deed. Some time in 1871 or 1872, Chambers conveyed, or attempted to convey, all his interest in said tract of 80 acres, described as the E.  $\frac{1}{2}$  N. E.  $\frac{1}{4}$  section 20, etc., and in other lands in Illinois, to the complainants, and received therefor the sum of only \$100. About the same time the complainants agreed with a real-estate agent in Chicago to convey to him one-half of such interest in the land as they should finally recover, upon condition that he should take possession of the property, employ attorneys, perfect the title, and pay all costs, expenses, and attorneys' fees. We agree with counsel for the defendants that the agreement in question was champertous and void, and could not be enforced, as between the parties to it. *Thompson v. Reynolds*, 73 Ill. 11; *Coleman v. Billings*, 89 Ill. 183. But we

do not regard such agreement as material in the consideration of this case, as the present suit is not between the complainants and the agent so employed by them. *Torrence v. Shedd*, 112 Ill. 466, 3 Amer. & Eng. Enc. Law, p. 86. It is not denied by the complainants that, in the fall of 1844, Isaac Cook was the owner of the other undivided one-half of the 80 acres which had not been conveyed in 1836 to Chambers and Benedict. The undivided half so conveyed to Chambers and Benedict was sold for taxes to Cook on November 28, 1842, and the sheriff issued a tax deed therefor to him on December 9, 1844. It is claimed by the defendants that Cook, holding under said tax deed, and under the deed to him of the other half, as color of title, paid all the taxes legally assessed upon the whole tract of 80 acres from 1844 to 1854, inclusive, while the land was vacant and unoccupied. We have heretofore passed upon the question of the payment of taxes by Cook under said tax deed, and have held that the payment of taxes by him during the period aforesaid was not established by proof. *Perry v. Burton*, 111 Ill. 138. Counsel claim that there is now new evidence in the record which shows that Cook did pay the taxes on the undivided half conveyed to him by the tax deed for a period of seven successive years between 1844 and 1854. We find no evidence whatsoever in the record which shows that the 80 acres were vacant and unoccupied for seven successive years during the period from 1844 to 1854. Cook says nothing upon this subject, and the other witnesses, to whose testimony we have been referred, speak of the land as it was after 1854. In the absence of proof that the land was vacant and unoccupied, or that Cook was in possession of it, during said period of seven years, it is immaterial, so far as the bar of the statute of limitations is concerned, whether the taxes were paid or not; and any discussion of the question whether the defense based upon the payment of taxes under the tax deed to Cook has or has not become res adjudicata under the former decisions of this court would be unnecessary and fruitless.

In 1854 Cook sold the 80 acres to John W. Finnell and Richard C. Wintersmith for \$4,000, and afterwards, by warranty deed dated July 9, 1857, conveyed to them the 80 acres so sold. On January 9, 1858, each undivided  $\frac{1}{2}$  of said 80 acres, being the E.  $\frac{1}{2}$  N. E.  $\frac{1}{4}$  section 20, etc., was separately sold for the taxes of 1855 to Frederick R. Wilson, and in pursuance of such sale the sheriff afterwards executed a tax deed, dated August 23, 1859, to Wilson, conveying to him the whole of the 80 acres. Afterwards, by deed dated April 28, 1865, Wilson conveyed the S.  $\frac{1}{2}$  of the E.  $\frac{1}{2}$  N. E.  $\frac{1}{4}$  section 20, etc., being the 40 acres in controversy in this suit, to Finnell, and by deed of the same date conveyed the N.  $\frac{1}{2}$  of said E.  $\frac{1}{2}$ , etc., to Wintersmith. By way of further effecting a partition of the 80 acres between them, Wintersmith or his grantees, by deed dated April 24, 1869, conveyed to Finnell said S. 40 acres, and, by deed of the same date, Finnell conveyed said N. 40 acres to

Wintersmith or his grantees. On August 28, 1869, Isaac Cook and John W. Finnell and Henry A. Montgomery and Abner Taylor, the two latter being grantees through meane conveyances from said Wintersmith, filed a bill in the superior court of Chicago against the unknown heirs and devisees of Asa W. Chambers, deceased, and the unknown heirs and devisees of Sheldon Benedict, deceased, as defendants. This bill set up that Cook conveyed an undivided  $\frac{1}{2}$  of E.  $\frac{1}{4}$  N. E.  $\frac{1}{4}$  of said section 20 to Chambers and Benedict, as above stated; that by deed dated November 10, 1845, Norman B. Judd had deeded the other undivided  $\frac{1}{2}$  of said 80 acres to said Cook; that in November 1845, Chambers and Benedict each owed more than \$1,000 to said Cook, and in consideration of such indebtedness executed an agreement in writing for the conveyance to him of their undivided  $\frac{1}{2}$  of said 80 acres; that the consideration therefor was the payment of said sums due from them, respectively; that said contract had been lost or mislaid, and had never been assigned by Cook; that neither Chambers nor Benedict, nor either of them, had ever conveyed any part of said land to said Cook, or to any other person. The bill recites the sale for taxes in 1842; the tax deed to Cook in 1844; the exercise of control over the 80 acres by Cook from 1848 to 1857; the payment of taxes by him from 1842 to 1854; the sale for taxes in 1856; the tax deed to Wilson in 1859; the deed from Cook to Finnell and Wintersmith in 1857; the deeds in 1865 from Wilson to Finnell of the S. 40 acres, and to Wintersmith of the N. 40 acres; the partition deeds in 1869 from the grantees of Wintersmith to Finnell of the S. 40 acres, and from the latter to the former of the N. 40 acres. The bill alleges that Chambers and Benedict had died intestate and unmarried, and without children, and had been dead many years, and prays for a decree compelling the defendants to convey the S.  $\frac{1}{2}$  of said E.  $\frac{1}{4}$  to Finnell, and the N.  $\frac{1}{4}$  thereof to Montgomery and Taylor, and in default thereof that a master make such conveyance, and for summons. Appended to the bill was an affidavit that the names of the heirs and devisees of Asa W. Chambers, deceased, and of the heirs and devisees of Sheldon Benedict, deceased, were unknown. Summons dated August 28, 1869, was issued to Cook county against the unknown heirs and devisees of Asa W. Chambers, deceased, and the unknown heirs and devisees of Sheldon Benedict, deceased, returnable on the first Monday of October, 1869, and was returned, "Not found." Proof of publication of notice to said defendants was filed November 29, 1869, the publisher's certificate showing publication for four successive weeks,—four times in a certain newspaper,—first on August 28, and the last on September 18, 1869. On November 29, 1869, the court entered an order finding that it appeared from proof filed that publication had been made in the Chicago Evening Post, a newspaper published in Chicago, containing notice of the pendency of said suit, etc., "the first of which publications was more than sixty days

before the commencement of this term of court," etc., and ordering that default be taken against the defendants, and that the allegations of the bill be taken as confessed by them, and that the cause be referred to Ira Scott, master in chancery, to take proofs and report. On Monday, May 21, 1870, the master made his report, returning therewith the deeds named in the bill, or certified copies thereof, and also the deposition of Cook, wherein he testified that Chambers and Benedict were dead, and had been dead for 15 or 20 years; that neither of them was ever married; that he had been unable to find any of their relatives living; that said Cook had reacquired the title to said 80 acres from said Chambers and Benedict by contract or deed, which he had been unable to find, and that no one ever claimed said land since its purchase by Cook from Judd and Chambers and Benedict, except Cook's grantees, and those claiming under them. On May 21, 1870, the court rendered a decree wherein, after reciting that the cause came on to be heard upon the bill, exhibits, and testimony, and that the defendants, the unknown heirs and devisees of Asa W. Chambers, deceased, and the unknown heirs and devisees of Sheldon Benedict, deceased, "although duly notified and warned," failed to appear and plead, it was ordered that the bill be taken for confessed; and after finding that the material averments thereof were fully proven it was further decreed that the complainants therein be quieted in their title to and possession of said 80 acres, and that the defendants, "and all others," be forever enjoined from setting up any claim or title to said premises, or any part thereof, adverse to the claim and title of the respective complainants therein, and that the defendants, within five days, execute a deed to complainants Montgomery and Taylor conveying to them said N.  $\frac{1}{4}$ , and a deed to the complainant Finnell, conveying to him said S.  $\frac{1}{2}$ , etc., and in default of their so doing, that said master make said conveyances for said defendants.

In pursuance of said decree, Ira Scott, master of said court, executed a deed dated June 14, 1870, and recorded June 23, 1870, conveying the S.  $\frac{1}{2}$  of the E.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  of said section 20, etc., to said John W. Finnell, and also, by deed of same date, and recorded on June 23, 1870, conveyed the N.  $\frac{1}{4}$  of said E.  $\frac{1}{4}$ , etc., to said Montgomery and Taylor. On February 23, 1871, Finnell sold said S. 40 acres to George G. Street for \$12,000, and conveyed the same to him by warranty deed of that date, which was recorded before October 9, 1871. Street paid \$3,000 in cash upon said purchase, and to secure the remaining \$9,000 of the purchase money executed to Samuel M. Moore, as trustee, four trust deeds, dated February 21, 1871, and recorded March 23, 1871,—one on the N. E. 10 acres of said S. 40 acres, to secure a note for \$2,250, payable in one year; one on the N. W. 10 acres thereof, to secure a note for \$2,250, payable in two years; one on the S. E. 10 acres, to secure a note for \$2,250, payable in three years; and one on the S. W. 10 acres, to secure three notes,

each for \$750, payable, respectively, in one, two, and three years,—all said notes signed by said Street, and payable to the order of said Finnell. On March 1, 1871, Street sold said 40 acres to William Hansbrough for \$18,000, and conveyed the same to him by a warranty deed dated March 1, 1871, and recorded March 31, 1871, subject to said incumbrances of \$9,000, which said Hansbrough assumed and agreed to pay. Hansbrough bought the property for himself and George W. Burton, and by a warranty deed dated January 30, 1872, and recorded January 8, 1873, conveyed the same, for an express consideration of \$18,000, to said Burton, who also assumed the payment of said incumbrances. On October 3, 1871, before the maturity of said notes, Charles G. Wallace bought all of said notes and trust deeds from said Finnell, and paid therefor \$8,600 in money. Burton paid the two notes payable in one year,—one for \$2,250, and one for \$750,—and the said N. E. 10 acres have been released from the lien of the trust deed thereon. In 1877, Burton executed upon the 40 acres a mortgage, which, in bankruptcy, was assigned in 1878 to the Louisville Banking Company, one of the appellants herein. In 1878, Burton became bankrupt, and an assignee of his estate was appointed. During this litigation the property had been sold for taxes, and John J. Mitchell, also one of the appellants, holds tax deeds upon the property. For the present we postpone the consideration of all questions as to the bankruptcy of Burton, and as to the rights of the Louisville Banking Company, and of Mitchell. Wallace, one of the defendants below, and one of the appellants here, is the owner of the unpaid notes secured by three of said trust deeds, together with the interest thereon. He claims that he bought the same in good faith, relying upon the validity of said decree of May 21, 1870, and of the master's deed made in pursuance thereof. Burton and Hansbrough, defendants below and appellants here, claim that they and their grantor, Street, bought the 40 acres in good faith, relying upon said decree, and that they are bona fide purchasers for value, without notice of the claim of complainants, or of their grantor, Chambers.

We are thus brought to the consideration of the question whether parties purchasing in good faith, and in reliance upon the validity of such a proceeding against unknown heirs and devisees as is above set forth, are entitled to be protected in their purchases. In support of their contention that the superior court of Chicago acquired jurisdiction in the proceeding of 1869 over the unknown heirs and devisees of Asa W. Chambers, deceased, counsel for appellants assert, in the first place, that the Chambers from whom the complainants derive their title was an impostor, and is not sufficiently identified by the evidence as being the same Asa W. Chambers who lived in Chicago in 1836 to overcome the presumption of death arising from absence for several periods of seven years each, and to overcome the judicial finding of the fact of his death made in 1869 and 1870, as above set forth. Undoubtedly, there are some circumstances

which leave the mind in doubt upon this question of identity. John C. Haines and Fernando Jones swear that they knew Chambers and Benedict well when the latter were in Chicago in 1836 and 1838; that Chambers was a young man, not more than 25 years old, and was an unmarried man; that he had no family, and slept in his store, etc. The grantor of complainants was in Chicago in 1872 or 1873, and gave his deposition in that city in September, 1874. He seems to have kept aloof from all of the old citizens, except one, who knew the Chambers of 1836 and 1838. His board, while he was here, was paid by the real-estate agent already mentioned. He states that he was engaged at that time in peddling bluing for washing purposes. He says that while he lived in Chicago he had a wife and children, and that one of his daughters was married in Danville before he went to Texas. Three or four witnesses swear that the reputation of the Chambers who lived in Texas in 1849 and 1862, for truth and veracity, was bad, and that they would not believe him under oath. Several testify that Chambers, of Texas, signed his name, "Asa Chambers," and was not known as Asa W. Chambers. There are many inconsistencies in the account which the grantor of complainants gives of himself, and of the transaction of which he speaks. If this matter depended upon his testimony alone, its inherent improbability, and its contradiction by Haines and Jones, would leave his identity with the original grantee of Cook unproven. But Haines and Jones did not see him when he was in Chicago in 1872 and 1874. On the other hand, Mark Beaubien, an old settler in Cook county, swears that he knew the Chambers who was here in 1836, and that the Chambers here in 1874 was the same man. The Chambers who testified in this case boarded with Beaubien in 1874, and the latter swears that he recognized him as the man who had formerly boarded with him in 1836 or 1837. While there is some evidence tending to show that Beaubien was a very credulous man, there is none that successfully impeaches his truthfulness. We think, upon the whole, that his testimony must be held to determine the question of identity in favor of the position taken by the complainants upon this subject.

But appellants contend, in the second place, that, even if the grantor of complainants be identified as the grantee of Cook, yet the rights of Chambers were cut off, as against them, by the decree of 1870. Their position is that the superior court of Chicago was a court of general jurisdiction; that it had jurisdiction of the subject-matter; that absence from the domicile for a period of seven years, without being heard from, creates a presumption of death; that Chambers had been absent, and not heard from, for 31 years, when the suit of 1869 was begun; that the court made a decree, upon proofs taken, finding him to be dead; that proper publication was made as to his heirs; that complainants were bona fide purchasers for value without notice, and were not bound to look beyond the decree, when executed by

a master's deed, inasmuch as the facts necessary to give jurisdiction appeared upon the face of the proceedings; that the decree cannot be attacked collaterally, etc. There is force in these contentions, where applied to the unknown heirs and devisees of Sheldon Benedict, deceased, as will be seen hereafter, but they have no application to Chambers. According to the testimony of Beaubien, as it appears in this record, Chambers was alive when the suit was begun, in 1869, and when the decree of 1870 was rendered, and when the present bill was filed, in 1873. He was not a party to the suit of 1869. The persons made parties as his unknown heirs and devisees were not then in existence. There were no such persons. The court had no jurisdiction over him, and the decree was absolutely void as to his one-fourth interest obtained from Cook in 1836. In authorizing the heirs of a deceased person, who has been interested in the subject-matter, to be made parties under the name of "unknown heirs," when their names are unknown, the statute presupposes that the death of such persons is an established fact. It was never designed to cut off the known rights of such a person while in life, even as against innocent purchasers for value. It has reference to deceased persons, and not to live persons. In *Thomas v. People*, 107 Ill. 517, where the proceeds of a sale in partition came to the hands of a master in chancery, and prior thereto administration had been granted upon the estate of one of the heirs upon the hypothesis that he was dead, because he had been absent, and not heard from, for more than seven years, the master paid to the administrator the portion of the proceeds belonging to such absent heir. Afterwards the person supposed to be dead turned out to be alive, and it was held that the grant of administration, and all acts done thereunder, were void; that the probate court had no jurisdiction, except over the estates of deceased persons; that the money was improperly paid out; and that the interested party, who had returned alive, was entitled to recover back his money from the master. We think that the doctrine of the *Thomas Case* is applicable to the case at bar, so far as Chambers is concerned. We are therefore of the opinion that the decree of May 21, 1870, and the master's deed of June 14, 1870, did not have the effect of depriving Chambers of the one-fourth interest shown by the records to have been conveyed to him in 1836.

The proceeding of 1869 must be regarded as a proceeding against the unknown heirs and devisees of Sheldon Benedict, alone, and the question arises whether it was valid as to them. There is no evidence in the record that Benedict was alive when that proceeding was instituted, or when the decree therein was entered. He had been absent from Cook county, and had not been heard from in that county, for 31 years. If he was alive in 1848, he had not been heard from in 1869 for 21 years. Acting upon the presumption of his death, and upon the evidence of Cook that he was dead, the decree of 1870 found the fact of his death to be established.

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The complainants have introduced no proof to contradict the truth of such finding. In their original bill filed in this cause on July 18, 1873, they alleged that Benedict was dead, and after filing the affidavit required by the statute made his unknown heirs and devisees parties defendant. We see no reason why the court did not obtain jurisdiction over the unknown heirs and devisees of Sheldon Benedict, deceased, by the proceeding of 1869, as above set forth. Inasmuch as said heirs and devisees were notified by publication only, they had a right to come in at any time within three years after the entry of the decree, and open it, and answer the bill. It is true that such a decree does not become final until after the lapse of three years, and that parties purchasing during that time do so subject to the contingency that the decree may be set aside. *Lyons v. Robbin*, 46 Ill. 276; *Bank v. Humphreys*, 47 Ill. 227. But when the three years have passed, and no steps have been taken by the defendants to open it, it has the same effect as though there had been personal service. *Caswell v. Caswell*, 120 Ill. 377, 11 N. E. Rep. 342. Although, in the present case, Street and Hansbrough and Burton and Wallace acquired their interests within three years after the entry of the decree of May 21, 1870, yet none of the heirs or devisees of Benedict appeared between that date and May 21, 1873, for the purpose of opening the decree, and answering the bill. The decree became final on May 21, 1873, and the rights of said appellants became thereby fixed, and relieved of their conditional character. The bill of the complainants in this case, not having been filed until July 18, 1873, was not filed until more than three years had passed, not only after the entry of the decree, but after the execution and recording of the master's deed to Fennell. It makes no difference that said bill was filed within less than two months after May 21, 1873. The evidence tends to show that the efforts made by the agent of the complainants to find Chambers, and get a conveyance from him, were prompted by the beginning of the chancery suit in 1869, and by the publication of the notice to unknown heirs, etc. Neither Fennell, nor the above-named appellants, who hold under him, had any notice whatever that Benedict had made a deed to Chambers until the filing of the original bill in this cause. The allegations of that bill made it known on July 18, 1873, for the first time, that such a deed, of which the records give no information, had been executed and lost. The first two deeds made by Chambers to the complainants gave no notice of the execution of a deed by Benedict to Chambers. They both bear date November 20, 1871. One was recorded on January 30, 1872, and the other on February 16, 1872. By the former, Chambers conveyed to Perry and Henderson "all of the equal and undivided one-half part," not of the E.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$ , etc., but "of the N. E. one-fourth of section 20," etc., and omitted to state in what county and state said N. E.  $\frac{1}{4}$  was located. By the latter, Chambers conveyed to Perry and Henderson "an undivided one-half of all the pieces, parcels, or

lots of land which I own, or have any title to," in Cook county, or in any part of Illinois, but failed therein to specifically describe any particular land. The third deed made by Chambers to Perry and Henderson, which recites that it is made to correct the mistake in the first deed of omitting the words "in Cook county, and state of Illinois," bears date July 5, 1873; and, although it is referred to in the original bill in connection with the other two deeds, it was not recorded until September 9, 1890.

Which title to the undivided one-fourth interest conveyed by Cook to Benedict in 1886 is the better title,—that of appellants, derived from Finnell through his master's deed of June 14, 1870, and purchased in good faith for valuable consideration, without notice of any adverse interest, or that of complainants based upon the lost deed of Benedict to Chambers, brought to light for the first time on July 18, 1873? The statute provides that "all deeds, mortgages, and other instruments of writing which are (required) authorized to be recorded shall take effect and be in force from and after filing the same for record, and not before, as to all creditors and subsequent purchasers without notice; and all such deeds and title papers shall be adjudged void as to all such creditors and subsequent purchasers without notice until the same shall be filed for record." If Benedict had been alive in June, 1873, and Finnell had then purchased his one-fourth interest from him for a valuable consideration, and in good faith, and without notice of any previous conveyance thereof, and had recorded his deed on June 28, 1873, Finnell would certainly have held the interest as against the unrecorded and lost deed previously made by Benedict to Chambers in 1848, and not heard of by Finnell until July 18, 1873. Although the legal title passes by the first deed, which is not recorded, yet by force of the recording laws it is postponed in favor of a subsequent deed to a bona fide purchaser, which is recorded. We have held that this rule applies as well to bona fide subsequent purchasers from heirs as to purchasers from the ancestor. In *Kennedy v. Northup*, 15 Ill. 148, we said: "During the lifetime of the grantor in an unrecorded deed the apparent title is in him; and he who purchases in good faith that apparent title, it is conceded on all hands, is protected by the statute. After the death of such original grantor the apparent legal title is in the heir, and the policy of the law, which is to make potent all legal titles to land, so far as practicable, that strangers may safely purchase, equally requires that the bona fide purchaser from the heir should be protected." If, therefore, Finnell had purchased said interest in good faith from the heirs of Benedict in June, 1873, and had recorded his deed in June, 1873, he would have been protected against the unrecorded deed made in 1848. But, when such heirs are unknown, why should not a subsequent purchaser, who acquires their interests in good faith and without notice, through a statutory proceeding against unknown heirs, be equally pro-

ected against the unrecorded deed? A deed from the heirs themselves no more effectually disposes of their interests than a deed executed for them by a master in chancery, under the orders of a court which has acquired jurisdiction over them. It has been held that the subsequent purchasers who are protected against unrecorded conveyances include purchasers at judicial sales as well as other sales. *Webber v. Clark*, 136 Ill. 256, 28 N. E. Rep. 860, and 32 N. E. Rep. 748. In principle and reason, these appellants, as purchasers from the grantees in the master's deed, executed under a judicial proceeding, occupy a position somewhat similar to that of the purchaser of a judicial sale. Section 7 of the chancery act is as follows: "In all suits in chancery, and suits to obtain title to lands, in any of the courts of this state, if there be persons interested in the same whose names are unknown, it shall be lawful to make such persons parties to such suits or proceedings by the name and description of unknown owners, or unknown heirs or devisees, of any deceased person who may have been interested in the subject-matter of the suit previous to his or her death. But in all such cases an affidavit shall be filed by the party desiring to make any unknown person a party, stating that the names of such persons are unknown; the process shall be issued against all parties of the name and description given as aforesaid; and notice given by publication, as required by this act, shall be sufficient to authorize the court to hear and determine the suit as though all parties had been sued by their proper names." *Starr & C. Ann. St. p. 395*. Section 43 of the same act is as follows: "All decrees, orders, judgments, and proceedings made or had with respect to unknown persons shall have the same effect, and be as binding and conclusive upon them, as though such suit or proceeding had been instituted against them by their proper names." *Id. p. 412*. The statute requires that the deceased person shall be one who was interested in the subject-matter of the suit previous to his death. *Pile v. McBratney*, 15 Ill. 314. The records showed, when the suit of 1869 was begun, that Benedict was the only person who had been interested in the one undivided fourth conveyed to him in 1836, except those holding tax titles. There was nothing to inform the complainants in the suit that Chambers had any interest in such undivided one-fourth, or that there were unknown persons interested therein, other than Benedict's heirs. In *Pile v. McBratney*, supra, the nature and effect of a proceeding precisely like the suit of 1869 were fully discussed, and it was there said: "The court having acquired jurisdiction of the case, and passed upon the rights of the parties, the decree was binding on the heirs of Mastin. The deed of the commissioners transferred all their interest in the land." When all persons known to have any interest in the land, or shown by the records to have any interest, are made parties, the proceeding would be useless, if, after it has become final, persons claiming to

hold secret interests, unrecorded and unsuspected, even, can come in, and set the decree aside. Such a doctrine would open wide the door to fraud and perjury. Speculators would be tempted to swear to lost deeds, or other instruments, as having been executed to them by parties to such proceedings, for the express purpose of declaring the decree invalid for want of jurisdiction over themselves. Thus the very object of the statute would be defeated. While the decree of May 21, 1870, was invalid, so far as it operated to deprive Chambers of the one-fourth interest shown by the records to have been conveyed to him in 1836, we cannot regard it as invalid so far as it affected the secret interest claimed to have been obtained by him through the lost deed of 1848. The apparent title to the latter interest stood in Benedict, or his heirs. "Where a deed is not recorded the title is apparently still in the grantor, and the law authorizes purchasers who are ignorant of the conveyance to deal with him as the real owner. In case of his death the heir becomes the apparent owner of the legal title, and it is equally as important, and equally as just, that the public may be allowed to deal with him as the real owner." *Kennedy v. Northup*, supra. When the facts authorize a statutory proceeding against the unknown heirs holding the apparent title, the prosecution of such a proceeding to the end, and the securing of a title thereunder, amount to a dealing with such heirs as the real owners, just as much as would be a purchase from heirs whose names are known. The bill of 1869 was to a large extent a bill for the specific performance of a contract to convey land. Cook and his grantees alleged therein that Chambers and Benedict executed a written agreement in 1843 to convey their interests in the 80 acres to Cook. The court found that allegation to be true, and ordered the defendants to make deeds to carry out the agreement, or, upon their default, that the master do so. Here was a judicial finding that Cook acquired an interest in Benedict's one-fourth before the deed of 1848 was made. The appellants, purchasing in good faith and without notice, had a right to rely upon that decree, and the deed thereunder, as passing Benedict's title. The court had jurisdiction of the parties,—the unknown heirs of Benedict, deceased,—and of the subject-matter,—the specific performance of a contract to convey land.

Counsel for appellees charge that the proceeding of 1869 was a fraud perpetrated upon the court by Cook, and that no such contract of sale as is therein set up ever existed. The proof does not sustain this charge. Chambers, it is true, swears that he owed Cook nothing when he left here, in 1838, and that he thinks Benedict owed him nothing. Cook, however, swears to the contrary in the suit of 1869, and the court found his evidence to be true; and, not only so, but he swears to the same thing in his testimony taken in this case in 1882. But, if it is true that Cook was guilty of the fraud charged against him, it was not such a fraud as goes to the ju-

isdiction of the court rendering the decree of 1870, and therefore is unavailable in a collateral attack upon the proceeding of 1869, as against innocent purchasers from the grantee in the master's deed. There are two kinds of fraud, as applied to this subject,—fraud in obtaining a decree by false evidence, and fraud which gives a court colorable jurisdiction over the defendant's person. In case of a fraud of the previous kind, a decree cannot be impeached in a separate and independent proceeding, though it is otherwise in the case of a fraud of the latter kind. *Caswell v. Caswell*, 120 Ill. 377, 11 N. E. Rep. 343.

Counsel for appellees contend that the contract set up in the bill of 1869 was a joint contract for the conveyance of an undivided one-half of the 80 acres by Chambers and Benedict together, and that, where jurisdiction over Chambers failed, there was no jurisdiction to enforce the contract against Benedict alone for the conveyance of his one-fourth interest. We do not concur in this position. The deed made by Cook in 1836 conveyed to Benedict one-fourth, and to Chambers one-fourth, and each could perform the contract as to his own interest only, and not as to the interest of the other. Hence, we see no reason why the master's deed to Finnell did not pass Benedict's one-fourth, though it failed to pass the one-fourth belonging to Chambers. Freeman, in his work on Cotenancy and Partition, (section 209,) says: "An agreement to convey, entered into by several cotenants, by which they stipulate that they will give a good and sufficient warranty deed, etc., does not require either to warrant the title of the others. It is complied with if each makes a separate deed of his moiety, containing the stipulated covenant, or if all join in a deed in which each grantor warrants his share, but not that of his co-grantor." *Coe v. Warahan*, 8 Gray, 198. Viewing the contract as one between Benedict, vendor, and Cook, vendee, for the sale of one-fourth of the land, and viewing the bill of 1869 as a bill brought by the vendee against the vendor for the specific performance of a contract made in 1843, we cannot see how the proceeding can be void, as to the vendor's interest, merely because a subsequent grantee of the vendor, to whom the latter conveyed in 1848, was not made a party, it being true that the original vendee filing the bill knew nothing about the conveyance to such second vendee. The bill alleged that Benedict had not conveyed any part of his interest in said land to any person, and the decree found that allegation to be true. The appellants, as bona fide purchasers from the master's grantee, had a right to rely upon the correctness of the finding. In case of a common bill for the specific performance of a contract of sale of real estate, the only proper parties, in general, are the parties to the contract itself. *Story, Eq. Pl. § 226b; Gibbs v. Blackwell*, 37 Ill. 191. "In a case before *Shadwell, V. C.*, where the vendor sold the same property twice over, and the bill was brought by the first purchaser against the vendor and the second purchaser, it was dismissed, without costs, as against



the latter, though specific performance was decreed as against the original contractor. This was affirmed by Lord Lyndhurst. \* \* \* *Cutts v. Thodey*, 1 Colly. 223." *Fry, Spec. Perf.* (3d Ed.) § 144.

Counsel for appellees contend that all questions as to the chancery suit of 1869 are res adjudicata, under the former decisions of this court made in this cause. We do not think that such is the effect of said decisions. The case was first tried before the superior court of Cook county in 1883. Upon the hearing then had, the superior court dismissed the bill of the complainants for want of equity. An appeal was taken to this court, and in an opinion filed on September 27, 1884, we reversed said decree of dismissal, and remanded the cause generally, without directions. 111 Ill. 138. The case was again tried before the superior court in May, 1887, and a decree was entered by that court on August 2, 1887, again dismissing the bill of complainants for want of equity. A second appeal was taken to this court, and in an opinion filed November 15, 1888, we reversed the second decree of dismissal, and again remanded the cause, without directions. 126 Ill. 599, 18 N. E. Rep. 653. An examination of the opinions of 1884 and 1888 will show that there was no discussion in regard to the proceeding of 1869, and not even a reference to it. The questions of law and the questions of fact there discussed were other than those which relate to the suit begun in 1869, and the decree therein entered, and the master's deed executed in pursuance thereof. When an opinion of this court directs the decree of the circuit court to be reversed, and the cause to be remanded without directions, what is said in such opinion in regard to the weight of evidence must be understood as applying only to the facts disclosed in the record then under consideration, and only the legal principles therein announced are binding upon the inferior court. *Shinn v. Shinn*, 15 Ill. App. 141. In such case it by no means follows that other facts may not be proved within the principles announced, or not inconsistent therewith, or that amendments may not be made which obviate objections to granting the relief sought, or to the allowance of a defense interposed. *Cable v. Ellis*, 120 Ill. 136, 11 N. E. Rep. 188; *Washburn & M. Manuf'g Co. v. Chicago G. W. F. Co.*, 119 Ill. 30, 6 N. E. Rep. 191; *Green v. City of Springfield*, 130 Ill. 515, 22 N. E. Rep. 602. It is true that some reference was made to the suit of 1869 in the original pleadings. But since the cause was last remanded new pleadings have been filed, and the old pleadings have been amended by both sides, and new and more extended averments have been therein made as to said suit. It appears clearly from the evidence of three witnesses, Finnell, Browning, and Jones, and from former briefs of counsel, as testified to by the counsel for appellees, that no proper and legitimate evidence as to said suit was or could have been introduced upon the hearing of 1883 and 1887. Neither party then had an abstract of title, made in the ordinary course of business before the destruction of the records in Cook county by the great fire of Oc-

tober, 1871, which showed fully all the proceedings in said suit. In 1887 the legislature passed an act amending what is known as the "Burnt Records Act." Said amendatory act went into force on July 1, 1887, and it was not until after it went into force that the defendants were able to introduce a letter-press copy, and extracts and minutes from the destroyed records in the possession of abstract makers, showing the return of the summons, and the publication of notice against the unknown owners, and other facts in said suit of 1869. Without the evidence made competent by the act of 1887, there was no way of proving that the court acquired jurisdiction in said suit over the unknown heirs of Benedict. In addition to this the complainants, Perry and Henderson, upon the reinstatement of the cause in the lower court after the reversal of 1888, not only filed in May, 1889, a supplemental bill referring to the previous pleadings in the cause, and making new parties, but as late as November 20, 1890, they filed an amended supplemental bill, attacking the validity of the proceeding of 1869 upon specific grounds, and setting up reasons why they entered no motion therein during the three years after the rendition of the decree of May, 1870, and also giving reasons why the defendant should not be allowed to rely upon the same for protection to themselves as bona fide purchasers. Answers were filed by the defendants setting up their reliance upon said suit. The amended supplemental bill of November 20, 1890, and the answer thereto, made a direct issue upon the validity of the proceeding of 1869; and new evidence, never before brought forward, was introduced in support of this issue. Having filed said amended supplemental bill, the appellees are estopped from claiming that the issue thereby tendered cannot now be considered. For the reasons hereinbefore set forth, we are of the opinion that the appellants, holding under Finnell, the grantee in said master's deed, have obtained good title to Benedict's one-fourth interest, as against Chambers, the grantee in the unrecorded deed of 1848. It follows that the complainants were only entitled to be regarded as owners of an undivided one-fourth part of said south 40 acres, and therefore the decree of the court below, holding them to be the owners of an undivided one-half part thereof, is erroneous.

The other questions in the case have reference to the rights of the defendants, as among themselves, in the remaining three-fourths of the tract, after awarding one-fourth thereof to Perry and Henderson.

As to the Wallace notes and trust deeds, Wallace has filed a cross bill asking for a foreclosure of the incumbrances held by him. The court below found that the legal title to the one-half not belonging to the complainants was vested in the Louisville Banking Company in trust for Burton, as hereinafter explained, and that as one-half of the \$12,000 of purchase money agreed to be paid by Street to Finnell had been paid, as above stated, and the other half, with interest thereon, was represented by the notes specified in the cross bills, and owned by Wallace, and as Finnell conveyed the



whole 40 acres to Street with full covenants of warranty, but in fact thereby conveyed the title to only one-half of the said property, therefore said Wallace could not enforce his trust deeds against the undivided half so decreed to be held by the company as trustee, etc., and said trust deeds were void, as against the rights of Burton and Hansbrough and said company, by reason of such failure of title to one-half of said land; and the court decreed, not only that the half held by it to be the property of complainants was free from the lien of said trust deeds, but that said Wallace had no claim whatever upon any portion of said tract of 40 acres. Burton and Hansbrough elected to assert their equities against Wallace. Although one of the errors assigned by Wallace is that the court below refused to enforce the lien of his trust deeds, yet his counsel do not present any argument in this court against the finding of the decree in this respect. Hence we conclude that they have abandoned their assignment of error. The deeds from Finnell to Street, and from Street to Hansbrough, and from Hansbrough to Burton, all contained full covenants of warranty. If the grantees had paid one-half of the purchase money, and received title to only one-half the land, they could certainly set up the failure of the warranty as to the other half of the land as a bar to the enforcement by Finnell of a suit to foreclose the notes and trust deeds given for the other half of the purchase money. As Wallace, purchaser of the notes from Finnell, is seeking to enforce them by foreclosure in a court of equity, said grantees could set up the same defense against him as against Finnell, the original payee. We are therefore inclined to think that the decree was correct in this particular, upon the hypothesis that the grantees of Finnell had lost title to one-half of the land. As, however, we hold that the title to one-fourth only of the tract has failed, Wallace is entitled to enforce his notes and trust deeds to the amount of \$8,000, with interest, according to the terms of the notes. To the extent thus indicated the decree below is erroneous.

As to the interest of the Louisville Banking Company. The controversy between the Louisville Banking Company and Burton is whether Burton still owns the equity of redemption, subject to the company's mortgage, or whether the company is the owner of the fee of the property, to the exclusion of any right to redeem on the part of Burton. The determination of this question requires a statement of the facts out of which the controversy grows: On January 15, 1877, Burton and wife, of Jefferson county, Ky., executed to R. K. White, of the same county, a mortgage upon said south 40 acres, and 80 acres of land in Morgan county, Ill., to secure three notes for \$6,000, \$4,500, and \$1,500, respectively, payable to the Louisville Banking Company, "and all renewals or extensions of the same, in whole or in part, and save the said White, who is indorser and security thereon, from all loss, cost, or damage;" the mortgage containing a provision that "if, during the time

said White holds the title to the said premises, he should be compelled to pay taxes or assessments, or other sums, on account of being title holder thereof, the same, with interest and costs, shall constitute a lien upon the premises aforesaid, and must be paid by said Burton before he can require reconveyance of said premises." This mortgage was recorded in Cook county on January 18, 1877, and in Morgan county on February 19, 1877. Afterwards, by a written instrument of transfer, dated August 8, 1878, and signed by both Burton and White, the said Burton and White assigned to the Louisville Banking Company the full benefit of all their interest, right, and title in and to said mortgage, and therein agreed that said banking company should be, and was thereby, substituted to all the rights then held by said White under said mortgage, "the same," as is stated in said written instrument, "having been made for the security of certain debts named therein, and are in a supplementary paper, of date 24th day of October, 1877, and to indemnify the said White as the surety of said Burton in said debts owing by said Burton to said banking company; and we hereby agree to make all other and further transfers, assignments, and writings as may be necessary to carry into full effect the true intent and meaning thereof." The amount of the indebtedness named in said mortgage was thereafter reduced, and new notes were executed to said banking company by Burton and White in place of said three notes, to wit, one for \$4,500, dated January 11, 1878, and one for \$5,970 dated April 24, 1878, both payable four months after date to the order of said company; the latter reciting upon its face a pledge by Burton, as security therefor, of two notes against P. G. Kelsey for \$1,219 and \$1,236.74, and one note against Kelsey and Giles for \$1,196.74, etc. It appears from a credit on the note for \$4,500 that there was pledged, as collateral security therefor, a claim against one R. C. Kerr, upon which \$1,171.50 was realized on May 18, 1881. Neither the mortgage aforesaid, nor the assignment thereof, were under seal, but Burton has never contested the same, nor denied his liability thereon. On August 26, 1878, Burton filed his petition in bankruptcy in the United States district court at Louisville, Ky., and was adjudged a bankrupt on August 28, 1878. On September 13, 1878, the creditors met, and selected W. W. Gardner, as assignee, and on the same day the register in bankruptcy made an assignment to said assignee of all the property and effects of the bankrupt. On April 24, 1879, Burton was discharged from bankruptcy upon his own application, and upon his filing the assent in writing of one-fourth in number, and one-third in value, of his creditors, to whom he was liable as principal debtor, and who had filed their claims. On June 26, 1880, Gardner was discharged as assignee of the bankrupt estate. His final accounts were filed on June 26, 1880, and found to be correct, and in his sworn report filed with the register on that day he says: "The bankrupt sets forth in his schedule filed in this court that he was the

owner of a large amount of real estate lying in various states, all of which appears to be incumbered largely in excess of its value, and is beyond the control of this assignee. \* \* \* This assignee is of the opinion that in no event can there be anything realized from the estate for the unsecured creditors. Hence he asks that his accounts be audited, and that he be discharged from all further liability on account of said trust." Gardner died in November, 1882,—more than two years after his discharge as assignee. But it appears that an attorney in Louisville went before said district court on December 15, 1882, and upon his motion, and announcement of the death of Gardner, an order was entered "that Harry Stucky be, and he is hereby, appointed assignee in bankruptcy of the estate of" George W. Burton. The records and files of the said district court show nothing further as to said Stucky, except the motion and order above named. No order was ever entered, directing said Stucky to make sale of any of the property of the bankrupt, or confirming any such sale after it was made. By deed dated January 14, 1884, and recorded January 21, 1884, Stucky, as assignee of Burton, and Burton and wife, united in a deed conveying said 40 acres in Cook county, and said 80 acres in Morgan county, to the Louisville Banking Company, reciting therein the bankruptcy of Burton, the appointment of Gardner, and assignment to him by the register, and his death, and the appointment of Stucky, and reciting, further, that all the right, title, and interest of Gardner, as assignee, became vested in Stucky, as assignee; that Stucky had advertised notice of sale for three weeks in a Louisville paper, and on January 14, 1884, had offered said premises for sale at public auction at the courthouse door in Louisville; and that said company had purchased the same for \$25. Afterwards, by another deed, executed on November 5, 1889, but dated back as of the 1st day of August, 1878, Burton and wife quitclaimed, for an express consideration of \$5, all their interest in said 40 acres to said banking company. It will be observed that the transactions referred to under this branch of the case all occurred during the pendency of this suit for partition, begun by the appellees Perry and Henderson. Burton had entered his appearance in the case as early as August, 1878. He filed an answer on January 26, 1881. The Louisville Banking Company was made a defendant on April 19, 1880, filed its answer on April 24, 1880, and a cross bill on July 3, 1882. Gardner was made defendant on February 11, 1881; and Stucky, on December 21, 1882. In all the pleadings of the banking company, filed in the case prior to July, 1890, it claimed to be mortgagee only, and sought to enforce its mortgage against such interest in the property as might be set off in the partition to Burton or his assignee. But in answers filed in July and October, 1890, and in an amended and supplemental cross bill filed on October 14, 1890, the banking company claimed that it had become the absolute owner of the property through the deeds executed to it by Burton and Stucky, and that whatever

interest in the property would have been set off to Burton or his assignee before the execution of said deeds should now be set off to it, as owner both of the mortgagee's title, and of the mortgagor's equity of redemption. The court below held, and we think correctly, that Burton did not part with his right to redeem upon the payment of what is justly due to the bank.

Leaving out of view for the moment the fact that the deed of January 14, 1884, was signed by Burton, and considering it as a deed executed by Stucky alone as assignee, was it a valid deed? In other words, did Stucky have any interest, as assignee of Burton, on January 14, 1884, which passed from him to the banking company by his deed of that date? Burton had been discharged from bankruptcy more than four years before that deed was executed, and more than three years before the entry of the order appointing Stucky assignee. Gardner had settled his accounts as assignee, and been discharged from his trust, more than three years before Stucky made his deed, and more than two years before Stucky's appointment. It must be conceded that the title to the property of the bankrupt passes to the assignee by the execution of the assignment of the register conveying the estate of the bankrupt. Such assignment relates back to the commencement of the bankruptcy proceeding, and by operation of law vests the title to all the bankrupt's property in the assignee. Bump, Bankr. (10th Ed.) pp. 137, 138, 485. Here, on September 13, 1878, and by relation on August 26, 1878, the title of Burton to the 40 acres was in Gardner, as assignee. But where was the title after the discharge of Gardner on June 28, 1880? It is well settled that an assignee is not bound to take possession of, or claim, all the property named in the bankrupt's schedule. He may reject such of the assets as may be a burden, rather than a benefit, to the estate. He may decline to receive property which is so heavily incumbered as to make it injudicious to receive it. In England, where leasehold estates pass to the assignee in bankruptcy, he is not bound to take the lease, and charge the estate with the payment of the rent, if the rent is greater than the value of the lease, but he may abandon it. In such cases, if the assignee declines to receive such property, or elects within a reasonable time not to take it, it remains the property of the bankrupt. *Smith v. Gordon*, 6 Law Rep. 813; *Amory v. Lawrence*, 3 Cliff. 523; *Glenny v. Langdon*, 98 U. S. 20; *Nash v. Simpson*, 78 Me. 142, 8 Atl. Rep. 53; *Brookfield v. Stephens*, 40 Ark. 366. The assignee is a trustee appointed for the purpose of disposing of the assets of the bankrupt, and distributing them among the creditors. He takes the title in his official character as a trustee, and as an officer of the court. The bankrupt law makes no provision for the reconveyance of the property undisposed of by the assignee to the bankrupt. As the assignee takes no title as an individual, but only as an officer, the title reverts to the bankrupt when the trust is ended, and the officer is discharged. When the creditors are settled with, and the bankrupt is discharged, and the estate

is wound up, and the assignee is discharged, the bankrupt becomes reinstated in his original title. It has been said that "the title must be somewhere, and under these circumstances it is necessary to regard it as in the only party interested." *Boyd v. Olvey*, 82 Ind. 294; *King v. Remington*, 36 Minn. 15, 29 N. W. Rep. 352; *Stevens v. Earles*, 25 Mich. 40; *Jones v. Pyron*, 57 Tex. 43; *Reynolds v. Bank*, 112 U. S. 405, 5 Sup. Ct. Rep. 213; *Bump, Bankr.* (10th Ed.) pp. 507, 669. In the case at bar, while Gardner was assignee, the 40 acres were incumbered by the Wallace trust deeds, by the mortgage of the Louisville Banking Company, and by a tax deed issued in 1873. Although the land has greatly increased in value since 1880, yet, when Gardner made his final report, the statement therein made, that the land appeared to be incumbered largely in excess of its value, was literally true. When he said that it was beyond his control, he said, in effect, that he had never taken control or possession of it, but had declined to receive it as an asset. Although he was made a party to the present suit, yet it was not until he had been discharged as assignee, and therefore not until all his title, which was official, and not individual, had ceased to exist. By his discharge, in June, 1880, the title thereafter reverted to Burton, and became reinvested in him. It necessarily follows from the foregoing considerations that the order made in December, 1882, appointing Stucky assignee, and the deed of January, 1884, viewed as a conveyance by Stucky alone, were void, and of no effect. Stucky cannot be regarded as a successor to Gardner in the office of assignee. Such a successor would only be appointed in case of the death, removal, or resignation of the former assignee before the winding up of the bankrupt estate. But where the trust is closed, and the acting assignee has done his duty, and has been discharged, a new assignee certainly cannot be appointed without the institution of a new proceeding in bankruptcy in accordance with the provisions of the act. But no such new proceeding for the appointment of Stucky was instituted. We are therefore of the opinion that Stucky conveyed no title to the banking company by the deed of January, 1884. The weight of authority is in favor of the position that where the estate is settled, and the assignee discharged, the legal title reverts to the bankrupt without a reassignment, so that he or his heirs may bring ejectment. But if this were not so, the equitable title would clearly be in the bankrupt, and whatever title could be regarded as remaining in the assignee, or in any person subsequently appointed by the court to act as assignee, would be a naked legal title held in trust for the bankrupt. *King v. Remington*, supra; *Reynolds v. Bank*, supra. Hence if, by any process of reasoning, it could be held that Stucky took any title at all, it could have been only a naked legal title, vested in him as a trustee for Burton, the holder of the equitable title. Consequently, when Burton united with Stucky in the deed of 1884, his joint execution with Stucky operated as a direction to the latter to convey such legal title for

the same purpose for which Burton was conveying the equitable title.

This leads to an inquiry as to the real object of the execution by Burton to the Louisville Banking Company of the deeds made in January, 1884, and November, 1889. In order to determine whether a conveyance made by the mortgagor to the mortgagee operates as an extinguishment of the right of redemption, it must be made to appear that the parties intended such conveyance to be a payment of the debt. The intention to pay the debt by a deed of the property will not be inferred where the creditor retains the evidences of the indebtedness, and the securities pledged for its payment. *Sutphen v. Cushman*, 35 Ill. 186; *Knowles v. Knowles*, 86 Ill. 1; *Dunphy v. Riddle*, Id. 22; *Bearss v. Ford*, 108 Ill. 16. The deed will not be regarded as a release of the equity of redemption unless it is made for a consideration which is adequate, and which would be deemed reasonable if the transaction were between other parties. If the value of the mortgaged premises greatly exceeds the debt secured by the mortgage, the fact of such excess will tend to show that a release was not intended. 1 *Jones, Mortg.* (4th Ed.) §§ 267, 340. A subsequent recognition of the mortgagee of the continued existence of the relation of debtor and creditor between the mortgagor and himself will be a circumstance tending to show the absence of such an intention. Id. § 267. The relations between the parties, and other facts and circumstances of a nature to control the deed, and to establish such an equity as would give a right of redemption, may be shown by parole evidence. *Knowles v. Knowles*, supra; *Conant v. Riseborough*, (Ill. Sup.) 28 N. E. Rep. 789. Applying these principles to the facts of the present case, we think it quite apparent that the deeds made by Burton to the banking company were merely intended as additional security for the mortgage indebtedness, and not as releases of the equity of redemption. Neither the mortgage, nor the notes secured thereby, nor the notes pledged as collateral security, were surrendered to Burton, or canceled, but were retained in the possession of the banking company. No consideration whatever was received by Burton for making these conveyances to the company. When they were made, both Burton and the company were parties to the present litigation, and engaged in contesting the title with Perry and Henderson and others. Burton was a party to the litigation when he executed the mortgage in January, 1877, and assigned it to the company, in August, 1878. He and White and Harris, the latter being president of the company, all lived in Louisville, and were intimate friends. He had been himself a stockholder and director in the banking company. In the assignment of the mortgage to the company he had agreed to make all such other and further transfers, assignments, and writings as might be necessary. The proof shows that Burton signed the deeds of 1884 and 1889 in Louisville at the request of Harris. Harris told him that the attorneys in Chicago

had requested the execution of the deeds, and that they were needed in the suit in Chicago, and for the correction of irregularities in former instruments. As there was no seal on the original mortgage, such a defect might be cured by a deed in the nature of a mortgage, executed under seal to the mortgagee. When the deed of 1889 was executed, the value of the property had begun to increase so as greatly to exceed the debt upon it. We are satisfied from a careful examination of all the evidence that Burton merely signed these deeds for the purpose of aiding the banking company in the defense of the present suit. His compliance with the request of the president of the company to execute additional papers will be presumed to have been in pursuance of his previous agreement upon the subject. After the execution of the deed of January, 1884, the banking company filed pleadings in this case, in which it recognized the relations of mortgagee and mortgagor as still existing between itself and Burton. In an answer filed by it on February 2, 1886, to Wallace's cross bill, the company sets up its claim as mortgagee, refers to the amount due upon its notes, speaks of its lien, and asks that a certain part of the property be allotted to Burton or his assignee in bankruptcy, subject to its lien. Also, in a cross bill filed by the company on May 6, 1890, after the execution of the deed of November, 1889, the company again refers to its lien. The recognition in these pleadings of the continued existence of the lien of the mortgage is wholly inconsistent with the claim that the company had ceased to be mortgagee, and had become the absolute owner, of the property.

It is assigned as a cross error by Burton that the decree below is erroneous in requiring him to pay certain moneys advanced by the company after January 14, 1884, for expenses and counsel fees in setting aside tax deeds upon the premises in question. When the property was conveyed to the company, in January, 1884, it thereafter held the legal title in trust for Burton, subject to his right to redeem it upon paying the mortgage debt and interest, and such legitimate disbursements by the company as were necessary to protect the title. One of the tax deeds was outstanding before the mortgage was made, and although the others were obtained thereafter it does not appear that the mortgagee was in possession of the property. As a general rule the mortgagee not in possession is under no obligation to pay the taxes upon the mortgaged premises. 1 Jones, Mortg. (4th Ed.) § 713. The decree does not allow a counsel fee for the foreclosure of the mortgage. The cases which hold that a counsel fee cannot be recovered in a decree of foreclosure unless there is a stipulation in the mortgage allowing it have no application here. Here the mortgagee, being clothed with the legal title by the mortgagor, succeeds in setting aside tax titles for the benefit of the mortgagor, as well as for the benefit of the mortgagee. When the legal title shall be restored to the mortgagor, upon his payment of the mortgage

debt, it will be restored free of tax incumbrances which have been removed by the mortgagee. It has been held that a court of equity will allow a mortgagee counsel fees incurred in defending his title, without any express contract. 2 Jones, Mortg. (4th Ed.) § 1606. When the mortgagee pays taxes to preserve his security he is entitled to recover the amount so paid. Id. § 1185; Wright v. Langley, 36 Ill. 381. Upon a bill to redeem, a mortgagee is entitled to credit for reasonable counsel fees paid in collecting rents and profits. 2 Jones, Mortg. § 1188. The point now under consideration is not alluded to by counsel for the company, and merely referred to, without discussion, by counsel for Burton. But we see nothing inequitable in allowing these advances, which are not unreasonable in amount.

There is a controversy in the case between Hansbrough and the Louisville Banking Company. Hansbrough's claim is that he was the equitable owner of one-half of the 40 acres, by reason of his joint purchase thereof with Burton; that Burton held the legal title to one-half in trust for Hansbrough; that Harris, the president of the banking company, had notice of Hansbrough's interest when he took the assignment of the mortgage to the company, on August 8, 1878; that by reason of such notice to its president the company cannot enforce its mortgage against the one-half interest owned by Hansbrough, but can only enforce it against the one-half interest owned by Burton. Hansbrough became a party to this proceeding for the first time on July 19, 1890. On that day he filed an intervening petition, and asked to be allowed to come in as a defendant, and answer. The prayer of his petition was granted. He then answered the original bill, and also filed a bill of interpleader setting up his claims as above stated. The proof shows that a written contract was executed between Burton and Hansbrough on March 2, 1871, in which it was agreed that "they are jointly and equally interested in the above-described 40 acres of land to the extent of one-half each, while the title is in said Burton." This agreement was never recorded. Burton, however, admits the ownership of one-half of the land by Hansbrough, and, as against Burton, Hansbrough is entitled to be regarded as said owner. But we think that the court below decided correctly in holding that his claim cannot be sustained, as against the mortgage of the bank. When the banking company took an assignment of the mortgage it had no notice of any interest in Hansbrough. It is conceded that the records furnished no notice of such interest. It is contended, however, that the bank had actual notice. Burton says that in May, 1873, he went to China, and was gone several months; that before leaving Kentucky, to take this trip, he left certain of his papers and business matters in the hands of Harris, as his friend; that he then told Harris of the interest Hansbrough had in the 40 acres. Harris denies that Burton gave him any such information, but says that if Burton did tell him anything about it it must

have been in some casual conversation, and that he had forgotten all about it when he acted for the bank, more than five years afterwards, in the matter of the White mortgage. When he took the assignment of the mortgage, on August 8, 1878, Harris was acting as the agent of the banking company. If he was told in May, 1878, of Hansbrough's interest, he received such information while acting as the friend or agent of Burton. He did not get the notice, if he was notified at all, while he was acting for the bank, but while he was acting for an individual. The knowledge of the agent must be acquired during his agency, and in the course of the same transaction from which the principal's rights and liabilities arise, in order to affect the principal with notice, unless it is clear from the evidence that the information obtained by the agent in a former transaction is so precise and definite that it is or must be present to his mind and memory while engaged in the second transaction. *Snyder v. Partridge*, (Ill. Sup.) 29 N. E. Rep. 851. It cannot be said that a remark made to Harris in a casual conversation in 1873 was present to his mind five years afterwards, when he was engaged in taking security for a debt due to the bank of which he was president. Moreover, there is no evidence that White, the original mortgagee in the mortgage made by Burton, had any notice whatever of Hansbrough's interest in the mortgaged premises. If White was a bona fide owner of the mortgage, the bank, as his assignee, would take good title, even if its president had notice. It is well settled that a purchaser with notice may get a good title from a bona fide purchaser without notice of prior equities. *Peck v. Arhart*, 95 Ill. 118. But, in addition to the foregoing considerations, Hansbrough abandoned the land, neglected for years to assert any interest in it, and suffered Burton to be held out to third parties as owner. He conveyed the title to Burton in January, 1872. In May, 1873, he executed a lease of the land to a tenant of Burton, and himself signed the lease as agent of Burton, and suffered Burton to hold the possession for years thereafter. He delivered up the written contract of March 2, 1871, to Burton, in whose possession it remained until the summer of 1890. Hansbrough went into bankruptcy in April, 1878, and did not schedule any interest in this land as a part of his assets. He admits in his testimony that he had forgotten all about his interest for 17 years, from 1873 to 1890, and only asserted it in the latter year because the contract of March 2, 1871, was then discovered among Burton's papers. During these years he had been a witness in this case, and knew of the mortgage of the banking company, and recognized its right to enforce a lien against the 40 acres, and aided its attorneys in asserting those rights. Under all these circumstances we think that Hansbrough is estopped from denying that the company is entitled to enforce its mortgage against his interest, as well as against that of Burton.

As to the tax deeds. After this cause

was reversed and remanded, in 1888, it was reinstated in the court below in March, 1889. Thereafter, by supplemental bill filed on May 23, 1889, and amendments thereto filed on November 25, 1890, the complainants made John McCaffrey and John J. Mitchell, holders of tax deeds, and James Price, claiming to be their tenant, parties defendant, and alleged the invalidity of such tax deeds, and asked that the same be set aside as clouds. On May 22, 1889, the Louisville Banking Company also filed an amended cross bill, which was still further amended on May 6, 1890, attacking the tax deeds, and praying for their cancellation. The same allegations as to the invalidity of the tax deeds are made in the bill of interpleader filed by Hansbrough on July 19, 1890, and in a cross bill filed by Burton on October 14, 1890. The tax deeds are three in number,—one dated July 31, 1876, executed to Asahel Gage, who afterwards conveyed to McCaffrey; one dated October 11, 1881, and one dated December 27, 1883, both issued to McCaffrey. On June 22, 1889, McCaffrey conveyed his interest to Mitchell, who now owns the three tax titles. The decree of the court below declared the deeds to be void, and set them aside. It seems to be taken for granted by counsel that the decree was correct, so far as it held the deeds dated July 31, 1876, and December 27, 1883, to be void. As counsel for Mitchell do not attack the finding made by the chancellor in reference to those deeds, we shall assume that no good reason exists for disturbing such finding. The only one of the tax deeds which counsel discuss in their briefs is the deed dated October 11, 1881. It was made in pursuance of a sale which took place on August 25, 1879, for the taxes of 1877 and 1878. The time of redemption expired on August 25, 1881. Section 216 of the revenue act provides that the purchaser at the tax sale, before he can be entitled to a deed of the land purchased by him, shall serve notice on every person in actual possession or occupancy of the land, also on the person in whose name the same was taxed or specially assessed, if, upon diligent inquiry, he or she can be found in the county, also upon the owners of or persons interested in the land, if they can, upon diligent inquiry, be found in the county, at least three months before the expiration of the time of redemption on such sale. The section, after specifying what the notice shall contain, then provides as follows: "If no person is in possession or occupancy of such land or lot, and the person in whose name the same was taxed or specially assessed, upon diligent inquiry, cannot be found in the county, or the owners of, or parties interested in, said land or lot, upon diligent inquiry, cannot be found in the county, then such person, or his assignee, shall publish such notice in some newspaper printed in such county, \* \* \* which notice shall be inserted three times, the first time not more than five months, and the last not less than three months before the time of redemption shall expire." The statute thus requires that the person in whose name the land is taxed shall be personally served with notice. If, upon

diligent inquiry, he cannot be found in the county, then the notice must be inserted in a newspaper three times. It is only when he cannot be found, upon diligent inquiry, that the three notices are to be inserted. The making of diligent inquiry, and the failure to find, as a result thereof, must precede the publication. When the party in whose name the land is taxed cannot thus be found he is entitled to notice by three publications,—not by one publication, or by two publications. If the notice is first published once or twice, and then the diligent inquiry is made, and the failure to find results therefrom, the law is not complied with. The statute does not contemplate that the purchaser shall first publish his notices, and then, afterwards, make diligent inquiry. Inquiry made before the insertion of the first notice might result in finding the person in whose name the land is taxed. He may leave the county between the first insertion and the second or third insertion. If he can be found at the time when the first notice is inserted, he is not notified in the way required by law,—that is, by personal service,—but in a way not required by law,—that is, by publication. The statute does not permit the holder of the tax certificate to postpone his diligent inquiry until after he has published his notice. The publication, in such case, has no legal foundation to rest upon, because it is not justified or authorized until there has first been diligent inquiry, resulting in a failure to find. The same observations here made as to the person in whose name the land is taxed apply also to the owners or parties interested. The affidavits filed by McCaffrey, the purchaser of the 40 acres at the tax sale on August 25, 1879, state that G. G. Street was the person in whose name the land was taxed, and that R. K. White was a party interested in the land, and that diligent search and inquiry were not made for them until May 21, 1881; but these affidavits also state, though no certificate of publication is filed with them, that the notice required by section 216 was inserted in the Chicago Daily Evening Journal on the 19th, 20th, and 21st days of May, 1881. Thus it appears that no inquiry was made for Street and White until the notice had been inserted twice, if not three times, in a newspaper. The affidavits show that James Price was in the actual possession and occupancy of the land on May, 24, 1881,—three days after the last publication of the notice. But whether Price or anybody else was in the possession or occupancy of the land before or at the time of the publication of the notice, or whether the land was vacant and unoccupied at that time, is not shown. The affidavit of Snow states that he served the notice on Price, as being the only party in the occupancy of the land, on May 24, 1881. The affidavit of Price himself states that he was on that day the agent of McCaffrey, and on that day served a copy of the notice on another party for McCaffrey, and as his agent. It thus appears that the purchaser at the tax sale served notice upon an occupant claimed to be his own agent, and acting in his own interest. The statute, by re-

quiring notice to be served upon every person in actual possession or occupancy of the land, never contemplated that the purchaser at the tax sale should himself create an occupancy, and then hand a notice to the occupant of his own creation. Such service is not a compliance with the law. The possession or occupancy specified in the statute is one which is held adversely to the holder of the tax certificate. We think that the deed of October 11, 1881, was properly held to be void because the affidavits filed with the county clerk for the purpose of obtaining it do not show that the publication of the notice was preceded by the preliminary conditions required by the statute; that is to say, it does not appear that before publication was made no person was in possession or occupancy of the land, or that there had been diligent inquiry for the persons above specified, and a failure to find them. *Gage v. Bailey*, 100 Ill. 580.

Counsel for the appellant Mitchell rely upon the fourth section of the limitation act, which provides that "actions brought for the recovery of any lands \* \* \* of which any person may be possessed by actual residence thereon for seven successive years, having a connected title in law or equity, deducible of record, \* \* \* from any public officer or other person authorized by the laws of this state to sell such land for the nonpayment of taxes, \* \* \* shall be brought within seven years next after possession being taken as aforesaid, but when the possessor shall acquire such title after taking possession the limitation shall begin to run from the time of acquiring title." Mitchell claims that McCaffrey was in possession of the land by the actual residence of his tenants thereon for seven successive years, having such a title as is called for by section 4, under said tax deed of October 11, 1881. The period of seven years is alleged to have begun on February 10, 1882, when McCaffrey executed a lease to the party then in possession, and to have ended before May 22, 1889, when the first amended cross bill, making the holders of the tax deeds parties, was filed herein. Any deed which purports on its face to convey title may be used as color of title under section 6 of the limitation act, which provides for possession and payment of taxes for seven years, and under section 7 of the same act, which provides for payment of taxes for seven years while the land is vacant and unoccupied. 2 Starr & C. Ann. St. pp. 1538-1548, c. 83. A tax deed may be good color of title under those sections even though the judgment and precept upon which it is based are absolutely void. But it requires something more than mere color of title to constitute the bar contemplated by section 4. Id. p. 1538. The latter section requires a prima facie title. For instance, it was held before the adoption of section 224 of the present revenue act (2 Starr & C. Ann. St. p. 2101) that a tax deed, without the judgment and precept upon which it is based, is not a prima facie title, such as is required by the act of 1835, of which said section 4 was a part. *Elston v. Kenicott*, 46 Ill. 187. By the terms of section 4 the officer must be "authorized" to sell

the land for the nonpayment of taxes. Unless the judgment and precept are produced, no authority to sell is shown. It cannot be said that the language of the section refers to any deed which a public officer may make without pretense of authority. *Elston v. Kennicott*, supra. On the contrary the deed is one which is made in pursuance of the authority required by law. The right of the owner of land which has been sold for taxes to redeem it within two years from the sale is a constitutional right; and the right of the owner to reasonable notice, by publication or otherwise, of the fact of sale, and when the time of redemption expires, is also a constitutional right. The constitution furthermore directs that occupants shall in all cases be served with personal notice before time of redemption expires. Const. 1870, § 5, art. 9. Hence it is necessary, in order to establish a prima facie title under section 4, to show notice, by personal service or by publication, to the owner, before a tax deed of his land can be lawfully executed by a public officer. Such deed is made without authority unless the notice prescribed by the statute is first given. Accordingly the legislature has provided, in section 217 of the revenue act, that before a purchaser at a tax sale, or his assignee, shall be entitled to a deed, he must, by himself or his agent, make an affidavit of his compliance with the conditions of said section 216, above quoted, "stating particularly the facts relied on as such compliance;" that this affidavit shall be delivered to the person authorized by law to execute the tax deed, and shall be filed by him with the officer having custody of the record of the lands sold for taxes," etc., "and entries of redemption," etc.; that the affidavit is to be entered by such officer "on the records of his office, and carefully preserved among the files of his office," etc. The affidavit required by section 217 must be produced in order to show the prima facie title demanded by such section 4. As the title called for by that section must be "a connected title, in law or equity, deducible of record," and as the affidavit, showing compliance with the requirements of the statute as to giving notice to the owner is made a part of the record, the affidavit is a necessary part of the prima facie title. In the present case, however, the affidavits do not show a compliance with section 216. They do not show that such notice by publication as section 216 prescribes was given, for the reasons already stated. It follows that the appellant Mitchell has not exhibited such a prima facie title as justifies him in relying upon the bar prescribed by said section 4. *Hughes v. Carne*, 135 Ill. 519, 26 N. E. Rep. 517.

Furthermore, we are of the opinion, from a careful examination of the evidence, that McCaffrey obtained the possession which he pleads as an actual residence by either forcing or persuading a party who was holding possession under Burton to abandon Burton, or those holding under him, and to attorn to McCaffrey. The actual residence specified in section 4 is not an unlawfully acquired possession. It is conceded that the evidence does not show pos-

session and payment of taxes by McCaffrey for seven years upon the whole tract of 40 acres. It is contended, however, that McCaffrey acquired title to the N. E. 10 acres of the 40 acres by possession and payment of taxes for seven successive years under the tax deed of October 11, 1881, as color of title. This contention, however, is not supported by the facts. The first payment of taxes made by McCaffrey under his tax deed was on August 5, 1882, and this suit was begun against him on May 22, 1889, as above stated. Seven years did not intervene between August 5, 1882, and May 22, 1889. In order to create a bar under the first section of the act of 1839, or section 6 of the present limitation law, seven years must elapse between the date of the first payment, when the statute begins to run, and the commencement of the suit. *McConnel v. Konepel*, 46 Ill. 519; *Iberg v. Webb*, 96 Ill. 415; *Holbrook v. Debo*, 99 Ill. 372.

The appellant Mitchell further claims that the Louisville Banking Company is precluded from the right to file a bill to remove the tax deed of October 11, 1881, as a cloud upon its title, upon the ground that Gardner's assignee in bankruptcy did not file the bill within two years from the time when the cause of action accrued in his favor, and consequently that any suit between him and McCaffrey, or Mitchell, claiming an adverse interest touching this property, was barred, under section 5067 of the Revised Statutes of the United States, and that the banking company, as grantee of said assignee in bankruptcy in the deed dated January 14, 1884, was also barred by said section, under the doctrine of *Gage v. Du Puy*, 127 Ill. 216, 19 N. E. Rep. 878, and other cases therein referred to. This point would be well taken if the banking company had no other title, when it filed its bill to remove the tax deed, except that derived from the deed made by Stucky, assignee, in 1884. But the bank held a mortgage against Burton, and we have recently held that a mortgagee may file a bill to set aside a tax deed as a cloud. *Miller v. Cook*, 135 Ill. 190, 26 N. E. Rep. 756. Whether a mortgagee in a mortgage which is not executed under seal can file such a bill, or not, is a question which we do not deem it necessary to pass upon in this case, because, when the company filed its amended cross bill, in May, 1889, it held the legal title by reason of the execution of the deed of 1884 by Burton, the mortgagor; he having united with Stucky in making that deed. The company was mortgagee, not only by reason of the original mortgage, but by reason of the conveyance to it by Burton. A mortgagee holding under a deed which, though absolute in form, was intended to be only a mortgage security, can certainly file a bill to set aside the tax deed. Nor do we deem it necessary to consider whether or not the decree of the court below was correct in establishing a lien upon the portion of the land apportioned to the complainants, Perry and Henderson, for the payment of one-half the amount due to Mitchell for purchase money paid at the tax sales, and for subsequent taxes, together with interest. As



the decree below must be reversed, and the cause remanded, the court below will change its decree so as to require one-fourth of said amount, with interest, to be paid by said complainants as a condition precedent to the setting aside of the tax deeds as against their one-fourth interest. We are of the opinion that the decree was correct not only in holding said tax deeds to be void, but also in disallowing the defenses set up by said Mitchell, as the same have been herein referred to. The decree of the superior court is reversed, and the cause is remanded to that court, with directions that it change and modify its decree so far as it is herein held to be erroneous, and that it enter a decree in accordance with the views expressed in this opinion. It is ordered that the costs of this court be paid, two-eighths by the appellees Perry and Henderson, three-eighths by the appellant the Louisville Banking Company, one-eighth by the appellant Burton, one-eighth by the appellant Hansbrough, and one-eighth by the appellee Mitchell. Revised in part, affirmed in part, and remanded, with directions.

#### On Rehearing.

**PER CURIAM.** Rehearing having been granted in this cause, we have again given the record such consideration as is necessary to a clear comprehension of the points made, and have, upon the merits, reached the same conclusions announced in our former opinion. It is urged that we should so modify the remanding order that the case may be open for further evidence upon the question of the identity of Asa W. Chambers, who gave his deposition in 1874, with the Asa W. Chambers to whom, with Benedict, the land was conveyed by Cook in 1836. Suggestion is made of newly-discovered evidence upon this point, and affidavits in support were filed with the petition for rehearing. This practice is, of course, not allowable, and such affidavits were, on motion, stricken from the files. *Newlin v. Snyder*, 78 Ill. 528. It is, however, insisted that, doubt having been expressed as to the absolute certainty that the persons were identical, the case should be left open, and appellants permitted to make further proof. To this we cannot assent. If the suggestions of newly-discovered evidence be considered as broadly as made by counsel, waiving the objection that it would be cumulative to that already in the record, it must be said that it would, at best, be inconclusive of the point. It might have been shown that the Chambers who testified had falsely accounted for his whereabouts and connections, or even had personated another, and that he was wholly unreliable; but the positive identification of the man who testified in 1874 with the man who boarded with the witness Beaubien in 1836-37, who was the partner of Benedict in those years, and who bought land of Cook, remains. Beaubien, whose integrity is not questioned, who recognized Chambers without introduction, and who had ample opportunity to verify his identification, testifies positively to the identity. But the more serious difficulty with the suggestion arises out of

the laches of the defendants. Chambers came from Texas to Chicago in 1874, and was there some months. The defendants were apprised of the taking of his deposition, and appeared by able counsel, and subjected him to a rigid and thorough cross-examination. He, in addition to Beaubien, gave the names of other residents of Chicago whom he had known in 1836-37, who presumably were then alive, (it is not questioned that they were,) and who could have been called to testify as to his identity. The defendants—those most interested—also appeared, and cross-examined Beaubien; and if any doubt existed in regard to the identity, or a fraud was being practiced, the evidence, presumably, was then at hand to have put the matter at rest. Chambers had returned to the scene of the transaction of 1836-37, gave the names of a number of those he knew, and if his identity had been then questioned these could have been called, and the matter established beyond cavil. Moreover, the entire data as to his history and connections, from which it is now suggested it can be shown that the man who testified was not the Chambers of the firm of Chambers & Benedict, doing business in Chicago in 1836, was then given by the witness Chambers. All these facts were known to the defendants in August, 1874. If the evidence existed at Georgetown, in Vermillion county, which it is now suggested can be produced, it existed then, and the slightest diligence would have discovered it. But the defendants lie by through three trials in the circuit court, three appeals and decisions of the cause in this court, without making any effort to procure the testimony, and not until after the third and final decision of the cause make these suggestions. In the mean time, by the effect of time, further proof of identification by those who knew the Chambers of 1836 has been rendered impossible. It is suggested that the Chambers who testified is himself dead, and those who knew him in 1836, if any could be found, could not know the identity of that man with the Chambers of 1874. The suggestion contains none of the elements of diligence which will control the exercise of the discretion of a court of conscience. To now, after the litigation of 18 years, open up this question, of vital importance, and which lay at the foundation of the complainants' right of recovery, would be to reward and foster negligence, at the expense of the diligent. We are of opinion that as by the decree, as directed to be modified, appellant Wallace will be entitled to a lien for part of the amount secured by the Street mortgage, and that mortgage being senior to the lien of the Louisville Banking Company's mortgage, the decree should be further modified by giving his lien priority in payment over the lien of the banking company. Also, it is conceded by the defendant Burton that at the time that he executed the original mortgage to White, and at the time of the transfer thereof to the Louisville Banking Company, and since, he held the legal title to one-half of the property in trust for appellant Hans-



brough, according to the written declaration of trust set out in the record, and the indebtedness to the Louisville Banking Company, being that of Burton alone, for which Hansbrough was in no way liable, the decree should be further modified, by requiring satisfaction of said indebtedness out of the share or part of said mortgaged premises declared to be in Burton, and that resort be had to the share or part found to be in Hansbrough only to satisfy the balance remaining after exhaustion of the interest therein of said Burton. The opinion heretofore filed in the cause will be relied as the opinion of the court, and the judgment heretofore entered, with the further modifications directed, will be again entered.

Reversed and remanded, with directions.

(159 Mass. 128)

FIELD v. ROOSA et al.

(Supreme Judicial Court of Massachusetts.  
Worcester. May, 1893.)

LANDLORD—STORAGE OF GOODS—REMEDY AGAINST  
MORTGAGEE.

The fact that a landlord, on rightfully taking possession of leased premises, finds himself involuntarily in possession of a stock of goods left by an outgoing tenant, which are mortgaged to their full value, and which the mortgagee declines to take into possession, or pay for storing, does not give the landlord a right of action against the mortgagee to recover compensation for storage, and to reach, in payment therefor, his interest in the goods, although the remedy by suit against the mortgagor is worthless.

Appeal from superior court, Worcester county; John Hopkins, Judge.

Bill by Jerome C. Field against Edwin S. Roosa and Albert K. Page to recover compensation for storing certain goods. Decree, from which complainant appeals. Affirmed.

W. A. Gile and W. S. B. Hopkins, for appellant. T. G. Kent and G. T. Dewey, for appellees.

FIELD, C. J. The bill in this case was filed on March 2, 1891, and the defendants were Edwin S. Roosa and Albert K. Page, called in the bill Charles H. Paige, but the misnomer was cured by an amendment. At that time it appears from the master's report that the plaintiff had let the west store, No. 43 Pleasant street, in Worcester, to Lucius Merrifield, for a term of five years from April 24, 1889, with the right in the lessee to underlet, but not to assign the lease. On December 18, 1890, Merrifield, then being in possession of the store under this lease, sold the stock of musical instruments, etc., in the store, to the defendant Roosa. This stock was sold subject to a mortgage from Merrifield to F. H. Dewey for \$1,400 and interest, on which there was due \$1,430. The mortgage contained a provision that the mortgagor, his representatives or assigns, should not attempt to sell or remove the stock from the store without the consent of the mortgagee, in writing. Merrifield also agreed with Roosa to assign the lease to him if the plaintiff would agree to take Roosa as a tenant. Roosa, as a part of the consider-

ation for the sale of the stock, gave to Merrifield a deed of certain real estate, subject to two mortgages, the second of which was assigned to Albert K. Page. Page assigned this mortgage to Merrifield as a part of the consideration of the sale of the stock of goods to Roosa, and Roosa gave to Page a mortgage on the stock of goods, subject to the mortgage to Dewey; and this mortgage also contained a provision against the removal of the stock from the store without the consent, in writing, of the mortgagee. Merrifield also gave to Roosa the key of the store, and the possession of the stock, and offered to assign the lease if the plaintiff would accept Roosa as a tenant. Roosa, objecting to the form of the execution of the lease, did not request Merrifield to assign the lease to him, nor did the plaintiff ever consent to any assignment, or to accept Roosa as his tenant, and Merrifield did not underlet the store to Roosa. Roosa continued in the use and occupation of the store from December 18, 1890, to January 13, 1891, without any agreement with the plaintiff. During this use and occupation there were negotiations between the plaintiff and Roosa for a lease for a short term, but they came to nothing; and on January 10, 1891, Roosa "left the store locked, and, taking the key, went to his home, in Newton." On January 12, 1891, the plaintiff entered the store through a door in the basement, changed the lock on the front door, made an agreement with Dewey "to keep the goods in the store for him until he should foreclose by a sale, or assign his mortgage," and on January 15th notified Page that the store was closed, and, if he wanted the goods, "to come up, pay the storage, and take charge of the goods; otherwise, they would be delivered to the first mortgagee." On the same day, Roosa demanded of the plaintiff admission to the store, which the plaintiff refused. On January 17th, Roosa brought suit against the plaintiff and one Hannah Lamb for a conversion of the goods, which suit is now pending. On January 28th, Dewey assigned his mortgage to George R. Wheelock, who knew of the pendency of the suit for conversion, and on the same day the plaintiff notified Roosa to remove the goods left in the store, and to surrender the key to him, which Roosa did not do; but it is not found that the plaintiff abandoned his claim for storage, and from the allegations of the bill it appears that he insisted on this claim. On March 2d, which, in the report of the master, is set down as March 4th, this bill was filed. On March 13th Wheelock was made a party defendant, and appeared on May 4th, and answered that he had assigned the mortgage which had been assigned to him. It appeared that he had assigned it to Luke J. Page; and the master has found that this was done for the benefit of Albert K. Page, the date of the assignment being April 23, 1891, and that Luke J. Page took the assignment with knowledge of the pendency of this bill in equity. This finding was subsequently confirmed by the master's supplemental report. Luke J. Page was made a party defendant, and answered the bill.

Wheelock consented that the bill be taken for confessed against him, "but without costs or personal liability" to him. Roosa demurred to the bill. The demurrer was overruled, and he appealed. No answer appears to have been filed by Albert K. Page. The supplemental report of the master was upon the issues raised between the plaintiff and Luke J. Page, and the master reported the evidence taken on those issues. The defendant Luke J. Page filed certain exceptions, and the case, apparently, came on to be heard on these exceptions, and on the pleadings and the two reports of the master. The bill was dismissed, and the plaintiff appealed.

On the papers before us, we are unable to see what right the plaintiff had to take possession of the store, at the time he took possession. It does not appear that the lease to Merrifield had been surrendered, or that he took possession for breach of condition, or that the lease was upon condition. If it be assumed that the plaintiff rightfully took possession, as against Merrifield, it does not appear that any of the defendants became the tenants of the plaintiff, and after he took possession none of them ever occupied the premises. The plaintiff, therefore, has no claim for rent against any of the defendants.

As to the plaintiff's claim of a lien for the storage of the goods, Roosa never agreed with the plaintiff that he should have a lien. Without expressing any opinion upon the question whether the plaintiff is guilty of a conversion of the goods, as against Roosa, the mere fact that the plaintiff, on taking possession of the store, found Roosa's goods there, and that he has since stored them, does not give him a lien on the goods. *Preston v. Neale*, 12 Gray, 222. If the plaintiff is entitled to recover of Roosa reasonable compensation for storage, as the master finds he is, he should have brought his action at law against Roosa, and attached Roosa's interest as mortgagor in the goods. But the object of this suit in equity, as stated in the plaintiff's brief, is to recover of Albert K. Page compensation for storage, and to reach in payment therefor his interest as mortgagee of the goods; and it is contended that he is the owner of the first, as well as of the second, mortgage. The bill, as originally brought, was to obtain a decree against Roosa and Albert K. Page for use and occupation of the store, and for storage of the goods; and it prayed that the goods might be sold subject to the first mortgage, but discharged of the second mortgage, for the satisfaction of this claim. If Dewey made an agreement with the plaintiff "to keep the goods in the store for him until he should foreclose by a sale, or assign his mortgage," as the master has found, this may be a valid agreement against Dewey; but he is not a party to this suit, and he assigned the mortgage before this suit was brought. It does not appear that Dewey ever took possession of the goods for breach of condition of his mortgage, or that it was understood between him and the plaintiff that the plaintiff should have a lien on his interest as first mortgagee; and the bill, as originally filed, shows that the

plaintiff did not claim any lien on the interest of the first mortgagee. By an amendment to the bill, the plaintiff, after he learned that Dewey had assigned his mortgage, attempted to extend his claim; and he then averred that the goods were held "upon a lien agreed upon between said Dewey and the complainant while said Dewey held said first mortgage." But this claim is not supported by the findings of the master. Besides, we do not see how a mortgagee not in possession can give to another person a right to possession except by first taking possession under his mortgage, and there is no finding that Dewey ever attempted to take possession. There is no finding that Wheelock, Albert K. Page, or Luke J. Page ever took possession, or attempted to take possession, under either of the mortgages. There is no averment in the bill or any of the amendments that any of the defendants ever promised the plaintiff to pay him anything for the storage of the goods, or for the use of his premises. There is some testimony that Wheelock did so promise the plaintiff, but the master has not so found, and Wheelock has conveyed to Luke J. Page all his interest in the property. There is also testimony that Albert K. Page, on June 15, 1891, after the bill was filed, requested the plaintiff to keep the property stored until some arrangement could be made, but Page denied this, and he testified that he had not attempted to take possession, or foreclose either mortgage. We are unable to find any fact in the master's report showing that, at the time the bill was filed, Albert K. Page was indebted to the plaintiff, in any sum, for storage, or for use and occupation; and the plaintiff must prevail, if at all, upon the cause of action existing when the bill was filed. The original bill proceeds on the ground that both Roosa and Albert K. Page refused to become responsible to the plaintiff for use and occupation; that they abandoned the occupation, and took away the key to prevent the plaintiff from attaching the property; and that after he took possession they refused to take away the goods, and pay the storage. As a second mortgagee, not in possession, Albert K. Page was not liable for the storage of the goods, unless he made a promise to be liable, and this is not averred or found. We take the finding of the master "that there is due said Field, the plaintiff, from said Edward S. Roosa and Albert K. Page, for storage of said property from December 18, 1891, to date of this report, at the rate of \$75 per month, the sum of \$1,050," as well as the finding "that the plaintiff is entitled to have the property sold for the satisfaction of his claim," to be conclusions of law, and we do not find that they are supported by the specific facts found by the master. A mortgagor of chattels cannot give a lien upon them, as against a mortgagee, without the express or implied assent of the mortgagee. *Howes v. Newcomb*, 146 Mass. 76, 15 N. E. Rep. 123; *Lynde v. Parker*, 155 Mass. 480, 30 N. E. Rep. 74. If a landlord, on rightfully taking possession of his real property, finds himself involuntarily in possession of a stock of goods left by an outgoing tenant,

and the goods are mortgaged for all they are worth, and the mortgagee declines to take possession, or to promise to pay the landlord for storing them, it may be a proper question for the legislature to consider, whether justice does not require that the landlord should have some remedy against the mortgagee, or his interest in the goods, if the remedy against the mortgagor by suit and attachment is practically worthless; but under the existing law, on the facts found, we are of opinion that this bill cannot be maintained.

Decree affirmed.

(159 Mass. 68)

**GLEASON v. NEW YORK & N. E. R. CO.**

(Supreme Judicial Court of Massachusetts.  
Suffolk. May 17, 1898.)

**MASTER AND SERVANT — NEGLIGENCE — RISKS OF EMPLOYMENT.**

A switchman who is injured by catching his foot in a space between the planking covering the railroad yards is not entitled to recover damages therefor where, at the time of the accident, he had been working in that yard for six weeks, during all of which time the planking had remained in the same condition.

Exceptions from superior court, Suffolk county: Franklin G. Fessenden, Judge.

Action by Harry E. Gleason against the New York & New England Railroad Company for personal injuries. Plaintiff was a switchman in defendant's service. While attending to his duties in the defendant's yard, plaintiff caught his foot in an opening between the planks, and was run into and injured by a passing train. There was a verdict for the plaintiff. Defendant excepts. Exceptions sustained.

C. G. Fall, for plaintiff. F. A. Farnham and R. D. Weston Smith, for defendant.

**ALLEN, J.** The defendant's passenger yard extended over Ft. Point Channel, being planked or timbered, and the planks or timbers were generally an inch or two apart, but at the place of the plaintiff's accident the evidence tended to show that the open space was about  $3\frac{1}{2}$  inches wide, extending between the rails of a track. The yard was about 500 feet long and 40 feet wide, with a space for walking. The plaintiff had been employed in this yard for about six weeks as a switchman. His duties had constantly taken him to all the switches in the yard, and he had been in the habit of throwing the switch which was at the hole where he got hurt. In view of the defendant's first request for instructions, which was refused, it must now be assumed that the open space or hole at the time of the accident was in the same condition as it was when the plaintiff went to work in the yard. It was plain to be seen, and any one passing there, and looking where he stepped, could not fail to see it. The plaintiff's familiarity with the general condition of the premises cannot be doubted, and the condition at this particular place, where he had been in the habit of working day after day, was open to view, and obvious. Under this state of things, no duty rested

upon the defendant to alter the timbering or planking, and the plaintiff must be held to have taken the risk. *O'Maley v. Gaslight Co.*, 157 Mass. —, 82 N. E. Rep. 1119; *Wood v. Locke*, 147 Mass. 604, 18 N. E. Rep. 878; *Lovejoy v. Railroad Co.*, 125 Mass. 79. The case is to be distinguished from *Hannah v. Railroad Co.*, 154 Mass. 529, 28 N. E. Rep. 682, where a temporary hole in the roadbed was formed after the plaintiff's employment began, and had been there but a short time, and had not been noticed by him.

Exceptions sustained.

(159 Mass. 91)

**TULLY v. TULLY.**

(Supreme Judicial Court of Massachusetts.  
Middlesex. May 17, 1898.)

**EXEMPTIONS—PENSIONS—ALIMONY—APPEAL.**

It is no ground for reversing a decree commanding a defendant to make certain payments for the support of his wife that his only means of obeying the order are from money received, or to be received, for a government pension, since such order does not direct the seizure of any specific sum of money before it reaches the defendant, and pension money being designed in part for the support of the pensioner's family.

Appeal from superior court, Middlesex county.

Suit by Bridget Tully against Luke Tully for separate maintenance. Decree for petitioner. Defendant appeals. Affirmed.

J. J. & W. A. Hogan, for appellant. A. D. Pratt and E. B. Quinn, for respondent.

**ALLEN, J.** The only question is whether, assuming all else in favor of the petitioner, her petition should be dismissed for the reason that the respondent's only means for complying with the order of the court are from money which he has received, or may hereafter receive, for a pension granted by the general government. It appears that on or about May 1, 1890, he received about \$2,800 in a gross sum, all of which he expended or gave away within less than 12 months, except \$250, which he had remaining in his own personal custody and control. It has been held that pension money, after being actually received by the pensioner, is not entitled to exemption from legal process. *Kellogg v. Waite*, 12 Allen, 529; *Spelman v. Aldrich*, 128 Mass. 113. In this case the proceedings are not directed to the seizure of any specific money, and no question is before us as to the manner in which the order of the court can or should be enforced. The order of the court was for the payment of \$25 on a certain date, and \$18 on the 1st day of every month thereafter. Such order might properly be passed under Pub. St. c. 147, § 33, although the only means of the respondent were derived from his pension. Pension money is designed in part to enable the pensioner to support his wife and family, and the statute of the United States (Rev. St. § 4747) should not be strained to enable him to avoid this duty. Decree affirmed.

(159 Mass. 51)

**SKILLINGS v. MARCUS et al.**(Supreme Judicial Court of Massachusetts.  
Suffolk. May 16, 1893.)**ACTION ON NOTE—DIRECTING VERDICT—EVIDENCE  
—INDORSEMENT—CONTRACT.**

1. Where the question at issue is whether the plaintiff took the note sued on by purchase or as collateral security for a loan, and the oral evidence on that point is conflicting, and the written evidence is not conclusive, the question should be submitted to the jury.

2. Plaintiff paid defendants \$675, and defendants indorsed to him a note for \$1,750. At the same time plaintiff gave defendants a written instrument agreeing to convey certain land to them "when the note is paid," and also stating, "When note is paid, credit to be given of \$1,075." *Held*, that the writing did not show conclusively that the plaintiff took the note by purchase, and not as collateral.

3. Where an agreement to sell land contains no covenant to purchase, the signature of the purchaser to the agreement does not bind him to buy the land.

4. One to whom a note is indorsed as collateral cannot recover from his indorser more than the amount of the debt to which the note is collateral security.

Exceptions from supreme judicial court, Suffolk county.

Action by James W. Skillings against the firm of Alfred A. Marcus & Son upon a note executed by one Shepard and indorsed by the defendants. The court directed a verdict for the plaintiff. Defendants except. Exceptions sustained.

F. Joy, for plaintiff. C. F. Eldredge, for defendants.

ALLEN, J. The plaintiff's oral evidence tended to show that he took the note by purchase, and the defendants' oral evidence tended to show that he took it as collateral. So far as the oral evidence was concerned, it was clearly a question for the jury. The ruling, therefore, must have been on the ground that the written agreement showed conclusively that the plaintiff took the note by purchase. We are unable to see that it has this conclusive effect. The plaintiff paid to the defendants \$675, and took from them Shepard's note for \$1,750. Upon this note Shepard was primarily responsible and the defendants were indorsers, and responsible secondarily. It was for the interest of the defendants that the money should be got out of Shepard. If the note should be paid by Shepard, the plaintiff would have in his hands \$1,075 more than his payment to the defendants. Under this state of things, the written agreement was executed. It may be assumed to have been so nearly contemporaneous with the transfer of the note as to be part of the transaction. Now, we have to consider whether this agreement necessarily implies that the plaintiff took the note by purchase, so as to be absolute owner, rather than as collateral. The words near the beginning of the agreement, "When the note is paid, I agree to convey to Alfred A. Marcus & Son," etc., may nat-

urally refer to a payment by Shepard, the maker, and do not necessarily imply a duty on the part of the indorsers to pay it in full. So the words at the end of the agreement, "When note is paid, credit to be given of \$1,075," may reasonably be held to mean, "When note is paid by Shepard, credit to be given to Marcus & Son of \$1,075." Payment by Shepard is consistent with the words and meaning. Since the plaintiff held the note, if Shepard wished to pay it in full, he would make the payment to the plaintiff. Moreover, there are no words showing that the defendants agree to purchase the land on the terms specified. The agreement is solely on the part of the plaintiff. The signature of the defendants does not bind them to make a purchase any more than if it were a bond for a deed to which the obligee should add his signature. The court cannot put words into the agreement which are not there, for the purpose of binding the defendants to make the purchase, unless it is certain from the context that such words were omitted by mistake. It might well be that the plaintiff intended merely to give to the defendants an option. There is nothing to show that the defendants had ever seen or heard of the land before, or that they had any intention of binding themselves to purchase it. In order to bind them, not only is their signature necessary, but also apt words to show the obligation into which they entered. But, even if their signature could be construed so as to import a contract to make the purchase, certainly it can bind them to no more than to make such purchase under the condition expressed in the writing. That condition is, "when the note is paid." The defendants might be willing to agree to take a conveyance of the land, provided the note should be paid by Shepard, but not willing to do so if they would have to raise the money themselves to pay for it. The note was not paid by Shepard. On the contrary, he went into insolvency, and the plaintiff received only 15 per cent. thereon. The defendants are not bound to raise money from their own means to pay \$1,075 for the equity of redemption of the land. The plaintiff cannot compel the defendants to pay the note, in order to put himself in a position where he will be bound to make the conveyance, and the defendants bound to accept it. In any view which can be taken of the written agreement, in the opinion of the majority of the court, it is not inconsistent with the defendants' contention that the note was taken by the plaintiff as collateral. If so taken as collateral, the plaintiff's right to recover upon it is limited to the balance due to him upon his loan of \$675 to them. *Third Nat. Bank v. Eastern R. Co.*, 122 Mass. 240. The discharge of Shepard under the composition proceedings, though assented to by the plaintiff, does not cut off the plaintiff's claim against the defendants as indorsers. *St. 1884, c. 236, § 9*; *St. 1885, c. 353*; *Pub. St. c. 157, § 85*.

Exceptions sustained.

(159 Mass. 62)

## COMMONWEALTH v. LOWREY.

(Supreme Judicial Court of Massachusetts.  
Suffolk. May 16, 1893.)

## CRIMINAL LAW—VERDICT—APPEAL.

Where, on an indictment containing three counts, charging offenses alleged to have been committed at the same time and place, there is a verdict of guilty on the first count, and not guilty on the second, a judgment of conviction will not be reversed on the ground that the verdict on the second count is repugnant to that on the first, since there is no presumption that the three counts charge the same offense.

Appeal from superior court, Suffolk county.

Indictment of James Lowrey for burglary. Defendant was convicted, and he appeals. Affirmed.

P. J. Casey, for appellant. G. C. Travis, Asst. Atty. Gen., for the Commonwealth.

**BARKER, J.** The defendant was charged, by an indictment in three counts, with offenses alleged to have been committed on the same day, and in the same place, and was found guilty of the first count, and not guilty of the residue. His motion in arrest of judgment is founded upon the contention that the counts charge but one offense, and that the verdict of not guilty upon the second count is repugnant to the verdict of guilty upon the first. But there is no legal conclusion from the record that the counts were for one and the same offense. On the contrary, they may have been for distinct offenses, in which case the verdicts were not repugnant, and would warrant judgment in favor of the government. See *Crowley v. Com.*, 11 Metc. (Mass.) 579. And, as stated in the same decision, it must be known to the judge before whom the cause was tried whether the offenses charged were distinct, and because the record does not show this this court cannot say that, in law, the record will not justify sentence. Such a record is to be construed in favor of the legality of the proceedings, by refusing to draw from it any unnecessary presumption impugning their validity; and this is what was done in the case of *Stevens v. Com.*, 4 Metc. (Mass.) 364, relied on by the defendant, as well as in *Carlton v. Com.*, 5 Metc. (Mass.) 532, and *Crowley v. Com.*, ubi supra. See, also, *Benson v. Com.*, (Mass.) 33 N. E. Rep. 384.

Judgment affirmed.

(159 Mass. 47)

## PUTNAM v. GLIDDEN.

(Supreme Judicial Court of Massachusetts.  
Middlesex. May 16, 1893.)

## SALE—RIGHTS OF SELLER.

Where a vendee refuses to accept chattels bought until the vendor has recovered judgment against him for the price, the vendor has no right of recovery against him for the care of the chattels between the sale and the delivery, since his care of them during that time is for his own benefit.

Appeal from superior court, Middlesex county.

Action by Frank E. Putnam against v.34N.E.no.1—6

Charles J. Glidden to recover for the keeping of two horses which plaintiff had sold to defendant, and which the defendant refused to receive until after the plaintiff had obtained judgment against him for their purchase price. Plaintiff sued for the keeping of the horses during the interval between the sale and the delivery. Plaintiff obtained judgment. Defendant appeals. Reversed.

Marshall, Hamblet & Burke, for appellant. F. W. Qua, for appellee.

**KNOWLTON, J.** On the agreed statement of facts in this case, the question is whether the law implies a contract on the part of the defendant to pay for the keeping of the horses. The burden of proof is on the plaintiff, and no inferences of fact can be drawn in his favor. *Railroad Co. v. Wilder*, 137 Mass. 536. It has been said that when a vendee returns or declines to receive property sold him "the vendor has his choice of either one of three methods to indemnify himself: First, he may store or retain the property for the vendee, and sue him for the entire purchase price; second, he may sell the property, acting as an agent for that purpose of the vendee, and recover the difference between the contract price and the price obtained on such resale; or, third, he may keep the property as his own, and recover the difference between the market price at the time and place of delivery and the contract price." *Dustan v. McAndrew*, 44 N. Y. 72, 78; *Haines v. Tucker*, 50 N. H. 313; *Girard v. Taggart*, 5 Serg. & R. 19; *Rosenbaums v. Werden*, 18 Grat. 785; *Holland v. Rea*, 48 Mich. 218, 224, 12 N. W. Rep. 167; *Cook v. Brandeis*, 3 Metc. (Ky.) 555; *Bagley v. Findlay*, 82 Ill. 524. Where the vendee contends that the property is not his, and treats it as belonging to the vendor, and the vendor elects to keep it for the vendee, and sue for the entire contract price, there is no implied contract on the part of the vendee to pay the vendor the expense of keeping it. *Whiting v. Sullivan*, 7 Mass. 107; *Earle v. Coburn*, 180 Mass. 596. In such cases, when there is controversy about the title, the election of the vendor to take care of the property is often more for his own benefit, in view of the risk that the main question in dispute may be decided against him, than for the benefit of the vendee, and the attitude of the vendee is equivalent to an express prohibition of the keeping on his account and at his expense. If the vendor wishes to avoid the expense of keeping, and at the same time to avail himself of the value of the property, he may sell under an implied agency for the vendee, and sue for the balance above what he obtains after paying the reasonable expenses. In the present case the plaintiff elected to sue for the entire contract price, and in the opinion of a majority of the court there is no principle of law which permits him now to maintain a second suit for the expense of keeping the horses, either during the whole time while the litigation was pending, or for that part of it which would have been required to enable him properly to dispose of the horses if he had chosen to sell

them on the defendant's account, and, after applying the proceeds, to sue for the balance due him.

Judgment for the defendant.

(150 Mass. 39)

LOOMIS v. NEW YORK, N. H. & H. R. CO.

(Supreme Judicial Court of Massachusetts.

Hampden. May 16, 1893.)

**EVIDENCE—DECLARATIONS BY ATTORNEYS.**

1. After witnesses have testified, affidavits previously made by them, stating the same matters as those testified to by them, are not admissible in corroboration of their testimony.

2. Where an attorney is retained, not only to sue a railroad company for damages caused by an accident, but also to present the plaintiff's claim to the company, and obtain settlement of it without suit, if possible, a letter written by his clerk, under his directions, to an officer of the company, stating what purported to be the facts in the case, in response to an inquiry by the company, is admissible in evidence for the company as a declaration by the plaintiff as to the facts. *Field, C. J., and Lathrop, J., dissenting.*

Exceptions from superior court, Hampden county: John Hopkins, Judge.

Action by Hulda L. Loomis against the New York, New Haven & Hartford Railroad Company for personal injuries. Verdict for plaintiff. Defendant excepts. Exceptions sustained.

J. B. Carroll, for plaintiff. Robinson & Robinson, for defendant.

**KNOWLTON, J.** The evidence that after the former verdict the witnesses Watkins and Potter signed affidavits of their knowledge of the facts upon which the motion for a new trial was founded, to the same effect as their testimony given at the last trial, was rightly excluded. The defendant could not add force to their testimony by showing that they had made the same statements a long time before. If there had been evidence from which the plaintiff could properly have argued that their testimony was manufactured just before the trial, a different question would be presented. But there was nothing on which to raise such an issue. If the jury were informed that these witnesses did not testify at the first trial, any inference to be drawn from that fact could be met without giving their former statements. *Murchie v. Cornell*, 155 Mass. 60, 29 N. E. Rep. 207.

The principal question in the case relates to the admissibility of a letter written to the defendant by a clerk of the plaintiff's attorney, under authority from the attorney, purporting to state the facts on which her claim was founded. The bill of exceptions sets forth two letters written to the defendant by this clerk, two written to the attorney by the executive secretary of the defendant, and one afterwards written to the defendant by the attorney with his own hand. The first two, written by the clerk under authority from the attorney, were first offered, then testimony was introduced, and the defendant offered the letters from the attorney to the defendant, "and also the letters of the defendant to Mr. Carroll," the attorney, and excep-

tions were taken to the refusal to admit them. It is clear that the defendant was not entitled to introduce the entire correspondence, for it contains statements of the executive secretary favorable to the defendant which were not competent. Perhaps, also, the last letter of the plaintiff's attorney, which he wrote with his own hand, was inadmissible, as containing opinions and comments which were strictly personal, and outside of the scope of his employment. It is contended that the only question open to the defendant is whether the entire correspondence was competent, but we are of opinion that the question whether the first two letters were competent was intended to be saved by the bill of exceptions. The object of the evidence was to show that, when the plaintiff presented her claim through her attorney, it was for a fall at a place near where the defendant's evidence at the trial tended to show that it occurred, and where the stairs were in perfect condition, and not at the place where the plaintiff located it in her testimony. Upon the issue raised, the fact sought to be proved was material and important. We are also of opinion that the method of proof was competent and proper. The undisputed evidence tends to show that the attorney had been employed to represent her in the collection of a claim against the defendant for damages resulting from a fall in the defendant's railroad station at Hartford. The terms of his employment do not expressly appear. But a fair inference from the evidence is that he was not merely employed to bring a suit, but was authorized to present the plaintiff's claim, and to endeavor to obtain a settlement of it without a suit. If this was his authority, we have no occasion to consider the cases holding that admissions which are mere matters of conversation with an attorney, though they relate to the facts in controversy, cannot be received in evidence against his client. Such admissions are not within the scope of his employment. Nor have we any reason to consider in this case the general authority of an attorney, by virtue of his position as an attorney at law in charge of a suit, to bind his client by agreements in reference to the management or disposition of the suit. See *Lewis v. Sumner*, 13 Metc. (Mass.) 269; *Saunders v. McCarthy*, 8 Allen, 42; *Pickert v. Hair*, 146 Mass. 1, 15 N. E. Rep. 79. The maxim, "qui facit per alium facit per se," applies as well to acts done or statements made by an attorney at law as by any other agent. The act of a party, done by his agent, may always be proved against him, if material. An attorney or agent employed to present and collect a claim is impliedly authorized to state to the debtor what the claim is. The plaintiff could not have expected that her attorney would collect her claim from the defendant, on demand, without stating the nature and particulars of it, so that the defendant could understand it, and make investigation in regard to its validity. It was as much a part of his duty to state, as nearly as possible, the precise place in the building where the accident happened, if asked to, as to state in what town or state the

plaintiff was when she fell. The defendant's letter of January 7, 1891, inquiring for particulars, is competent, in connection with the letter of January 10th, which purports to be an answer to it, to show how the statement came to be made; and the two together, in connection with the first letter, of January 5th, show conclusively that writing the words, "she fell on the third or fourth step from the bottom of the stairway across the tracks from the waiting room," was strictly within the authority of her attorney employed to present and collect her claim. The fact that they were not written by her own hand, but by an agent who was acting under instructions received through her husband, who was also her agent in the same business, affects the weight, but not the competency, of the evidence. 1 Greenl. Ev. § 186; Marshall v. Cliff, 4 Camp. 133; Baring v. Clark, 19 Pick. 220; Woods v. Clark, 24 Pick. 35, 39; Cooley v. Norton, 4 Cush. 98; Haney v. Donnelly, 12 Gray, 361; Morse v. Railroad Co., 6 Gray, 450; Gott v. Dinsmore, 111 Mass. 45; McAvoy v. Wright, 137 Mass. 207. There is nothing in the adjudication in *Pickert v. Hair*, 146 Mass. 1, 15 N. E. Rep. 79, nor in the language of the opinion as applied to the matters then under consideration, which is at variance with the views above stated. The letters are not inadmissible as part of an offer to compromise a controverted claim. At the time they were written, there had been no intimation on the part of the defendant that the plaintiff would not be paid all that she thought it right to ask. The only communication which had been received from the defendant indicated a desire to ascertain the truth, as if for the purpose of promptly paying the claim if it appeared to be valid.

Exceptions sustained.

LATHROP, J., (dissenting.) I am unable to concur in the opinion of the majority of the court. If it is assumed that the question of the admissibility of the first two letters written by the clerk of the attorney for the plaintiff is open on the exceptions,—a point which is not free from doubt,—and if it is also assumed that the evidence sought to be introduced is material,—a point about which there is also a doubt, as the evidence for the plaintiff tended to show that there was ice on all the steps, and the evidence for the defendant tended to show that there was no ice on any of the steps,—I do not agree that the letters were competent evidence. There was no evidence that the letters in question were written by the direct authority of the plaintiff, or by her consent, or even with her knowledge. There was no evidence that, at the time of the accident, Mr. Carroll was the plaintiff's attorney; and he could have had no personal knowledge on the subject, as it appeared that he was retained as an attorney at law, after the accident, by the plaintiff's husband, and did not see her until less than two weeks before the first trial of the action, which was long after the letters

were written. In *Pickert v. Hair*, 146 Mass. 1, 15 N. E. Rep. 79, the question was as to the effect of an admission made by Mr. Thayer, an attorney, after an action brought, but before the beginning of the case then before the court, was considered. One of the grounds of the decision was thus stated: "The admission was not made by Mr. Thayer for the purpose of dispensing with any rule of practice, or with the proof of any fact in the trial of the action already brought, or of the actions which might be brought, in reference to the attached property. It was a conversation relating to a fact in controversy, but not an agreement relating to the management and trial of a suit, or an admission intended to influence the procedure in the pending action, or in any other, if the attachment was not discharged." In support of these propositions several cases are cited, and an examination of them shows that the doctrine hitherto established is that an admission by an attorney at law does not bind his client, although it relates to a fact in controversy, unless it is made for the purpose of dispensing with some rule of practice, or with the proof of a fact in the trial of a case, or is an admission intended to influence the procedure in the action. To the same effect are the following cases: *Rockwell v. Taylor*, 41 Conn. 55; *McKeen v. Gammon*, 33 Me. 187; *Cassels v. Ury*, 51 Ga. 621. The opinion of the majority of the court apparently proceeds upon the theory that an attorney stands in a different relation to his client before action is brought from that which he occupies afterwards. But no case is cited which sustains this position. The general rule that an attorney cannot, without the consent of his client, disclose a confidential communication made to him by his client, applies as well to communications made before action brought as afterwards. See *Foster v. Hall*, 12 Pick. 29, and cases cited. With one exception, the cases cited in the opinion of the majority of the court in support of the propositions that an attorney is merely an agent, and that his admission binds his principal, are cases of mere agents, and not of attorneys. They seem to me to throw no light on the question in this case. The case of *Marshall v. Cliff*, 4 Camp. 133, remains to be considered. This was an action against the owners of a vessel. To prove the defendants to be the owners, there was offered in evidence an undertaking in the following form, given before the action was begun, by the persons who were afterwards the defendants' attorneys of record: "I hereby undertake to appear for Messrs. Thompson and Marshall, joint owners of the sloop *Arundell*, to any action you may think fit to bring against them." This was held by Lord Ellenborough to be sufficient evidence. But, as was pointed out by Mr. Justice Parke in *Wagstaff v. Wilson*, 4 Barn. & Adol. 339, the undertaking was "a step in the cause." I am authorized to state that FIELD, C. J., concurs in this opinion.



(159 Mass. 61)

**COMMONWEALTH v. DILL et al.**(Supreme Judicial Court of Massachusetts.  
Barnstable. May 16, 1893.)**LASCIVIOUS COHABITATION—INDICTMENT.**

An indictment which charges that the defendants "did lewdly and lasciviously abide and cohabit" together, is sufficient after verdict, although it uses the word "abide," where the statute used the word "associated."

Appeal from superior court, Barnstable county; Franklin G. Fessenden, Judge.

Indictment of Sylvanus S. Dill and Lucinda L. Higgins for adultery and lewd and lascivious cohabitation. The indictment charged that the defendants "did lewdly and lasciviously abide and cohabit each with the other." Defendants were convicted, and they appeal. Affirmed.

P. H. Hutchinson, for appellants. C. N. Harris, Second Asst. Atty. Gen., for the Commonwealth.

**KNOWLTON, J.** This case comes before us on an appeal from an order overruling a motion in arrest of judgment. Such a motion for a cause existing before verdict cannot be allowed unless the cause affects the jurisdiction of the court. Pub. St. c. 214, § 27; Com. v. Brown, 150 Mass. 334, 23 N. E. Rep. 98. The only cause alleged in this case is a defect in the indictment, but it is clear that the indictment states a case which is within the jurisdiction of the court. It charges lewd and lascivious cohabitation; and, although the word "abide" is used where the statute uses the word "associated," it contains all the substantive allegations which make up the offense. Without intimating that there is any such formal defect as could have been availed of if the defendants had taken their objection seasonably by a motion to quash, it is enough to say that the cause stated does not affect the jurisdiction of the court. Judgment affirmed.

(159 Mass. 55)

**COMMONWEALTH v. SHEEDY.**(Supreme Judicial Court of Massachusetts.  
Norfolk. May 16, 1893.)**LOTTERY—INDICTMENT.**

An indictment which charges the defendant with disposing of one suit of clothing, of the value of \$35, by way of lottery, without stating the name of the person to whom the clothing was disposed of, or that his name is not known, is defective.

Exceptions from superior court, Norfolk county; Edgar J. Sherman, Judge.

Indictment of Thomas F. Sheedy for disposing of clothing by way of lottery. There was a verdict of guilty. Defendant excepts. Exceptions sustained.

C. N. Harris, Second Asst. Atty. Gen., for the Commonwealth. Sprague & Washburn, for defendant.

**LATHROP, J.** The indictment in this case charges that the defendant, at a time and place stated, "did dispose of one suit of clothing, of the value of thirty-five dollars, by way of lottery." Pub. St. c. 209,

§ 1. While the indictment follows the language of the statute, yet, as it charges a specific act, this is not enough. The defendant is entitled to have the offense set out with the usual precision and certainty. The person to whom the suit of clothing was disposed of should be alleged, or, if he was unknown, this fact should be stated. This has been held to be the rule in regard to an illegal sale of liquor. Com. v. Thurlow, 24 Pick. 374, 379; Com. v. Kimball, 7 Metc. (Mass.) 304, 308. And in Com. v. Moore, 11 Cush. 600, it was held that an indictment for letting a tenement to be used for purposes of prostitution must state the name of the person to whom the tenement was let, or that such person was to the jurors unknown. In Com. v. Horton, 2 Gray, 69, on which the government relies, the offense charged was the setting up of a lottery. See, also, Com. v. Harris, 13 Allen, 534; Com. v. Sullivan, 146 Mass. 142, 15 N. E. Rep. 491. In Com. v. Brockway, 150 Mass. 322, 23 N. E. Rep. 101, no objection was made to the form of the indictment. For the reasons above stated we are of opinion that the defendant's motion to quash the indictment should have been granted.

Exceptions sustained.

(159 Mass. 113)

**COMMONWEALTH v. STEWART.**(Supreme Judicial Court of Massachusetts.  
Suffolk. May 17, 1893.)**OLEOMARGARINE—NOTICE.**

Under St. 1891, c. 412, § 5, which requires every person who furnishes to a guest in a restaurant or hotel oleomargarine or butterine, instead of butter, to notify him that the substance furnished is not butter, it is not sufficient to put up in a restaurant conspicuous signs, reading, "Butterine Used Only Here," and to print on the bill of fare, "Only Fine Butterine Used Here," where it is shown that the guest to whom butterine was furnished instead of butter neither saw the signs nor read the bill of fare.

Exceptions from superior court, Suffolk county.

Information against John Stewart for furnishing to guests at his restaurant oleomargarine instead of butter, without notifying them of the fact. There was a verdict of guilty. Defendant excepts. Exceptions overruled.

C. N. Harris, Asst. Atty. Gen., for the Commonwealth. F. G. Holcombe, for defendant.

**BARKER, J.** The statute of 1891, c. 412, § 5, requires every person who furnishes, or causes to be furnished, to a guest in a restaurant or an hotel or at a lunch counter, oleomargarine or butterine, in the place or stead of butter, to notify him that the substance furnished is not butter. The defendant was the proprietor of a restaurant at which oleomargarine was furnished to one Quinn in the place or stead of butter. No oral notice was given to him. There were signs in conspicuous places in the restaurant bearing the words, "Butterine Used Only Here," and on the tables were bills of fare on which were printed the words, "Only Fine But-



terline Used Here;" but Quinn saw neither of the signs, and did not examine the bill of fare, and so had no actual notice that the substance furnished him was not butter. If he had read the signs, or the statement printed on the bill of fare, he would have had sufficient notice; for, if knowledge that the substance furnished is not butter is in any way effectually communicated to the guest, the law is complied with. The statute does not require a distinct statement, either oral or written, to be given to each guest on every occasion when he is furnished with oleomargarine or butterine in the place or stead of butter, but is satisfied if, by any act of the person who furnishes it, or causes it to be so furnished, the guest is made aware of the fact that the substance furnished is not butter.

The two counts allege offenses on different days, while the statement of agreed facts, as printed, relates to but one occasion. If there was but in fact one occasion to which the statement relates, and the defendant was convicted on both counts, the error can be corrected in the court below. No question was raised at the argument on this branch of the case. Exceptions overruled.

(159 Mass. 101)

#### COMMONWEALTH v. DE VOE.

(Supreme Judicial Court of Massachusetts.  
Middlesex. May 17, 1893.)

#### COMPLAINT—VIOLATION OF SUNDAY LAW—INFORMATION.

1. Where the reason why a special justice sat to examine a complainant in regard to the offense which he charges to have been committed is set out in the record, it is not necessary that either the caption or the jurat of the complaint should state such reason.

2. A complaint charging a violation of the Sunday law need not be under the seal of the court, there being no statutory requirement to that effect.

3. Such complaint need not negative the exceptions contained in the statute forbidding work on Sunday.

4. A complaint alleging that the defendant negotiated for the sale of certain land on Sunday need not describe the situation of the land.

Exceptions from superior court, Middlesex county; Charles Thompson, Special Judge.

Complaint against Leslie E. De Voe for working on Sunday. There was a verdict of guilty. Defendant excepts. Exceptions overruled.

B. Hall and R. W. Goding, for plaintiff. C. N. Harris, Asst. Atty. Gen., for the Commonwealth.

MORTON, J. It was not necessary that the caption or jurat should state the reason for the sitting of the special justice, or that the complaint should bear the seal of the court. The reason was set out in the record, and that was sufficient. *Com. v. Fitzgerald*, 14 Gray, 14; *Com. v. McCarty*, 1d. 18; *Com. v. Fay*, 151 Mass. 380, 24 N. E. Rep. 201; *Com. v. Carney*, 153 Mass. 444, 27 N. E. Rep. 9. The statute requires that the complainant shall be examined on oath, and that the complaint shall

be reduced to writing by the magistrate receiving the same, but does not require that it shall be under seal. Pub. St. c. 212, § 15.

It was not necessary to negative in either count in the complaint the exceptions contained in the statute. *Com. v. Shanahan*, 145 Mass. 99, 13 N. E. Rep. 347.

The offense in the first count was sufficiently set out by describing it as a negotiating for the sale of certain land. *Com. v. Wright*, 12 Allen, 187; *Com. v. Shanahan*, supra; *Com. v. Crowley*, 145 Mass. 480, 14 N. E. Rep. 459; *Com. v. Marzynski*, 149 Mass. 68, 21 N. E. Rep. 228. It was unnecessary to describe the situation of the land. The gist of the offense was the business done in negotiating for land, wherever situated.

The fifth, sixth, and seventh objections to the sufficiency of the complaint relate to the second count, on which the defendant was acquitted in the district court, and are therefore now immaterial.

The instructions requested were properly refused. While they might have been correct if the testimony had tended to show that only the things to which they related had been done, and that those had been done as assumed in the instructions requested, they were inadequate, taking the case as a whole, and the testimony as it actually stood, and would have tended to mislead the jury, if given as requested. The instructions actually given were correct. *Com. v. Dextra*, 148 Mass. 28, 8 N. E. Rep. 756. Exceptions overruled.

(159 Mass. 147)

#### BOSTON FERRULE CO. v. HILLS et al.

(Supreme Judicial Court of Massachusetts.  
Suffolk. May 19, 1893.)

#### NUISANCE—INJUNCTION.

1. A bill by the occupant of one floor of a manufacturing building against the occupants of the floor above for an injunction and damages, which alleges that defendants use sand and acids in their business, and that they allow these substances to sift and come through holes in the floor, which are properly there, whereby complainant's machinery is damaged, is good as against a demurrer.

2. In such case it is not necessary that the bill allege in terms that the business of defendants is unsuitable to be carried on in the building, or that there is negligence in the mode of carrying it on, or that complainant has used due care.

Appeal from supreme judicial court, Suffolk county.

Bill by the Boston Ferrule Company against Edwin A. Hills and others for an injunction and damages. The bill was dismissed on demurrer, and complainant appeals. Reversed, and demurrer overruled.

The bill was as follows: " \* \* \* And the complainant says: (1) That it is engaged in the business of manufacturing and selling ferrules, and carries on its business of manufacturing on the third floor of the building numbered 291, on Congress street, in said Boston, in rooms leased by it from the owner of said building by a written lease. That the term of said lease began on April 1, 1888, and the complainant then entered into occupation of the leased premises, putting therein delicate

and expensive machinery necessary for its business, and said term has not yet expired. (2) That the complainant has carried on ever since said date, and still carries on, its business of manufacturing in said premises. (3) That the defendants are and have been engaged in said Boston in the business of manufacturing and polishing mirrors and other glassware, and selling the same; and in the summer of 1888, said defendants leased the fourth floor of said building numbered 291 Congress street from the owner thereof, took possession, and established their manufacturing business there. (4) That power to run the machinery of the complainant and of the defendants is obtained from engines situated in said building below the third floor, and is conveyed to the premises of the complainant and defendants by means of belting; and, in order that the belting may run from one floor of said building to another, there are suitable holes made in the floor, through which said belting passes. There are several of such holes in the flooring separating the premises occupied by the complainant from those occupied by the defendants, and there are also numerous smaller cracks and crannies in said flooring. And said belting and holes in the floor were in essentially the same position and condition on April 1, 1888, and at the time when the defendants took possession, as they have since been and now are. (5) That in carrying on its manufactures the defendants use large quantities of sand and acids, and they allow, and have for a long time allowed, said sand and acids, and the fumes of said acids, to sift and come through said holes, cracks, and crannies in the flooring, and fall upon the premises occupied by the complainant, to the very great damage of the machinery, materials, and goods manufactured and in process of manufacture; particles of sand getting in said machinery, and injuring and ruining it, and the acids and fumes of acids corroding said machinery, materials, and goods. (6) That the defendants knew when they entered into the occupation of said premises the character of the complainant's business, and they have been since that time frequently notified by the complainant of the damage caused by said sand and acids, and requested to prevent a continuance thereof; but they still continue to allow their sand, acids, and fumes of acids to come upon the premises of the complainant. (7) That the complainant's business is suited to the locality and building where it is situated. (8) That the plaintiff is without adequate remedy at law. Wherefore the complainant prays that the defendants may be enjoined from allowing sand, acids, and fumes of acids to come as aforesaid upon the premises leased and occupied by the complainant as aforesaid from the premises leased and occupied by said defendant as aforesaid; and as auxiliary and subsidiary relief the complainant prays that for the damage already caused by them as aforesaid the defendants be decreed to pay ten thousand dollars damages to the complainant."

Defendants demurred on the grounds: "First, because said bill does not set forth

any cause of action, as required by the rules of law or equity, or such as entitles it to the relief sought or to any relief in equity; second, because the bill does not allege due care on part of the plaintiff, and does not charge that the respondents have been guilty of any negligence or want of care in the premises; third, because the plaintiff has a full, adequate, and complete remedy at law."

M. F. Dickinson and S. Williston, for appellant. H. L. Harding and J. W. Austin, for appellees.

HOLMES, J. The fair interpretation of the plaintiff's bill is that the floor above its rooms naturally and properly has holes in it, and that the defendants knowingly carry on their business in such a way as to send fumes of acids and large quantities of sand through these holes upon the plaintiff's premises, and thereby to corrode and spoil its machinery and goods.

As between adjoining proprietors, one of them has no right as against the others to do what is complained of here, and it would be no answer to an action to say that the plaintiff might have shut his windows. There would be no need to allege in terms that the business was unsuitable to be carried on in that place, or that there was negligence in the mode of carrying it on. As the damage was a manifest consequence of the defendants' business, the fact that he could not help it if he carried on that business would be immaterial. See the form of declaration in *Tipping v. Smelting Co.*, 4 Best. & S. 608, 11 H. L. Cas. 642.

The only justification that could be urged would be that the interests of adjoining owners necessarily conflict; that they are both intrinsically meritorious; that the law has to adjust them by drawing a quasi physical line; and that the damage complained of was on the right side of that line, and must be put up with by the plaintiff,—as was held, for instance, in *Middlesex Co. v. McCue*, 149 Mass. 103, 21 N. E. Rep. 230; *Rogers v. Elliott*, 146 Mass. 349, 15 N. E. Rep. 768. But, if the allegations in regard to the injury were fully proved, there can be no question that this defense would not prevail. The discharge of acid fumes upon neighboring land in sufficient quantities to do substantial harm is deemed so clearly beyond the limit of reasonable use of a man's premises that courts have held as matter of law that it is actionable. *Wesson v. Iron Co.*, 13 Allen, 95, 104; *Rex v. White*, 1 Burrows, 333; *Crump v. Lambert*, L. R. 3 Eq. 409; *Cooke v. Forbes*, L. R. 5 Eq. 166. This may be subject to the question of the uses to which the land in the neighborhood is adapted, but that question is not before us at this stage.

If the defendants are not liable, supposing the damage to be in its control as alleged, it must be on the ground that tenants of different floors of the same manufacturing building have a right to do more towards making each other's premises uninhabitable than owners of adjoining houses in a city could do. As

any line of adjustment between conflicting rights must be drawn on practical grounds, there is no doubt that it may vary under different circumstances. For instance, in England, in view of the national importance of their great manufacturers, juries are instructed that in counties where great works are carried on parties must not stand on extreme rights. *Smelting Co. v. Tipping*, 11 H. L. Cas. 642. But we cannot rule as matter of law that the defendants are not liable. It may be said that the plaintiff need not have hired rooms in this building, and that, if it did, it took the risk. No doubt, when once it is decided that a certain liability or risk shall be attached to a voluntary relation, the party entering into that relation takes that risk. But what risks shall be attached to any relation is a pure question of policy in the first instance. The argument is that in a broad sense the plaintiff has come to the nuisance, even if, as here, the plaintiff's lease is earlier than the defendants'. But a man is as free not to buy the fee as he is not to hire, and it is wholly immaterial that a purchaser has come to the nuisance. *Com. v. Upton*, 6 Gray, 473, 475; *Tipping v. Smelting Co.*, L. R. 1 Ch. App. 66. It seems that the law is the same as to lessees. *Wood, Nuis.* (2d Ed.) §§ 574, 575.

If there are any special reasons why the defendants should be allowed to do what they do, they should be alleged in the answer. The question before us is whether there is a general right to invade lower premises with acid fumes and sand in the mode described in a manufacturing building, if the aggressor finds it necessary for his business. We are not prepared to admit the existence of such a right.

Demurrer overruled.

(159 Mass. 125)

**DONAHOE v. NEW YORK & N. E. R. CO.  
BECKER v. SAME.**

(Supreme Judicial Court of Massachusetts.  
Suffolk. May 18, 1893.)

**ACTION FOR PERSONAL INJURIES—DEFECTIVE APPLIANCES—EXPERT TESTIMONY.**

1. In an action for personal injuries received by employes of a coal yard while unloading a "dump car" belonging to defendant railroad company, it appeared that, after the body of the car was tipped over to discharge the coal, it suddenly swung back and struck plaintiffs. Plaintiffs contended that the accident resulted from the hooks which served to keep the body of the car in a horizontal position being out of order, so that they would not catch. Defendant offered evidence that a block could be used in tipping the car so that the hooks, though in good order, would not catch, that a man was present provided with such block, that he knew how to use it for that purpose, and that he was so using it just before the accident. *Held*, that the evidence was admissible.

2. In such case an expert in dumping cars was properly allowed to testify that the accident could have happened otherwise than by reason of a defect in the car, and that he had seen a car in good order fly back through the fault of those dumping it.

Exceptions from superior court, Suffolk county; Edgar J. Sherman, Judge.

Action by Patrick Donahoe against the New York & New England Railroad Company for personal injuries. Action by Andrew Becker against same defendant. Verdict for defendant in each case, and each plaintiff alleges exceptions. Exceptions overruled.

It appeared at the trial that on the above date, and for 20 years before, one Amory Fisher was engaged in the coal business at Dedham, Mass. That during that time the defendant corporation had been transporting coal for hire on its cars, over its tracks, from Boston to his yard at said Dedham; that coal had also been transported there at times by the Old Colony Railroad. Said Fisher had no control of the freight or dumpcars or mode of operating the same until they were placed by the defendant in position for unloading. During the period aforesaid, as well as on the 14th day of July, 1890, he furnished the men at his yard to unload the cars, only after the same were put in proper position for that purpose by the defendant. Said Fisher's coal yard was located adjoining the tracks of said New York & New England Railroad, at a point near Dedham station. That his coal shed in said yard was so constructed and built with reference to said tracks that coal cars could be dumped direct into said shed from a certain side track of said defendant, which was on the outside of the shed, and also from a trestle track, so called, which ran through the middle of the shed, and from its trestle track coal could be dumped into bins on either side. This trestle track, so called, was built on a wooden trestle, at an elevation of about 11 feet from the ground. On either side of the trestle track there was a platform parallel with it about 20 inches wide, close to the rail, upon which the men, engaged in the work of dumping said coal cars, stood. The cars used in so transporting the coal to Dedham were known as "dump cars." These cars are shorter than ordinary freight cars, and the body of the car is hung on two iron rockers, so called, which rest upon solid iron bars, known as the "rocker beds," attached to the truck frame of the car at either end of the car. The rockers are kept in position on the rocker beds by several iron pins projecting from the beds, which pins fit into corresponding cavities in the rockers. The body of the car is kept in a horizontal position by two iron hooks on either side, which hang down from the bottom sill of the car, and catch upon two iron latches which are made fast to the truck frame. The sill, when the body of the car is in horizontal position, is about 43 inches from the ground, and the overhang of the car on either side of the rail is from 22 to 24 inches. These hooks are attached to the body of the car by an iron casting so that they swing to and fro, and on the outside of and attached to those hooks is a solid piece of iron of considerable weight, which is called a "counterweight," the purpose of which is to keep the hook down over the iron latch or catch. The photographs of the cars used at the trial may be referred to at the arguments. The plaintiffs had been in the employ of said Fisher, and

they had assisted in unloading coal from cars similar to the ones hereinbefore described, and had experience for a period extending from 12 to 20 years in that work. On the said 14th day of July a train of 26 dump cars loaded with coal was transported by the defendant to said coal yard, and certain cars of said train were placed by the defendant on the trestle track until the same was full, and the remainder of the cars were placed on the track outside the shed. The plaintiffs and other men employed by said Fisher proceeded to discharge said train of cars, and first dumped the cars standing on the outside track, and thereafter proceeded to dump the cars standing on the trestle track. After they had dumped certain of the cars on the trestle track, the plaintiffs were injured while dumping car No. 307, one of the cars standing on said trestle track. The plaintiffs offered evidence tending to show that they and the other men who assisted in dumping car No. 307 were at work properly and in the usual and ordinary manner, and as they were accustomed to do while in Fisher's service, i. e. from 12 to 20 years; that they stood opposite to the body of the car and in such position that each would raise one of the hooks heretofore described, and after doing so would assist in raising up and tipping the body of the car. Two other men employed with the plaintiffs stood near them at either end of the car, and with an iron bar, such as they were accustomed to use there, pried up on the rocker, resting the end of the bar on the rocker bed in the usual and ordinary manner. One man on the side of the car opposite the plaintiffs unfastened the locks which kept the gate or side board of the car in place, and after so doing called out to the men on the other side that it was all ready, this being a notification to them that they might proceed to tip the car. All the men furnished by Fisher who assisted in unloading this car were experienced and accustomed to that kind of work. When the plaintiffs reached car No. 307, having received word from the man on the opposite side of the car, they tipped the car up so that a portion of the coal therein was dumped out or discharged into the shed, when suddenly and without any notice, and with violence, the body of the car turned and swung back, and, striking the plaintiffs, threw them from the side straining to the ground. The plaintiffs testified that they had never known a car to do so before, but one of the men working with the plaintiffs (and called by the plaintiffs) testified on cross-examination that he had known a car so to act, but it did not appear that the plaintiffs had knowledge of that fact. There was no other evidence tending to contradict the plaintiffs' evidence on this point. The plaintiffs offered evidence tending to show that the hooks on the side of the car opposite to where they stood were bent, defective, and rusty, so that they would not catch upon the truck frame hereinbefore described, and shown by said photographs, and that their injury was occasioned by their failure so to catch owing to such defective condition. The plaintiffs introduced the

testimony of one E. O. Googins, an expert, tending to show that if the hooks and catches were in proper condition, and were not defective, they would catch, and thus prevent the car from tipping back beyond the horizontal position. But on cross-examination this expert testified, among other things, as follows: "Question. I assume that there were five examinations the same day, two before the accident and three after,—very soon after, only half an hour. Assuming that all to be a fact, and those men failed to find any defect whatever in the car, what would be your opinion as to the cause of the car flying by? Answer. Well, I should say there might have been a block in there."

The defendant offered evidence tending to show that the train, including the car in question, was inspected on the morning of the day of the accident by one of its train inspectors, before said train left the defendant's yard in Boston; that it was again inspected by the conductor in charge of the train at South Boston, after leaving the said yard, and before reaching Dedham; that subsequent to the accident, the car in question was looked over by the conductor, and later on the same day, upon the arrival of the said train in Boston, the train was again inspected by one of the defendant's inspectors, and said parties found no defect in the condition of the hooks or hangers or catches of the car in question. The evidence was conflicting as to the cause of the hooks not catching, and whether or not the same were rusty or defective. The defendant offered evidence tending to show that the hooks might be prevented from catching by placing a block, plug, or board between the end of the sill and the hook or hanger. It called one John B. McCarthy, who was conductor of the coal train in question, and he testified that while the plaintiffs were unloading the cars upon the trestle track in the shed, he was standing between the cars on the footboard or perch at some little distance from car 307, where the accident occurred; and he testified, against the plaintiffs' objection, that in unloading certain of the cars in the same train, and at the same time, such a block was used by one of the men in Fisher's service, but not by the plaintiffs or either of them. Albert Wood, called by the defendants as an expert, and adjudged by the court to be such after said McCarthy had testified, and one of the car inspectors and repairers of the defendant company in the Boston yard, testified to having had fourteen years' experience as such, and testified that he had not had much experience in dumping coal, but had had two years' experience in dumping gravel, which is transported in the same cars as coal. He testified, among other things, as follows: "Question. Whether the car is necessarily out of repair in case the car should go by without the hangers catching? Answer. The car could be in perfectly good order, and go by in that way in two different ways. It would be no fault of the car, but it would be the fault of the ones that dumped it. Q. Please describe it. A. They could do it by using pinch bars on the rocker. Q. What do you mean by those?

A. Those are bars with the ends turned up a little,—crowbars. They could dump out part of the load; then, if it was heavy, come back on those bars, and then it would throw the rocker back on top of the rocker bed. It would throw the car on one side, and still remain on the rocker bed, and throw it far enough so that the catches would go by. In another way it could be done, by blocking the hanger,—putting a small piece of wood between the intermediate sill and the hanger. That would clear the hanger when it went over, and let the hanger go by the iron catch again."

J. E. Cotter and R. M. Saltonstall, for plaintiffs. F. A. Farnham, for defendant.

ALLEN, J. The immediate question of fact to be determined was why the car flew back. The plaintiffs contended that the reason was because the hooks were bent, defective, and rusty, so that they would not catch upon the truck frame. The defendant denied that the hooks were in that condition, and offered evidence tending to show that the hooks and car were in good order both before and after the accident, and was allowed to introduce other evidence tending to show that the flying back of the car could be otherwise accounted for. The first piece of evidence of this character was the testimony which tended to show that a block could be and was so used in tipping the car that the hooks would not catch. If the evidence had gone so far as to show that a man was seen using the block at the time upon the very car which caused the injury to the plaintiffs, and that it had the effect to prevent the hooks from catching at that very moment, no one would doubt that the evidence would have been clearly relevant. The evidence did not go so far as this, but it was circumstantial evidence tending to establish the same thing; that is to say, there was evidence that a block could be so used, that a man was there provided with such a block, that he knew how to use it for that purpose, and that he was in fact so using it immediately before the accident. From these facts a legitimate argument might be urged that he was there for the purpose of so using the block, and that he in fact so used it upon the car which caused the accident. If it were a criminal offense to use such a block in that way, and if that particular person were under indictment for so using it on this particular occasion, it seems clear that the evidence introduced by the defendant to show the good condition of the car and of the hooks before and after the accident, and to show the opportunity, means, and knowledge of that person, would be competent evidence tending to show his guilt. In like manner, the evidence was competent in behalf of the defendant, as tending to meet and disprove the case of the plaintiffs by showing that the accident was probably not due to a defect in the car. The evidence of the defendant's expert was competent for similar reasons. It tended to show that the accident could be accounted for otherwise than by reason of a defect in the car.

When he stated that a car might be in perfectly good order, and still fly back by reason of the fault of those that dumped it, it was not erroneous to allow him to add that he had seen it done. This served to show more clearly the value and weight of his opinion. *Com. v. Leach*, 156 Mass. —, 30 N. E. Rep. 163, and cases there cited. Exceptions overruled.

(150 Mass. 156)

#### MARNIN v. KITSON MACH. CO.

(Supreme Judicial Court of Massachusetts. Middlesex. May 19, 1893.)

##### INJURY TO EMPLOYEE—CONTRIBUTORY NEGLIGENCE.

Plaintiff, while in defendant's service, was told by defendant's superintendent to take a heavy piece of machinery to the elevator, and that he (the superintendent) would follow, and help him. Plaintiff put the machinery on the elevator without waiting for the superintendent to arrive, and was injured in consequence of the machinery slipping while he was trying to get it off again, when told to do so by the elevator man. *Held*, that defendant was not responsible for the accident.

Exceptions from superior court, Middlesex county; John Hopkins, Judge.

This was an action of tort, brought by Timothy Marnin against the Kitson Machine Company, to recover damages for injuries claimed by the plaintiff to have been sustained by him while in defendant's employ. There was a verdict for defendant. Plaintiff excepts. Exceptions overruled.

J. F. Manning, for plaintiff. G. F., G. R. & D. M. Richardson, for defendant.

MORTON, J. It appears that the plaintiff and a fellow servant named Butterman were told by the superintendent to take a heavy piece of machinery to the elevator, and that he (the superintendent) would follow, and help them, as soon as he got another man. The plaintiff and Butterman loaded the machinery in a truck, of which no complaint is made, and took it to the elevator, and then, without waiting for the superintendent to arrive, put it on the elevator. It caused the elevator to drop about an inch, and McArdle, the man who had charge of the elevator, and who was oiling it,—the belt being off,—shouted to them to take it off; and while they were doing so the wheels of the truck struck the curbing which surrounded the elevator well, and which was level with the floor, and caused the machinery to slip and injure the plaintiff. We do not see how, on this state of facts, it can be said that the plaintiff's injury was due to any negligence on the part of the defendant, or to anything except his own act, and the act of Butterman, in trying, in consequence of what McArdle had said to them, to get the machinery off of the elevator after they had put it on without any direction from anybody. There was nothing to show that the injury was due to any defect in the elevator, and the testimony that was offered was therefore rightly excluded. It may be added, also, that the plaintiff's declaration, fairly con-

strued, does not allege that the injury was caused by any defect in the elevator, or in the ways, works, or machinery of the defendant. Exceptions overruled.

(159 Mass. 154)

**WILSON v. TREMONT & SUFFOLK MILLS.**

(Supreme Judicial Court of Massachusetts. Middlesex. May 19, 1893.)

**INJURY TO SERVANT—ASSUMPTION OF RISK.**

1. A servant of full age and ordinary intelligence who, in order to adjust appliances, stands on a narrow, convex ledge at a distance from the ground, as shown how to do by the overseer, without the means of safely supporting himself, after having several times performed the task, cannot recover from his master if he falls and is injured, as the danger is obvious, and he assumes the risk.

2. The fact that the overseer may have told him to perform the task is immaterial, as it could not render the danger less obvious, or the assumption of risk less voluntary.

Exceptions from superior court, Middlesex county; John Hopkins, Judge.

Action by James Wilson against the Tremont & Suffolk Mills for personal injuries. A verdict was directed for defendant, and plaintiff excepts. Exceptions overruled.

It appeared from the evidence that defendant was a corporation engaged in the manufacture of cotton goods, and plaintiff was in its employ as a laborer, in that part of their works called the "dye house," and the injury of which he complained was received in the "dry room." The dryers in this room were appliances or structures of wood, in the shape of a box, 12 feet long, 6 or 7 feet wide, 5 feet high, and open at the top. In the inside of this structure, and about 12 inches from the top, was stretched a stout wire netting, attached to the sides and ends, and covering the whole interior. Beneath this netting were steam pipes to furnish heat for drying the cotton which was placed upon the netting. In this room were five dryers, side by side, in immediate contact, and occupying so much of the room as to leave between them and the walls of the building a passageway about three feet wide. Around the top the dryer was finished with and terminated in a wooden moulding or "ledge," as it was called, about two inches wide, and somewhat convex on its upper surface. When the cotton was dry it was taken from the dryer, and put into bags suspended from the ceiling, and in contact with the end of the dryer, in the following manner: Directly over the dryer ran beams which supported the ceiling. Into the sides of these beams were driven spikes or nails. Two ropes, one for each side of the bag, were suspended from these spikes by loops at one end, and at the other end held the bag by hooks; a third rope, to hold the bag open, was stretched to the opposite wall. Only one set of ropes was used, so that when one dryer had been emptied it was necessary to hang the ropes in a different place to empty another dryer. The plaintiff entered the service of the defendant, in this room, two or three days before the accident. He had worked in factories before, but was unfamiliar

with this kind of work, and had never seen the bags suspended in this manner before. He was instructed how to hang the bags by one Harkins, the overseer and agent of the defendant having charge of this room, who at the same time gave him a practical illustration; saying to the plaintiff, "Wilson, this is the way we do it." Harkins got into the dryer, and, being unable to reach the spike to hang the rope, he stepped up onto the "ledge" running around the top of the dryer, as before described, and, steadying himself with one hand against the beam, hung the rope with the other. Wilson was not so tall as Harkins, and standing on the "ledge" he could just reach the beam with his fingers. Before the accident he had successfully performed this act of "putting up the hooks," as hanging the ropes was called, once or twice. On the 18th day of November, 1891, Harkins told the plaintiff and a fellow workman named Brady to go up into this room, take the cotton from a certain dryer, and put it into bags. Accordingly the plaintiff, Brady, and Harkins proceeded to the dry room. The plaintiff and Brady got up into the dryer. Harkins took down the ropes from another dryer, and told the plaintiff to hang them, he, Harkins, in the mean time standing near the dryer, with a needle in his hand to sew up the bag when filled. The plaintiff then proceeded in his testimony as follows: "Harkins directed me—told me—to put the hooks up. I took the rope in my hand. I knew that I couldn't possibly touch the nail or spike by reaching it; consequently I had to step off the dryer where the cotton is onto this ledge. I had the rope in my hand, ready to put it onto the nail, and I stepped onto the ledge, sprang up, as it might be, so as to reach the nail or spike to put the rope on, and in doing so I missed the little hole that was in the joist [beam] for to put my fingers in to balance myself, and I missed my hold; consequently I fell forward to the ground." By this fall the plaintiff received severe injuries. It was admitted that the plaintiff would testify that in performing this act the plaintiff relied to a certain extent upon the instructions and directions of the defendant.

W. H. Bent, for plaintiff. G. F. Richardson, G. R. Richardson, and D. M. Richardson, for defendant.

MORTON, J. For aught that appears the plaintiff was of full age and of ordinary intelligence. He had been told how to do the work on which he was engaged at the time of the injury. He had done the identical thing, which he was attempting to do when hurt, once or twice before. There was no concealed danger nor defect, nor any danger which he could not appreciate. It was perfectly obvious that, if he slipped or missed his hold, he was liable to fall. We think he must be held to have understood the risk, and to have voluntarily incurred it. The mere fact that the defendant told him to take the cotton from the dryer did not make a concealed danger of that which was obvious before, or render involuntary his assumption of a

risk which was incident to and part of his regular work, and which he knew to be such and understood. Exceptions overruled.

(159 Mass. 133)

UNION FREIGHT R. CO. v. WINKLEY  
et al.

(Supreme Judicial Court of Massachusetts.  
Suffolk. May 19, 1893.)

CARRIERS—FREIGHT CHARGES—WHO LIABLE.

1. When the vendor of goods delivers them to a railroad to be carried to the purchaser, though the title may pass to the purchaser by such delivery, and the name and address of the consignee, who is the purchaser, may be known to the company, the vendor is presumed to make the contract for transportation on his own behalf, and is liable for the freight, but such presumption may be rebutted by evidence showing that it was understood that the consignee should pay the freight.

2. An employee of defendants, who had sold ice to one H., told the agent of a railroad company that there was a car to go to him, without further instructions. The company billed the car to H. via connecting carriers. No bill or receipt was given defendants, and the freight charges were made to H. by all the carriers, and bills for freight sent to him. *Held* sufficient to show that it was understood that H., and not defendants, should pay the freight.

Appeal from superior court, Suffolk county.

Action by the Union Freight Railroad Company against John N. Winkley and others to recover freight charges. Judgment was ordered for defendants, and plaintiff appeals. Affirmed.

It appeared from an agreed statement of facts that plaintiff, at the occurrence of the events hereinafter mentioned, and for a long time previous, was a common carrier, having its usual place of business in Boston, and operating a railroad between the stations of the various railroads, including those hereinafter mentioned, which have their terminal points in Boston; that the defendants were copartners dealing in ice under the name of Winkley & Maddox, having a usual place of business in Boston, and in the year 1890 having part of their stock stored in ice houses on the shore of Smith's pond, in the town of Wolfborough, in the state of New Hampshire; that the defendants sold to N. M. Merrick, of Plympton, in this commonwealth, in August, 1890, a carload of ice at a price per ton delivered on the cars; that there was a side track (constructed on private lands by parties interested in the ice trade) from a railway operated by the Boston & Maine Railroad, running alongside of the ice houses of the defendants, upon which track cars were pushed up by the Boston & Maine Railroad Company, and left to be loaded; that the defendants' servants loaded the said ice in a car thus left on said side track; that one of the defendants' servants informed the station agent at a station of said railroad company about two miles distant that there was at the ice houses of Winkley & Maddox, at the pond, a car of ice for N. M. Merrick, Plympton, Mass., giving the number of the car, and giving no other instruction or direction; that no other informa-

tion concerning the destination of the car was at any time given the Boston & Maine Railroad Company; that said company waybilled the said car to N. M. Merrick, Plympton, Mass., via the Old Colony Railroad Company, billed the freight charges to N. M. Merrick, hauled the car to Boston, and delivered it to the Union Freight Railroad Company to be hauled to the Old Colony Railroad Company; that the Union Freight Railroad Company hauled said car from the freight yard of the Boston & Maine Railroad to that of the Old Colony Railroad Company, and delivered it to the latter company, paying to the Boston & Maine Railroad Company its freight charges, and taking its said bill to N. M. Merrick, so paid and receipted; that the Old Colony Railroad Company paid to said Union Freight Railroad Company the amount of the bill so paid to the Boston & Maine Railroad Company, and its own (the Union Freight Railroad Company's) charges to said N. M. Merrick for its freight; that the Old Colony Railroad Company billed these charges, plus its own charges for transportation from Boston to Plympton, to said N. M. Merrick, sending to said Merrick the said bills for freight, and delivered the said ice to said Merrick at Plympton. Neither said Merrick nor any one else has paid said freight charges. The defendants thereafter claimed payment for said car of ice from Merrick, but payment has not been made.

C. F. Choate, Jr., for appellant. Lund, Jewell & Welch, for appellees.

FIELD, C. J. The plaintiff is the second in a line of three connecting railroads over which the ice was transported, and the freight due to the first two roads has been paid by the last. We assume, without deciding it, that the right of the plaintiff to maintain this action is the same as if it were the first road, and the freight had not been paid. With whom, then, did the Boston & Maine Railroad make the contract for transportation, and who promised that company to pay the freight? There was no express contract. The defendants, through their servants, might have contracted with the railroad to pay the freight, although, as between themselves and Merrick, he was bound to pay it, but they made no such contract, in terms. A consignor of merchandise delivered to a railroad for transportation may be the owner, and act for himself, or may be an agent for the owner, and act for him, and this may or may not be known to the railroad company. In the present case the railroad company knew the name and residence of the consignee. From the agreed facts it appears that the title to the ice passed to Merrick when it was put on board the car, and that it was transported at his risk. The doctrine of the courts of the United States seems to be that the property in goods shipped is presumably in the consignee, although this presumption may be rebutted by proof. *Lawrence v. Minturn*, 17 How. 100; *Blum v. The Caddo*, 1 Woods, 64. In *Dacey on Parties to Actions*, (pages 87, 88,) the result of the English decisions is stated



to be as follows: "The contract for carriage is, in the absence of any express agreement, presumed to be between the carrier and the person at whose risk the goods are carried, i. e. the person whose goods they are, and who would suffer if the goods were lost. \* \* \* When, therefore, goods are sent to a person who has purchased them, or are shipped under a bill of lading by a person's order, and on his account, the consignee, as being the person at whose risk the goods are, is considered the person with whom the contract is made. He is liable to pay for the carriage, and is the proper person to sue the carrier for a breach of contract." And, (Id. page 90, note:) "When the consignor acts as agent of the consignee, but contracts in his own name, it would appear that either the consignor or consignee may sue." *Dawes v. Peck*, 8 Term R. 330; *Domett v. Beckford*, 5 Barn. & Adol. 522; *Coombs v. Railway Co.*, 3 Hurl. & N. 1; *Sargent v. Morris*, 3 Barn. & Ald. 277; *Dunlop v. Lambert*, 6 Clark & F. 600; *Railway Co. v. Bagge*, 15 Q. B. Div. 625; *Cork Distilleries Co. v. Great Southern & W. Ry. Co.*, L. R. 7 H. L. 269. The cases generally are collected in *Hutch. Carr.* § 448 et seq.; *Id.*, § 720 et seq. Most of the English cases were reviewed in *Blanchard v. Page*, 8 Gray, 281. That was a case of the carriage of goods by sea under a bill of lading, and it was held that the bill of lading was a contract between the shipper and the shipowner, and that although it was shown that the shipper acted as agent of the consignees, who had bought and paid for the goods before shipment, yet he could bring an action in his own name for breach of the contract of carriage, unless he was prohibited by his principal, and it was said that he would be liable for the freight. In *Wooster v. Tarr*, 8 Allen, 270, it was decided that under a bill of lading in the usual form the shipper was liable to the carrier for the freight, although the bill contained the usual clause that the goods were to be delivered to the consignees or their assignees, "he or they paying freight for said goods," etc. It was said "to be the settled doctrine that a bill of lading is a written simple contract between a shipper of goods and the shipowner; the latter to carry the goods, and the former to pay the stipulated compensation when the service is performed." Both these cases were upon express contracts.

The strongest case for the plaintiff is *Finn v. Railroad Co.*, 102 Mass. 233, which was upon an implied contract. In that case one Clark had ordered shingles of Finn, who shipped them on his own account, under a bill of lading, on board a canal boat, to be delivered to "the Great Western Railroad Company, or their assignees, at Greenbush, N. Y. Consignee to pay freight on the delivery." And the shingles arrived by boat at the freight station of the railroad company at Greenbush, N. Y. The shingles were described in the bill of lading as marked, "J. S. C. Extra," or "J. S. C." They were burned, while in the freight house, by an accidental fire. They were intended to be transported to Joseph S. Clark, Southampton,

Mass. Clark accepted and paid a draft drawn by Finn for the shingles; and, in a suit by Finn against him, Clark pleaded the amount of the draft in set-off, and recovered the amount, on the ground that "the omission of the plaintiff [Finn] to forward the goods with proper directions to the consignee and the place of delivery authorized the defendant [Clark] to treat the alleged sale as one never perfected, and to recover back the money paid upon the draft." *Finn v. Clark*, 10 Allen, 479, 12 Allen, 522. Finn then brought suit against the railroad company for its failure to forward and deliver the shingles to Clark. It was held that although the case of Finn against Clark settled the fact that, as between them, the title to the property remained in Finn, yet the railroad company, not being a party to that suit, could not set up the judgment in it "as an estoppel against Finn upon the question of" delivery. *Finn v. Railroad*, 102 Mass. 233. At the second trial the plaintiff obtained a verdict, and the facts stated in the exceptions showed "that the title to the property had passed to Clark before the loss occurred, leaving Finn, at most, only right of stoppage in transitu;" and it was in this aspect of the case that the opinion in 112 Mass. 524, was delivered. The contention of the plaintiff was that the shingles had been delivered to the railroad company with proper directions for their transportation, and that the defendant had neglected to transport them, whereby they had been burned. In the opinion the court say of the liability of a common carrier that, "prima facie, his contract of service is with the party from whom, directly or indirectly, he receives the goods for carriage; that is, with the consignor. \* \* \* When carrying goods from seller to purchaser, if there is nothing in the relations of the several parties except what arises from the fact that the seller commits the goods to the carrier as the ordinary and convenient mode of transmission and delivery, in execution of the order or agreement of sale, the employment is by the seller, the contract of service is with him, and actions based upon the contract may, if they must not necessarily, be in the name of the consignor. If, however, the purchaser designates the carrier, making him his agent to receive and transmit goods, or if sale is complete before delivery to the carrier, and the seller is made the agent of the purchaser in respect to the forwarding of them, a different implication would arise, and the contract of service might be held to be with the purchaser." Although this was not a suit to recover freight, the principles on which it was decided are applicable to such a suit, and the effect of this and the previous decisions, we think, is that in this commonwealth, when the vendor of goods delivers them to a railroad to be carried to the purchaser, although the title passes to the purchaser by the delivery to the railroad company, and the name and address of the consignee, who is the purchaser, is known to the company, the vendor is presumed to make the contract for transportation with the company on his own behalf, and



is held liable to the company for the payment of the freight. This presumption, however, is a disputable one, and may be rebutted or disproved by evidence; and if the vendee has ordered the goods to be sent at his risk, and on his account, he also may be held liable as the real principal in the contract. See *Byington v. Simpson*, 184 Mass. 169. But, whether the presumption be one way or the other, it is a matter of inference from the particular circumstances of the case, and the question which is always to be considered is the understanding of the parties. See *Railroad v. Whiteher*, 1 Allen, 497. In the present case there was no bill of lading or receipt signed by the railroad company, and accepted by the defendants. There was a waybill but it does not appear that the names of the defendants were in it. The freight charges were made in every instance to Merrick, the consignee, and the bills for freight were sent to him. These facts, and perhaps some others stated in the agreed facts, afford some evidence that the railroad company understood that Merrick was to pay the freight to the company. Upon an agreed statement of facts this court cannot draw inferences of fact, unless they are necessary inferences. *Railroad v. Wilder*, 187 Mass. 536. The agreed facts in this case, we think, contain some evidence that the understanding of all the parties was that Merrick should pay the freight to the railroad company; and we cannot hold, as matter of law, that the defendants made a contract on their own behalf to pay the freight. Judgment affirmed.

(159 Mass. 158)

# MERCHANTS' NAT. BANK v. HAVERHILL IRON WORKS.

(Supreme Judicial Court of Massachusetts.  
Middlesex. May 19, 1893.)

ACTION ON NOTE—CONFLICTING EVIDENCE—BONA FIDE OWNER—QUESTION FOR JURY—HARMLESS ERROR.

1. In an action on a note by a bank against the maker, where there is evidence that the note was fraudulently put into circulation by a brokerage company, which received it from defendant, and plaintiff's president and cashier testify that plaintiff took the note in good faith and for value before maturity, which is uncontradicted, defendant is entitled to go to the jury on the question whether plaintiff took the note for value and without notice of fraud.

2. Though plaintiff's president was bound to know as matter of law the powers conferred on the brokerage company by its charter, the admission of his statement that he did not know them could do defendant no harm.

Exceptions from superior court, Middlesex county; Daniel W. Bond, Judge.

Action by the Merchants' National Bank against the Haverhill Iron Works, as maker, on a note. The court directed a verdict for plaintiff, and defendant excepts. Exceptions sustained.

C. S. Lilley, for plaintiff. Jones & Pin-gree, for defendant.

MORTON, J. There was evidence tending to show that the note was put into circulation fraudulently by the Potter-

Lovell Company, which received it from the defendant. The plaintiff was bound to show, therefore, that it took the note in good faith and for value before maturity. *Sullivan v. Langly*, 120 Mass. 437; *Emerson v. Burns*, 114 Mass. 348. The president and cashier of the plaintiff bank testified that such was the fact. The defendant introduced no testimony to contradict those officers, but claimed the right to go to the jury on the question whether the plaintiff took the note for value and without notice of the fraud. The court, however, ruled as matter of law that the plaintiff was entitled to recover, and directed a verdict for the plaintiff. We think this was error. The jury may have disbelieved the president and cashier, or have believed them only in part, and have been satisfied on all the evidence that they either had notice, or did not take the note for value before maturity. They were not bound, as matter of law, to believe the president and cashier, though their testimony was uncontradicted. *Twombly v. Monroe*, 186 Mass. 464. There was nothing in the charter of the Potter-Lovell Company which expressly or by implication forbade that company from purchasing the note in suit. It was fairly incident to the conduct of a brokerage business that it should at times purchase or discount notes. If, therefore, the plaintiff's president was bound to know as matter of law the powers conferred upon the Potter-Lovell Company by its charter, the admission of his statement that he did not know them could have done the defendant no harm. Because of the error in taking the case from the jury the exceptions are sustained.

(159 Mass. 138)

# HOUGHTON et al. v. CITY OF BOSTON et al.

(Supreme Judicial Court of Massachusetts.  
Suffolk. May 19, 1893.)

TAXES—PAYMENT BY CHECK.

As the statutes of Massachusetts contemplate payment of taxes in money, if the collector, for the convenience of taxpayers or of himself, receives checks, in the absence of any agreement to the contrary, they are to be taken as a conditional payment, and if they are not paid the claim for taxes is not satisfied, and may still be enforced.

Case reserved from supreme judicial court, Suffolk county; John Lathrop, Judge.

Suit by Samuel S. Houghton and others against the city of Boston and James W. Ricker, collector of taxes. The case was heard on agreed facts, and reserved for the full court. Bill dismissed.

It appeared from the agreed facts that a tax was assessed against plaintiffs, and remitted to the collector, Ricker, for collection. On October 30, 1890, between 9 and 10 o'clock in the forenoon, a messenger from plaintiffs brought to the collector's office in city hall, and gave to one of the collector's clerks, two checks for the tax and the tax bill. The employe of the collector took the checks, stamped and re-

cepted the tax bill, and gave it to the messenger, and entered the checks on a list which he kept of the checks and moneys received by him that day. Nothing was said by the messenger to the clerk, or by the clerk to the messenger, as to the checks. The collector, by his cashier, received during Friday, October 30th, the amounts in money and checks set forth in respondent's answer, including the checks in controversy, and after the closing of the office at 2 P. M. prepared a list of the checks and moneys so received, and of the corresponding taxes, and between 9 and 10 A. M. of Saturday, the 31st, the cashier of the collector handed to the city treasurer said list, checks, and moneys. Said city treasurer, by his clerks, caused said checks to be listed and entered on the books of the office, and about noon of said Saturday, the 31st, deposited said checks to the credit of said city in certain banks, a check for \$2,457 being deposited by him in the National Bank of the Republic, said Bank of the Republic being a member of the clearing-house association, of which said Maverick Bank was also a member. The plaintiffs had sufficient funds on deposit in the Maverick Bank to have paid said check if presented Friday or Saturday, and the check would have been paid if presented at the Maverick Bank prior to the close of banking hours on Saturday, the 31st. On Sunday, the 1st of November, the bank examiner was instructed by the comptroller of the currency to take possession of the funds of the Maverick Bank, and close the same for business, and in consequence said bank did not open for business Monday morning. Said check was returned Monday, November 2d, from the clearing house to said national bank, and was immediately returned by said bank to the city treasurer, and by the city treasurer to the city collector, and [said treasurer] removed from his books the credit he had given to the city collector for said check. On said Monday, about noon, the cashier of the city collector returned to the plaintiffs said check, and informed them that it was not paid, and demanded payment of the tax. The collector had given no special instructions to the clerk who received the check concerning taking checks or receipting tax bills, and did not know that any check of Houghton & Dutton's was taken until Monday, the 2d of November, when the check was returned to him by the city treasurer. The check was taken in accordance with the usage of the collector's office of many years' standing, and is, as he is informed and believes, the ordinary usage of business firms in Boston. The custom is for the convenience of taxpayers to receive their checks for the amount of their taxes, receipt their tax bills when the checks are presented in person, and turn the checks over to the city treasurer for deposit and collection. If the amount of the check was credited to the collector by the city treasurer, the tax was paid, and the receipt ought to stand; that is, the collector takes the check as an impliedly conditional payment, the condition being that the checks will be paid, and the amount credited to him by the city treasurer. The well-established usage of

national banks in Boston, known to the plaintiffs, is that all checks are exchanged at a clearing house held every morning by the clerks representing each bank. Said exchange takes place at 10 A. M., and includes only checks held by each bank at the close of the previous day's business, and each bank receiving through its clerk a check from the clearing house, by usage, has the right to return any of said checks which it has not the funds to cover at any time before 12 M., and the balances due to and from the several banks are settled in money at 12 M. of each day. It is also the settled usage in Boston with persons having bank accounts to deposit in their own banks checks received by them on any bank. This usage is in long standing, and well known at all the banks of Boston, and among those keeping accounts at such banks. The check in question was deposited Saturday before 12, but, in accordance with this usage, was not presented at the clearing house until Monday at 10 o'clock, at which time the Maverick Bank had failed, and those checks were thrown out of the clearing-house settlements. Benjamin F. Dutton, of the plaintiffs' firm, had the principal, and almost the exclusive, conduct and control of the financial affairs of the firm. Prior to November 2, 1891, he had no knowledge of the disposition, use, or manner of dealing with checks by the collector of taxes of the city of Boston when received by the latter in payment of taxes. As a rule, he has paid the taxes assessed to his firm, or ordered them paid, by checks, and the checks were received, and the tax bills receipted. This he has done as a matter of convenience, but he never had any conversation or arrangement with the collector about it. He did not, in fact, know of any customs or usages prevailing in the collector's office or at the city hall relating to the disposition or use of such checks, but simply dealt with the city as he would with any other creditor of his firm.

J. O. Teele, for plaintiffs. T. M. Babson, for defendants.

FIELD, C. J. A collector of taxes is a public officer, and his powers and duties generally are defined in Pub. St. c. 12. *Dunbar v. Boston*, 112 Mass. 75. The provisions of this chapter imply that taxes are to be collected in money, and that, if they are not so collected, the collector may levy the same by distress and sale of goods, or, if he cannot find sufficient goods, then by arrest and imprisonment; and taxes assessed on real estate may also be levied by a sale of the real estate, and in certain cases the collector may maintain an action of contract to recover taxes as for his own debt. A collector is liable to the town or city for all taxes on the tax list committed to him which by his fault he does not collect. *Colerain v. Bell*, 9 Mete. (Mass.) 499. But the power which a collector has by statute of compelling the payment of taxes he holds for the benefit of the town or city whose collector he is. If he dies, resigns, or is removed from office, and another collector is appointed, the new collector has the same power to col-

let all the taxes on the tax list which remain unpaid. The check, under our laws, was not an assignment of the funds in the bank to the extent of the sum of money for which it was drawn, and the plaintiffs still remain entitled to receive on the whole amount of the deposits standing to their credit the dividends which have been declared by the receiver of the bank. As between merchants, a check is usually to be considered as conditional payment; that is, as payment, if it is in fact paid. If it is not paid, we think that the original cause of action is not discharged, unless the check has been taken as absolute payment. If the check is not seasonably presented, and the bank meantime fails, the drawer of the check cannot be held upon the check, and the person whose duty it was to present the check for payment may become liable for the damages which the drawer suffers thereby, if he suffers any damages; but these may be less than the amount of the check. We are of opinion that the statutes contemplate that taxes should be paid to the collector of taxes in money; that if the collector, for the convenience of taxpayers or of himself, receives checks, in the absence of any agreement to the contrary, they are to be taken as conditional payment; and that, if they are not paid, the claim for taxes is not satisfied, but that the taxes can still be collected according to law. If the collector has been negligent in presenting a check, whereby the drawer has suffered loss, it may be that he is personally liable therefor. We express no opinion whether, on the facts of this case, the check was seasonably presented, so as to absolve the collector or the treasurer from liability to the drawers for damages suffered by the failure of the bank. Bill dismissed.

(159 Mass. 198)

AUSTIN et al. v. HATCH et al.

(Supreme Judicial Court of Massachusetts.  
Middlesex. May 19, 1893.)FORECLOSURE OF MORTGAGE — ADVERTISEMENT —  
SUFFICIENCY — SETTING ASIDE — INADEQUATE  
PRICE — SUFFICIENCY OF BILL TO SET ASIDE.

1. The fact that the advertisement of a mortgage sale did not state that the land was improved is not a sufficient reason for setting aside the sale.

2. Where the land is worth \$5,000, and sells under foreclosure for \$2,525, the sale will not be set aside for mere inadequacy of price.

3. A bill in equity to set aside a mortgage sale, alleging that the purchaser is a son-in-law of one of the owners of the equity of redemption, and that he acted in collusion with such owners to acquire the land for them relieved of plaintiff's claims under subsequent mortgages, but does not allege collusion between the mortgagee who made the sale and the purchaser, or between the mortgagee and such owners, is demurrable.

Appeal from superior court, Middlesex county.

Suit by Elizabeth Austin and Eunice M. Tisdale against Fred W. Hatch, William K. Knowles, Daniel S. Simpson, and Howard Simpson to set aside a mortgage sale. From a decree sustaining a demurrer filed by defendant Knowles, plaintiffs appeal. Affirmed.

G. E. Smith, W. C. Smith, and J. R. Carret, for plaintiffs. S. L. Whipple, for defendants.

LATHROP, J. The plaintiffs, by a bill in equity, seek to set aside a sale made under a power contained in a mortgage. The case is before us on an appeal by the plaintiffs from a decree sustaining a demurrer filed by the purchaser at the sale. The legal advertisement of the sale described the estate as a certain parcel of land, and gave the metes and bounds as described in the mortgage. After the mortgage was delivered, the mortgagor erected four houses on the land. This fact was not known to the mortgagee until the day of the sale, and was not stated in the advertisement. Though the plaintiffs do not impute bad faith to the mortgagee, they contend that it was carelessness on his part not to ascertain the condition of the property, and give notice in the advertisement of the fact that the land was improved. We are of opinion that this is not a sufficient reason for setting aside the sale. The description given in the mortgage was followed. The improvements were obvious to those who attended the sale. There is nothing in the bill to show that there was not a number of bidders present, or that the sale was not conducted as an auction sale should be conducted. *Stevenson v. Hano*, 148 Mass. 616, 20 N. E. Rep. 200.

It is further alleged in the bill that the property was worth \$5,000, and was bought for \$2,525; and the plaintiffs seek to have the sale set aside on the ground of inadequacy of price. Mere inadequacy of price is no reason for setting aside a sale. *King v. Bronson*, 122 Mass. 122, 128; *Wing v. Hayford*, 124 Mass. 249; *Learned v. Geer*, 139 Mass. 31, 29 N. E. Rep. 215. In *Clark v. Simmons*, 150 Mass. 357, 361, 23 N. E. Rep. 108, it is said: "Inadequacy of price will not invalidate a sale, unless it is so gross as to indicate bad faith, or a want of reasonable judgment and discretion in the mortgagee." In *King v. Bronson*, the property sold for \$600. It was found to be worth more than \$2,000, and less than \$2,600. In *Wing v. Hayford*, the land was sold to the agent of the mortgagee for \$3,000, though it appeared that the mortgagee authorized the agent to bid as high as \$6,000. In *Learned v. Geer*, the sale was for \$2,000, and the property was found to be worth \$2,500. In *Clark v. Simmons*, the sale was for \$1,200, "which amount was at least \$200 less than its fair market value." The amounts in the last two cases are taken from the papers on file. In the case at bar there is no allegation that an adjournment of the sale would have resulted in a higher price being realized. It is a notorious fact that when land is sold, by auction, under a power contained in a mortgage, it seldom, if ever, brings a price which reaches its real value. If this is a hardship upon a mortgagor or those claiming under him, it is owing to the contract which he has made, and which the mortgagee has a right to have carried out. On the allegations of this bill we see no reason for setting aside the sale.

It is further contended by the plaintiffs

that the purchaser is a son-in-law of one of the owners of the equity of redemption, and that he acted in collusion with such owners for the purpose of acquiring the estate for them relieved of the claims of the plaintiffs, who hold subsequent mortgages. There is, however, no allegation of any collusion between the mortgagee who made the sale and the purchaser, or between the mortgagee and the owners of the equity. The mortgagee is therefore entitled to receive the purchase money, which, after his own claim is paid, he will hold in trust for the parties entitled to it. As he is entitled to have the sale carried out, we cannot restrain by injunction the purchaser from paying the money to him.

Decree affirmed.

(159 Mass. 83)

**MELLEN v. WILSON'S SONS STEAMSHIP CO., Limited.**

(Supreme Judicial Court of Massachusetts.  
Suffolk. May 17, 1893.)

**MASTER AND SERVANT — NEGLIGENCE OF FELLOW SERVANT.**

In an action by an employee of a steamship company for injuries received from falling down an unlighted hatchway, it appeared that the electric lights on the vessel had gone out, by an accident, which the engineer could have repaired, and that there were lanterns that might have been used in their place. *Held*, that the company was not liable, since the injury was caused by the negligence of the plaintiff's fellow servants.

Exceptions from superior court, Suffolk county; Daniel W. Bond, Judge.

Action by John Mellen against the Wilson's Sons Steamship Company, Limited, for personal injuries. There was a verdict for the defendant. Plaintiff excepts. Exceptions overruled.

B. Hall and R. W. Goding, for plaintiff.  
C. T. Russell, Jr., and A. E. Russell, for defendant.

**HOLMES, J.** This is an action to recover for injuries caused by falling down a hatchway alleged to have been insufficiently lighted, on the British steamship *Martello*, while upon the high seas. The plaintiff was employed on board as a coal trimmer, and when the accident happened had finished his work, and was going forward to his berth. The ship lurched. He stumbled, and fell headlong upon the forward part of the hatch, got up, groped, made a step, and fell into the hatchway. The judge directed a verdict for the defendant.

We cannot say that the plaintiff was negligent before his first fall, and it would be going very far to say that his conduct, in the first confusion of his rising, was negligent, as matter of law.

The more difficult question is whether there was any evidence of the defendant's negligence. It seems that the plaintiff made complaints at not being furnished with a lantern when he asked for it, but we lay that on one side, as it is plain that his request had reference to his work, while he was engaged upon it, whereas, at the time of the accident, his work was

over. The deck was lighted by electric lights, and on the night of the accident there was trouble with them, and they went out. The testimony for the plaintiff was a little ambiguous, but perhaps may have meant that the electric lights, even when going, were in such a position that they would not light the hatch sufficiently. The going out of the lights was not due to any defect in the apparatus, as furnished, but was due to temporary matters,—the slipping of a belt, etc.,—which the engineer could have repaired. After the accident the hatchway was lighted by a lamp, so that there were lights available for that purpose. The plaintiff knew of the hatchway, of course, and does not say that he supposed, or had reason to suppose, that it was closed. There was no trap in the case, and he was going his own way at his own will. Under such circumstances it is doubtful if the district judges would find any evidence of negligence, as against the crew, in leaving the hatch open and unlighted. *Dwyer v. Steamship Co.*, 4 Fed. Rep. 493, 495.

If this were certain, it would be questionable whether a common-law court ought to allow a jury to find the other way. But we assume, in favor of the plaintiff, that the jury would have been warranted in finding it necessary to light the hatch. Still the question remains whether any negligence is shown on the part of the defendant. Taking the plaintiff's evidence in the most favorable way possible, it does not mean that the going out of the electric lights made no difference in his situation. On the contrary, his testimony, by dealing with that matter at length, implies that it did make a difference. The expression that at the hatchway "we could merely see a glimmer," and the plaintiff's statement that on other nights he had some little light, show the same thing.

It cannot be said, then, that if the electric lights had been going the accident would have happened. But, if the going out of the electric lights was the cause of the accident, that, so far as appears, was due to the negligence of the engineer,—a fellow servant of the plaintiff. It is not even brought home to the captain, so that we have not to deal with the question whether, in this case, he was to be deemed a fellow servant with the plaintiff,—the English law not having been put in evidence. See *Benson v. Goodwin*, 147 Mass. 237; *The A. Heaton*, 43 Fed. Rep. 592; *Hedley v. Steamship Co.*, (1892.) L. R. 1 Q. B. 58. Furthermore, as we have stated, it appears that, in addition to the electric lights, there were lanterns available; and, if one of them was not used, that also, so far as appears, was due to the omission of a fellow servant. We are of opinion that the plaintiff has failed to show that his injury was caused by inadequate equipment of the vessel, or by any breach of duty on the part of the defendants. *Floyd v. Sugden*, 134 Mass. 563; *Johnson v. Tow-Boat Co.*, 135 Mass. 209; *Moynihan v. Hills Co.*, 146 Mass. 586, 593, 16 N. E. Rep. 574.

Judgment on the verdict for defendant.

\*17 N. E. Rep. 517.

(6 Ind. App. 663)

**STEINKE et al. v. BENTLEY et al.**

(Appellate Court of Indiana. May 13, 1893.)

PLEADING—VARIANCE—EASEMENT—DITCH—NUISANCE—COUNTERCLAIM.

1. In an action for a nuisance caused by stopping up a ditch, the complaint alleged that the agreement upon which the right to maintain the ditch was founded was made with the plaintiff, while the proof showed that it was made with his ancestor. No objection to the proof was made at the trial. *Held*, that the variance was no ground for reversal under Rev. St. 1881, § 391, which declares that "no variance between pleading and proof is to be deemed material unless it has actually misled the adverse party to his prejudice."

2. An executed parol agreement for the construction of a ditch across one man's land, to drain the land of another, creates an easement appurtenant to the latter tract of land.

3. Under Rev. St. 1881, § 289, which defines a nuisance as "whatever is injurious to health, indecent, or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property," the obstruction of a ditch which drains a tract of farming land is a continuing nuisance, for which a purchaser of the land, after the creation of the obstruction, may bring suit.

4. The rule that one purchasing land with a nuisance already upon it is not liable therefor until requested to remove it does not relieve from liability a purchaser who was an actor in creating the nuisance.

5. The grantor and grantee of land cannot join in a counterclaim for continuing trespasses on the land sold, since their rights of action are not joint.

Appeal from circuit court, Marshall county.

Action by Harriet A. Bentley and others against August Steinke and John E. Steinke. Plaintiffs obtained judgment. Defendants appeal. Affirmed.

Chas. Kellison, for appellants. Saml. Parker, for appellees.

**GAVIN, J.** This is an action brought by appellees to recover damages by reason of appellants having closed up two drains upon their own lands, through which appellees claimed a right by way of an easement to conduct the water off their lands. From the special findings of fact it appears that, in the year 1862, one Persees Reeves was the owner of the two tracts now owned by the appellants and appellees, respectively. At that time the land now owned by appellees was wet, and required drainage to make it fit for use, and she then constructed two ditches upon and from that land, across the tract now owned by appellants, emptying into a natural running stream, whereby the water was drained off the tract now owned by appellees. These ditches were of sufficient capacity to, and did, properly drain the marsh lands now owned by appellees. From the time of their construction forward until 1884, when obstructed by appellants, these ditches were all the time open, plain, and visible ditches from their sources to their outlets, and were, during all that time, operating to and did drain the wet lands and marshes on the land now owned by appellees, and were continuously used by the owners of that tract under a claim of right, all of which

was well known to appellant August Steinke when he purchased his tract, and to both the appellants when they obstructed the ditches, and when August conveyed to John E. In 1866 said Persees Reeves conveyed the one tract to Mary Ann Kennedy, a married woman, who in 1876 conveyed it to August Steinke, and he, in 1889, conveyed the same to the appellant John E. Steinke, the present owner, reserving the use of part of the house and barn, and reserving, also, one-fourth of the products of the land. In 1872 said Persees Reeves conveyed the other tract to William H. G. Bentley, from whom the appellees inherited it in 1885. In the year 1883 said August Steinke obstructed and filled up the greater part of one of said ditches, known as the "East Ditch," upon his land, thereby almost completely obstructing and preventing the drainage of Bentley's land. Bentley objected to this obstruction, claimed the right to have said ditch kept open to drain his land, and threatened legal proceedings to enforce this claim. With knowledge of this claim by Bentley, August Steinke, in the year 1883, agreed that if Bentley and one Nash, who also owned land which drained into this ditch, would each cut one-third of an open ditch on the lands of said Steinke where said east ditch had originally been made, he would cut and open one-third of the same, and allow the water from Bentley's said land and that of Nash to flow through said east ditch onto and over his land. This agreement to reopen the ditch was carried out, and the ditch restored so as to properly drain the lands of Bentley. At the time of the conveyance to him, John E. Steinke had knowledge of this agreement, and that the ditch had been reopened by the parties under it. In 1884 said August Steinke, assisted by John E., without the knowledge or consent of said William G. H. Bentley, laid a four-inch tile in the east ditch, and built an embankment across the same at the line of appellees' land, leaving no other outlet for the water in said ditch from appellees' land except said tile, which was wholly insufficient to properly carry off the water which usually and naturally flowed through said east ditch, whereby five acres of cleared and tillable land of appellees were rendered wet and unfit for cultivation, and four acres of appellees' marsh land were kept flooded, whereby appellees were damaged, etc. As to this east ditch, the court's conclusions of law were in favor of appellees, while as to the west ditch he gave them no damages. The appellants jointly and severally excepted to the correctness of the court's conclusions.

The complaint alleges the agreement for the restoration of the ditch to have been made by Steinke, Nash, and the appellees, instead of the appellees' ancestor, as shown by the facts. Appellants insist that in this there is a variance which amounts to an absolute failure of proof, by reason of which they are entitled to judgment. Section 391, Rev. St. 1881, provides that "no variance between the allegations in a pleading and the proof is to be deemed material unless it has actually

mised the adverse party to his prejudice in maintaining his action or defense upon the merits." "When the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs." Id. § 392. If the court may thus direct the jury, he may, of course, thus find himself when the cause is tried without a jury. In order to constitute a failure of proof, and not merely a variance, the allegation of the claim or defense must be unproved, not in some particular or particulars only, but in its general scope and meaning. Id. § 398. We have a right to suppose the findings supported by the proof, and no objection appears to have been made to proof that this arrangement was made with appellees' ancestor, instead of with them. Appellees were in direct privity with their ancestors, and stand in their shoes. Had objection been made, or even without objection, the court might have permitted the pleading to be amended. No claim is made that appellants were misled on the trial, and we are unable to see how they could have been misled. In *Roberts v. Graham*, 6 Wall. 578, this rule is laid down: "The objection of a variance not taken at the trial cannot avail the defendant as an error in the higher court if it could have been obviated in the trial below." This is quoted with approval by Elliott, J., in *Graves v. State*, 121 Ind. 357, 23 N. E. Rep. 155. These propositions are also sustained by *Taylor v. State*, 130 Ind. 66, 29 N. E. Rep. 415; *Braden v. Lemmon*, 127 Ind. 9, 26 N. E. Rep. 476; *Hedrick v. Osborne*, 99 Ind. 143; *Krewson v. Cloud*, 45 Ind. 273; 1 *Estee*, Pl. § 205; *Green & M. Pl. Mo.* § 468. It was within the province of the court to have permitted an amendment on the trial. *Leib v. Butterick*, 68 Ind. 199; *Child v. Swain*, 69 Ind. 230. We are therefore of opinion that the variance was not material, within the meaning of the statute, and, since the complaint might have been amended in the court below to correspond to the proof, it will be deemed to have been so amended here. *Hydraulic Co. v. Boyer*, 87 Ind. 236.

The fair construction of the arrangement made for the restoration of the ditch is that Nash and Bentley were to have the perpetual right to flow water from their lands through the ditch. There is no limitation as to its duration, and nothing to indicate that it was merely temporary; on the contrary, all the facts stated point to the opposite conclusion. If we deem the right of Bentley to have been created by this agreement and its execution, the parcel agreement thus acted upon by the parties, there being both performance and possession taken, created, in equity, a right of easement which became appurtenant to the land, and passed with it to the appellees. *Nowlin v. Whipple*, 120 Ind. 596, 22 N. E. Rep. 669; *Hodgson v. Jeffries*, 52 Ind. 337; *Snowden v. Wilas*, 19 Ind. 10; *Robinson v. Thrallkill*, 110 Ind. 118, 10 N. E. Rep. 647; *Cook v. Pridgen*, 45 Ga. 331.

Counsel for the appellants urge that, under the facts of this case, all the damages to the land injured to William G. H. Bentley, who was the owner when the ditch

was closed up; that the obstruction was a permanent one, and all damages must be recovered in one action. We are unwilling to give our adherence to the proposition that appellants could thus force appellees or their ancestor to part with their right of drainage, and rely upon the recovery of damages. Appellees were entitled to the continued use of the drain. The right, having vested in them, could not be taken from them without their consent or acquiescence. They could maintain this right by injunction. 3 *Suth. Dam.* §§ 1036-1039; 1 *Add. Torts*, § 404. The wrong done by appellants did not constitute a mere trespass, for which a single recovery would suffice, but it constituted a continuing nuisance, from which appellees were entitled to be relieved, as well as to a recovery of damages. Our statute (*Rev. St.* 1881, § 289) thus defines a nuisance: "Whatever is injurious to health, indecent, or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action." By section 291 is given, also, the right to abate it upon a proper showing. *Wood, Nuis.* § 13, thus distinguishes between a nuisance and a trespass: "A trespass is a direct and forcible invasion of one's property, producing a direct and immediate result, and consisting usually of a single act; but injuries of this class [nuisances] are indirect, and a consequence of a wrongful act, and continuous, and the fact of their continuousness is one of the main reasons that make them a nuisance." There is a manifest distinction between a wrong of this character and the injury resulting from the construction of some work by a city or a railroad, wherein all damages must be recovered in one action. This distinction is recognized in the case of *City of North Vernon v. Voegler*, 103 Ind. 314, 2 N. E. Rep. 821, which is relied upon by appellants, wherein the act complained of is held not to have been a nuisance at all, but a mere case of negligence. While there may be some difference of authority upon the proposition, we think the correct rule is that, in such a case as this, it may be reasonably anticipated that the wrongdoer will remove the cause of injury rather than respond in continued damages, and that all damages, prospective as well as present, do not accrue to the owner of the land at the time of the interference. *Brewing Co. v. Compton*, (Ill. Sup.) 32 N. E. Rep. 693; 1 *Suth. Dam.* §§ 125-127; *Stein v. City of Lafayette*, (Ind. App. Case,) 83 N. E. Rep. 912. See notes to *Cooke v. England*, 92 *Amer. Dec.* 618; *Aldworth v. City of Lynn*, 153 *Mass.* 53, 26 N. E. Rep. 229; *Brown v. Railroad Co.*, 80 *Mo.* 457. Since no future or prospective damages could have been recovered by William G. H. Bentley, it necessarily follows that they are recoverable by the appellees; otherwise, they could be recovered by no one. Appellees' damages must necessarily be limited to the loss accruing to them during their ownership of the property. *Thompson v. Gibson*, 7 *Mees. & W.* 456. In *Wells v. New Haven, etc., Co.*, 151 *Mass.* 46, 23 N. E. Rep. 724, a purchaser of land is held

entitled to maintain an action for damages on account of a continuing nuisance erected before he acquired title to the land. Both the appellants were active participants in closing up the ditch with knowledge of the claims of Bentley, and both must be held to respond for all damages resultant therefrom. *Prentiss v. Wood*, 132 Mass. 486. August Steinke, the owner at that time, continues to hold an interest in the land and its products under his deed to his son John. The doctrine that one purchasing land with a nuisance already upon it is not to be held liable until requested to remove it cannot be invoked for the benefit of one who was an actor in creating the nuisance. 1 *Add. Torts*, § 383; *Ahern v. Steele*, 115 N. Y. 203, 22 N. E. Rep. 193; *Dalay v. Savage*, 145 Mass. 38, 12 N. E. Rep. 841; *Russell v. Brown*, 63 Me. 203.

Under the facts as found, an easement would appear to have been created by implication in favor of the tract retained by Persees Reeves when she conveyed away the tract over which the drain was constructed from the tract retained by her, and now held by appellees. The following rule is laid down in *Insurance Co. v. Patterson*, 103 Ind. 582, 2 N. E. Rep. 188: "Where, during the unity of title, an apparently permanent and obvious servitude is imposed on one part of an estate in favor of another, which at the time of the severance is in use, and is reasonably necessary for the fair enjoyment of the other, then, upon a severance of such ownership, whether by voluntary alienation or judicial proceedings, there arises by implication of law a grant or reservation of the right to continue such use." There is a difference in the authorities as to just how far this rule ought to be extended in favor of a grantor who has failed to expressly reserve any rights in his deed; but there are many authorities supporting the doctrine as enunciated in the *Patterson Case*, as applicable to easements such as this, which was apparent and continuous in its character. *Railroad Co. v. Jones*, 50 Pa. St. 423; *Gelble v. Smith*, (Pa. Sup.) 23 Atl. Rep. 437; *Seymour v. Lewis*, 13 N. J. Eq. 439; *Kelly v. Dunning*, 43 N. J. Eq. 62, 10 Atl. Rep. 276; *Elliott v. Rhett*, 5 Rich. Law, 405; *Harwood v. Benton*, 32 Vt. 724. Since counsel have not discussed this proposition in their briefs, we have not determined the case upon it, but simply refer to the principle and some of the authorities thereon.

The appellants assign as error the sustaining of the demurrer to their joint counterclaim. In this there was no error, for one reason at least. In that pleading it is alleged that appellant August Steinke owned the land up to 1889, when he conveyed it to appellant John by deed. Up to this time John had no interest in the land. After this conveyance, August had none, so far as the pleading shows. Their rights of action were therefore several, and not joint. It is well settled that a complaint, to be good, must show a cause of action in favor of all the plaintiffs. The same rule would apply to a counterclaim or cross complaint. *Berkshire v. Shultz*, 25 Ind. 523; *Holzman v. Hibben*, 100 Ind. 340; *Harris v. Harris*, 61 Ind. 117; *Conger*

*v. Miller*, 104 Ind. 592, 4 N. E. Rep. 300. There was no error in overruling the motion of appellant John Steinke asking the court to modify its findings so as to quiet his title against any further claims of appellees. The motion did not go to the west ditch alone, but to both, and to this he was not entitled in any event. Several questions are suggested as arising upon the introduction of evidence, but, as there is no pretense that the evidence is in the record, we are not permitted to consider them. *Ahlendorf v. Bank*, (Ind. App.) 33 N. E. Rep. 529. We have found no cause for reversal.

The judgment is affirmed.

(6 Ind. App. 595)

# HAVERSTICK v. STATE ex rel. HAVERSTICK.

(Appellate Court of Indiana. May 13, 1893.)

## BASTARDY—EVIDENCE—HARMLESS ERROR.

On trial of a bastardy case by the court without a jury it is not reversible error to refuse defendant's offer to prove that the relatrix was "keeping company" with another man near the time when the child was conceived, where the defendant does not afterwards offer proof tending to show that she had intercourse with the other man. 32 N. E. Rep. 785, affirmed.

On rehearing. For former opinion, see 32 N. E. Rep. 785.

DAVIS, J. We have carefully considered the petition for rehearing, the granting of which is earnestly urged by counsel for appellant. In our investigation of the question presented we have read the entire record, and have closely scrutinized all the evidence. The writer is of the opinion that ordinarily, in prosecutions for bastardy, where the defendant denies the sexual intercourse, it is competent for the defendant to introduce testimony, if he can, to establish the fact that other men were associating or keeping company with the relatrix at or about the time conception should have taken place. Such evidence may or may not tend to support the theory that she had illicit intercourse with other men. Of course, such testimony should be confined within proper limits, and its effect will depend on the circumstances in each particular case. The overt act of sexual intercourse on the part of relatrix and another man is usually difficult, if not impossible, to establish in behalf of the defendant; and such defense, if relied on, must, of necessity, as a general rule, be supported by circumstantial evidence. In my opinion, when the attorney for the defendant in such case offers in response to a proper question to prove that, within a few days of the time when conception is claimed by the relatrix to have taken place, she, a young unmarried woman, was keeping company with another man, and proposes, in the same connection, to follow it up with competent evidence tending to show that at such time she had sexual intercourse with such other man, such evidence is competent, and it is error for the court to exclude it. The defendant should not be required, as preliminary to such proof, to say that



he would follow it up with evidence showing the overt act of such intercourse. The offer to introduce evidence tending to support that theory makes it competent. The weight or effect of such evidence, when introduced, is, of course, for the trial court or jury. In this case the trial was by the court, and a patient and thorough investigation convinces us that, if there was any error in the adverse rulings of the court against the defendant, such error, under the facts and circumstances disclosed by the record, was harmless. The writer indorses the original opinion, with the exception of the views herein expressed inconsistent therewith, and, subject to the modification indicated, concurs in overruling petition for rehearing. Petition overruled.

(6 Ind. App. 600)

**WALKER v. JOHNSON.**

(Appellate Court of Indiana. May 13, 1893.)  
BREACH OF PROMISE—EVIDENCE—HARMLESS ERROR.

In an action for breach of promise of marriage, where it is admitted by plaintiff that she is subject to epilepsy, the exclusion of evidence as to the intensity of her disease is harmless error. 33 N. E. Rep. 267, affirmed. Reinhard, C. J., and Ross, J., dissenting.

On rehearing. For former opinion, see 33 N. E. Rep. 267.

LOTZ, J. The appellant has filed a petition for a rehearing, and with great earnestness contends that the former opinion should be withdrawn, and that the cause shall be reversed, for the improper exclusion of the proffered evidence of the witness Mrs. McCormack. It is insisted that the trial court proceeded upon the theory that evidence of the appellee's physical condition could not be given unless fraud was pleaded as a defense. It is true that the record shows that the court during the progress of the trial made some remarks to this effect in the presence of the jury, but appellant did not object or except to any statement of this kind made by the court. The court, however, upon another theory, permitted evidence of the physical condition of the appellee to go to the jury, and her physical condition was fully shown by a number of witnesses. In reviewing the evidence, we do not see how it could have been much more fully shown upon any theory. The evidence was in the case, and the jury were fully informed of her physical condition. The theory upon which it was admitted is immaterial. When it was in evidence, it was in for all purposes, and, if appellant desired to have the jury to consider it in mitigation, he should have asked the court to instruct the jury to that effect. He made no request of this kind. Indeed, in his original brief he does not contend that this evidence was proper in mitigation, but upon the theory that it had a tendency to rebut the probability that he would make a promise to marry the appellee, knowing her affliction. The terrible disease with which appellee was affected was admitted by her, and the proffered evidence could only have one

purpose,—to show a greater intensity of the disease. Epilepsy is a disease of that character which causes the greatest apprehensions on the part of those so affected and their friends. It is not so much the intensity as the dread character of the disease itself that causes alarm. Appellee freely admitted her affliction, and that she suffered intensely from it on many occasions. What more could the appellant ask on this score? If the jury failed to consider appellee's physical condition in mitigation, it may have been because the appellant did not request it to be done. The court at no time made a ruling that the jury could not consider appellee's physical condition in mitigation of damages; nor do we think this evidence was proper as tending to impeach or contradict the appellee. When the material fact is admitted, no impeachment or contradiction is possible concerning such fact. We still adhere to our original opinion that the ruling was harmless in the light of the facts disclosed by the record.

ROSS, J. I cannot concur in the opinion overruling motion for a rehearing.

REINHARD, C. J., is of the opinion that a rehearing should be granted upon the grounds expressed in his dissenting opinion.

(6 Ind. App. 622)

**RILEY v. WALKER.**

(Appellate Court of Indiana. May 10, 1893.)  
ACTION ON CONTRACT—COMPLAINT—REPUDIATION OF CONTRACT—PLEADING AND PROOF.

1. In an action for breach of a contract to do something more than to pay money it is not necessary for the complaint to allege that the damages claimed are due and unpaid, for the damages in such case are not the primary object of the contract, but merely an incident of its breach. Ross, J., dissenting.

2. Where such complaint alleges facts showing that the defendant has repudiated the contract, it is not necessary to allege performance or readiness to perform on the part of the plaintiff. Ross, J., dissenting.

3. Plaintiff alleged a breach by defendant of an express contract to pay plaintiff \$20 for each entertainment given by defendant, the plaintiff being traveling agent for such entertainments. The evidence showed that certain third parties were to pay \$60 for each entertainment, of which sum \$20 was to be paid to plaintiff and \$40 to defendant; and that defendant put an end to the arrangement by refusing to give the entertainments as agreed. *Held*, that the variance between pleading and proof was fatal to plaintiff's recovery.

4. The evidence showed that said third persons agreed to pay defendant weekly, and that they were in arrears when defendant repudiated the contract, and no excuse for their being in arrears was shown. *Held*, that the evidence did not justify the conclusion that defendant's repudiation of the contract "was without any just and sufficient cause."

Appeal from superior court, Marion county; N. B. Taylor, Judge.

Action by Amos J. Walker against James Whitcomb Riley. Plaintiff obtained judgment. Defendant appeals. Reversed.

W. P. Kappes, for appellant. Winter & Eliam, for appellee.



LOTZ, J. This action was brought by the appellee against the appellant to recover damages for the alleged breach of a contract. Appellant demurred to the complaint. His demurrer was overruled, to which he saved an exception. The cause was then put at issue, and tried by the court. The court, at the request of parties, made a special finding of the facts, and stated the conclusions of law thereon. Appellant excepted to the first and third conclusions of law, and made a motion for a venire de novo, a motion for a new trial and in arrest of judgment, and for a judgment in his favor on the special findings, each of which motions was overruled, and proper exceptions taken. On appeal to the general term the judgment of the special term was affirmed.

The complaint reads as follows: "The plaintiff, Amos J. Walker, complains of the defendant, James Whitcomb Riley, and says that heretofore, to wit, on the 1st day of April, 1885, the plaintiff and the defendant entered into a contract in writing in partnership in the giving of lectures by said James Whitcomb Riley, which partnership was to continue for the term of five years, and by the terms of which said James Whitcomb Riley was to devote his time to the delivery of lectures, and to meet all demands on him for such services, and the said Amos J. Walker was to be the business manager of said partnership, and to make all contracts with persons desiring lectures by said Riley. The net proceeds of such lectures, after defraying all expenses, were to be divided equally between said Riley and said Walker. Thereafter, to wit, on the — day of October, 1889, while the said partnership was in full force, a contract was entered into between the plaintiff and the defendant on the one part and Edgar W. Nye and James B. Pond on the other part, whereby it was agreed that said Riley should be engaged by said Nye and Pond to give public readings in conjunction with said Nye in such cities and towns in the United States and Canada as said Nye and Pond should select; such readings not to exceed six (6) public appearances in each week, nor to be less than four, and to begin not later than the 22d of October, 1889, and to continue until the 1st of April, 1890, except the week known as "Holiday Week" from December 24 to December 29, 1889, which was to be optional with said Nye and Pond. It was further agreed that said Riley should not appear in public under any other auspices than those of said Nye and Pond during said term, without the written consent of said Nye and Pond; that in case of the serious illness of said Nye or Riley the said agreement should not be enforced during such inability; and that the management of such entertainments should be exclusively under the control of said Pond. In consideration of the services to be rendered by said Riley as provided by the said contract, said Nye and Pond undertook and agreed to pay said Riley the sum of \$60 for each public entertainment which should be given, and all travelling expenses, including sleeping-car fare, payments to be made at the end of each week. And said Riley, at the time of

making said contract, and as a part thereof, in consideration of the said contract of partnership hereinbefore mentioned, then existing between him and said Walker, and of the assent of said Walker to said contract with said Nye and Pond, which assent the said Walker then and there gave, undertook, promised, and agreed to pay to said Walker one-third of the said sum of sixty dollars for each entertainment, which, as aforesaid, was agreed to be paid to said Riley by said Nye and Pond; and at the same time, and as a part of the same arrangement, and in consideration of the agreement aforesaid of said Riley to give public readings under the auspices of said Nye and Pond, said Nye and Pond undertook and agreed to pay said Walker the sum of \$50 a week during the entire term to which said contract was to extend, for services to be rendered by him as traveling agent. Plaintiff avers that, upon said contract being entered into, said Nye and Pond selected the cities in the United States and Canada at which such public readings were to be given, and made out a schedule thereof, extending to the 1st day of April, 1890, and embracing entertainments to be given at the cities so selected, from day to day, from the 22d day of October, 1889, to the 1st day of April, 1890. And thereupon all parties to the said contract entered upon the execution thereof; the said Riley appearing and giving public readings at the dates and places named in such schedule, and the plaintiff acting as traveling agent, as he had undertaken to do; and the said Nye and Pond paying to said Riley his traveling expenses and the sum of \$60 for each reading by him given, and to this plaintiff the sum of \$50 per week for his services as traveling agent, as they had agreed to do; and said Riley paying over to this plaintiff one third of said sum of \$60 for each entertainment, in all respects according to the terms of said contract. And the plaintiff avers that he and the said Nye and Pond fully performed said contract in respect of all the obligations to be performed by them thereunder. But plaintiff avers that said Riley failed and refused to perform the said contract in this respect, to wit: On January 17, 1890, at Madison, Wisconsin, and on the — day of —, 1890, at —, which cities had been selected by said Nye and Pond for public readings to be given by said Riley at the said dates respectively, and which were embraced in the schedule adopted by them, as hereinbefore stated, said Riley, without any just cause for so doing, failed and refused to read or take any part in the entertainments scheduled as aforesaid to be given at said places at said dates, by reason of which such entertainments could not be given; and afterwards, to wit, on the 30th day of January, 1890, said Riley, without any just cause or sufficient reason for so doing, announced to plaintiff and to said Nye and Pond that he would not appear at any of the entertainments which remained to be given in the future between that date and the 1st day of April, 1890, and that he would not give any more public readings under said contract, or further perform the same in any way, whereupon

said Nye and Pond abandoned the giving of any further entertainments under said contract in conjunction with said Riley, and discharged the said plaintiff from their employ as traveling agent; all of which was done solely on account of the refusal aforesaid of said Riley to perform said contract in any way; nor did said Riley thereafter further perform the said contract in any way. Plaintiff avers that the following cities in the United States and British Columbia had been selected by said Nye and Pond, and included in the schedule aforesaid as places at which public readings would be given under said contract by said Riley in conjunction with said Nye between the 30th day of January, 1890, and the 1st day of April, 1890, and the date of the entertainment at each city, as fixed in said schedule, being stated below, opposite the name of such city." Then follows a schedule of the time and place of entertainments. Following the schedule is the prayer, which is in these words, *vis.*: "Wherefore plaintiff says he has sustained damages in the sum of one thousand dollars, for which he demands judgment."

Appellant asserts that the case made by the complaint is one for a money demand upon an express contract, and as such it is wanting in an averment that the claim is due and unpaid. If the premises be true, the conclusion necessarily follows, for it is well settled that in a suit for a money demand upon contract, express or implied, the complaint must show in some manner that the claim, or some part thereof, is due and unpaid. *Goodman v. Gordon*, 87 Ind. 128; *Pace v. Grove*, 26 Ind. 26; *Howorth v. Scarce*, 29 Ind. 278; *Seldoubridge v. Connally*, 32 Ind. 375; *Green v. Louthain*, 49 Ind. 139. The reason for the rule is that in every action to recover damages for the breach of a contract, the breach must be averred either in direct terms or by the statement of facts from which it is necessarily inferred. It is essential, not only to show a breach, but a continuation of the breach; and in certain kinds of cases this can be fully done by the use of the term "due and unpaid." If the obligation of a contract be to pay money simply at a certain time, and is independent of any other condition, then an allegation that the defendant failed to pay it when it became due sufficiently shows the breach, but, standing alone, does not make the complaint good, for after the breach payment may have been made; but the words "due and unpaid" fully show the right of action. If the stipulations of a contract require something more to be done than simply to pay money,—that is, if one party agree to do or refrain from doing certain things,—then upon a breach it is not necessary to allege that the damages are due and unpaid, for the damages are not the primary object of the contract, but merely an incident that flows from the breach, and are unliquidated in amount. The contract declared upon in the complaint falls within this latter class. *Harman v. Moore*, 112 Ind. 221, 13 N. E. Rep. 718; *Catterlin v. Armstrong*, 101 Ind. 258; *Kent v. Cantrill*, 44 Ind. 452.

By the terms of the contract the appellee is required to do something more than receive money, and the appellant is required to do something more than merely to pay money. The purpose to be accomplished by the contract is to give entertainments for the amusement of the public. Appellee agreed to act as the traveling agent, Pond as the business manager, and Nye and Riley as the chief actors for the combination. A traveling agent or business manager might be substituted, but, if either Nye or Riley refused to perform, the combination would be broken, and, to use a homely but expressive phrase, "the show could not go on." Nye and Pond did not agree to pay Riley \$60 for each entertainment, as stated in schedule, at all events, nor did they agree to pay Walker \$20 for each entertainment, at all events, but each of these stipulations depended upon certain contingencies. The contract expressly provides against sickness and inability. The law raises other contingencies that would defeat a recovery in the event of a breach. It might be advantageous to all the parties to be released from the contract, and, if they could obtain employment in the same line for better compensation, no obligation to pay anything would exist. We think the complaint not open to this objection.

Another objection urged against the complaint is that it does not allege performance or willingness to perform the contract on plaintiff's part. There is an allegation that the "plaintiff, Nye, and Pond fully performed said contract in respect to all the obligations to be performed by them thereunder." This allegation must be taken in connection with the other allegations, which show that the contract was never fully performed by any of the contracting parties. There is another allegation, however, which shows that the appellant, "without any just cause or sufficient reason for so doing, announced to the plaintiff, Nye, and Pond that he would not appear at any more entertainments to be given under the contract, or further perform the same in any way, \* \* \* nor did said Riley thereafter perform the said contract in any way." It is unnecessary to allege performance or readiness to perform on the part of the plaintiff, where it is shown that the defendant has repudiated the contract, or affirmatively refused to perform, or denies liability under it. *Floyd v. Maddux*, 64 Ind. 124; *Mathis v. Thomas*, 101 Ind. 119; *Skehan v. Rummel*, 124 Ind. 347, 24 N. E. Rep. 1089; *Insurance Co. v. Hinesley*, 75 Ind. 1. We think the demurrer was properly overruled.

The special findings are unnecessarily prolix, and contain a great deal of the evidence, and are unfortunate in not defining the exact terms of the contract. The rights of the parties must be measured by their pleadings and their proof. We desire to call attention to each. The complaint charges the breach of two stipulations of the contract, made for the benefit of the appellee, resulting from the failure of the appellant to perform the contract on his part. The first is the failure of

Riley to pay him \$20 for each remaining entertainment as per schedule; and the second, the failure of Nye and Pond to pay him \$50 per week for the remaining time. Each of these promises is an express, and not an implied, one. We think it apparent from the conduct of the parties as found by the court that they were all working under an agreement for the giving of the entertainments at the times and places fixed by the schedule. We will not attempt to set out the findings, or the substance thereof, but will call attention to a few of the salient points. It appears that the first memorandum of the contract was made by appellant's agent, and sent to the appellee, accompanied by a letter of explanation. This memorandum was never signed. A second memorandum was prepared by appellee and Pond. This second memorandum was never signed, because all the parties were never together at one place and time. In neither the first unsigned memorandum nor the accompanying letter is there an express stipulation that Riley should pay Walker \$20 per each entertainment. If it can be inferred from this memorandum that any such obligation rested upon Riley it is an implied, and not an express, one. In the second unsigned memorandum it is expressly stipulated that Nye and Pond are to pay Walker the \$20 for each entertainment, and not Riley. Nor is there anything in the finding to the effect that Riley ever expressly promised to pay Walker anything. It is true that Walker surrendered his interest in the partnership contract, but so did Riley. Nye and Pond were desirous of obtaining their services, and to have the partnership contract abandoned. Riley consented that Walker should have \$20 of the \$60 to be paid him for each entertainment. This was merely permissive on his part. He did not promise expressly or impliedly to pay it. If Riley refused to perform his part of the contract, and his refusal necessarily resulted in a breach of the stipulations made for the benefit of Walker, we think Riley would be liable to respond for the damages sustained, but this obligation is one raised by law, and not one that arises from an express promise. The court stated conclusions of law upon the facts found: "First. That the plaintiff is entitled to recover from the defendant the sum of \$880, with interest from the 1st day of April, 1890, at the rate of six per cent. per annum, as the damages sustained by him by reason of the breach of said contract by the defendant as aforesaid. Second. That the plaintiff is not entitled to recover anything as damages for the loss of his employment by Nye and Pond as manager as aforesaid. Third. That the plaintiff should have judgment against the defendant for nine hundred and thirty-nine dollars and forty cents." Granting that the findings in all other respects entitle the plaintiff to a recovery, we think there is a variance between the facts found and the allegation of the complaint, and that the first conclusion of law should have been for the defendant. As no cross errors are assigned, it is not necessary for us to determine the correctness of the sec-

ond conclusion. The plaintiff having stated his cause of action to be the breach of an express contract, he cannot recover upon a different state of facts from that alleged in the complaint; the variance is fatal, and no recovery can follow. There is a failure of proof. *City of Huntington v. Mendenhall*, 73 Ind. 460. It has often been held that the plaintiff must recover *secundum allegata et probata* or not at all. *Railway Co. v. Wynant*, 100 Ind. 160. In the case of *Armstrong v. Lindley*, 116 Ind. 295-298, 19 N. E. Rep. 138, it was said that "a party who bases his right of recovery upon the breach of an express special contract cannot recover upon proof of a breach of an implied contract, or the failure to perform a legal duty. Nor can there be a recovery where the action is upon an implied contract if the evidence disclose the breach of a special contract." See, also, *Bartlett v. Railway Co.*, 94 Ind. 287, and cases cited. There is another objection to the conclusions of law. The findings show that on the 31st day of January the defendant refused "to proceed any further in the execution of said contract, or in taking part in any of the entertainments yet remaining to be given at the time and places mentioned in said schedule. Such refusal was without any just and sufficient cause. \* \* \* Ten entertainments had been given from January 18th to and including January 30th, for which payment had not been made to the defendant at the time of his refusal to proceed further in the giving of said entertainments, as hereinbefore stated; and the amount due defendant on account of such entertainments was retained by Nye and Pond, who claimed to have sustained damages, by reason of defendant's refusal, largely in excess of said amount." No fact is found from which the conclusion can be drawn that the defendant's refusal "was without any just and sufficient cause." If a party is excused from performing his contract, it is the law that excuses him; and if he is not excused, it is the law that enforces performance. The law springs from the facts, and whether a party is excused or not can only be determined from the facts. When the facts are not found, it is impossible to determine whether or not a party is excused from performing his contract. In the absence of such facts, it is not proper to draw the legal conclusion that the defendant's refusal was without sufficient cause. But we have here a fact found which of itself overthrows this legal conclusion. Nye and Pond had not paid Riley for 10 entertainments given from January 18th to January 30th, amounting to \$400, when the contract required them to pay weekly. It may have been that Riley did not want the money, and excused them from paying weekly; but, if so, there is nothing in the findings to show it. The findings show a breach of the contract on their part,—Nye and Pond,—and do not show any excuse for the breach. It may be said that Walker is not responsible for the failure of Nye and Pond, but appellee's complaint contradicts this theory, for he alleges performance or willingness to on their part. Suppose that, instead of Riley refusing

to perform, it had been Nye. Would it be contended that Riley should, notwithstanding, pay the plaintiff \$20 for each remaining entertainment? Surely his remedy would have been against Nye. To entitle the plaintiff to a recovery in this case, he must not only show a performance or willingness to perform on his part, but also on the part of Nye and Pond. The findings show that the first breach was on the part of Nye and Pond, and no excuse for the breach is shown. Looking into the record of this case, we think the ends of justice will be best subserved by reversing the cause, with instructions to the lower court to sustain the motion for a new trial.

ROSS, J., (dissenting.) While I cannot concur in the opinion of the majority of the court that the complaint is sufficient, I do concur in the opinion that the facts found did not warrant the conclusions of the court in favor of appellees.

(6 Ind. App. 610)

VAN AUKEN v. HOOK et al. (No. 850.)  
(Appellate Court of Indiana. May 10, 1893.)  
APPEAL — JUDGMENT OF COUNTY COMMISSIONERS.

Under Rev. St. 1881, §§ 5772, 5773, which allow any aggrieved person to appeal to the circuit court from any decision of the county commissioners, on filing affidavit and bond, the filing of a single affidavit and bond for an appeal from a joint judgment in favor of seven claimants against the county is not such a compliance with the statute as will entitle the appellant to a review of the case by the circuit court, where the commissioners, instead of rendering a joint judgment, allowed the account of each claimant separately.

Appeal from circuit court, Noble county; J. W. Adair, Judge.

Claims by Jacob M. Hook and others for services rendered to De Kalb county. Their claims were allowed. Calvin E. Van Auker, a taxpayer of said county, appealed to the circuit court. From an order of the circuit court allowing the claims to be docketed separately, and dismissing Van Auker's appeal, he appeals. Affirmed.

H. G. Zimmerman and Woodhull & Brown, for appellant. W. L. Penfield, for appellees.

ROSS, J. This is an appeal from separate allowances made by the board of commissioners of De Kalb county, Ind., to the appellees, seven in number. At the September term, 1891, of the commissioners' court, each of the appellees filed a separate account against De Kalb county for services rendered, at the instance of the board of commissioners, on public ditches in said county, which accounts were duly allowed by said board at said term. Several days after the allowance of said claims the appellant filed with the auditor of De Kalb county his affidavit, in which he deposed that he was a taxpayer of De Kalb county, and, as such, was interested in all orders made by the board of commissioners of said county, taking money out of the county treasury; that as such taxpayer he was interested in and aggrieved by the order of the board

allowing said claims. He prayed an appeal from the order of the board to the De Kalb circuit court, and filed an appeal bond in the sum of \$100, which was approved by the auditor. In the circuit court the appellees appeared specially, and separately moved to dismiss the appeal for the reason that said appeal was without authority of law, and without sufficient affidavit and bond, and for the further reason that each claim was a separate and distinct claim against De Kalb county. These motions were overruled by the court, and thereupon each of the appellees filed his separate motion and affidavit for change of venue from the county, which was granted, and the cause sent to the Noble circuit court. In the Noble circuit court the appellees each filed his separate motion to separate and docket separately each of their said claims, and also filed their separate motions to dismiss said appeal, both of which motions were sustained by the court, to which rulings the appellant excepted, and these rulings are the basis for the errors assigned in this court.

Section 5772, Rev. St. 1881, provides that "from any decision of such commissioners there shall be allowed an appeal to the circuit court by any person aggrieved; but, if such person shall not be a party to the proceeding, such appeal shall not be allowed unless he shall file, in the office of the county auditor, his affidavit, setting forth that he has an interest in the matter decided, and that he is aggrieved by such decision, alleging explicitly the nature of his interest." And section 5773 provides: "Such appeal shall be taken within thirty days after the time such decision was made, by the appellant filing with the county auditor a bond, with sufficient penalty and sureties, to be approved by said auditor, with condition for the due prosecution of such appeal and the payment of all costs, if the same shall be adjudged against said appellant." It will be seen from the provisions of section 5772 that, if the person appealing is not a party to the proceedings, in order to appeal he must file an affidavit meeting the requirements of the statute. In this case each of the appellees filed a separate and distinct claim, in no way connected one with the other, and the board of commissioners made a separate allowance to each of the appellees. In order, therefore, that the appellant could take an appeal from the allowance of any one of the claims, he must have made and filed the necessary affidavit and bond required by the statute. The separate allowance to each of the appellees was in fact that many separate decisions, and must be appealed from separately. The appellant filed but one affidavit and one bond, and perfected but one appeal, and that from a joint judgment, while the record shows separate judgments in favor of each of the appellees. The appellant did not file such affidavit and bond in each case as the law requires. The ruling on the motion to dismiss the appeal is the only question of importance presented in this court, and, inasmuch as the court below committed no error in dismissing the appeal, interme-

diolate errors, if there were any, were harmless. We find no error in the record for which the judgment of the lower court should be reversed. Judgment affirmed.

DAVIS, J., (concurring specially.) The theory on which the appeal was taken appears to have been that the several allowances constitute one decision only. This position is not tenable. The allowance in favor of each party was a separate decision. In order to review such decisions, a separate appeal should have been prosecuted from each allowance. This, it is true, could have been done through one affidavit and one bond, properly worded and conditioned, showing an intention to appeal from the allowance so made in favor of each appellee in said order. The defects could, and perhaps would, have been corrected on proper application in the trial court, but, as no such request was made, there was no error, for reasons stated, in the rulings of the court below. With these observations, I concur in the principal opinion.

(6 Ind. App. 700)

VAN AUKEN v. RAINIER. (No. 851.)  
(Appellate Court of Indiana. May 25, 1893.)

Appeal from circuit court, Noble county; J. W. Adair, Judge.

Claim by Byron Rainier for services rendered to De Kalb county, which was allowed. Calvin E. Van Auker, a taxpayer of said county, appealed to the circuit court. From an order of the circuit court dismissing Van Auker's appeal, he appeals. Affirmed.

H. G. Zimmerman and Woodhull & Brown, for appellant. W. L. Penfield, for appellee.

ROSS, J. The record in this case, and the questions presented, are the same as in cause No. 850, (Van Auker v. Hook, 34 N. E. Rep. 104,) decided at the November term, and upon the authority of that case the judgment rendered in this case must be affirmed.

Judgment affirmed.

(6 Ind. App. 614)

PEOPLE'S MUT. BEN. SOC. v. WERNER.  
(Appellate Court of Indiana. May 10, 1893.)

MUTUAL BENEFIT INSURANCE—JUDGMENT.

The by-laws of a mutual benefit insurance company provided that losses should be paid by bimonthly assessments, that each loss should be payable pro rata out of the next assessment after proof of death, or if the claim were contested, and judgment recovered against the company thereon, the judgment should be paid pro rata out of the assessment next after its rendition. A claim having been contested and reduced to judgment in another state, suit was brought on the judgment. Held, that the facts that the pro rata share of the assessment next after the judgment would amount to less than the judgment, and that the company had disputed the claim, believing it to be unjust, constituted no reason for not paying the judgment in full, since the extent of the company's liability was determined by the judgment.

Appeal from circuit court, Elkhart county; J. M. Vanfleet, Judge.

Action by Fredericka Werner, administratrix, against the People's Mutual Benefit Society. Plaintiff obtained judgment. Defendant appeals. Affirmed.

J. H. Baker, Francis Baker, and Hubbell & Conley, for appellant. K. C. Dodge, for appellee.

REINHARD, C. J. The appellee sued the appellant in the court below on a judgment recovered in the circuit court of Will county, Ill., for \$1,000 and costs. The court below sustained a demurrer to the special and sole answer of the appellant, and rendered judgment for the appellee for the full amount of her claim. The single question presented for our consideration is that of the sufficiency of the answer. The appellant is a life insurance corporation organized under the laws of the state of Indiana, where it exists and carries on its corporate business of life insurance on the mutual or assessment plan. See act approved March 9, 1883, (Elliott's Supp. § 970.) The answer avers, among other things, that the judgment declared upon was recovered on an insurance policy or certificate which is copied into the answer at length. One of the printed conditions of said policy is as follows: "(11) That this society shall at no time nor under any circumstances make to exceed one assessment per month; and the losses of each alternate two months of each year (beginning with the first two months) shall be paid by the assessments of the following two months,—losses of January and February paid by the March and April assessments, and the March and April losses by the May and June assessments, etc. But should the losses of any two months amount to more than 80 per cent. of the amount collected from the assessments of the two months following, then, and in every such case, the 80 per cent. of the amount so collected shall be divided pro rata among the beneficiaries of said two months' losses, and the amount so divided shall be received and accepted as full payment of the certificate or certificates held as aforesaid. Should one assessment be sufficient to pay two months' losses, then only one assessment shall be made during the two months. If two are required, two will be made,—one each month, etc. All losses shall be classed and paid with the pool of the months in which the proofs of deaths are approved by the society, and in case this certificate becomes a claim, and is contested by the society, and a judgment is rendered in favor of the plaintiff, said judgment shall be placed in and paid pro rata with the pool then forming." It is further alleged that the by-laws of said society, which had been adopted long before the appellee's intestate became a member, and remained in force at and after the time of his death, provided, among other things, as follows: "Sec. 23. Each calendar year shall be divided into six parts, designated as 'pools'; each pool consisting of two calendar months, beginning with January and February for the first pool; March and April for the second; May and June the third; July and August the fourth; September and October the fifth; and November and December the sixth. Sec. 24. The society shall at no time, or under any circumstances, make to exceed six assessments per year; and eighty per cent. of the entire

amount collected from the assessment levied in January, and each pool thereafter, shall be placed in a burial fund, and divided equally among the shares (i. e. claims for death loss) which mature and are approved during the pool next preceding the one in which the assessment is levied, and the amount so divided shall be considered as payment in full of the certificates terminated in said pool, and shall be so received by the beneficiaries named therein, or the legal holders thereof, who shall properly receipt the same in accordance therewith, and deliver them to the society at Elkhart, Indiana, upon the payment to them of said sum. If no shares mature during any pool, no assessment will be made during the next. All shares maturing shall be paid with the pool of the months in which the proofs of death maturing the same are approved by the society. In case any shares mature, the payment of which is contested by the society, and a judgment is rendered in favor of the plaintiff, said shares shall be placed in and paid with the pool then forming." The answer avers that the claim upon which said judgment is founded was believed by said company to be fraudulent and unjust, and was rejected, and was for that reason not placed in the pool for March and April, 1889, out of which said claim would have been payable pro rata if it had been approved. It is further stated that the appellee, upon said rejection of said claim, brought suit to recover the full amount of said policy in said court, and to establish the validity of said claim, and to liquidate and settle by the judgment of said court the amount at which said claim and judgment should be placed in the pool forming at the time said claim might become a judgment of said court; that the appellant contested the claim in said court, but that upon proper proceedings had it was adjudged to be valid, and the amount thereof, as provided in said policy or certificate, was adjudged to be \$1,000 and costs of suit taxed at \$69.40, which is the judgment sued upon. It is averred that the company formed pools in compliance with its by-laws and the provisions of the policy, and placed said judgment in the pool forming when the judgment was rendered, (November 26, 1890;) that is to say, in the pool forming for the months of November and December, 1890; and that out of the pool thus formed it made a pro rata distribution among all the claims placed in and entitled to payment out of the same, including appellee's judgment, with interest and costs; that the amount of the appellee's pro rata share of said pool is \$260, and no more; that appellant had collected all the assessments for said pool which could be collected, and that it had repeatedly offered to pay said appellee the said amount she was entitled to receive, but she had as often refused to accept the same, and that the appellant now brings the said amount of \$260 into court, and offers to allow judgment to be entered against it for said sum and costs and accruing costs.

Nothing is better settled than the rule that a member of a mutual benefit society is required to take notice of its by-laws,

and is bound by their provisions. When a certificate of insurance is issued to him by such society, the by-laws relating to the subject, as well as the conditions incorporated in the certificate itself, become part and parcel of his contract of insurance, and, if valid, are mutually obligatory upon both the company and the member holding the certificate. Of course, the society is powerless to enforce conditions in the by-laws or certificate by which it assumes to deny to the courts of the land the ultimate right of deciding all controverted questions between the body and its members touching the right and extent of recovery upon the policy or certificate, though it may lawfully provide by such by-laws or the conditions in the certificate that the claim shall be first submitted for adjustment to certain designated officials or boards of the society, and that in such process of adjustment it shall pass through certain channels of appeal until it has received the sanction or disapproval of the association. *Supreme Council v. Forsinger*, 125 Ind. 52, 25 N. E. Rep. 129. A provision looking to the adjustment of death claims made on the basis of regular assessments, the proceeds of which are to be used to form pools, periodically, out of which such claims are to be paid pro rata, is a valid one, and if incorporated in the by-laws or certificate, and if seasonably and properly asserted, may be enforced by either of the parties. In the case at bar the society, under the provisions of its by-laws, formed and maintained two distinct mortuary funds,—one for the payment of death claims to be paid upon adjustment of the proper board to which such claims were submitted, and the other for the payments of judgments of courts upon litigated claims. The pool for the payment of the former class was formed out of assessments made during the stated bimonthly period in which the death occurred or the proof thereof was submitted, while the pool for the payment of the latter class was created by assessments made during the period of two months in which the judgment was rendered. The amount to be paid upon such claims depended upon the number of assessments, on the one hand, and the number of deaths, on the other. If the membership was full, and each member paid his periodical assessment, and there was but one death during the period, the beneficiary would be entitled to receive the full amount specified in the certificate. If the assessments paid were fewer in number than the whole membership, or the deaths greater in number than one during such period, the beneficiaries would receive a correspondingly decreased amount. The number of assessments also depended upon the number of deaths, for it was provided that, in any event, not more than one assessment should be made upon a member during any one month, and, in case of but one death during any two months in which the pool was forming, then only one assessment should be made upon each member during such period of two months. The amount going to the beneficiary depended further upon the longevity of the member insured after the time the certifi-

cate was issued to him. It is not shown in the answer how much the appellee would have been entitled to receive out of the pool forming at the time of the intestate's death, or proof thereof. For aught that appears the proper amount may have been just \$1,000, the amount of the judgment recovered, and, in the absence of any showing to the contrary by the answer, it must be conclusively presumed that this was the correct amount, for it cannot be denied that this was a question that might have been litigated in the court that rendered the judgment declared upon; and, where that is the case, the judgment is conclusive as to all such questions. Assuming, therefore, as we must, that the pool out of which this claim would have been payable, had it not been contested, was sufficient to entitle the appellee to receive the full amount of \$1,000, the question arises, does the answer set up a sufficient excuse for the appellant's failure and refusal to place the claim in such pool, and for placing it in one which paid only \$260 in satisfaction of the same claim? Surely, if the claim was a just one, the appellant should have paid it out of the fund created and set apart therefor at the time of the intestate's death. The excuse given for not doing this is contained in the following clause of the appellant's answer: "And the said defendant further says that said claim for the death of the plaintiff's intestate was believed by it to be fraudulent and unjust, and thereupon, for that reason, it rejected said claim and refused to allow the same, and refused to place the same in the pool for March and April, 1889, out of which pool said claim would have been payable pro rata if such claim had been approved by it as a valid claim and death loss." Was this a valid reason for the refusal? We are of the opinion that the question must be answered in the negative. Whether the claim was or was not "fraudulent and unjust" was a matter for the decision of the court that rendered the judgment. The mere fact that the appellant believed it to be such was not sufficient to withhold payment, if in fact the claim was just and bona fide. The beneficiary, by the death of the assured, and his contract with the society, acquired a right to share in a certain fund, and could be deprived of that right only because the deceased or beneficiary had done something or omitted to do something that would legally result in such a consequence. The question whether the estate of the deceased members should share in such fund or not cannot depend upon the mere arbitrary notions of right or wrong entertained by the officers of the society to whom the adjustment of such claims is referred. In other words, the assured could forfeit the rights secured by the policy only by his own acts, and they could not be taken away by the acts of the company, and without any fault on his part. The association may provide for the submission of claims to its officers, and this may even be made a condition precedent to the bringing of a suit upon the certificate, but here its power ends. The corporation cannot abridge or destroy the property rights of a member by the arbitrary decision of

its officers that a claim is not valid. Such an act is but an attempt to deprive the courts of their rightful jurisdiction over such questions, and not within the power of the body or its officers. *Supreme Council v. Forsinger*, supra; 11 Amer. & Eng. Enc. Law, 353. The fund provided for the payment of death losses arising out of assessments made during the bimonthly period in which the intestate died was the primary fund out of which the appellee had the right to be paid, and the answer fails to show any valid reason why such payment should not have been made therefrom, or in an amount equal to that to which the appellee was entitled out of the same. Moreover, the amount which the appellee should recover was a question for the decision of the Illinois court, and all matters of defense as to any or all of such amount are merged in the judgment. This is not a case of an attempted compromise after suit, where the parties stipulate, in consideration of the judgment, how the same shall be paid, and the cases cited by the appellant's learned counsel bearing upon such questions are therefore not in point. That an assessment for the specified period would not produce a sufficient amount to pay the certificate, or any portion thereof, was a matter of defense in the suit upon the certificate. *Association v. Houghton*, 103 Ind. 286, 2 N. E. Rep. 763. Whether a condition in a contract of the character of the one here involved, which undertakes to vary the amount the beneficiary shall receive in satisfaction of a judgment from that designated in the judgment itself, as by making the amount of such payment depend upon future contingencies, can ever be enforced, may well be doubted, we think. Our conclusion is that the ruling upon the demurrer was not erroneous. Judgment affirmed.

(8 Ind. App. 50)

#### DERRY et al. v. MORRISON.<sup>1</sup>

(Appellate Court of Indiana. May 10, 1903.)

##### CONSTRUCTION OF BOND—ACTION—PARTIES.

1. An attorney paid to his client money collected as the client's share of a certain estate, and received from the client a bond reciting that suit had been begun against the attorney and his client and others by a third person, demanding that the attorney pay said money into court, and agreeing to repay the attorney said money "in case he is ordered to refund or repay said sum, or any part thereof, to the plaintiff, to the clerk of said court, or to the administrator of said estate." The plaintiff in said action recovered judgment against the attorney's client, but not against the attorney himself. The bond was never assigned by the attorney. *Held*, that the administrator of said estate had no right of action on said bond, it being given solely for the indemnification of the attorney. *Chandler v. Morrison*, 23 N. E. Rep. 160, 123 Ind. 254, distinguished.

2. The fact that the attorney was made a party defendant to the action on the bond does not give the administrator any right to sue thereon, in the absence of any allegation in the complaint that the bond had been assigned or transferred to the administrator.

Appeal from circuit court, Hancock county; W. H. Martin, Judge.

Action by Frank W. Morrison, admin-

<sup>1</sup>Rehearing denied.



istrator of the estate of John C. Atkinson, against Joel Derry, Martha Derry, and James A. New. Plaintiff obtained judgment. Defendants appeal. Reversed.

W. R. Haugh and Davis & Martz, for appellants. Ayres & Jones, for appellee.

GAVIN, J. The appellee brought suit upon a written bond executed by the appellants to one James A. New. The cause was tried on the answer of general denial to the complaint. The bond is as follows: "This is to certify that I and my wife, Martha A. Derry, have this day received of James A. New the sum of six hundred and twenty-five dollars, (\$625.00,) money collected in the suit of Morrison, Admr., against Dean et al., in the circuit court of Marion county, and that I am empowered and authorized by the said Martha to receive said sum of said New; and that whereas, further, a suit is instituted in the Marion circuit court against said New, demanding that he shall return said money to the clerk's office of said county, and the said New is refusing to turn said sum of money over to me on account thereof: Now, we each hereby agree and bind ourselves unto said James A. New in the said sum of \$625.00, in case he is ordered to refund or repay said sum, or any part thereof, to the plaintiff, Noble Warrum, to the clerk of said court, or to the admr. of said estate, that we will pay said New said sum on demand, and in default will be liable to said New in damages to that amount. [Signed] Joel Derry. Martha Derry." To the complaint, a demurrer for want of facts was overruled, with an exception.

The following are the facts as found specially, and the conclusions of law thereon: "First. That on the 27th day of June, 1884, the defendant James A. New, as the attorney of and for the defendant Martha Derry, received from the clerk of the circuit court of Marion county, Ind., as her, the said Martha's, distributive share of the estate of her father, John C. Atkinson, deceased, the sum of \$1,389. Second. That afterwards, on the ——— day of ———, 1884, the defendant New, as the attorney of the defendant Martha Derry, as and for a part of the money so received by him for her as above found, delivered to her his check on bank for the sum of \$600, and also surrendered for cancellation a certain promissory note for the sum of \$25, which had been executed to him by the defendant Joel Derry, in part consideration for his services as the attorney for said Martha in the suit and matter wherein said moneys had been collected and received, and that at the time the defendants Martha and Joel executed to the defendant New the written instrument sued on and set out in the amended second paragraph of complaint herein, which said instrument in substance certifies." After reciting the substance of the contract heretofore set out, the finding then proceeds: "And that the only consideration for the execution of said instrument by said Martha and Joel was the delivery of said check for the sum

of \$600, and the surrender of said note for \$25, as aforesaid. Third. That after the execution of said written instrument, on the 8d day of May, 1887, in the certain action pending in the circuit court of Marion county mentioned in said instrument, and wherein Noble Warrum was plaintiff, and Frank W. Morrison, James A. New, Martha Derry, Logan Galbreath, and Flora Fishburn were defendants, said court did, among other things therein, order and decree that the defendant Martha Derry should, within sixty days thereafter, pay over to Frank W. Morrison, as administrator of the estate of John C. Atkinson, deceased, the moneys so received by her from the defendant New, as hereinbefore found by the court. Fourth. That the defendant New was not in the action named in the last finding above, nor has he been in any action by any court, ordered or directed to assign, transfer, or deliver the written instrument sued on and set out in the amended complaint herein to the plaintiff. Fifth. That the defendant New did not at any time before the commencement of this action, nor has he at any time since, assigned, transferred, or delivered to the plaintiff said written instrument sued on herein, otherwise than by the institution and prosecution of this proceeding as the attorney for the plaintiff herein. Sixth. That no order has at any time been made by the Marion circuit court for the repayment to Noble Warrum, or to the clerk of said court, or the administrator of the estate of said John Atkinson, deceased, by said James A. New, or by any person other than the defendant Martha Derry, of the \$625 so found to have been paid the said defendant by said New. That said money was so paid to the defendant Martha Derry as a part of her distributive share as one of the heirs of said John C. Atkinson, deceased, and that the same is the \$625 mentioned in said instrument of writing, and that said instrument was executed to secure the payment of the same, if required and ordered by said Marion circuit court to be paid by said New, and that the same has not been repaid by said Martha Derry to said James A. New, or to the clerk of said Marion circuit court, or the administrator of said estate, or to any other person, but is now retained by her. From the facts so found, I conclude that the plaintiff is entitled to recover of the defendants Joel Derry and Martha Derry said sum of \$625. Wm. H. Martin, Judge."

"The facts found show that there were in the hands of New, her attorney, certain moneys received by him for appellee Martha Derry as part of her distributive share in her father's estate; that he refused to pay them over to her because of certain threatened claims upon him made by others, who asserted a right to the funds superior to hers; that, in order to procure the moneys from him, she executed the bond sued on, payable to him, wherein the obligors agree to pay to him said sum on demand, "in case he is ordered to refund or repay said sum, or any part thereof, to the plaintiff, Noble Warrum, to the clerk of said court, or to the



administrator of said estate." It is expressly found by the court that New never has been ordered to pay this money to Warrum, nor to the clerk, nor to the administrator, nor to any one else. We are unable to construe this bond to be other than a simple bond of indemnity made for the protection of New. Its words are plain and unambiguous. There is in it not the least hint that it is for the protection of the administrator or the estate. The court finds expressly as a fact that it was executed to protect New. There is no pretense that New has ever been ordered to refund or repay the money, or damaged in any manner. If he has not, no cause of action has accrued to him or any one else upon the bond. There is no right to maintain an action on this bond shown to exist in favor of the appellee under the facts as found. The bond is executed to New. He is made a party to answer to his interest, but there is no finding of its transfer to appellee in any manner whatever. There is a finding that he was not ordered to transfer it, and also a finding that he never did transfer it to appellee, "otherwise than by the institution and prosecution of this proceeding as attorney for the plaintiff herein," which is equivalent to a finding that he did not transfer it. His bringing suit in appellee's name could not be a transfer. It might be evidence of a transfer, but nothing more. The bond having been executed to New alone, and there being no averment that it had been assigned or transferred to appellee, his complaint is bad. *Holman v. Langtree*, 40 Ind. 349; *Green v. Louthin*, 49 Ind. 139; *Richardson v. Snider*, 72 Ind. 425. The fact that New was made a party to answer to his interest does not aid the complaint in this respect. His presence or absence as a party does not affect the sufficiency of the complaint on a demurrer for want of facts. Whether he is made a party or not is immaterial, as a matter of pleading, unless the question is raised by demurrer for defect of parties defendant. *Strong v. Downing*, 34 Ind. 300; *Shaue v. Lowry*, 48 Ind. 205; *Leedy v. Nash*, 67 Ind. 311. There might be facts, such as the insolvency of New, or an order of the court to transfer, and refused by him, which might enable appellee to be subrogated to the rights of New in the bond, but none such are alleged.

Counsel for appellee rely with apparent confidence upon the case of *Chandler v. Morrison*, 123 Ind. 254, 23 N. E. Rep. 160, as conclusive of this cause and identical with it. We are unable to so hold. There is between the two cases a marked and wide difference. In that case the bond was upon its face made for the benefit and protection of Morrison as well as New. It was therein expressly agreed that "if any suit shall be instituted by any pretended creditor of said estate against either said New or said Morrison, arising out of their doings in said estate, and their receipt and disbursement of said funds, then this obligation shall protect them against said litigation or liability to said extent of \$625." In the bond in this case there is no effort to protect Mor-

rison. The question there arose on demurrer to the complaint, which alleged that, in a suit against said New and others, said proceedings, by which the payment of said money to the heirs had been ordered, had been set aside, and said New had been ordered to pay to the clerk all said moneys in his hands, and all notes and collaterals, including the bond sued on, which should be taken by the administrator for the benefit of said estate, and that under said order he did turn said bond over to said administrator. In this case there was no order against New, and no transfer by him. There are other averments in that complaint which evidently influenced the mind of the court, and which do not appear in the facts as found in this cause. It is, however, unnecessary to go into these in detail. We have already called attention to essential allegations in that complaint, which are entirely lacking in the facts as found by the court in this case, and which supply the very things which are wanting here. We are, therefore, of the opinion that the court erred in its conclusions of law. If it be granted, which we do not hold, that there is in the complaint a sufficient averment of an order of the court requiring New to repay this money, the complaint is still bad for want of direct averment of an assignment or transfer of the bond to appellee. The judgment is reversed, with instructions to the court to sustain the demurrer to the amended second paragraph of complaint, with leave to amend.

(7 Ind. App. 655)

EVANSVILLE S. & N. RY. CO. v. LAVENDER.<sup>1</sup>

(Appellate Court of Indiana. May 10, 1893.)

APPEAL—RECORD—BILL OF EXCEPTIONS.

1. A transcript on appeal that begins with what appears to be a copy of the complaint, but which does not anywhere state that such complaint or any complaint was filed in the cause, does not constitute a full transcript of the record.

2. Where there has been a change of venue from one county to another, an assignment of error in overruling a demurrer in one county does not raise the question of the action of the court of the other county in overruling a demurrer.

3. A recital in the transcript that "the following bill of exceptions was filed in the office of the clerk of the W. circuit court, to wit," followed by a copy of the bill of exceptions, is a sufficient showing that the bill of exceptions was filed.

4. Where a bill of exceptions purports to contain all the evidence, but shows on its face that a mortgage which is not set out in the bill was read in evidence, an appellate court cannot consider errors assigned in regard to the admission of evidence and the giving of instructions.

Appeal from circuit court, Warrick county; E. Gough, Judge.

Action by Izzie Lavender, administratrix of Isaac Lavender, deceased, against the Evansville Suburban & Newburgh Railway Company to recover damages for an alleged obstruction of the highway in front of the real estate of the decedent, Isaac Lavender, by the laying of defend-

<sup>1</sup>For opinion on rehearing, see 34 N. E. Rep. 847.

ant's track along the highway, and the building of a coal house and a water tank near the decedent's premises. Plaintiff obtained judgment. Defendant appeals. Affirmed.

D. B. Kumler, Alexander Gilchrist, and C. A. De Bruler, for appellant. S. B. Hornbrook and J. S. & C. Buchanan, for appellee.

DAVIS, J. In their brief, filed in this court on the 9th day of September, 1892, counsel for appellee say: "It may be proper to suggest, at this place, that very little, if any, of the transcript which has been filed, constitutes a record before this court; if the complaint was ever filed, it does not appear where and when; hence appellee asks that the court shall find that there is no proper record before it." The brief in behalf of appellant was filed March 4, 1892, and counsel for appellant, since the filing of appellee's brief, have made no response to the point relative to the defect in the transcript raised by counsel for appellee. The transcript filed in this court begins (without any preliminary or introductory preface or statement whatever) with what appears to be a copy of the complaint. This is followed by copies of entries and papers, covering several pages, to which is attached a copy of a certificate of the clerk of the Vanderburgh circuit court, in which he certifies "that the foregoing is a full, true, and complete copy of the orders of said court made in said case, as the same appears of record in my office." There is no certificate or statement anywhere in the record that the paper or complaint referred to, which forms the introductory part of the transcript, was ever filed in the office of the clerk of the Vanderburgh circuit court, or in any other office. No papers or copies of papers are referred to in the foregoing certificate of the clerk. Immediately following said certificate there appears what purports to be a transcript of certain proceedings in the Warrick circuit court, but there is no statement therein that any complaint or transcript of proceedings in the Vanderburgh circuit court was ever filed in the office of the clerk of the Warrick circuit court. The beginning of the transcript of the proceedings in the Warrick circuit court, following the said certificate of the clerk of the Vanderburgh circuit court, is an entry relating to the filing of a reply by plaintiff, and the submission of the cause to a jury for trial. Then, in final conclusion of the transcript, the clerk of the Warrick circuit court certifies "that the above and foregoing transcript contains true and complete copies of all the papers and entries in said cause." This court might, if permissible under the authorities and rules of practice, indulge the presumption or inference that the complaint was at some time filed in the office of the clerk of the Vanderburgh circuit court, and that afterwards it was transmitted, with the transcript of the "orders of said court," to the clerk of the Warrick circuit court, and that the certificate of the clerk of the Warrick circuit court was intended to include the papers which were

filed and the proceedings which were had in the Vanderburgh circuit court, then we could enter upon the consideration of the questions which counsel for appellant have sought to present, but there is absolutely nothing in the record, except as indicated, tending to show that the complaint was ever filed in the office of the clerk of the Vanderburgh circuit court, or in any other office, or that it was transmitted to the clerk of Warrick circuit court. In this connection it is proper to state it does appear, from what we have said concerning the transcript of the record presented by appellant on this appeal, that certain proceedings were had in the action in the Vanderburgh circuit court, and that on the 11th day of December, 1890, "the defendant's demurrer to the plaintiff's complaint heretofore filed, being submitted to the court, and the court being duly advised, now here overrules said demurrer, to which ruling of the court the defendant excepts," and that afterwards the venue of the cause was changed to the Warrick circuit court.

The errors assigned are: (1) "The Warrick court erred in overruling the demurrer to the complaint." (2) "Said court erred in overruling the motion for a new trial." The transcript does not indicate in any manner that any demurrer was ever filed to the complaint, or ruled on, in the Warrick circuit court. In fact, with the exception of the reference to the demurrer "heretofore filed," and the statement afterwards made, "said demurrer is in the words and figures as follows," then setting out the demurrer, it is not shown that any demurrer was ever filed.

We now return to the principal question under consideration. This appears to have been an attempt to prosecute an appeal pursuant to the provisions of section 640, Rev. St. 1881, which provides: "Such appeals may be taken by procuring from the clerk of the court a transcript of the record and proceedings in the suit, or so much thereof as is embraced in the appeal, and filing the same in the office of the clerk of the supreme court," etc. Sections 649, 650, are in relation to the preparation of the transcript, and what it shall contain. The concluding part of section 649 is as follows: "A transcript of the record in the cause, or so much thereof as the appellant, in writing, directs, certified and sealed, to which shall be appended the written directions of appellant above contemplated, if any." Section 650 provides that "all proper entries made by the clerk, and all papers pertaining to the cause, and filed therein, [except, etc.,] are to be deemed parts of the record." Section 186, Elliott's App. Proc., is as follows: "The transcript is the source from which appellate tribunals obtain their knowledge of the facts involved in the controversy between the parties before them, as well as the source from which they derive their knowledge of the questions upon which it is their duty to pronounce judgment. The Reports contain many cases where parties acted as if they were ignorant of this principle, and this excuses the statement of a principle so plain as to scarcely excuse its expression in words. The courts have

again and again adjudged that appeals are heard upon the record and by the record determined. The principle is often thus expressed: 'Errors must be manifest on the face of the record.' It is the duty of the party who asks an appellate tribunal to reverse the judgment of a trial court to bring to the higher court 'a perfect record.' The record, as embodied in a properly prepared and duly authenticated transcript, imports absolute verity, and cannot be aided, varied, or contradicted by extrinsic evidence. The record cannot be contradicted by a plea in the appellate tribunal. For what is done in the trial court the supreme court 'will look only to the transcript of its record.' If the transcript does not contain all that is essential to show error, the appeal will fail, since errors will not be presumed to exist, and a radically imperfect transcript cannot show error." See sections 193, 200-202. The record must be complete in itself. Section 195. The court will not act upon matters not properly in the record, if attention be directed to the infirmity in the transcript. Id. § 196. See *Bain v. Goss*, 123 Ind. 511, 24 N. E. Rep. 361. The rule is well established that on appeal the appellate tribunal will indulge the presumption that there is no error in the proceedings and judgment of the trial court, and that it is incumbent on appellant, before he can succeed, to bring before the court a transcript of the record, or some part thereof, which affirmatively shows that there is manifest error in some specific particular. *Martin v. Martin*, 74 Ind. 207. In *Collins v. Express Co.*, 27 Ind. 11, the supreme court said: "But it does not contain a copy of the complaint, without which no question is presented by the record for the decision of this court. It was incumbent on the appellants to bring to this court a perfect record of the judgment and proceedings of the court below, on which errors could be assigned. The complaint forms a necessary part of the record of a cause, and the record before us contains ample evidence that a complaint was filed in the case, but it is omitted in the record filed by the appellants. In the absence of the complaint, the record filed fails to present any question for the decision of this court." See, also, *McCardle v. McGinley*, 66 Ind. 538, 541; *Fellensner v. Van Valsah*, 95 Ind. 123. The rule is well settled by the authorities that, where the transcript is defective, the appellate court may either affirm the judgment or dismiss the appeal. *Allen v. Gavin*, 130 Ind. 190, 20 N. E. Rep. 363.

In this case there has been no effort to appeal on "any question of law decided by the court during the progress of the cause," (section 630, Rev. St. 1881,) or to prosecute the same on "so much thereof as is embraced in the appeal," (section 640, Rev. St. 1881,) or to bring before this court "so much thereof as the appellant, in writing, directs." Section 649, Id. The effort has been to bring a "full and complete transcript." Busk. Pr. pp. 81-83. The rule in such cases is that "the complaint, then, is a part of every record, and if it were necessary to procure a transcript of the whole of any record, in order to ap-

peal, an appeal could not be taken unless the transcript embraced the complaint." *Helzer v. Kelly*, 73 Ind. 582, 584; *Senger v. Aughe*, 97 Ind. 285, 288.

As a matter of fact, we infer, or rather we may say we do not doubt, that the complaint which forms the introductory part of the transcript of the record before us was filed in the office of the clerk of the Vanderburgh circuit court, and that the demurrer thereto was overruled by that court, and that the original complaint, the demurrer, and other papers were, in fact, when the venue of the cause was changed, transmitted with the transcript of the orders of said court to the clerk of the Warrick circuit court, and that the parties proceeded to trial thereon in that court, but this inference is only a presumption. The transcript is imperfect. Such imperfections cannot be cured by indulging in inferences or presumptions in favor of appellant. The rights of the parties on this appeal must be "heard upon the record, and by the record determined." Appellant should have procured "a perfect record," for the reason that, so far as this court is concerned, "errors must be manifest on the face of the record." Sections 186, 189, Elliott's App. Proc. If an exception was made in this case, we would violate the spirit at least of the rule long established by the supreme court, and followed by this court in an unbroken line of decisions, as the result of the application of which it has been often decided that a bill of exceptions incorporated, bound, and certified in a transcript of the record will not be considered as a part thereof unless it affirmatively appears in due form that such bill of exceptions has been duly filed "by an independent record entry," (or its equivalent,) and that it properly and rightfully forms a part of the transcript. Section 805, Id. The principle referred to by analogy is applicable to the case in hand in this respect, namely, that an appellate court cannot and will not indulge in any presumptions or inferences as to whether what purports to be the complaint, attached to the transcript in manner and form as in this case, was duly filed and acted upon in the court below, in the entire absence of any formula or preface at the head or beginning of the transcript. See *Busk. Pr.* p. 83.

If, however, we should hold that the transcript was not radically imperfect in any essential respect, and that we should enter upon an investigation of the merits of the question sought to be presented by this appeal, we would then, under the authorities, be forced to the conclusion that the first error assigned relative to the alleged overruling of the demurrer to the complaint in the "Warrick court" presents no question for our consideration as to the ruling on such demurrer in the Vanderburgh circuit court, and, as there is nothing whatever in the transcript tending to indicate that any such demurrer was ever either filed in or overruled by the Warrick circuit court, this assignment would not, even if the complaint was properly in the record, require any attention. The rule is that specific error relied on in an appellate court must be clearly

assigned. Section 306, Elliott's App. Proc. note 2, and authorities there cited.

Counsel for appellee also say: "It does not appear that bills of exception were ever filed." The transcript discloses that the verdict was returned on the 10th day of June, 1891. Judgment was rendered on the same day, and the record recites that "ninety days' time is given to file its bill of exceptions." Then follows what purports to be a bill of exceptions, in which is incorporated a motion to suppress certain portions of depositions. It does not appear when this bill was filed. Following this is an entry showing the filing of an appeal bond on the 13th of June, 1891, but the transcript was not filed in this court until January 6, 1892, so the appeal was not perfected pursuant thereto. Section 638, Rev. St. 1881. The record of the proceedings on June 10, 1891, recites that appellant "files its motion and reasons in writing for a new trial herein," which motion is not set out, but the record shows that it was overruled, and judgment rendered as before stated. Following the appeal bond filed on June 13th, the motion for new trial is copied into the transcript. Immediately following the conclusion of the motion for a new trial there appears the following entry: "And afterwards, on the 8th day of September, 1891, the following bill of exceptions was filed in the office of the clerk of the Warlick circuit court, to wit." Then follows bill of exceptions in due form, containing the evidence, except as hereinafter stated, and also the instructions. Whatever may be said of the record in other respects, it sufficiently appears that the bill of exceptions was filed. The bill recites: "And this was all the evidence given on the trial of this case." Counsel for appellee, however, contend that "a mortgage referred to as having been read in evidence does not appear in the record, so that the record does not contain all the evidence." An examination of the record shows that this position is well taken.

The only questions arising on the second error assigned, discussed by counsel, relate to the evidence and to instructions given and refused. The rule has been long established that in such cases, where the evidence is not all in the record, the court will not consider any question in reference to the sufficiency of the evidence, or errors in relation to the admission or exclusion of evidence, nor will the court consider the instructions given or refused, where an examination of the evidence is required. *Eichel v. Bower*, 2 Ind. App. 84; 28 N. E. Rep. 192; *Stout v. Turner*, 102 Ind. 418; 26 N. E. Rep. 85; *Jennings v. Durham*, 101 Ind. 391; section 824, Elliott's App. Proc., and authorities cited in note 4. It is not necessary, as a rule, in such cases, to bring all the evidence before the appellate court, but, when the effort is made to present the questions for review on the theory that all the evidence is in the record, the bill of exceptions must clearly and affirmatively show that all the evidence given on the trial is incorporated therein. *Shugart v. Milae*, 125 Ind. 445, 25 N. E. Rep. 551. See sections 193, 195, 863, Elliott's App. Proc. In fact, it is ordinarily preferable, in many

respects, if care is observed in preparing the record, to present the questions which arise in the trial court for review in an appellate court, without incorporating the entire evidence in a bill of exceptions, which purpose can be accomplished in shorter form, with less expense, and to better advantage, by bringing before such appellate court so much only of the record as may be necessary to show the adverse ruling, and that the exceptions have been properly and seasonably taken and well reserved. In such case the record must show that there was competent and material evidence in relation to the matter which gave rise to the ruling and exception. In short, the transcript must contain all such matters as may be necessary to overcome the presumption which is indulged in favor of the proceedings and rulings of the trial court. In other words, the transcript of the record, or so much thereof as may be necessary to present the question under the statute and rules of practice, must be complete in itself, and must show error. But when the theory of the appeal, as in this case, is to have such questions reviewed on a record, in which the attempt has been made to incorporate all the evidence, the omission of any part of the evidence (however immaterial in fact it may have been, when such omission affirmatively appears on the face of the record without any explanation or statement therein in reference thereto) will be fatal to the appeal, so far as the same is predicated on any adverse ruling relating to the evidence or instructions. *Patchell v. Jaqua*, (Ind. App.) 83 N. E. Rep. 132. We have carefully examined the record in the respects indicated, and would have been pleased to have been able to investigate and decide the many interesting questions so fully and ably argued by learned counsel, but, if we are right in what we have heretofore said, it necessarily follows that no question as to the merits of the controversy is presented by the record for our consideration. Judgment affirmed.

REINHARD, C. J., took no part in the decision of this case.

(7 Ind. App. 239)

KILEY et al. v. MURPHY.<sup>1</sup>

(Appellate Court of Indiana. May 11, 1893.)

JUDGMENT — BILL OF REVIEW — SUFFICIENCY OF ANSWER—RECORD—DEFENSES.

1. A complaint for the review of a judgment for error apparent on the record must show such error as would authorize a reversal of the judgment had an appeal been perfected.

2. An answer to such complaint, averring that the transcript is incorrect because it does not set out a motion to strike out testimony or show any ruling thereon, is demurrable, since such motion, and the rulings thereon, are no part of the record unless made so by bill of exceptions or order of the court.

3. In such action such defenses only are proper as are available on an appeal from the judgment.

Appeal from circuit court, Grant county; W. M. Boggs, Special Judge.

Action by Reuben Murphy against John Kiley and others to review a judgment

<sup>1</sup> Rehearing denied. See 34 N. E. Rep. 650.

for defendants in an action between the parties. From a judgment for plaintiff, defendants appeal. Affirmed.

John A. Kersey, for appellants. John T. Strange, Ethan A. Huffman, and H. B. Shively, for appellee.

ROSS, J. The complaint filed in this case was to review the judgment and proceedings of the Grant circuit court in an action brought by the appellee against the appellants, wherein judgment had been rendered in favor of the appellants, the appellee seeking the review. Counsel have argued, at great length, several questions presented by the record which precede the questions arising upon the complaint, but the view we take of the record and proceedings does not require us to examine and pass upon such questions. The court below, as well as counsel, considered this as an original and independent action, and in that view the parties made issues and submitted the cause to the court for trial; and the court, after hearing evidence, at the request of the appellants, made a special finding of the facts with conclusions of law thereon, and, after overruling a motion made by appellants for a new trial, rendered judgment in favor of the appellee on its special finding of facts, but did not reverse or set aside the judgment rendered in favor of the appellants on the special verdict in the original cause. The complaint in this case was to review on account of errors of law apparent on the face of the record; and, in order to be sufficient, it must show such error as would authorize this court to reverse the judgment had an appeal been perfected. *Richardson v. Howk*, 45 Ind. 457; *Rice v. Turner*, 72 Ind. 559; *Insurance Co. v. Gibson*, 104 Ind. 336, 3 N. E. Rep. 892; *Baker v. Ludlam*, 118 Ind. 87, 20 N. E. Rep. 648.

The errors for which a review was sought are as follows: "(1) The court erred in overruling plaintiff's motion for judgment on said special verdict. (2) The court erred in sustaining the defendants' motion for judgment on said special verdict. (3) The court erred in rendering judgment for the defendants on said special verdict." These assignments call in question the correctness of the ruling of the court in the rendition of the judgment, and nothing more. If the copy of the record and proceedings with the complaint is a complete and true copy, the ruling on the demurrer to the complaint to review raised every question presented by the assignments of error for review, and judgment should have followed the ruling of the court upon the demurrer, unless the appellants answered matters arising after the rendition of the judgment, or such errors as would have been available as cross errors on appeal. When a complaint is filed to review for errors of law apparent on the face of the record, the defendant can answer any other error apparent on the face of the record which, if assigned as cross error on appeal, would result in an affirmance of the judgment; or he may answer such defenses as the statute of limitation, the

pendency of an appeal from the judgment, or payment; or he may deny that the copy of the record set out in the complaint is a correct and complete copy of the record sought to be reviewed. *Bucher v. Knapp*, 107 Ind. 340, 8 N. E. Rep. 263. The appellants insist that the court erred in sustaining the demurrers to the second and third paragraphs of their answer. An action to review a judgment must be brought in the court in which the judgment was rendered. Section 615, Rev. St. 1881; *Jones v. Ahrens*, 116 Ind. 490, 19 N. E. Rep. 334. A complaint for review must bring before the court a full and complete record of the judgment and proceedings sought to be reviewed. *McDade v. McDade*, 29 Ind. 340; *Comer v. Himes*, 58 Ind. 573; *Whitehall v. Crawford*, 67 Ind. 84. The second paragraph of the answer purports to be a plea of nul tiel record. In this answer the appellants aver that the copy of the record is incorrect because certain parts thereof had been stricken out by drawing a pen through such parts, and that the parts thus eliminated are essential, and that said parts so stricken out "state, among other things, that at the trial of said cause the plaintiff moved the court to strike out part of the testimony given therein, and said pretended transcript does not contain said motion, nor any matter stating what disposition was made thereof, or what ruling, if any, the court made thereon." The copy of the record filed with the complaint does not show on its face that it is incomplete, and this answer does not show wherein it is deficient. The allegation that a motion was made to strike out part of the testimony, and that the record does not set out said motion, or show any ruling thereon, does not show the copy of the record to be incorrect or incomplete. Motions to strike out, as well as the rulings of the court thereon, are made part of the record only by proper bill of exceptions or by order of the court. If this motion, together with the court's ruling thereon, were not made a part of the record by a bill of exceptions or order of the court, they were not a part of the record. *Balue v. Richardson*, 124 Ind. 480, 25 N. E. Rep. 11.

As to the sufficiency of the third paragraph of the answer, counsel for appellants says: "The third paragraph of appellants' answer to appellee's amended complaint for review is in the nature of a cross assignment of errors. It avers that on appellee's objection the court, in the trial of cause No. 3,170, excluded certain testimony offered by appellants to prove the damages averred in their answer in that case, and averring facts showing the admissibility of such evidence, that it was true, and that if it had been admitted it would have shown that appellants did not owe appellee anything whatever. This does not appear by a bill of exceptions, because, as is very natural, when the court which tried cause No. 3,170 came to the conclusion that the special verdict therein would not justify a judgment in favor of appellee, and rendered judgment for appellants, they would not

be very likely to disturb themselves much about hills of exceptions." Simply to quote the reasoning of counsel is all that need be said concerning this answer, because it is seen at once that appellants seek to take advantage of something which is not in the record, and not there because they failed to have it made a part of the record. By the supplemental answer filed by appellants they sought to raise issues and make a defense which were available only in the original action. This they could not do, either on appeal or in an action to review. Such defenses only were proper as would have been available in this court had an appeal been taken from the original judgment instead of a review sought. The first paragraph of the answer was a general denial, and, like a joinder in error on appeal, simply denies the errors assigned upon which a review is asked. This paragraph raised no question in this case not presented by the demurrer to the complaint. But one question, therefore, is presented by this appeal, namely, did the complaint state facts sufficient? The complaint for review contains a copy of the pleadings, judgment, and proceedings in the original action, from which we find the original complaint to be a suit upon an account for a certain amount of broken stone sold and delivered by appellee to the appellants. Several issues were formed by special answers. The case was tried by a jury, and a special verdict returned, showing a balance due the appellee of \$608.80. Upon the special verdict, however, the court rendered judgment for the appellants. The facts found in the special verdict were sufficient to have supported a judgment thereon for the appellee, and the court erred in rendering judgment for the appellants. In this case the court should have entered judgment for the appellee upon its ruling on the demurrer to the complaint. Counsel for both sides have filed very able and exhaustive briefs, in which many questions are discussed which it is unnecessary to examine and decide on this appeal; and, while we do not fully approve the manner in which judgment was entered in this case, we think the right result has been reached, and for that reason will not reverse the cause for technical errors of practice which do not go to the merits of the controversy. Judgment affirmed.

(8 Ind. App. 153)

**MILES v. DE WOLF et al.**

(Appellate Court of Indiana. May 11, 1893.)

COMPENSATION OF ATTORNEY — PRESUMPTION OF EMPLOYMENT — EVIDENCE.

1. In an action for professional services rendered by plaintiffs, in an action to set aside a will, as attorneys for defendant, a testamentary trustee of one-third of the estate, it appeared that one plaintiff was administrator *de bonis non*, and another, guardian of a minor legatee, and both were defendants in such action. Other attorneys were employed therein, and were paid by the administrator out of the estate. When the administrator's compensation was fixed, his services as attorney in such action were considered. There was no direct evidence that defendant specially employed

plaintiffs to represent him. Held, that defendant was not liable, either personally or as trustee.

2. The fact that plaintiffs prepared the case for trial, interviewed witnesses brought to their office by defendant, and assisted at the trial in his presence, did not raise a presumption of employment.

Appeal from circuit court, Knox county; George W. Shaw, Judge.

Action by William H. De Wolf and others against William R. Miles, trustee under the will of William J. Wise, deceased. From a judgment for plaintiffs, defendant appeals. Reversed.

H. S. Cauthorn and Townsend & Wilhelm, for appellant. Cullop & Kessinger, for appellees.

DAVIS, J. The complaint filed in this case in the court below was in the words and figures following, to wit: "State of Indiana, Knox county—ss.: William H. De Wolf, Smiley N. Chambers, Edgar H. De Wolf vs. William R. Miles, trustee under the last will and testament of William J. Wise, deceased. Knox circuit court, March term, 1890. The plaintiffs, late co-partners, doing business under the firm name of De Wolf, Chambers & De Wolf, complain of the defendant, and say that said defendant is indebted to them in the sum of six thousand dollars for services as attorneys rendered said defendant, at his special instance and request, in the defense of the suit of Jacob Shugart et al. against said defendant and others, and for professional services rendered said defendant in the management of said trust, a bill of particulars being filed herewith and made a part hereof; and plaintiffs say that said account is due, and remains wholly unpaid, wherefore they demand judgment for six thousand dollars. Cullop & Kessinger, Attorneys for Plaintiffs." In the bill of particulars the alleged services in the Shugart Case were estimated at \$5,000, and the services rendered in the management of the trust at \$1,000. The answer was a general denial, payment, and set-off; but the alleged payment and set-off were founded on items of nominal amount only, and therefore these answers are not material, so far as the questions presented for our consideration are concerned. There is no averment in the complaint that said Miles was trustee under any will, or for any person. Neither is there any averment as to the extent, character, value, or condition of the estate, if any, in his hands. In fact, it is not alleged that he had any trust estate in his hands or under his control, or that he was in such trust capacity a party to any suit, or that as trustee he required the services of an attorney, or that as trustee he employed appellees to perform any services for him, or that any such services were necessary. On whatever theory the parties to the action may have proceeded in the court below, the case, as it comes to us on the record, appears, under the authorities, to have been merely a personal action against said Miles to recover from him the alleged value of the services rendered by appellees. *Turner v. Flagg*, (Ind. App.) 33 N. E. Rep. 1104, and author-

Rehearing denied.

ities there cited. What we have said on this subject has been for the purpose of getting an accurate statement of the pleadings and the theory of the case before us, in order to determine whether there is available error in the record. The cause was submitted to a jury for trial, and resulted in a general verdict for appellees in the sum of \$2,480, on which verdict a personal judgment was rendered against William R. Miles.

The history of the case, with a general statement of the facts, may be summarized as follows: William J. Wise, of Vincennes, died testate January 4, 1884, leaving a large estate. He left no issue, as he was never married. By his will he devised almost his entire estate to William R. Miles and John M. Boyle, in trust for the use and benefit of Elizabeth S. Miles, Catharine A. Fay, and Mary B. Ryder, his three nieces, one equal third to each. The said nieces were all married, and their husbands living, at the date of the death of testator. By the provisions of the will, if either of the husbands of the cestui que trustent should die, then the one-third interest of his estate should absolutely vest in the surviving widow, freed from the trust; and if either of said nieces should die before their husbands, and leave issue surviving, then the one-third interest in his estate should absolutely vest in her surviving issue, also freed from the trust. Catharine A. Fay and Mary B. Ryder, two of the nieces, died before their husbands, and before the estate was settled, and while it was in litigation. They both left minor children, and, by the terms of the will, one-third of the estate of testator vested in their children. F. M. Fay, the surviving husband of one, was appointed guardian of her children, and Smiley N. Chambers was appointed guardian of Emma W. Ryder, the minor child of Mary B. Ryder. This left under the charge and control of the trustees under the will only the one-third interest of Elizabeth S. Miles. John M. Boyle, one of the trustees named in the will, did not qualify, but William R. Miles, the husband of Elizabeth S. Miles, qualified to look after the interest of his wife. After the death of William J. Wise, the testator, Richard J. McKenney was appointed administrator with the will annexed of his estate, and made an inventory, collected many thousands of dollars of notes and other choses in action, settled and adjusted a partnership of over 30 years' duration, of which testator had been a member, involving assets of over \$200,000, and in fact administered the estate, and had the assets ready for distribution, and filed a final account showing the complete settlement of the estate, and the character of the assets in hand ready for distribution. Distribution was alone prevented and postponed by pending suits to contest the will in order to ascertain whether distribution was to be ordered according to the will if sustained, or according to law if it was annulled. The estate was in this condition when McKenney resigned the trust, and when William H. De Wolf was appointed administrator de bonis non. McKenney was allowed, for his services in settling the estate, in all

\$4,750. After the death of testator and the probate of his will, Henry K. Wise, a brother of testator, commenced an action in the Knox circuit court to set it aside. This action was tried in said court before a jury, and resulted in a verdict sustaining the will. On this trial, which lasted some four weeks, substantially all the evidence tending to sustain and uphold the will was hunted up, as well as most of the evidence relied on to defeat it, and the same was taken down in shorthand, and embodied in a bill of exceptions. The appellees in this case had no connection with that litigation or the estate of testator in any way. Henry K. Wise, the contestant, died, and the appeal was never prosecuted from the judgment of the Knox circuit court. Afterwards Jacob Shugart and others, heirs of testator, commenced an action in the Knox circuit court to contest his will. This action was, on the application of contestants for a change of venue, sent to the Sullivan circuit court for trial. At the time this second action was commenced, the interests of Catharine A. Fay and Mary B. Ryder had vested in their minor children by their death, and Frank M. Fay and Smiley N. Chambers, the guardian of Emma W. Ryder, the sole heir of Mary B. Ryder, were both made defendants in that suit, as also Richard J. McKenney, the administrator with the will annexed of the testator, his estate being unsettled, and William R. Miles, the trustee, who had charge under the will of the one-third interest of Elizabeth S. Miles, his wife. The first trial of the said second suit, brought by Shugart and others in the Sullivan circuit court before a jury, resulted in the jury failing to agree. On that trial Richard J. McKenney, the administrator, employed William H. De Wolf and Smiley N. Chambers, among other attorneys, to defend and sustain the will, and paid them in full for the services rendered on said trial under said employment. The testimony on the trial of that cause to sustain the will was practically the same as the testimony on the first trial of the case of Henry K. Wise. After the said first trial it was deemed advisable to get rid of McKenney as administrator, as he was thought unsafe on account of his wife being interested in defeating the will as one of the general heirs of testator, and taking an active part in the pending suit to accomplish it. To prevent measures being taken to remove him, McKenney resigned as administrator, and settled the estate ready to deliver all the assets to a successor, which assets were in fact turned over to his successor before the second trial of the cause. The second trial of the Case of Shugart, had in the Sullivan circuit court before a jury, resulted in a verdict sustaining the will. This second trial was not as long continued as the preceding one, and the evidence to sustain and support the will was practically the same as the evidence on the two former trials; and the evidence on the preceding trial of Shugart, resulting in the jury failing to agree, was also taken down in full by a stenographer appointed by the court. On the last trial of the Shugart Case, which resulted in a verdict sustaining the



will, a question of law arising on the ruling of the court admitting certain testimony was reserved for the decision of supreme court on appeal. A bill of exceptions embodying the questions reserved was filed, and the appeal prosecuted, resulting in the affirmance of the judgment of the Sullivan circuit court. 25 N. E. Rep. 551. After the first trial of the Shugart Case, and after the resignation of McKenney as administrator, William H. De Wolf, one of the appellees, was appointed administrator de bonis non with the will annexed of testator, and was properly substituted as a defendant in lieu of McKenney in the Shugart contest before the trial of the cause. In the last trial of the Case of Shugart in the Sullivan circuit court the following attorneys were especially employed to defend the will in said court, and also to defend or prosecute any appeal in the supreme court that might be taken from the judgment of the Sullivan circuit court, and their receipts were drawn so as to evidence this special contract and agreement: Hays & Hays, of Sullivan; Gardiner & Taylor, of Washington; Harrison, Miller & Elam, of Indianapolis; and McDonald, Butler & Snow, of Indianapolis. Messrs. Gardiner & Taylor, of Washington, Frederick W. Viehe and Mason J. Niblack, of Vincennes, were retained and took part in all the three trials had to contest the will of the testator. The attorneys for the defense participating in the trial of the Shugart Case paid all their own expenses. The expenses of William H. De Wolf, who was defendant as well as administrator, were paid out of the estate of testator before it was settled and distribution made. The expenses of Smiley N. Chambers, who was guardian of Emma W. Ryder, and also a defendant, were also paid out of the estate before distribution. The same assets that McKenney had on hand when he resigned the trust passed to De Wolf as his successor, and De Wolf procured an order of court to authorize him to suffer the assets so received by him to remain in bank in the same manner that they had been kept by McKenney. After the judgment of the Sullivan circuit court was rendered, sustaining the will, and before the appeal taken to supreme court therefrom, De Wolf filed his final account as administrator, showing that the assets of the estate were in the same condition and consisted of same items as turned over to him by McKenney, only increased in amount by interest that had accrued and been received on United States bonds. He claimed for his services \$10,000, which was resisted by appellant as being excessive. Pending adjudication of the amount of his allowance, the court ordered him to distribute all the estate in his hands among the parties entitled there to under the will, except the \$10,000 claimed by him for his services as administrator, and he accordingly distributed the same, one-third to Smiley N. Chambers, one of appellees, who was guardian of Emma W. Ryder, one-third to F. M. Fay, guardian of the minor heirs of Catharine A. Fay, and one-third to William R. Miles, as trustee for his wife, Elizabeth S. Miles. The \$10,000 claimed for services were to be held for

further order on proof of the value of his services. On hearing proof of the value of his services, the court allowed him \$6,820, and ordered the \$3,180 remaining to be distributed to the parties entitled thereto under the will, which was accordingly done by De Wolf, and the estate was declared settled, and he was discharged. William H. De Wolf was only practically administrator about seven months, and the assets he distributed were the same he had received from McKenney, with the exception of interest received on the United States bonds. The court, in hearing proof on the claim of De Wolf for services as administrator, admitted and received testimony as to the appointment of De Wolf as administrator de bonis non, the amount of bond he gave as such, the amount of the assets, his services as an attorney in defending the suit of Shugart to contest the will in both the Sullivan circuit court and in supreme court on appeal, and all matters and things done and performed by him in connection therewith, as to loss of time and attendance at court in a foreign county, and every matter connected with or growing out of said suit, excepting his expenses, which were paid out of the estate without question, and which payment of his expenses was admitted by De Wolf, but it does not appear that the court allowed him anything for his services as attorney. After the final settlement of the estate and distribution of the assets the appellees, as partners at law, filed in the Knox circuit court, on the 28th day of February, 1890, the complaint in this case, to recover from appellant for professional services rendered by them in the Sullivan circuit court and in supreme court on appeal, and for advice given him as trustee at his special instance and request, and making an account current for him. The appellant denied the indebtedness in toto, except as to an account current, and that he ever employed appellees to render any service whatever for him, either in the Sullivan circuit court or in this court in the Shugart Case, and denied seeking or obtaining any advice from them in the management of the trust, and that the only service rendered by appellees for him, as trustee or otherwise, was simply copying the items of receipts and disbursements from his account book, in the form of a report to submit to court of his trust, and that appellees had in their hands \$20 of money for his use, which was sufficient to cancel and offset the services rendered by them in making his account as trustee. The \$20 claimed was not denied. There are, in some other particulars, material facts which will, further on in the course of this opinion, be more fully stated.

The first error discussed is that the court below erred in overruling appellant's motion for judgment in his favor on the answers of the jury to the interrogatories. The facts found by the jury in answers to the interrogatories are, in substance, as follows: First. That William H. De Wolf was administrator de bonis non cum testamento annexo of the estate of William J. Wise at the time of the last trial in the Sullivan circuit court. Second. That Smiley N. Chambers was



guardian at law of Emma Ryder during the last trial in the Sullivan circuit court. Third. William H. De Wolf was appointed such administrator in October, 1887. Fourth. That he was discharged as such in February, 1889. Fifth. That said William H. De Wolf, administrator, was party defendant upon said last trial. Sixth. That William H. De Wolf had received, for his services as such administrator, \$6,820. Seventh. That the appellees were partners in the practice of the law in May and June, 1888. Eighth. That Smiley N. Chambers was guardian at law of Emma Ryder, and party defendant in the suit tried in the Sullivan circuit court. "Interrogatory 9. Did the defendant William R. Miles, trustee, etc., employ the plaintiffs as attorneys to defend the action of Jacob S. Shugart et al. vs. William R. Miles et al. on the last trial thereof, in May and June, 1888, in the Sullivan circuit court?" Answer. We decide that the plaintiffs were in his employ. J. R. Hadden, Foreman. Int. 10. If you find any such employment was made as inquired about in the ninth interrogatory, state when the contract was made, where made, and with which one of the plaintiffs was it made. A. We decide that they were employed in the first trial at Sullivan, and were not discharged. J. R. Hadden, Foreman." Eleventh. That said firm of attorneys made out a report for William R. Miles as trustee, and filed the same in court. Twelfth. That William R. Miles employed said firm of attorneys in the appeal to the supreme court. Thirteenth. That said firm of attorneys assisted in preparing the brief, and were present when the case was argued. It is earnestly insisted that this motion should have been sustained, because one of the appellees, William H. De Wolf, was, as administrator, a party defendant, and another of the appellees, Smiley N. Chambers, was also a party defendant, as guardian of the person and property of Emma Ryder, in the identical cause for which they seek compensation in this action as attorneys. The contention is that the law forbade appellees William H. De Wolf and Smiley N. Chambers, occupying the position they did,—one as administrator of the estate of William J. Wise, deceased, and the other as guardian of the ward whose property interests were involved,—from accepting employment and receiving compensation as attorneys for the discharge of duties which the law imposed upon them from the first moment after they qualified and became responsible for the legal protection of the interests involved in the trusts committed to their hands. It is well settled that an administrator cannot recover for services rendered by him as an attorney in the settlement of an estate, and neither is a law firm of which he is a member entitled to such compensation. Sections 2396, 2398, Rev. St. 1881; Taylor v. Wright, 93 Ind. 121; Pollard v. Barkley, 117 Ind. 40, 17 N. E. Rep. 294. The appellees in argument do not controvert the law as enunciated above and supported by the authorities cited, but they urge "that one defendant may employ his codefendant to represent and defend his interest, although they

may be cotrustees representing the same fiduciary interest. In the case at bar they were not cotrustees in any sense whatever, but represented entirely different and distinct interests, with entirely different and distinct relations, duties, and responsibilities." Many authorities are cited by counsel in support of the proposition that the offices of trustee and administrator are distinct, and involve different duties, (Schouler, Ex'rs, §§ 46, 472; Williams, Ex'rs, § 472; Lewis, Trusts, § 205; Valentine v. Valentine, 2 Barb. Ch. 480; Lansing v. Lansing, 81 How. Pr. 55; Wheatly v. Badger, 7 Pa. St. 459; Simpson v. Cook, 24 Minn. 180; 7 Amor. & Eng. Enc. Law, p. 179, and notes. Drury v. Natick, 10 Allen, 169, 174;) and, further, when one trustee acts as solicitor or attorney for another trustee, in a litigation in which both, by reason of their trust relation, are involved, that such solicitor or attorney is entitled to compensation from his cotrustee for the services so rendered, (Cradock v. Piper, 47 Eng. Ch. 663; Lyon v. Baker, 5 De Gex & S. 622.) The Cradock Case, on which appellees rely in support of their position on this question, was one in which there were four trustees, and where three of them had employed the fourth, who was a solicitor, to represent them as such trustees in several important litigations in which the trust estate was involved, and, so far as appears, the trustee who so acted was the sole and only solicitor who appeared for the trust in the litigation; and it was held, under the facts, in that case, that he was entitled to have his costs taxed as such solicitor, in order that the same might be paid out of the trust estate. But whatever view may be taken of the application to this case of the authorities cited, and without at this time entering upon an analysis of the interrogatories and answers thereto, it will suffice to say that it is doubtful whether, on any theory, the answers of the jury to the interrogatories are so effectually and irrevocably antagonistic to the general verdict as to overthrow it and control the result; and we will therefore, for the present, pass on to the consideration of other questions which are pressed upon our consideration. Gaar, Scott & Co. v. Rose, 3 Ind. App. 269, 29 N. E. Rep. 616; Baldwin v. Shill, 3 Ind. App. 291, 29 N. E. Rep. 619.

The next assignment of error is overruling appellant's motion for a new trial. It should be borne in mind that, for services in the Shugart Case, Mr. De Wolf, as administrator, paid attorneys' fees as follows: Harrison, Miller & Elam, \$5,000; McDonald, Butler & Snow, \$5,000; Gardiner & Taylor, \$2,000; John T. Hays, \$2,000,—pursuant to the written request of Chambers, Miles, and all the parties in interest, in which he was directed "to pay the fees of counsel in the contest of the will." In addition thereto, De Wolf and Chambers were paid by the administrator for services rendered by them on the first trial in the Sullivan circuit court, and Viehe and Niblack were also paid by the administrator, out of the trust estate in his hands, for services rendered on each trial. It is not claimed that De Wolf and Cham-

bers were employed by appellant on the first trial. The uncontradicted evidence also shows that, when the proposed appointment of De Wolf was under consideration, Mr. De Wolf said to Mr. Miles, if he was appointed administrator, it would cut him off of any claim or right to compensation as an attorney. In this connection we quote at length extracts from brief of counsel for appellant, as follows: "(1) The verdict of the jury is not sustained by the evidence, but is contrary to both the law and the evidence. The complaint in this case is to recover for professional services alleged to have been rendered under a contract of employment. The general denial, which was pleaded, imposed upon appellees the burden of proving, by a fair preponderance of the evidence, every material fact necessary for a recovery. This is clear, and will not be questioned. Therefore the jury, before they could find any verdict in favor of appellees, must first find, from the evidence, that the services sued for were rendered under a contract with appellant. The evidence of appellees is all in the record. The only evidence in the case that has any bearing whatever upon this material question is the evidence of Mr. De Wolf and of Mr. Chambers. We invite the careful attention of the court to their evidence. It will be found that Mr. Chambers, in his evidence, says nothing whatever about the services being rendered under any contract with appellant, or at his special instance and request. Nothing whatever in his evidence appears to throw any light whatever upon this question of employment by appellant, which is absolutely necessary for a recovery; nothing appears to show that the services he rendered were not rendered in discharge of his duties as guardian of Emma W. Ryder; and, in the absence of all proof on the subject, the legal presumption is that he performed the services in discharge of the duties devolved upon him by law as guardian of Emma W. Ryder. And there is nothing whatever in the evidence of Mr. De Wolf that has any tendency whatever to show that the services sued for were rendered under a contract with appellant or at his special instance and request. The only statement in his entire evidence in the least concerning appellant is a naked assertion, where he says: 'I rendered the services for the defendant.' Leaving out this naked and unsupported assertion, there is absolutely nothing in his evidence that has any tendency to show that the services were not rendered in the discharge of his duties as administrator. And this statement is not of a fact, and does not even assert that appellant employed or requested him to perform said services. From all that appears, he may have done so voluntarily, and without solicitation. The bare statement that he performed them for appellant is not sufficient, of itself, to raise any presumption of an employment by appellant, or even to negative the legal presumption that he was not doing his duty as administrator. We confidently rely upon this total failure of proof of an employment, or that the services were rendered at the special instance and request of appellant, for a re-

versal of the case. This case is not one where the rule applies that a case will not be reversed upon a bare preponderance of the evidence. It is a case where there is a total want of evidence upon a point material to any recovery. The evidence of appellees is in the record, and our positive assertion of the want of any evidence to sustain the verdict on this material question is fully sustained by the record. The most that can be claimed for it on behalf of appellees is that they rendered certain professional services in a case in which there were several parties defendant, among them two of the appellees, F. M. Fay, and appellant. But who employed them nowhere appears in the evidence, and no attempt was made to show it. The only thing the evidence discloses, affecting, in any way, appellant, is that he was present in court when the services were rendered. But this presence of appellant at the time the services were rendered furnishes no ground to presume he employed them to perform the services, more than any of the other defendants to the suit who were also present. The appellees, in the court below, relied upon this presence and knowledge of appellant as being sufficient of itself to warrant a presumption of employment, and the court below gave color to this claim in one of the instructions to the jury. The verdict of the jury cannot be sustained, in the absence of proof of an employment of appellees by appellant. His mere presence at the trial when the services were rendered, in a case in which he was not a sole party, and in which the appellees who actively rendered the services were themselves parties with him, and upon whom the law imposed the duty to render and perform them, cannot raise any presumption against him to aid appellees or sustain the verdict. In the case in which the services were rendered, Mr. De Wolf, one of the appellees, was a defendant as administrator, and Mr. Chambers, another appellee, was also a defendant as guardian of Emma W. Ryder. The law specially imposed upon them, as such defendants, the imperative obligation of rendering the services in person, or to employ some attorney to do so. The trust character in which they were clothed required this of them, and to have failed to do so would have been a gross violation of their trust duties. In the absence of all proof on the subject, the reasonable and legal presumption is that they performed the services in fulfillment of their duties as such trustees. Besides, F. M. Fay, as guardian of the children of his deceased wife, was a party defendant, and was also present when the services were rendered. He represented the same interest as Chambers, and they both represented an equal interest in the litigation with appellant. Why should the mere fact of presence at the trial raise any presumption against appellant of an employment of appellees, more than against Fay? Besides, the action of appellees shows clearly, we think, that at the time these services were rendered they were in fact rendered on their own behalf, and in discharge of their duties as trustees, and not otherwise. It was the duty of Mr. De Wolf, as

administrator, to defend the suit and sustain the will if he believed it a valid instrument; and, in so doing, all his reasonable expenses incurred in good faith, including attorneys who were employed to defend, would be allowed him and paid out of the estate, whether the result of the litigation was favorable or unfavorable to the validity of the will involved in the litigation. *Bratney v. Curry*, 33 Ind. 899. And this is what was actually done in this case, before any distribution of the assets. All the expenses of Mr. De Wolf and Mr. Chambers, as defendants, and the fees of the attorneys employed to sustain the will, were thus paid. The written order Mr. De Wolf took from the beneficiaries of the estate to pay attorney fees shows this. It was demanded by Mr. De Wolf, and given by the beneficiaries for his satisfaction, although the law would have protected him in making the payment of reasonable attorney fees without it. It may have been feared by Mr. De Wolf that some trouble might arise on account of the fees paid by him to attorneys being unreasonable, owing to the number employed and paid by him. That order to pay attorney fees was signed by Mr. Chambers and Mr. Fay, as well as by appellant, and they represented all the interests involved. If there were any attorney fees due appellees, or claimed by them, why were they not paid out of the estate before distribution of the assets? Or is it equitable and just, after the estate had been settled and the assets distributed, to assert such a claim against appellant alone, representing, as he does, but a one-third interest in the estate, the same as represented by Mr. Chambers and Mr. Fay? So far as any presumption of employment from the fact the services were rendered with the knowledge and in the presence of appellant is concerned, we hold no such presumption can be indulged in this case. Even if Mr. De Wolf, under any possible circumstances, could claim attorney fees, occupying the relation he did to the Shugart Case, (which right to claim attorney fees by him from any one we expressly deny,) still, in this case, the claim of appellees cannot be aided by any presumption. If an attorney in no way connected with a suit as a party renders professional services for a sole party, in his presence and with his knowledge, a presumption of employment reasonably and properly arises; but where such services are rendered in a case where there are several parties on the same side, in aid of which rendered, and in the presence of all, no presumption of an employment arises hostile to any one in particular to the exclusion of the others. And where the attorney who performs the services is himself a party to the suit, in a case where the law required him to perform such services as part of his sworn duty, the presumption, in the absence of proof on the subject, certainly is they were rendered in the line and discharge of his duty, and not otherwise; and such, we insist, is the case we are considering."

This is a part, only, of the argument of counsel for appellant on the question under consideration, and we quote in full all that counsel for appellees have said

with reference to the alleged employment, in which is embodied the substance of the testimony of appellees as to the character and value of the alleged services: "The legal right, upon the part of Miles, to employ the firm of appellees being thus established, the question that remains for this court to investigate is, was there evidence before the jury tending to support their verdict? If there was such evidence, under the frequent rulings of this court the verdict will not be disturbed. William H. De Wolf testified that, during the years 1887, 1888, 1889, the firm was composed of William H. De Wolf, Smiley N. Chambers, and E. H. De Wolf. 'I was connected with said suit as one of the attorneys for the defense. After the first trial of the case in the Sullivan circuit court we began to prepare for the next trial of the case. From that time we were almost constantly employed, except Sundays, perhaps. I made two trips to McConnelsville, Ohio; one to Peabody, Kan. The pleadings were reformed, and new issues added. I personally attended to same. Made two trips to Indianapolis for consultation with General Harrison, one of the attorneys, and interviewed Dr. Fletcher, and also Dr. Thomas. \* \* \* Mr. Miles brought the witnesses for the defense to our office to ascertain to what they would testify. Chambers and De Wolf attended to all the legal work required in relation to the witnesses. \* \* \* I interviewed the witnesses for the defense in my office. I was employed this way day and night. Mr. Miles was there very often. Mr. Miles was in my office almost every day, and sometimes several times a day. \* \* \* I myself prepared a memorandum of legal questions. On the second trial of the case there were about seventy-five witnesses on each side. There were also a vast number of depositions taken and used in the case on both sides. There were also new witnesses,—quite a number,—and new evidence adduced. I was present every hour in the court room during the progress of the trial. Every witness for the defense was privately examined at our rooms. Sometimes it was myself, and sometimes Harrison and Gardiner, who interrogated. \* \* \* Edgar H. De Wolf, one of the plaintiffs, had personally no connection with the trial of the case except that, during the time it was on trial in the Sullivan circuit court, he remained at the plaintiffs' office in Vincennes, to be prepared to send witnesses to Sullivan as they were needed, and attended to that duty, and had witnesses go to Sullivan as required. \* \* \* I went to Spencer before Judge Franklin, concerning the case arising on questions involved upon the bill of exceptions. Chambers was also before the judge at a subsequent day, and the bill of exceptions was finally signed by the judge. \* \* \* I cannot give the language used by Mr. Miles when he employed us. He said once that he had spoken to Viehe to represent him in the trusteeship, and that Mr. Viehe did not want to take the case. \* \* \* Smiley N. Chambers testified as follows: 'After the disagreement of the jury on the first trial, another trial of the case was a

matter of course. The attorneys for the defense agreed among themselves that the first thing to be done to insure a successful issue for the defense was to get rid of McKenney. I was finally deputized to call on McKenney, and notify him that unless he voluntarily resigned the trust that charges would be made against him, and that he would be legally forced to give up the trust. Finally, Mr. McKenney made his final settlement of the estate and resigned the trust, and Mr. De Wolf was appointed in his place. We then commenced preparations for the second trial of the cause in earnest. Mr. Miles was in our office nearly every day, and sometimes several times a day. He brought many witnesses to our office who were to give evidence for the defense, in order to have them examined, and they were examined by Mr. De Wolf or myself. This took up about all our time. We were the only local attorneys that took charge of the case for the defense, and the work of preparing for the coming trial devolved upon us. The second trial of the case commenced in May, 1888, and lasted about six weeks. I suggested to General Harrison that the issues in the case should be amended by a plea of former adjudication, and the issues in the case were accordingly amended. On the second trial of the case there were a number of new witnesses, and much new matter was brought out in evidence. I took notes of the testimony as it was given by the witnesses, with the expectation of making an argument in the case, but different arrangements were made, and I did not make an argument. \* \* \* I went to Spencer on business connected with the bill of exceptions. The brief in the case on appeal to the supreme court was originally prepared by John T. Hays. After he had prepared the same, he brought the brief to our office, and it was read over and corrected. I went to Washington to consult with Gardiner concerning the brief, read it over to him, and with him made corrections and additions. I superintended the printing of the brief. \* \* \* Our firm also did work for Mr. Miles as trustee. We gave him legal advice concerning his duties as trustee. We commenced to advise him concerning his duties in 1887 sometime. I do not remember the date. He was continually consulting us and getting our advice. Mr. De Wolf also made out a report for him as trustee, which was filed in this court. It took considerable time and labor to prepare this report. It was quite lengthy, and Mr. De Wolf was in all two weeks in preparing it. It was a difficult report to make. It was his first report as trustee. There were many collections to make. Mr. De Wolf worked several nights until a late hour. The great difficulty in preparing the report was in making the calculations of the premiums of the bonds he had in his hands. A reasonable fee for the services rendered him as trustee in this respect by our firm was \$1,000."

The fourth reason assigned in the motion for new trial is, "The damages assessed by the jury are excessive in amount," and the fifth reason is, "The assessment by the jury of the amount of

recovery is erroneous, being too large." We have carefully read the evidence, and, in view of all the facts and circumstances surrounding the case, we fail to find any evidence in the record fairly tending to support the theory that appellant, either individually or as trustee, employed appellees as attorneys to appear for and represent him or any one else in the Shugart Case on the second trial in the Sullivan circuit court, to contest the will of William J. Wise. Neither of appellees has testified to any fact or circumstance, conversation with, or statement made by, said William R. Miles, indicating any such employment. The evidence and the answers of the jury to interrogatories indicate that any such agreement was an implied one predicated upon the previous employment of Messrs. De Wolf and Chambers by the former administrator on the first trial of the Shugart Case. Any such employment made by said McKenney prior to or on the former trial could not be a continuous one, as his power to employ and retain counsel ceased before the second trial, and Mr. De Wolf succeeded him as administrator. The law firm of appellees seems to have been afterwards formed. When Mr. De Wolf accepted the appointment as administrator he entirely changed his relation to the case, and conceding, without deciding, that he or the firm of which he was a member might thereafter have accepted retainer and employment therein as attorneys for the trust estate represented by appellant, yet nothing is shown to have been said or done by Mr. Miles after the first trial which can be construed as an intent on his part to so retain and employ appellees. The fact that he may have had frequent conversations with them in regard to the case, or that he took witnesses to their office, or that he knew they were devoting their time to preparation for the trial, or that he was present at the trial and saw and knew they were assisting as attorneys therein, when considered separately or together, are not, under the other conceded facts in the case, circumstances indicating or tending to establish such employment by him. Nothing appears in the record on this branch of the case which can be construed as tending to create an obligation, either personally or as trustee, on the part of William R. Miles. The late esteemed Chief Justice Mitchell said: "A relation which the law recognizes as contractual may arise between the parties in three ways: (1) The terms of the agreement may have been uttered, avowed, or expressed at the time it was made, in which case an express contract results. (2) Circumstances may have arisen, or acts may have been done, which, according to the dictates of reason and justice, and the ordinary course of dealing, or the common understanding of men, show a mutual intention to contract, in which case an implied contract arises. (3) There may have been no intention to contract at all, and yet one may have come under a legal duty to another of such a character that the law precludes him from asserting that he did not agree to

perform it; and thus, by a fiction of law, a contract results by construction or implication." *Rainsey v. Ramsey*, 121 Ind. 215-220, 23 N. E. Rep. 69. We do not find anything in the evidence tending to support the proposition that there was an express contract, or that there was a mutual intention to contract, or from which a contract results from construction. Nothing is shown to have been done or said by appellant which could be fairly construed by appellees as an employment of their firm as attorneys by him on the second trial. There is an entire absence of evidence to sustain the theory that the minds of the parties ever met on the vital question now in dispute. The evidence was taken at the trial in long-hand in narrative form, and some material parts thereof may have been inadvertently omitted. Ordinarily, it is true that where an attorney appears in court for and in behalf of one of the parties involved in a litigation, and performs services in the action as such attorney, in the presence of the party, the law implies a contract between the attorney and the person who receives the benefit of the services, and, in the absence of an agreement as to terms and amount, the client is under obligation to pay the reasonable value of the services so rendered; but under the circumstances of this case that rule is not applicable. It does not appear in this case that appellant knew, or that the circumstances were such he ought to have known, that appellees were claiming that they specially represented him, or that they were expecting compensation from him. In fact, the evidence, together with the acts of the parties, and all the facts and circumstances in the case, tend strongly, without contradiction, to support the theory that all of the attorneys who represented the defense in the contest of the will appeared generally for all of the defendants in interest, and no attorney or firm of attorneys is shown to have been employed by, or to have appeared for or represented the interest of, any one person or defendant especially. Further, as we read and understand the record, the agreement implied, if not expressed, seems to have been that all of the fees of the different attorneys who appeared in the interest of the defendants were to be paid in full by said De Wolf, as administrator of the estate of William J. Wise, deceased, out of the trust funds in his hands before distribution. The isolated and independent expressions, "When he employed me," or "I rendered the services for the defendant," standing alone and without explanation, cannot be construed, as the statement of any conversation, fact, or circumstance on which to base a contract of employment in the case to contest the will. The qualified expression or assertion, "When he employed me," is not preceded or followed by any statement or explanation tending to show there ever had been any employment of appellees by appellant, so far as the litigation is concerned, and, so far as anything to the contrary appears, the expression, for whatever it may be worth, may refer to the services mentioned in the sec-

ond item of the claim in question. In his fiduciary capacity the administrator represented all of the parties in interest in that litigation, and, as between themselves, Mr. Chambers, Mr. Fay, and appellant, each represented a one-third interest, which he was to receive on final settlement of the administrator and distribution of the estate; and no circumstance has been mentioned, either in the evidence or argument, which in justice and fair dealing should impose the liability on appellant, either personally or as trustee, to pay the entire fee of appellees for services rendered by them on second trial. The rule has been thoroughly established in a long line of unbroken decisions that, when there is evidence in the record fairly tending to sustain the verdict of the jury on every material point in the case, this court will not, on the weight of the evidence, disturb the judgment of the trial court rendered thereon; but when the evidence is wholly insufficient, in any essential particular, as it is in the respect hereinbefore set out in this case, to support such verdict, the judgment will be reversed. *Railroad Co. v. Eves*, 1 Ind. App. 224, 27 N. E. Rep. 580; *Nichols v. Pressler*, 3 Ind. App. 324, 29 N. E. Rep. 611.

Several other questions are presented and discussed, which in some instances, at least, do not constitute substantial error, and, if others were construed as reversible error, the decision thereof is unnecessary, in view of the conclusion we have reached in the case. Since this cause was submitted, William R. Miles has departed this life, and Mary W. Miles, as administratrix, has been substituted as appellant. Our conclusion is that, while there is some evidence tending to sustain the second item of \$1,000 mentioned in the complaint and bill of particulars, there is no evidence in the record, for the reasons stated, to support the first item; and therefore the judgment of the court below is reversed, as of the time when submitted, at costs of appellees, with instructions to sustain appellant's motion for a new trial.

(6 Ind. App. 672)

#### TAYLOR et al. v. DAHN.

(Appellate Court of Indiana. May 23, 1893.)

**MECHANIC'S LIEN—NOTICE TO OWNER—STATUTES—RETROACTIVE—REPEAL BY IMPLICATION.**

1. Act March 6, 1883, § 5, provided that, in order to obtain a lien for materials furnished a contractor, the mechanic must, on or before furnishing them, notify the owner or his agent. This section was repealed February 24, 1891, by an act approved on that date. The statutes give a mechanic 60 days within which to file a notice of an intention to claim a lien. *Held*, that the act of 1891 was not retroactive, and, where materials were furnished on February 2d of that year, a notice of lien recorded March 13th, without a previous notice to the owner, as provided in the act of 1883, was inoperative.

2. Act March 6, 1883, § 5, providing for notice by a mechanic to an owner on or before furnishing materials to a contractor or performing labor for him, is not repealed by implication by Act March 9, 1889.

Appeal from circuit court, Bartholomew county; Hacker, Judge.

Action by James C. Taylor and others against Frederick Dahn to foreclose a mechanic's lien. A demurrer to the complaint was sustained, and plaintiffs appeal. Affirmed.

John W. Morgan, for appellants. Hord & Emig, for appellee.

REINHARD, J. The sustaining of the demurrer to the appellants' complaint is the only error relied upon. It is averred in the complaint that one Marsh was the contractor for the construction of a building for the appellee; that on the 2d day of February, 1891, appellants furnished lumber and material to Marsh for said building, and that the same was used by Marsh in the construction thereof; and that appellants, within the prescribed time, filed in the recorder's office a notice of intention to hold a lien on said appellee's property for the materials furnished said Marsh in building the same for appellee. The complaint seeks to foreclose the alleged lien of the material man. There was no averment that the appellee was given actual notice that such materials were furnished to said Marsh. The court below held the complaint insufficient for the want of such allegation of notice, as provided in section 5 of an act approved March 3, 1883, which is as follows: "Sec. 5. To enable the mechanics or other persons furnishing material or performing labor, as above provided, to a contractor, to acquire such lien, he must, at or before the time he furnishes the material or performs the labor, notify the owner or his agent that he is furnishing the materials or performing the work for the contractor." Elliott's Supp. § 1692. If the section just cited was in force at the time of the furnishing of the materials sued for, the demurrer was properly sustained; if not, the ruling was error. The contention of appellants is that the section quoted was repealed by the act approved March 9, 1889, (Elliott's Supp. § 1705 et seq.) It will be noticed by examination of the act just cited that the title of the act declares section 5 of the former act repealed, but in the body of the act (section 5) it is section 4, and not section 5, that is repealed. Elliott's Supp. § 1709. It is manifest, therefore, that the section under consideration was not repealed directly by the later law of 1889, and consequently was in force when the materials were furnished, unless it had been repealed by implication in the act of 1889. By the act approved February 24, 1891, the section was expressly repealed. Acts 1891, pp. 28, 29. That act contained an emergency clause, and therefore became operative at once upon its passage and approval on the date last named. It appears from the complaint that the materials were furnished the contractor on the 2d day of February, 1891. It is the further contention of the appellants that, as the law gives the material man 60 days' time within which to file his notice of intention to hold a lien, the appellants had until the 2d day of April, 1891, to do so; and that, if they filed such notice after the 24th day of February, 1891,—the date of

the approval of the repealing act,—they were not required to give actual notice to the appellee. The complaint shows that the notice of lien was recorded on the 13th day of March, 1891, which, as we have seen, was after the repealing act had gone in force.

The first question we shall undertake to decide, therefore, is the last one presented by appellants' brief, viz.: Did the appellants acquire a valid lien by virtue of their recorded notice, without actual notice to the appellee, conceding that section 5 of the act of 1883 was not repealed earlier than February 24, 1891? If the act of 1883 was in force when appellants furnished the articles for which they sue, they had no remedy against the owner of the property, unless, at or before the time they furnished such articles to the contractor, they gave notice thereof to the owner. Their remedy was against the contractor only. In our opinion, the remedy given to material men as against the owners of property subsequently did not operate retroactively in favor of appellants. The right to hold a lien becomes vested at the time the material is furnished, and in determining whether or not such right exists the courts will look only to the statute in force at that time. *Goodhub v. Estate of Hornung*, 127 Ind. 181, 28 N. E. Rep. 770. True it is that the statutes giving liens affect only the remedy; but here we find a party claiming a remedy against one who was not a party to the contract, and who, for aught we know, may have paid the value of the materials received by him to the contractor. The repeal of the section requiring the material man to give notice to the owner in effect creates a new liability upon the part of the latter. Had the appellants notified the appellee of their intention to hold him liable at or before the time the materials were furnished, he would have had an opportunity of protecting himself by withholding from the payment to the contractor the amount such owner was required to pay the material man. To hold him liable to the appellants might result in requiring him to pay for the same articles twice, without negligence or fault on his part. For these and other reasons that might be given the repealing statute cannot be accorded a retroactive effect, and we think that the law in force at the date of the furnishing of the materials must determine the appellee's liability. If the act of 1883 was then in force, the appellants could not acquire a lien upon the appellee's property unless they had complied with the terms of the statute by giving him actual notice, as therein provided. *Caylor v. Thorn*, 125 Ind. 201, 25 N. E. Rep. 217; *Parker v. Dillingham*, 129 Ind. 542, 29 N. E. Rep. 23. Section 5 of the law of 1883 was therefore in force at the time the materials were furnished the contractor, unless the section was repealed by implication by the act of 1889. Was it so repealed?

The position of appellants' counsel is that the section is in conflict with the act of 1889, construed as a whole; that the latter act covers the entire subject-matter of the old, and was manifestly intended

to take its place. If this position is well taken, the contention of counsel must prevail. We are, however, of the opinion that the premises are not well founded. The entire act of 1889, in so far, at least, as it relates to the subject-matter of notice, is amendatory. The old law provides for two kinds of notices by a material man to the owner, viz. notice of intention to hold a lien, to be filed in the recorder's office, and actual notice to such owner. The new law re-enacts the old matter relating to the notice to be filed in the recorder's office, and adds some amendments not connected with the subject of actual notice, nor inconsistent therewith. It makes an attempt to repeal certain sections expressly, but fails. The new act makes no change and contains no provision whatever respecting the subject of actual notice, and does not, therefore, cover the entire subject-matter of the old, and is not repugnant to the same. Where such is the case, inasmuch as repeals by implication are not favored, it is the duty of the courts to construe them so as to give effect to both. *Sosat v. State*, 2 Ind. App. 586, 28 N. E. Rep. 1017, and cases cited. In the present case, as we have seen, the new law is amendatory of the old. As a general rule, where this is the case, the sections of the old law not amended will stand. It is only where the sections as amended contain such new matter as to cover the subjects embraced in all the old sections, including those not amended, and where such sections, as amended, are positively repugnant to the provisions in the sections not amended, and the entire new act is evidently intended to supersede and take the place of the old one, that the latter repeals the former. See *Longlois v. Longlois*, 48 Ind. 60. The legislature of 1891, recognising the existence of section 5 of the act of 1883, expressly repealed it. While it is true that legislative interpretation by an assembly subsequent to the one that enacted the law is not binding upon the courts, and is generally of but little controlling force, it is not entirely without its influence. Our conclusion is that the section under consideration was in full force at the time the appellants delivered to the contractor in this case the materials for which they seek to hold the appellee liable; that the appellee was entitled to actual notice of the fact that appellants had furnished such contractor with the materials sued for; and the complaint, failing to aver such notice, is defective. There was therefore no error in sustaining the demurrer.

Judgment affirmed.

(7 Ind. App. 94)

HODGE et al. v. FARMERS' BANK OF FRANKFORT.

(Appellate Court of Indiana. May 23, 1893.)

SURETY—RELEASE—ALTERATION—EXTENSION OF TIME OF PAYMENT.

1. A note delivered by a surety, with all blanks filled, including blank for the payee, who is named, merely as an individual, cannot afterwards be altered, without the surety's con-

sent, by writing "cashier" after the payee, thus making it payable to a bank.

2. The consent of a surety to "any extension of the time of payment," embodied in a note, is binding for at least one extension.

Appeal from circuit court, Boone county; J. A. Abbott, Judge.

Suit by the Farmers' Bank of Frankfort against John Hodge, Gard, and others. Verdict directed against Hodge and Gard, who appeal. Reversed.

Bayless & Guenther, M. Bristow, Asa H. Boulden, and C. M. Zion, for appellants. C. S. Wesner, for appellee.

GAVIN, C. J. The appellee sued the appellants Hodge and Gard, together with Lewis C. Riley and James H. and H. Droneberger, upon a promissory note. It is alleged in the complaint that the defendants "executed to plaintiff their promissory note, payable to David A. Coulter, cashier of the Farmers' Bank, for two thousand dollars," etc. Gard, Hodge, and Riley filed sworn answers of non est factum. Gard also answered, affirmatively, that he was surety, as appellee knew, and that the time of payment was extended three months, upon payment of interest in advance, without his knowledge or consent. To this answer a demurrer was sustained. Upon the trial the court instructed the jury to return a verdict against Hodge and Gard, who now appeal. Upon the correctness of this instruction depend the rights of the parties.

An instruction to return a verdict in favor of one of the parties can only be justified when there is no evidence which would sustain a different verdict. *Weis v. City of Madison*, 75 Ind. 241; *Purcell v. English*, 86 Ind. 34; *Overton v. Railroad Co.*, 1 Ind. App. 436, 27 N. E. Rep. 651. The facts, as disclosed by the evidence, are about as follows: John Hodge, at the request of James H. Droneberger, signed a blank note, upon appellee's ordinary printed form, payable at its bank, and intrusted it to Droneberger. The name of Lewis C. Riley was next added to the note. It was afterwards presented by Droneberger to Gard for his signature. Gard signed it, but at the same time filled in the date, amount, and name of payee, making the note apparently complete in all respects, except that by oversight he omitted the word "days" after "sixty." As he filled out the note it was made payable to "David Coulter," and a line was drawn through the blank space after "Coulter," leaving then no blank space in that part of the note left for the payee's name. Droneberger then took the note, and presented it to David Coulter, at the appellee's bank, of which he was the cashier. He looked at it, and said: "This is not right. It is made payable to David Coulter. It should be made payable to the bank." Whereupon Droneberger told him to add "cashier" to his name, which he did. Droneberger then signed his firm's name to the note, and Coulter, for the bank, discounted the note, and placed the proceeds to the firm's credit in bank. The alteration of the note was made without the knowledge or authority of any of the



makers, except Droneberger. The Dronebergers were principals on the note, as the appellee knew. There were personal dealings between Coulter and the Dronebergers aggregating several thousand dollars. In addition to these facts, which are undisputed, Hodge testified that the note was to be for only \$1,000, and that this amount was written in figures in the upper left-hand corner, and that Droneberger told him the money was to be obtained from David Coulter. By the verdict of the jury, Riley was held not liable. Hodge and Gard are in somewhat different positions with respect to the alteration, in that, when Hodge signed the note, the payee's name was left blank, while Gard filled it in when he signed. For the purposes of this investigation, however, they are upon an equality. The blank for the payee's name had been filled in by Gard, in accordance with the understanding between Hodge and Droneberger, as testified to by Hodge; the note being, in this form, —apparently perfect and complete,—presented to Coulter by the principal. Coulter was thus advised as to the purpose of Hodge. Droneberger had no actual authority from Hodge to make or authorize the alteration. Neither was he at this time clothed with any apparent authority to do so, because there was no blank space wherein the matter was appropriate to make the instrument complete. It is true that if a surety trusts to his principal a negotiable note, signed by himself, but left blank in part, and incomplete, the principal may fill such blanks with appropriate matter, and the surety will be bound thereby, in the hands of an innocent holder, even though the principal, in filling the blanks, exceeds his authority. *De Pauw v. Bank*, 126 Ind. 553, 25 N. E. Rep. 705, and 26 N. E. Rep. 151; *Geddes v. Blackmore*, (Ind. Sup.) 32 N. E. Rep. 567. Here, however, there was no blank to be filled when the alteration was made, and the power to fill blanks does not include alterations or additions to a completed instrument. *Cronkhite v. Nebeker*, 81 Ind. 319. Notice to the payee, of the limitations of the principal's authority, prevents him from taking advantage of this rule. *Wagner v. Diedrich*, 50 Mo. 484. The presence of the name of the payee in the note, when presented to him, was notice to him that it was the design of those who had signed it to make the note payable to the payee named therein. The following cases are authorities upon the principle here involved. *Angle v. Insurance Co.*, 92 U. S. 330; *Hagler v. State*, (Neb.) 47 N. W. Rep. 692; *Dair v. U. S.*, 16 Wall. 1; *Pawling v. U. S.*, 4 Cranch, 219; *State v. Craig*, 58 Iowa, 238, 12 N. W. Rep. 301. A surety is released by a material alteration of the body of a note made by the payee, with knowledge of the suretyship, without the surety's consent, and after it has been signed by the surety, and is apparently complete. *Coburn v. Webb*, 58 Ind. 98; *Johnston v. May*, 76 Ind. 293; *Schnewind v. Hackett*, 54 Ind. 248. In *Eckert v. Louis*, 84 Ind. 99, this language is quoted from *Daniel, Neg. Inst.* § 1873: "Any change in the terms of a written contract which varies its original legal effect and operation, whether in respect

to the obligation it imports, or to its force as matter of evidence, when made by any party to the contract, is an alteration thereof, unless all the other parties to the contract gave their express or implied consent to such change. And the effect of such alteration is to nullify and destroy the altered instrument as a legal obligation."

The real controversy in this case arises upon the question as to the materiality of the alteration. The appellee, if we understand his position aright, claims that the addition of the word "cashier" did not in any way affect the note, because it was a mere descriptive appellation, and, so far as its legal force was concerned, neither added to nor detracted from the name already there. In support of their position, counsel cite and rely upon several Indiana cases wherein it is held that contracts signed by individuals, with the word "agent" or "trustees" of a certain church or order, are to be considered as individual contracts, and not the contracts of the body of which the signers are such agents or officers. *Hayes v. Matthews*, 63 Ind. 412; *Hayes v. Crutcher*, 54 Ind. 260; *Williams v. Bank*, 88 Ind. 237; *McClellan v. Robe*, 93 Ind. 298; *Second Baptist Church v. Furber*, 109 Ind. 492, 10 N. E. Rep. 118. While these cases so hold, it is fully recognized by our supreme court that, as to banks, the act of the cashier is the act of the bank, and that a bank may sue upon a note payable to its cashier, as such, just as though it were payable to it by its corporate name. This principle was enunciated in the early case of *Bank v. Wheeler*, 21 Ind. 90, where a bill was indorsed to "H. Early, Cashier," and by "H. Early, Cashier." In a suit by the indorsee, holding under this indorsement, it was held that the bank of which he was cashier was liable upon it. In *Dutch v. Boyd*, 81 Ind. 146, the court decides that "paper made payable or indorsed to the cashier of a bank is, in legal effect, payable to the bank itself." In *Nave v. Bank*, 87 Ind. 204, it is held that a note made payable to A. B., "cashier of 1st Nat'l Bank," may be sued on by the bank, as payee, without any indorsement, upon an allegation that A. B. was cashier of plaintiff's bank. "It is well settled that a note made payable to the cashier of a bank is to be deemed payable to the bank, and that the bank may sue thereon as payee." *Nave v. Hadley*, 74 Ind. 155; *Erwin Lane Paper Co. v. Farmers' Nat. Bank*, 180 Ind. 367, 30 N. E. Rep. 411. The principle upon which these cases are based is supported by numerous authorities. *Story, Prom. Notes*, 127; *Bank of New York v. Bank of Ohio*, 29 N. Y. 619; *Bank v. Hall*, 44 N. Y. 395; *Bank of Genesee v. Patchin Bank*, 19 N. Y. 312; *Folger v. Chase*, 18 Pick. 63; *Baldwin v. Bank*, 1 Wall. 234; *Houghton v. Bank*, 28 Wis. 663; *Garton v. Bank*, 34 Mich. 279; *Morse, Banks*, §§ 1581, 170; 2 Amer. & Eng. Enc. Law, 337; *Pratt v. Bank*, 12 Kan. 570; *Horn v. Bank*, 32 Kan. 518, 4 Pac. Rep. 1022; *Bank v. Ferris*, 17 Conn. 259. That the law thus established as to banks and bank cashiers is an exception to the general rule as laid down in cases cited by appellee, and re-



ferred to above, may be conceded; but that the exception created, doubtless from a deference to commercial necessities and usages, is thoroughly established and generally recognised, is, we think, unquestionable. It is said in Daniel, Neg. Inst. § 417: "An exception to the general rules of interpretation which have been stated has been made in respect to cashiers of banks. They are the chief financial agents of their institutions, and when a bill or note is made payable to an individual, with the suffix of 'Cas.,' 'Cash.,' or 'Cashier' to his name, it has been generally decided to be really payable to the corporation of which such party is the cashier, and so to import upon its face, the officer's name being used as that of his principal, which may not be disclosed on the face of the paper." "When a bank sues on a note, an allegation that 'A. B.' was its cashier, and that the note was indorsed to 'A. B., Cashier,' is sufficient to show the bank's title." Bolles, Banks, § 523. "In general it may be said that the title to a note payable to a cashier is prima facie in the bank of which he is the cashier, and that the institution can sue thereon in its own name." Id. § 524. The appellee has acted upon this doctrine by bringing this suit in favor of the bank, counting upon the note as executed directly to it, without even seeking the aid of any extraneous facts. It is well established that a payee is essential to a promissory note, and the change of the payee or of an indorsee is a material alteration. *Grimes v. Piersol*, 25 Ind. 246; *Stoddard v. Penniman*, 108 Mass. 366; *Bell v. Mahin*, 69 Iowa, 408, 29 N. W. Rep. 381; *Robinson v. Berryman*, 22 Mo. App. 510; 1 Amer. & Eng. Enc. Law, 506; 2 Daniel, Neg. Inst. § 1347. The note in suit, when signed, was payable to Coulter. It was by the holder changed so as to be payable to another without the consent of appellants. The identity of the note was thereby destroyed, and the appellants were no longer bound by it. This we must hold to be law, under the facts which the evidence proved, or tended to prove, in this case. *Weir Plow Co. v. Walmesley*, 110 Ind. 242, 11 N. E. Rep. 282; *Insurance Co. v. Courtney*, 60 Ind. 184. It therefore follows that the court erred in directing a verdict for the appellee.

Some other questions are presented, with reference to the action of the court upon the trial, but we do not deem it necessary to take them up. The answer setting up a single extension of time of payment for a valuable consideration is bad by reason of the provision in the note whereby it is waived. The note contains this clause: "The drawers and indorsers severally waive presentment for payment, protest, and notice of protest and non-payment of this note, and all defenses on the ground of any extension of the time of its payment that may be given by the holder or holders to them, or either of them." It is established law that a contract made with the principal debtor, upon a valuable consideration, and without the consent of the surety, extending the time of payment for a definite period, releases the latter from liability. *Gipson*

*v. Ogden*, 100 Ind. 20; *Jarvis v. Hyatt*, 48 Ind. 183. The terms of this note, however, must necessarily be construed to be a consent to at least one extension of time. That such a consent, embodied in the note, is binding and effectual upon the makers, is recognised by the case of *Gildeden v. Henry*, 104 Ind. 278, 1 N. E. Rep. 389, wherein it is held that a provision for general extensions destroys the character of negotiability by the law merchant which would otherwise attach to the note. 24 Amer. Law Reg. (N. S.) p. 716, contains an exhaustive review of this case by Mr. W. W. Thornton. That such a provision is binding upon the surety for at least one extension is held by *Brandt, Sur.* § 346; *Bank v. Chick*, 64 N. H. 410, 18 Atl. Rep. 872; *Miller v. Spain*, 41 Ohio St. 876.

Judgment reversed, with instructions to sustain the motion for a new trial.

(7 Ind. App. 89)

#### MILLER et al. v. RAPP.<sup>1</sup>

(Appellate Court of Indiana. May 24, 1893.)

JURISDICTION OF APPELLATE COURT—SUIT BETWEEN PARTNERS—DISSOLUTION AND RECEIVERSHIP.

An action by partners against a copartner to obtain a dissolution of the partnership, the appointment of a receiver to wind up its affairs, and a distribution of the proceeds, where defendant files a cross complaint asking for an accounting and settlement of the business, is a "suit in equity," within the meaning of Act Feb. 18, 1893, providing that the appellate court shall not have jurisdiction of appeals in such suits.

Appeal from circuit court, Wells county.

Action by Frederick G. Miller and others against Andy Rapp. From a judgment for defendant, plaintiffs appeal. Transferred to supreme court.

G. A. Mason, A. L. Sharp, and Wilson & Todd, for appellants. Martin & Vaughn, for appellee.

LOTZ, J. The appellants brought this suit against the appellee, alleging in their complaint that they and the appellee were partners engaged in the business of buying, slaughtering, and selling live stock; that differences had arisen between them and the appellee as to the management and conduct of said business, and as to the division of the profits and property of said firm. They prayed the judgment of the court dissolving said partnership, for an accounting between the partners, the appointment of a receiver to wind up its affairs, and that the proceeds, after paying all the debts, be distributed between them in accordance with their interests, and all other proper relief. A receiver was appointed on appellants' application, who qualified, and took possession of the partnership property, and sold the same under the order of the court. After said receiver had been appointed, appellee filed an answer and a cross complaint. In his cross complaint he also asked for an accounting and winding up of the affairs of the partnership. The cause was put at issue, and tried by the court. The court made a special finding of the facts and an accounting between the parties, and stated its conclu-

<sup>1</sup> Transferred to Supreme Court. See 34 N. E. 681. Rehearing denied, 35 N. E. 693.

sions of law, and rendered a final judgment in favor of the appellee and against the appellants. From this judgment this appeal is prosecuted.

We are confronted at the threshold with the question of the jurisdiction of this court. Section 1 of the act of February 16, 1893, (Acts 1893, p. 29,) defines and limits the powers and jurisdiction of this court. The second exception to the court's jurisdiction found in said section is as follows: "The appellate court shall not have jurisdiction of suits in equity, hereby meaning, by the term 'suits in equity,' such cases as were known and recognized, prior to the 18th day of June, 1852, as suits of equitable cognizance, and wherein specific decrees are appropriate and essential." This leads to the inquiry as to what a suit in equity was, prior to the adoption of the present Code. The law gives a remedy to every person whose rights are infringed. He is generally required to seek his redress in a court of justice. The method by which he sets the court in motion is by a suit or action; hence a suit is any proceeding in a court of justice by which a person pursues that remedy which the law allows him. Whatever the mode, if the right is litigated, the proceeding by which the judgment of the court is sought is a suit. The words "suit" and "action" are generally synonymous, although the term "suit" is the appropriate one to designate a proceeding in a court of equity, and "action" to designate a proceeding in a court of law. In English jurisprudence there are two kinds of courts,—the law courts and equity courts. The law court is presided over by a judge, and the equity court by a chancellor. In some jurisdictions these courts are kept separate and distinct; in others, the two methods of administering justice are enjoined upon the same court, but the forms of procedure in the different classes of cases are as distinct as if there were two courts,—one of law, and one of equity. It was this latter kind of courts and method of procedure that was in vogue in Indiana prior to the adoption of the present Code. If, prior to 1852, any person desired to bring an action in a court of this state, his first inquiry was to determine whether it was a suit in equity or an action at law. If it was a suit in equity, it went upon the chancery side of the court; if at law, it fell upon the law side of the court. The essential difference between a court of equity and a court of law, or between the equity side and law side of the same court, consists in the different modes of administering justice; in the mode of proof, trial, and relief afforded. Equity adapts its decrees to all the varieties and circumstances which may arise, and adjusts them to all the peculiar rights of all the parties in interest, while a court of law is bound down to a fixed and invariable method of procedure and form of judgment, the judgment being, in general terms, absolute for the plaintiff or defendant. The purpose of the Code was not to do away with equity procedure or law procedure, but to simplify and blend the two systems into one, so that the same court might administer justice in any case by appropriate procedure and

judgment. The purpose of the exception in the statute above quoted is not to take from this court all equitable powers or all equitable cases, for jurisdiction is given of certain equitable proceedings by other clauses of the same section; but its purpose is to take from this court a particular class of cases, such as were known and designated as "suits in equity" prior to 1852, and which require specific decrees to enforce them. The main purpose of appellants' complaint and of appellee's cross complaint is to have the partnership dissolved, and its affairs closed out. An account must be taken, the assets must be marshaled, and applied, first, to the debts, and the residue, if any, distributed among the partners. A receiver is one of the instruments by which the end sought is accomplished. Every order of the court requires a specific decree. A bill for an accounting and dissolution of a partnership is one of special equitable cognizance. An action at law cannot be maintained by one partner against the other, except after an accounting, balance struck, and express promise to pay. *Arnold v. Arnold*, 90 N. Y. 580. "But equity removes the obstacles, and enables the partners to dissolve the partnership, pay the debts, state the account, and ascertain and divide the surplus." *Beach*, Mod. Eq. Jur. § 873; *Daniell*, Ch. Pr. 1248, 1249. Having reached the conclusion that the case made by the complaint and the cross complaint falls within that class which were known as "suits in equity" before the adoption of the present Code, and that a specific decree is appropriate and essential to enforce the judgment and order of the court, we conclude that this court has no jurisdiction. *Huber v. Beck*, (Ind. App.) 82 N. E. Rep. 1025. The clerk is ordered to transfer this cause to the docket of the supreme court.

(7 Ind. App. 102)

#### SHOEMAKER v. SOUTH BEND SPARK ARRESTER CO.<sup>1</sup>

(Appellate Court of Indiana. May 24, 1893.)  
JURISDICTION OF APPELLATE COURT—INJUNCTION.

An appeal in an action to enjoin defendant from representing to the public and to plaintiff's customers that he is the owner of a certain patent, or that he has an interest therein, and to enjoin him from threatening litigation against plaintiff's customers, and from manufacturing the improvements covered by said patent, is not within the jurisdiction of the appellate court.

Appeal from circuit court, St. Joseph county.

Action by the South Bend Spark Arrester Company against George H. Shoemaker to obtain an injunction. From a judgment for plaintiff, defendant appeals. Transferred to supreme court.

F. J. L. Meyer, for appellant. Lucius Hubbard, for appellee.

LOTZ, J. The appellee brought this suit against the appellant, invoking the judgment and decree of the court to enjoin the appellant from representing to the public and to appellee's customers

<sup>1</sup> Transferred to Supreme Court. See 35 N. E. 230.

that he (appellant) was the owner of certain letters patent issued by the patent office of the United States, and to enjoin him from representing that he had any interest therein, and to enjoin him from threatening litigation against appellee's customers and purchasers, and to enjoin him from manufacturing the improvement covered by said letters patent, and judgment for damages for infringing said letters patent. The main purpose of the suit is the injunctive relief sought. The case is not within the jurisdiction of this court. *Miller v. Rapp*, 34 N. E. Rep. 125, (decided at this term of this court.) The clerk is ordered to transfer the case to the docket of the supreme court.

77 Ind. App. 166)

#### STATE v. SMITH et al.

(Appellate Court of Indiana. May 25, 1893.)

##### TRESPASS—INDICTMENT—DESCRIPTION OF LAND.

Under Rev. St. 1881, § 1961, which makes it unlawful for any person to remove from the lands of another, without license, "any \* \* \* valuable article," an indictment sufficiently describes the property removed where it charged that defendant, at (giving county and state,) did "unlawfully enter upon and remove from the lands of [complainant,] there situated, a certain fence, then and there belonging to [complainant,] and constituting a part of said lands."

Appeal from circuit court, Boone county; S. Neal, Judge.

Barnard Smith and John Murphy were jointly indicted for trespass, and from a judgment quashing the indictment the state appeals. Reversed.

P. H. Dutch, for the State. S. R. Artman, for appellees.

LOTZ, J. The appellees were indicted in the Boone circuit court for trespass upon lands. The essential part of the indictment is as follows: "That Barnard Smith and John Murphy, on the 8th day of October, A. D. 1892, at the county of Boone and state of Indiana, did then and there unlawfully enter upon and remove from the lands of George Stephenson, there situate, a certain fence, then and there belonging to said George Stephenson, and constituting a part of said lands, without a license to do so from the said George Stephenson, or from any other competent authority; the said fence being then and there of the value of fifteen dollars." Upon appellees' motion the indictment was quashed in the court below. This ruling is the error assigned.

Appellees' contention is that the indictment is fatally defective for want of a more specific description of the land and of the fence. The statute (section 1961, Rev. St. 1881) makes it a criminal offense for any person, without a license, to remove from the lands of another "any tree, stone, timber, or other valuable article." The object of criminal prosecutions is to mete out punishment to those who violate the criminal laws. The method of procedure is by indictment or information. The purpose of the indictment is—First, to inform the court of the facts alleged, so that

it may decide whether they are sufficient in law to support a conviction if one should be had; and, second, to furnish the accused with such a description of the charge against him as will enable him to concert his defense, and avail himself of his conviction or acquittal for protection against further prosecution for the same offense. To secure these ends, certain rules of pleading must be pursued. A crime is an act committed or omitted in violation of a law of the state. It is elementary that the indictment or information must charge the time, place, nature, and circumstances which enter into and constitute the offense, with clearness and certainty. The act done or omitted to be done is the vital element of a crime. Time, place, and attendant circumstances are usually mere incidents, descriptive of the offense. The general rule is that the minor circumstances, which are merely incidental to the main fact, need only to be stated with that degree of particularity that carries knowledge of the offense, and bars a future prosecution. In such matters it is unnecessary to descend into detail or minutiae. In some cases, however, time, place, and other circumstances are vital elements of the offense, and in such cases it is necessary that they be specifically alleged and proved as laid. The offense defined by the statute, on which the indictment in this case is predicated, consists in the act of removing certain articles from the lands of another. The two things affected by the act are the lands and the fence. They are both elements of the offense, but are subordinate to the act. They are not active, but passive,—are acted upon. The indictment charges that the lands are situate in Boone county, that Stephenson is the owner thereof, and that the fence formed a part of said lands. This we think sufficiently specific of a minor element to apprise the defendant of the charge against him, and bar another prosecution. Appellees in their brief say: "If there be three George Stephensons in Boone county, each the owner of lands in said county, (which is a fact,) how can we tell on which one's land we are charged with having trespassed, unless there be a sufficient description to identify the land? Or, if there be one George Stephenson, who is the owner of more than one parcel of land in Boone county, (which is a fact,) how can we determine on which parcel we are charged with having trespassed, unless there be a sufficient description to distinguish the parcels? If the description is not sufficient for this, how could the record of a conviction or an acquittal be available in a subsequent prosecution for the same offense?" The case of *State v. French*, 120 Ind. 229, 22 N. E. Rep. 108, 735, is cited and relied upon in support of this position. There seems to be some conflict between the reasoning in that case and the later case of *Winlock v. State*, 121 Ind. 531, 23 N. E. Rep. 514, but there is no conflict on the point in judgment in the two cases. Appellees' argument above quoted would be equally applicable to a charge of burglary. If the charge was that the defendants did feloniously break into the storehouse of

George Stephenson, there situate, it might be true that there were three George Stephensons in said county, or that there was one George Stephenson who owned three different storehouses; yet we apprehend that counsel would not seriously contend that in such a charge it is necessary to describe the owner so that he could be distinguished from other persons of the same name, or to describe the realty on which the storehouse was situated so as to distinguish it from the other storehouse owned by the same person. We think the case at bar and the supposed case are analogous. It is not the law that an indictment shall be so distinct and minute in its description of the offense or offender as to constitute, without parol proof, a bar to a second prosecution for the same offense. The identity of the two accusations may always be shown by parol. *Bish. Crim. Proc.* § 544. The indictment is sufficient. *Winlock v. State*, 121 Ind. 531, 23 N. E. Rep. 514, and cases cited. Judgment reversed, with instructions to overrule the motion to quash.

**DENTON et al. v. THOMPSON et al.**<sup>1</sup>  
(Appellate Court of Indiana. May 25, 1893.)  
SUPREME COURT—JURISDICTION—DRAINAGE PROCEEDINGS.

The supreme court alone has jurisdiction of appeals in drainage proceedings.

Appeal from circuit court, Jasper county.

Appeal by Amanda A. Benton and others from a judgment in drainage proceedings in favor of Alfred Thompson and others. The case was transferred to the appellate court. Retransfer directed.

Hartman & Hamelle and T. F. Palmer, for appellants. S. P. Thompson, for appellees.

**PER CURIAM.** This is an appeal from a judgment in a proceeding for drainage. The cause was appealed to the supreme court, and transferred by the clerk to this court. We are of opinion that the transfer was erroneous, and that the supreme court alone has jurisdiction in such cases. The clerk will retransfer the cause to the docket of the supreme court.

**BIBLE, Sheriff, et al. v. VORIS.**<sup>2</sup>  
(Appellate Court of Indiana. May 27, 1893.)

APPELLATE COURT—JURISDICTION.

Under Acts 1893, p. 29, § 1, which provides that the appellate court shall have jurisdiction in all appeals from judgments for the recovery of money only, where the amount in controversy, exclusive of costs, does not exceed \$3,500, such court has jurisdiction of an action to set aside a judgment of the circuit court in an action on notes, where the amount demanded is within the jurisdictional limit, and no other relief is demanded in the complaint.

Appeal from circuit court, Montgomery county.

Action by John P. Bible, sheriff, and others, against Ezra C. Voris, to set aside

<sup>1</sup> Transferred to Supreme Court. See 35 N. E. 264. Rehearing denied.

a judgment of the circuit court. Request to transfer the case to supreme court denied.

H. D. Van Cleave, Wm. B. Paul, and Johnston & Johnston, for appellants. Paul & Bonner, for appellee.

**REINHARD, J.** Counsel for the respective parties have requested the clerk to transfer this cause to the docket of the supreme court, believing the jurisdiction to be in that tribunal, and the clerk has asked us for instructions in the premises. The action is to set aside and vacate a judgment of the circuit court alleged to be void for certain reasons set forth in the complaint. The judgment sought to be vacated was for a debt evidenced by certain promissory notes. It was in an action for the recovery of money only, and the amount demanded and recovered was within the limit of the jurisdiction of this court. No other relief is asked for in the complaint of this cause than that the judgment be set aside and vacated. We are of opinion that this court alone has jurisdiction. Section 1 of the act amendatory of the act creating the appellate court provides that the said court shall have exclusive jurisdiction, in all appeals from judgments for the recovery of money only, where the amount in controversy, exclusive of costs, does not exceed \$3,500. Acts 1893, p. 29. This proceeding is but an incident attaching to the main action for the recovery of a money judgment. If the appeal results in the vacation of the judgment, there may be another trial in the cause, from which an appeal would lie to this court in any event. To hold that the supreme court must first pass upon the questions which may result in such new trial would be deciding that this court has jurisdiction of a portion or branch of the proceedings in the cause, and the supreme court of another portion. The question has been fully decided in *Parker v. Bank*, 126 Ind. 595, 26 N. E. Rep. 881. See, also, *City of Hammond v. New York, etc., Ry. Co.*, 126 Ind. 597, 27 N. E. Rep. 130; *Railroad Co. v. Swift*, 128 Ind. 84, 27 N. E. Rep. 420; *Brighton v. White*, 128 Ind. 320, 27 N. E. Rep. 620; *Harris v. Howe*, 129 Ind. 73, 27 N. E. Rep. 561; *Baker v. Groves*, 126 Ind. 593, 26 N. E. Rep. 1076. The cause is within the exclusive jurisdiction of this court, and should not be transferred. The clerk is so directed.

(6 Ind. App. 677)

**LEVY et al. v. BIGELOW.**

(Appellate Court of Indiana. May 23, 1893.)

MOTION FOR NEW TRIAL—PRESENTATION TO "COURT"—SUFFICIENCY OF RECORD—MASTER AND SERVANT—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

1. The record in a case showed that it was tried before B., "sole judge of the said" circuit court; that a verdict was returned, and afterwards, "before the same honorable judge, the following proceedings were had: \* \* \* Come now defendants by their attorneys, and file their motion and written reasons for a new trial in this case," etc. Held, that the record sufficiently showed that a motion for a new trial was presented to the "court."

<sup>2</sup> Transfer to Supreme Court denied. See 40 N. E. 670. Rehearing denied.

2. Plaintiff, 18 years old, who had been employed in the press room of defendants' printing house for over two years, was ordered by the foreman to remove a heavy cylinder from one of the presses. Generally the press was stopped by shifting a belt from a tight to a loose pulley by means of a lever which stood beside the press. Plaintiff shifted the belt, got inside the frame, and, while removing the cylinder, accidentally struck the lever which reshifted the belt, and he was crushed in the press. There were three ways of preventing such an accidental starting, with all of which plaintiff was familiar, and had seen each of them employed, and in some cases had himself assisted in securing the machine. *Held*, as a matter of law, that plaintiff was guilty of contributory negligence.

Appeal from circuit court, Marion county; E. A. Brown, Judge.

Action by Isaac Bigelow, by John S. Bigelow, his next friend, against William M. Levy and others, for personal injuries. Judgment for plaintiff, and defendants appeal. Reversed.

Winter & Elam, for appellants. P. W. Bartholomew and C. E. Averill, for appellee.

LOTZ, J. The appellee sued the appellants to recover damages for personal injuries sustained by him through and by the alleged negligent acts and conduct on the part of appellants. The complaint, after stating the business in which appellants were engaged, and describing the location where it was carried on, then further alleges that appellants operated in their establishment a very large and powerful printing press, called the "Babcock Printer." A full description of this machine is given, and it is averred that the removal of a certain heavy iron roller from its place in the press was a work of great hazard while the belt communicating power to the press was revolving on the loose pulley at the side of the machine; that at the time the appellee received his injury he was a boy about 17 years of age, of immature judgment and experience, and ignorant of and uninstructed in respect to the hazard and peril stated; that he was learning the trade of "pressman" in said establishment by and with the consent and approval of appellants, and under the direction and control of their foreman; that appellee was ordered by the foreman to remove the iron roller aforesaid, so that the same might be repaired; that it was necessary, in order to remove the roller, to get within the frame of the press; that while he was obeying and carrying out the order of the foreman, and while he was in the exercise of due care, and without any fault or negligence on his part, he received the injuries which resulted in the loss of his leg; that at the time he received such injuries he was ignorant of the hazard and danger incident to said work, and had never been warned nor instructed in relation thereto; that on account of appellee's youth, inexperience, and immaturity of judgment, he did not and could not know how to perform, nor had he been instructed by appellants, nor any one for them, as to the manner of performing, such work so as to avoid the danger;

that he had no assistance, and that no one was ordered or directed to assist him; that the belt was not thrown off the pulley, nor was he authorized to throw it off. It is also alleged that the throwing of the belt from the pulley was exclusively under the control and direction of the foreman; and it is further averred that the appellants, by the exercise of proper care, might have known, and did know, that the appellee was of immature judgment and experience, and ignorant of and uninstructed in respect to the dangers of the work; that appellants had full knowledge of all the hazards and dangers of the work, but that, notwithstanding their full knowledge in the premises, they carelessly and negligently ordered him to perform the work without providing any assistance, and without warning him or instructing him in any respect, and without taking any means to care for his safety. These are the substantial allegations showing the manner of the infliction of the injuries and the negligence of the appellants. There was a trial by jury, and a verdict for appellee in the sum of \$1,000. The jury also returned answers to certain interrogatories submitted by the appellants. A motion for a new trial was filed and overruled, and final judgment followed. The ruling on the motion for a new trial is the only error assigned.

The appellee asserts that the motion for a new trial was never properly presented to the trial court, and that for that reason this court should not consider it. The basis for this claim is that the record does not affirmatively show its presentation to the trial court, and that this court will not assume anything not affirmatively shown by the record in order to overthrow the judgment, (*Cline v. Lindsey*, 110 Ind. 337, 11 N. E. Rep. 441; *Graves v. Duckwall*, 103 Ind. 560, 3 N. E. Rep. 263;) and, further, that the appellee is entitled to everything in the record which may prevent a reversal upon the errors assigned, (*Martin v. Martin*, 74 Ind. 207.) It is true that a motion for a new trial must be presented to the court. Filing it with the clerk alone is not sufficient. *Emison v. Shepard*, 121 Ind. 184, 22 N. E. Rep. 883; *Gilbert v. Hall*, 115 Ind. 549, 18 N. E. Rep. 28. The record in this case, however, shows that the cause was tried "before the Honorable Edgar A. Brown, sole judge of the said Marion circuit court." It also further appears that on the 18th day of February, 1891, being the thirty-ninth judicial day of the January term, 1891, the jury returned its verdict into open court. "And afterwards, to wit, on the 26th day of February, 1891, being the forty-sixth judicial day of the January term, 1891, of said court, before the same honorable judge, the following proceedings were had herein; that is to say: Come now the defendants by their attorneys, and file their motion and written reasons for a new trial in this cause, in the words and figures following, viz." Then follows in the record the action of the court. At the next succeeding March term of the court this motion was overruled. It is not sufficient to present the

motion and written causes to the clerk, and request that the same be placed among the files of his office, but the motion must be brought to the attention and knowledge of the court. The record does not say in direct terms that the motion was brought to the notice and knowledge of the court, but it does purport to give the proceedings had in a certain cause in the Marion circuit court, and while the Honorable Edgar A. Brown was presiding as judge thereof. This indicates that the court was in actual session at the time. A "court" has been defined as "a place where justice is judicially administered." Co. Litt. 58; 8 Bl. Comm. 23. This definition, however, has been often criticised as too narrow, being limited by the word "place." The prominence of the word "place" in this definition no doubt arises from the ancient idea that the king was the fountain and dispenser of justice, and wherever he was domiciled was a court or place where justice was dispensed. In modern times, and under our form of government, the judicial power is exercised by means of courts. A court is an instrumentality of government. It is a creation of the law, and in some respects it is an imaginary thing, that exists only in legal contemplation, very similar to a corporation. A time when, a place where, and the persons by whom, judicial functions are to be exercised, are essential to complete the idea of a court. It is in its organized aspect, with all these constituent elements of time, place, and officers, that completes the idea of a court in the general legal acceptance of the term. But a court may exist in legal contemplation without any officers charged with the duty of administering justice. The officers might all die or resign, and still the legal fiction would continue to exist. The judge of a court, while presiding over the court, is by common courtesy called "the court," and the words "the court" and "the judge" or "judges" are frequently used in our statutes as synonymous. *Michigan Cent. R. Co. v. Northern I. R. Co.*, 3 Ind. 239, 245. The record from which we have quoted shows that the sole judge of the court was presiding over the court at the time the motion was filed. We have here all the elements of time place, officer, and actual exercise of judicial power. It is sufficiently shown that the motion was presented to the court at the term when the trial was had.

The facts as proved on the trial are substantially as follows: William H. Levy and Louis H. Levy were partners carrying on the business of printing in Indianapolis, Ind. In May, 1890, the firm had four printing presses, one of which was called a "Babcock Press," two were called "Potter Presses," and one a "Cincinnati Stop Press." The Cincinnati press was a small one, and the Potter presses were smaller than the Babcock press. The presses were operated by steam power. There were 10 persons, including apprentices, employed in the establishment. The work was in charge of a foreman. On the 22d day of January, 1888, the appellee, Isaac Bigelow, became an apprentice in this

printing establishment. He desired to learn the trade of a pressman. At the time of beginning work for the appellants the appellee was 16 years and 4 months old. Before commencing to work in such establishment appellee had no knowledge of the printing business or the press. He was placed under the control of the appellants' foreman. He was bright, intelligent, and active, and possessed at least usual physical strength for one of his age. He was injured while working about the Babcock press, on the morning of the 27th of May, 1890. He worked continuously for appellants from the 22d day of January, 1888, to the time of his injury, being a period of two years and four months. He was employed in various ways, and at different parts of the work carried on by appellants. Before the injury appellee had assisted in taking the Babcock press apart and in setting it up again in a new location. This Babcock printing press was a machine upon which an employee might be injured, but it was not an especially dangerous machine; nor were its operation and construction difficult to comprehend. The appellee was familiar with its construction and the method of operating it. The Babcock printer was set in an iron frame, was about 7 feet high at one end, and lower at the other, about 12 feet long, 2 feet wide at the front, and wider in other portions. There was an ink well or fountain at the top, large enough to hold a considerable quantity of ink. When the machine was operated the ink was slowly discharged from this fountain upon a system of rollers placed below it in the iron frame, by which rollers the ink was distributed until a space at least as wide as the matter to be printed was saturated with ink; under these rollers, which were made of different materials, and differed somewhat in size and weight, there was passed back and forth what was called the "bed" of the press. This bed carried the form from which the printing was done, and the paper upon which the impression was to be made was fed to the machine by an employee. The bed was securely placed in the press, and was very heavy. When the press was in operation the play or movement of the bed was from one end of the press to the other, or nearly so. The bed was about five feet wide, and had a play or movement back and forth of about four feet. The movement of the bed was not rapid, as time was allowed for the ink from the rollers to make a distinct impression upon the paper. At one end of the frame there were two cylinders, and upon the end of the movable bed, which, when in operation, approached that end of the press frame, there were two plungers, which fitted closely into the cylinders, and thus constituted an air chamber, which served to gradually check and stop the movement of the bed. There was a short counter shaft above the press, about 10 feet from the floor, from which the power was communicated to the machine or press by means of a belt. This belt passed from a pulley upon the shaft to a pulley on the south side of the press. Within about an eighth of an inch of the fixed

pulley upon which this belt ran when the machine was in operation there was upon the same shaft a loose pulley, to which the belt was shifted when the machine was to be stopped. The same result could be accomplished by throwing the belt from the pulley on the counter shaft above the machine, and if the press was to be stopped for a considerable time the latter course was sometimes adopted, although it was not usual to stop it in this way. When the belt was shifted from the tight to the loose pulley, or vice versa, it was done by means of a shifter which was on the opposite or north side of the machine. This shifter consisted of an upright lever, standing outside of the frame of the press, working loosely on a bolt, which bolt was placed about 18 inches from the lower end of it. The lower end of the shifter connected with a rod which passed across the lower part of the press, and was adjusted with respect to the belt which was to be shifted from the fixed to the movable pulley in such a way that when the top of the shifter was moved towards the frame a distance of about 3 or 10 inches the belt would be forced upon the fixed pulley, and the machine would start; and when the top of the shifter was pushed outward from the frame the belt would be transferred to the loose pulley, and the press would stop. If a small portion of the width of the belt was moved upon the tight pulley, the resistance readily forced the whole width upon the pulley, and started the press. The upper part of the shifter was shaped so as to be convenient to grasp with the hand, and in the operation of the machine the belt was moved from the fixed pulley to the loose one, and back again from the loose pulley to the fixed one. The method of throwing the lever which constituted the shifter back and forth, and thus starting and stopping the press, was simple, and easily comprehended by any one of ordinary intelligence who operated the machine for a short time, or saw others operating it. The appellee was acquainted with the action and purpose of the shifter and the method of using it. He testified that, among other work done at appellants' place of business, he fed and assisted in the operation of the machine by which he was injured, and had used the shifter in starting and stopping the press. One of the first things learned by an apprentice in that establishment was to feed the press. He had advanced beyond that stage of apprenticeship, and at the time of his injury was assisting "on the floor," as it was called, which meant, among other things, that he assisted in making up and putting in the forms from which the printing was done. When feeding, it was necessary to stop and start the press about every 20 minutes. During the several months' service in said establishment, appellee operated the shifter, starting and stopping the machine by means of it a large number of times; and he had often assisted in cleaning and preparing the press, and had been present when others were doing it, and had often on such occasions seen the shifter tied with a rope, or propped with a

stick, so that it could not be accidentally readily moved; and on other occasions had seen the belt that ran the press thrown from the pulley on the counter shaft above by means of a long stick kept in the place for the purpose of shifting belts from pulleys on the shafts overhead. Some such precaution was taken to prevent the accidental starting of the press whenever it was necessary to get inside of the frame, or under the bed upon which the form was carried, or elsewhere, when there was danger of being caught by the heavy bed if set in motion. There were at least three ways of preventing such an accidental starting of the press, with all of which the appellee was familiar, and each of which he had often seen employed, and in some instances had himself assisted in so securing the press by tying the shifter, by propping it with a stick between the framework, and by throwing the belt from the pulley on the counter shaft. He sometimes shifted the belts with the iron rod, which was an easy thing to do, and he knew perfectly well how to do it. Among the rollers mentioned there was one of iron, about 5 feet long and 2½ inches in diameter, weighing from 50 to 60 pounds, and, when in place, extending horizontally from the north to the south side of the press. It was necessary to remove this roller frequently, at least as often as once a day, for the purpose of cleaning it, and this was a part of work performed by apprentices, and had often been done by appellee. This roller might be removed from its place, if two persons were doing it, by one standing at each end, entirely outside of the frame, and lifting it from its place. If one person was removing it, he could stand outside the frame, and, if he possessed sufficient strength, lift one end of the roller with one hand, and extend the other towards the center of the roller, and, grasping it there, lift it and draw it towards him and thus remove it to be cleaned. One objection to taking it out this way was that, in grasping the roller towards the middle, the hand became covered with ink, as that part of the roller was always wet with ink. Appellee had removed the roller for the purpose of cleaning it, without assistance, at least a dozen times. It was somewhat easier to lift from its place by grasping it with both hands near the center, and appellee had removed it on former occasions by grasping it in this manner. On the day of the injury appellee had stepped inside of the frame of the machine, and within the space where the bed carrying the form moved back and forth. He had removed the roller in this way a number of times before, without accident. There was on the north end of this iron roller a small projection, called a "spindle," about six inches long, and extending around it in the form of a collar or ring, which stood at right angles to the axis of the roller, and projected beyond the outer surface of the roller an inch or more. Near the end of this spindle was a spool, cam, or cog, as it is variously called by the witnesses, which served to give the roller a vibratory motion, which was necessary in the



proper distribution of the ink. This spool or cam was a round piece of iron  $1\frac{1}{2}$  inches in diameter and  $1\frac{1}{2}$  inches in length, firmly attached to the spindle of the roller, the spindle passing through it. In lifting the roller from its place by grasping it with both hands in the middle part it was convenient, in order to get it out of its bed and clear of the frame of the machine, first to pass the north end outside of the frame, and in close proximity to the vertical shifter, and then carry it somewhat to the south again. After the south end had passed certain obstructions presented by the framework and other parts of the press, it could be lifted out. Appellee was familiar with the roller and the projecting spool at the north end, and with the position and movement of the shifter, which stood outside of the frame of the machine. On the morning of the day when the injury was inflicted appellee was preparing to begin the operation of the press, when he discovered that there was a broken cog in the machinery which operated the roller, and informed the foreman of the fact. The foreman directed him to remove the roller from the press, and take it to a machine shop, and have it repaired. There was at the time another apprentice and some journeymen about the place in the building, and the apprentice had just been assisting appellee in some work he was doing about the press, but had gone to some other part of the room. At this time the belt was running on the loose pulley. Without asking any assistance, appellee undertook to remove the roller, and without securing the shifter in any manner, or throwing the belt from the pulley at the counter shaft above, he stepped inside the frame of the press, lifted the roller from its bed, passed it to the north until the end carrying the projecting spool extended beyond the shifter, and then drew it towards the south, when the spool or spindle caught upon the shifter and pulled the shifter towards the press. This shifted the belt from the loose pulley to the fixed one, and started the press. Before appellee was aware that the shifter had been moved, or had time to escape, his leg was caught between one of the cylinders constituting the air chamber, and its plunger, or some part of the frame of the moving bed, inflicting an injury which afterwards required the amputation of the limb. Appellee could not see the position and movement of the north end of the roller as it was projected near the shifter and drawn back again, for the reason that the ink fountain above the rollers obstructed his vision, and he did not feel the spool, spindle, or projection catch the shifter as he drew the roller back, but he testified that he knew of no other way in which the press could have been started. He also testified that he knew that if the machine started while he was in the frame there was great danger of being caught. The appellee had from time to time received instructions as to the manner of doing his work and of operating the press, and had often seen others remove the rollers, and do other work necessary in cleaning and repairing it, and he had often assisted in this work.

But no one had ever warned him of the danger, or instructed him how to take the rollers out alone. Appellee was receiving five dollars per week for his services.

In making this summary, we have given the appellee the advantage of every conflict in the evidence, and resolved every doubt in his favor. At the request of appellants, the court submitted certain interrogatories to the jury, to be answered with their general verdict. The interrogatories and answers are as follows: "(1) Did not the plaintiff know, before he received the injury of which he complains, that it was unsafe to stand inside the frame of the printing press while engaged in removing the roller, unless the belt was removed from the pulleys at the counter shaft, or the shifter was fastened, so that it could not be moved by coming in contact with the roller? Answer. No. (2) Did not the plaintiff know, before he received the injury of which he complains, that the roller could be removed by one person without danger if the belt was removed from the pulleys at the counter shaft, or the shifter was tied or otherwise fastened, so that it could not be moved? Answer. No. (3) Had not the plaintiff himself, at various times before he received the injury of which he complains, while working about the printing press in question, removed the belt from the pulleys at the counter shaft, and tied back the shifter, and fastened it back with a stick, so as to prevent it being moved while he was engaged in his work? Answer. No. (4) If you answer the last interrogatory in the affirmative, did not the plaintiff, in so acting, do so because he knew there was danger of the press being started by the shifter being moved while he was engaged in his work? Answer. No. (5) Did not the plaintiff know, or could he not have known if he had reflected or looked, before receiving the injury of which he complains, that there was danger of the end of the roller coming in contact with the shifter and starting the press, if he should attempt to remove the roller by standing inside the frame and pushing the end of the roller through the frame towards the shifter, and then withdrawing it towards himself? Answer. No. (6) Did not the plaintiff know, or, if he had reflected, would he not have known, that it was unsafe to remove the roller, without assistance, while standing inside the frame, and in such a position that he could not see the end of the roller next to the shifter, or the shifter itself, by pushing the roller through the frame towards the shifter, and then withdrawing it towards himself? Answer. No. (7) What, if anything, was there that prevented the plaintiff from having assistance in removing the roller? Answer. Nothing. (8) What, if anything, was there that prevented the plaintiff from tying back the shifter, or fastening it back with a stick, or from removing the belt from the pulleys at the counter shaft, before he attempted to remove the roller? Answer. None. (9) Had not the plaintiff, before he received the injury in question, worked for defendants for over two years and four months, and become familiar with the printing



press in question, and the danger of working inside or under it unless the belt was removed from the pulleys at the counter shaft, or the shifter was tied or otherwise fastened back? Answer. No." The appellee contends that this court may look to the interrogatories and answers to assist it in determining whether or not the verdict is supported by sufficient evidence. The main purpose of interrogatories and the answers thereto is to test the correctness of the general verdict. It is also true that the special findings may sometimes be looked to for other purposes. *Railroad Co. v. Newell*, 104 Ind. 264, 3 N. E. Rep. 836. The general verdict covers all the issues in the case, and, if the special findings harmonize with the general verdict, they may be taken as corroborative, for they then indicate that the jurors have considered special facts in arriving at their verdict. But the general verdict yields to the special findings only when there is such a conflict between them that they cannot be reconciled upon any reasonable hypothesis. *Railroad Co. v. Marohn*, 84 N. E. Rep. 27, (decided at this term of this court.)

The answers to the interrogatories, as above set out, in the main corroborate the general verdict, but they do not entirely harmonize with it, for the answers to Nos. 7 and 8 have a tendency to show contributory negligence on the part of the appellee. Several of the answers seem to us to be in direct conflict with admitted facts. In this condition of the special findings, we are able to derive but little, if any, assistance from them in determining whether or not the verdict is supported by the evidence. In determining this question we believe the correct rule is to look to the evidence alone, and be uninfluenced by the special findings. Whether or not this court has the right to disturb the judgment of the lower court for want of evidence to support the verdict depends upon several contingencies. Where there is a conflict in the evidence this court will not weigh it, but must accept the verdict and judgment of the lower court as conclusive. However, when all the material facts are conceded, or are undisputed, and only one inference can be legitimately drawn from them, this court has the same right to draw the inference as has the jury or the trial court. The issue here is negligence, and negligence is usually a mixed question of law and fact. An act, under certain circumstances, may constitute negligence, and the same act, under other circumstances, may not constitute negligence at all. The questions of care and want of care depend upon the circumstances. If only one inference can be legitimately drawn from them, and that inference indicates a want of proper care, then negligence may be ruled as a matter of law. If the inference indicate proper care, then no negligence may be ruled as a matter of law. Under such circumstances it is the duty of the court either to direct a verdict or wreat the case from the jury and pronounce judgment upon the facts. If, however, both inferences may be reasonably drawn from the circumstances, it is a question for the jury to determine which one

shall prevail under proper instructions from the court. These same rules govern the questions of contributory negligence. The jury cannot, arbitrarily, infer negligence from any state of facts. It is the duty of the court to instruct the jury what facts within the issues, if established by the evidence, may or may not, under the circumstances, constitute negligence or contributory negligence, leaving to the jury the duty of determining whether the facts have been proved or not, and the inferences to be drawn therefrom. *Railway Co. v. Collarn*, 73 Ind. 261; *Railway Co. v. Eves*, 1 Ind. App. 224, 27 N. E. Rep. 580; *Evans v. Express Co.*, 122 Ind. 362, 23 N. E. Rep. 1039; *Shoner v. Pennsylvania Co.*, 130 Ind. 170, 28 N. E. Rep. 616, 29 N. E. Rep. 775; *City of Franklin v. Harter*, 127 Ind. 446, 26 N. E. Rep. 882; *Railway Co. v. Locke*, 112 Ind. 404, 14 N. E. Rep. 391; *Gregory v. Railway Co.*, 112 Ind. 385, 14 N. E. Rep. 228; *Mann v. Railroad & Stock-Yard Co.*, 128 Ind. 188, 26 N. E. Rep. 819; *Rush v. Mining Co.*, 131 Ind. 135, 30 N. E. Rep. 904; *Railroad Co. v. Stout*, 17 Wall. 657; *Elliott, Works of Advocate*, pp. 690, 691, and authorities cited; *Brown v. Wood*, (Pa. Sup.) 16 Atl. Rep. 42. If, from the conceded or undisputed facts of this case negligence and the absence of contributory negligence may be reasonably and fairly inferred, then this court has no right to invade the province of the jury and weigh the evidence. The verdict will not be disturbed except in very clear cases. *Bridge Co. v. Quinkert*, 2 Ind. App. 244, 28 N. E. Rep. 338; *Elchel v. Senhenn*, 2 Ind. App. 208, 28 N. E. Rep. 193. The same is true with reference to the nonexistence of contributory negligence. In actions of tort, whether or not a certain act constitutes negligence depends upon the duties imposed by law. This leads to the inquiry as to the respective rights and duties of the appellants and appellee. It is the duty of the employer to furnish his employe with reasonably safe machinery, tools, and appliances, and place to work, and exercise reasonable supervision and care to keep them safe. The employe has the right to repose confidence in the prudence and caution of the employer, and rest on the presumption that he has and will do his whole duty in supplying such appliances, and in keeping them reasonably safe. He may also rest upon the presumption that the place where, and the appliances with which, he works are safe from any hidden or undisclosed perils which are not open and obvious to his senses; but the employer is not an insurer of the employe against injury, nor is he required to supply appliances that are safe beyond question. *Railway Co. v. Roesch*, 126 Ind. 445, 26 N. E. Rep. 171; *Pennsylvania Co. v. Burgett*, (Ind. App.) 33 N. E. Rep. 914; *Pennsylvania Co. v. Brush*, 130 Ind. 317, 28 N. E. Rep. 615; *Car Co. v. Parker*, 100 Ind. 181; *Railway Co. v. Buck*, 116 Ind. 566, 19 N. E. Rep. 453; *Bradbury v. Goodwin*, 108 Ind. 286, 9 N. E. Rep. 302. There are also certain duties resting upon the employe. He is not required to search for hidden or undisclosed perils, but he must take notice of such as are open and obvious to his senses; and he is bound to

use the machinery and appliances with prudence, and exercise that degree of care commensurate with the known dangers involved. *Griffin v. Railway Co.*, 124 Ind. 326, 24 N. E. Rep. 888; *Water-Supply Co. v. White*, 124 Ind. 376, 24 N. E. Rep. 747; *Light & Power Co. v. Murphy*, 115 Ind. 566, 18 N. E. Rep. 80; *Railway Co. v. McCormick*, 74 Ind. 440; *Umbach v. Railroad Co.*, 83 Ind. 191. These rules apply in all cases where the master and servant are upon an equal footing.

The charge made by the complaint is not that the machine itself was dangerous, or the removal of the iron roller a specially hazardous undertaking, but the peril averred is in attempting to remove the roller by getting within the frame while the belt was revolving on the loose pulley in close proximity to the tight pulley that communicated power to and set the machinery in motion. This peril, it is charged, the appellee was incapable of understanding and appreciating, owing to his youth, immature judgment, and want of experience, and that appellants failed to give him proper instruction or furnish him with assistance. Appellee's own admissions dispel several of these averments. It is apparent from his admissions that he was possessed of sufficient capacity and understanding to know how easily the belt could be shifted from the loose to the tight pulley. This he had done a great number of times. He also knew that it was dangerous to be within the frame when the machine was in motion. He knew how to secure the shifter, by tying it with a string, or by propping it with a stick, so that the belt could not be easily transferred to the tight pulley. Both of these he had done many times. He also knew that the roller could be removed without getting within the frame by two persons standing on the outside, for this he had assisted in doing. He might have had help had he desired it, and thereby need not have exposed himself to the action of the sliding bed. We think the danger involved in attempting to remove the roller by getting within the frame while the belt was revolving on the loose pulley without securing the shifter was an open and obvious danger, and that appellee had sufficient judgment and experience to know and appreciate it without instructions. In *Pennsylvania Co. v. O'Shaughnessy*, 122 Ind. 558, 23 N. E. Rep. 675, it was held that an employee who does what he is ordered to do by the master, or those placed over him, is protected, to a reasonable extent, by the order while engaged in performing the special duty enjoined upon him, but that it is incumbent upon him, whether acting under the orders or not, while engaged in the line of his duty, to use ordinary care to avoid injury; that, where there are two ways open to him to do a certain thing, one of which is entirely safe and the other perilous, and he voluntarily adopts the dangerous method, knowing the danger to which he exposes himself, and using no precaution to avert it, he is guilty of contributory negligence, and cannot recover. Here there were three ways by which appellee might have done the thing ordered

in comparative safety: By securing the shifter, by throwing the belt off the pulley on the counter shaft, and by calling assistance. If he recklessly or heedlessly exposed himself to the danger, then his own negligence contributed to the injury, and he cannot recover.

We accord to the appellee the full force of the rule that, where negligence is a matter of inference for the jury to draw, this court has no right to interfere with the verdict; but the conceded facts of this case fail to show that he did not understand and appreciate the perils involved. If he appreciated the danger, he must have had sufficient judgment to avoid it by the exercise of due care. Upon both principle and authority it is clear that in respect to all matters wherein a young and inexperienced employee is competent to understand and avoid the dangers, such employee stands upon the same footing with an experienced adult. Counsel for appellants, in their able and exhaustive brief, have cited many authorities bearing upon this question. We call attention to a few that seem most pertinent. In *Costello v. Judson*, 21 Hun, 396, a boy 14 years of age was employed to carry water in the building where a number of persons were employed. While ascending in the elevator he projected his foot beyond the elevator floor, so that it was caught upon the arch of one of the doors opening into the elevator, and so injured that amputation was necessary. The court affirmed a judgment for the defendant, saying: "The danger of injury which would obviously result from allowing one of his feet to project beyond the platform of the elevator in its ascension would, we think, be obvious to a youth of the age of 14, of ordinary capacity, which it appears the plaintiff was proved to be of; and it cannot be that it is the duty of the master to give his employee an express and particular instruction to guard against such dangers as are evidently obvious." In *Robert v. Phipps*, (Mass.) 21 N. E. Rep. 370, a boy of 15 had worked in a silk mill about 3 weeks. In starting and stopping the machines about which he was employed he had to go into a somewhat narrow space between them, and throw a belt on or off a wheel. In doing so he was caught by a part of the gearing which projected and was rapidly revolving, and he was injured. He had no knowledge of machinery before entering this employment. He had always been warned by fellow employees against getting caught in the gearing, but the court puts its decision upon the ground that the danger was obvious, and held the defendant not liable, saying: "We think that it appears from the testimony of the plaintiff himself that the danger of getting caught in the gearing was obvious, and that he well understood what this danger was, and how it was to be avoided; and that it was from his own want of care that he was injured." In the case at bar the appellee testified that he knew that if the machine was started while he was in the frame there was danger of being caught. In *Buckley v. Manufacturing Co.*, 113 N. Y. 540, 21 N. E. Rep. 717, a boy about 12 years

of age was employed to assist in operating a machine in a factory. He had been thus engaged about three days, when, in attempting to put a cylinder in place, his foot slipped, and he threw out his hand to save himself from falling, and thrust it into the cogs of some revolving wheels about nine inches from the end of the cylinder, and the hand was crushed. The court said: "It is idle to say that this plaintiff did not know, as well as a grown man, that if he placed his fingers between the revolving cogs he would be injured. \* \* \* It is impossible to perceive how the absence of instructions had anything to do with this injury. He had been sufficiently instructed by what he saw during the time he had been employed there. He had seen the machine operated, and had worked about it. He had seen this cylinder removed by others, and had himself assisted in removing it. What further knowledge could have been given him by instructions it is impossible to discern. \* \* \* We think it is preposterous to say that it was the duty of the employer to warn him not to put his fingers in between the cogs. It might as well be required to warn a boy twelve years old, who was working about boiling water, or a hot fire, not to put his hand into the water or the fire. \* \* \* There is no rule of law that a minor may not be employed about a dangerous machine, and the simple fact that a machine is dangerous does not make an employer liable for an injury received by a minor employed upon such machine. All the law requires is that the minor should be properly instructed as to the danger to which he is exposed; and, if he is injured because he has not received such instructions, then, as a general rule, the employer may be held responsible. But where the minor is familiar with the machine, and its character and operation are obvious, and he is aware of and fully appreciates the danger to be apprehended from working the machine, the fact that he is a minor does not alter the general rule that the employee takes upon himself the risks that are patent and incident to the employment." *Stuart v. Patrick*, (Ind. App.) 30 N. E. Rep. 814; *Engine Works v. Randall*, 100 Ind. 293; *Railway Co. v. Adams*, 105 Ind. 151, 5 N. E. Rep. 187; *Hickey v. Taaffe*, 105 N. Y. 26, 12 N. E. Rep. 286; *Sjogren v. Hall*, 53 Mich. 274, 18 N. W. Rep. 812; *Palmer v. Harrison*, 57 Mich. 182, 23 N. W. Rep. 624; *Anderson v. Morrison*, 22 Minn. 274; *Fones v. Phillips*, 39 Ark. 17. Many other cases might be cited to the same effect. In reaching this conclusion we do not overlook the rule that the master is liable for an injury resulting if he employ one of immature judgment, and without instruction set him to perform service the peril of which, on account of his immature age, he is incapable of appreciating, although visible; or if, being instructed and cautioned, his mind is so immature as not to be capable of understanding the instruction and warning. It is not always that instruction and warning will absolve the master. *Coal Co. v. Gaffney*, 119 Ind. 455, 21 N. E. Rep. 1102; *Coal Co. v. Young*, 117 Ind. 520, 20 N. E. Rep. 423. We do not think the facts

of this case bring it within that rule. Even if it be a matter of doubt as to whether the appellants were guilty of negligence, we think, upon the conceded facts and admissions of appellee, that contributory negligence may be ruled as a matter of law. Judgment reversed, with instruction to grant a new trial.

(145 Ill. 208)

UNION NAT. BANK OF CHICAGO v.  
LOUISVILLE, N. A. & C. RY. CO.<sup>1</sup>

(Supreme Court of Illinois. May 9, 1893.)

USURY—NATIONAL BANKS—CORPORATIONS—  
PLEADING.

1. A bank made a loan, and took therefor the borrower's note, payable in six months, which it discounted at 6 per cent. per annum. The borrower orally agreed to open an account with the bank, and in default thereof to pay the bank 2½ per cent on the loan as "commission." The money lent belonged to the bank, and there was no agent or broker employed in the matter. *Held*, that the agreement to pay the 2½ per cent. was usurious, under Rev. St. 1881, c. 74, which declares that no person shall receive interest at a greater rate than 8 per cent. per annum.

2. Act July 1, 1879, § 11, which declares that no corporation shall interpose the defense of usury in any action, does not render enforceable contracts by corporations for the payment of usurious interest.

3. Said act does not prevent a corporation, when sued by a national bank for usurious interest, from setting up in defense that the transaction is illegal under Rev. St. U. S. § 5197, which forbids national banks from charging interest in excess of the rate allowed by state laws.

Appeal from appellate court, first district.

Assumpsit by the Union National Bank of Chicago against the Louisville, New Albany & Chicago Railway Company. Defendant obtained judgment, which was affirmed by the appellate court. Plaintiff appeals. Affirmed.

The other facts fully appear in the following statement by BAILEY, C. J.:

This was a suit in assumpsit, brought by the Union National Bank of Chicago, against the Louisville, New Albany & Chicago Railway Company, a corporation existing under the laws of the state of Illinois. To the declaration, which consisted of the common counts, including a count for interest, the defendant pleaded non assumpsit, and two special pleas. By the first plea it was alleged, in substance, that the plaintiff is a national bank existing under the laws of congress; that the several causes of action in the declaration set forth are one and the same, viz. the cause of action alleged in the first count; that before the making of the promises in that count mentioned it was corruptly and unlawfully agreed between the plaintiff and defendant that the plaintiff should loan to the defendant the sum of \$150,000, and should forbear the same for the period of six months from that day, and that for such loan and forbearance the plaintiff should retain 6 per

<sup>1</sup>Reported by Louis Boiset, Jr., Esq., of the Chicago bar.

cent. of the \$150,000, and that in addition thereto the defendant should pay 2½ per cent. commission,—making in all 8½ per cent. to be paid by the defendant as interest on the loan,—and that to secure the payment of the \$150,000 and the 6 per cent. discount the defendant should make and deliver to the plaintiff its promissory note therefor; that in pursuance of this unlawful and corrupt agreement the plaintiff then and there loaned to the defendant the sum of \$150,000, and deducted and retained 6 per cent. thereof, and the defendant executed and delivered to the plaintiff its promissory note for the full sum of \$150,000, which was fully paid at maturity, and that this suit is brought to recover the 2½ per cent. in addition to the 6 per cent. so taken and retained by the plaintiff; that the 6 per cent. deducted, and the 2½ per cent. now sued for, exceed the rate of \$7 for the forbearance of \$100 for one year, contrary to the laws of congress in relation to national banks, by means whereof, and by force of the statute, the promises in the declaration alleged are wholly void in law. The second special plea sets out the provisions of sections 5197 and 5198 of the Revised Statutes of the United States, and alleges, in substance, that there is no law in the state of Illinois fixing or limiting the rate of interest which the defendant, as a corporation, may agree to pay, the defendant being expressly exempted and excluded from the law of the state fixing the rate of interest; that by reason thereof the provisions and limitations provided by the laws of congress apply, and expressly prohibit the plaintiff, as a national bank, from charging or receiving interest to exceed the rate of 7 per cent. per annum; that the several causes of action alleged in the declaration are one and the same, viz. the one alleged in the first count; that before the making of the promises in that count alleged it was corruptly and unlawfully agreed between the plaintiff and defendant that the plaintiff should lend to the defendant \$150,000, and should forbear the same for six months from that date, to wit, from September 17, 1890, and that for such loan and forbearance the plaintiff should retain 6 per cent., as for interest, out of the \$150,000, and that in addition thereto the defendant should secure for the plaintiff the deposits of the Chicago & Western Indiana Railroad Company, and in case of failure to secure for the plaintiff that company as a depositor the defendant should pay the further sum of 2½ per cent. for said loan and forbearance; that to secure the payment, as aforesaid, of the \$150,000, and the interest discount of 6 per cent. thereon the defendant should make and deliver its promissory note therefor to the plaintiff; that on the day aforesaid, in pursuance of said corrupt and unlawful agreement, and in violation of the provisions of the laws of congress, the plaintiff then and there loaned to the defendant \$150,000, and deducted therefrom, as interest, 6 per cent. thereof, and the defendant executed and delivered to the plaintiff its promissory note for \$150,000, which it fully paid and discharged at maturity; that the defendant did not secure the Chicago & Western

Indiana Railway Company as a depositor of the plaintiff, and this suit is brought to recover, in addition to the 6 per cent. so taken and retained by the plaintiff, the 2½ per cent. aforesaid.

The cause coming on for trial before the court, a jury having been waived, it was stipulated by the parties that issues in the cause should be deemed to have been made and joined, as to the special pleas, the same as if formal replications, denying each traversable allegation, had been filed. The cause was then tried by the court upon the following facts admitted by stipulation: "On or about September 17, 1890, William L. Breyfogle, then president of the Louisville, New Albany & Chicago Railway Company, verbally arranged with the Union National Bank of Chicago for a loan of one hundred and fifty thousand dollars to said railway company, the repayment thereof to be secured by collateral security in the form of three hundred bonds of the general gold bonds of the Louisville, New Albany & Chicago Railway Company, said bonds being in the denomination of one thousand dollars each. It was verbally agreed in this arrangement that the bank should discount from this one hundred and fifty thousand dollars interest at the rate of six per cent. per annum, and that Mr. Breyfogle, president of the railway company, should endeavor to secure the Chicago & Western Indiana Railway Company as a depositor with said Union National Bank, and in case he failed so to do the said bank should have, in lieu of such deposit, a commission of two and one-half per cent. upon said \$150,000 in addition to said six per cent. thereon. The deposits of the Chicago & Western Indiana Railway Company would have been valuable to the said bank, as a part of its business, and it declined to make the said loan, except upon the terms above stated. After this arrangement had been thus agreed upon, Mr. Lewis, the treasurer of the railroad company, filed out a note for one hundred and fifty thousand dollars, dated September 17, 1890, payable six months after date, to the order of the Union National Bank, describing the collateral security, and providing that after maturity the note was to draw interest at the rate of 8 per cent. per annum, the note being as follows: '\$150,000.00. Chicago, Illinois, Sept. 17th, 1890. Six months after date, for value received, we promise to pay the Union National Bank of Chicago, or order, one hundred and fifty thousand dollars, in gold coin, or U. S. notes, or treasury notes, which are a legal tender, at its office in Chicago, with interest at the rate of eight per cent. per annum, after due, having deposited with it as collateral security (being the legal holder) for the payment thereof, and also for all other present or future demands of any kind of the said bank against the undersigned, due or not due, three hundred thousand dollars general mortgage gold bonds of the Louisville, New Albany & Chicago Railway Company, being 300 bonds of \$1,000 each,—Nos. 11,196 to 11,495, inclusive,—the market value of which is now \$——. Said bank has the right to

call for additional security satisfactory to it, and, if the same is not furnished on demand, may, at its option, declare this note immediately due and payable, without notice to us. And we hereby give the said Union National Bank of Chicago, or its assigns, full power and authority, on the maturity of this note, or at any time thereafter or before, at discretion, to collect or otherwise convert said securities, or either or any part of them, or any substitutes therefor, or any additions thereto, or, in the event of said securities depreciating in value, to sell said collateral securities, or any portion thereof, at public or private sale, at the discretion of said bank, without advertising the same, or otherwise giving notice to us, (and the said bank may become the purchaser at any public sale;) and said bank shall apply the proceeds, after the payment of all expenses attending said collection, conversion, or sale of the said collateral securities, to the payment of this note, with all interest due thereon, and return the overplus, if any, to us; and in case the proceeds of said collection, conversion, or sale of said collateral security shall not cover the principal, interest, and expenses, we promise to pay the deficiency forthwith. Louisville, New Albany & Chicago Ry. Co. [Signed] By Wm. J. Breyfogle, President. W. H. Lewis, Secretary. Union National Bank, Chicago, 23 Mar., 1891. Paid.' After this note had been duly prepared by Mr. Lewis, and executed by the railroad company, he took the note to the bank, and the bank accepted said note, and placed the amount thereof, less the interest, for six months at the rate of 6 per cent., as above stated, to the credit of the said railroad company. Upon the maturity of said note said loan was extended for 30 days by a further note of the same amount, prepared by Mr. Lewis in the same manner as the first note was prepared, and delivered by him, that note being similar in form with the one above set forth. Upon the delivery of this second note to the bank the first note was canceled, in the following words: 'Union National Bank, Chicago, 23 March, 1891. Paid,'—and returned to the railroad company. Upon the maturity of this second note the same was paid to the bank by the treasurer of the railroad company, according to its tenor and effect, and upon such payment said second note, and the three hundred thousand dollars of bonds therein named as collateral security, were returned to the said treasurer, as the proper officer of said railroad company to receive the same, and said second note was marked 'Canceled and paid.' The Chicago & Western Indiana Railway Company was not secured as a depositor with the said bank, nor has any part of the said commission of two and one-half per cent. been paid."

The foregoing being all the evidence offered, the plaintiff submitted to the court the following propositions to be held as the law in the decision of the case: "(1) The court finds, as a matter of law, that no corporation organized under the laws of Illinois can interpose the defense of usury in any action, even though the

plaintiff in such action (the lender) be a national bank organized under the act of congress establishing national banks. (2) The court finds, as a matter of law, that if, in consideration of the making of the loan in controversy by the plaintiff to the defendant, the defendant agreed that, in addition to paying six per cent. interest on said loan, it would secure the Chicago & Western Indiana Railway Company as a depositor of plaintiff, which said deposit account would have been of value to plaintiff, or, failing to secure such account, would pay plaintiff a commission of two and one-half per cent. on said loan in addition to said six per cent. interest, this would not constitute usury, or defeat a recovery by plaintiff, unless it should appear by a preponderance of the evidence that such arrangement was a mere shift or cover or device to evade the statute against usury, or the provisions of the national banking act, or that such was the intent or purpose of the parties, or one of them." The court refused to hold these propositions, but, at the request of the defendant, held the following: "The court holds, as a matter of law, that a national bank in Illinois has no legal right or authority to charge or receive interest in this state to exceed the rate of eight per cent., and that the statute of this state which denies to corporations the right to plead usury cannot expand the authority of national banks touching this subject, as conferred by, and fixed in, the national banking act." The court thereupon found the issues for the defendant, and, after denying the plaintiff's motion for a new trial, gave judgment in favor of the defendant for costs. On appeal to the appellate court that judgment was affirmed, and this appeal is from the judgment of affirmance.

Willits, Robbins & Case, for appellant.  
G. W. Kretzinger, for appellee.

BAILEY, C. J., (after stating the facts.) The judgment of the circuit court was affirmed by the appellate court on the ground that a recovery by the plaintiff would necessarily involve the admission of evidence of a contemporaneous parol contract to modify and add to the terms of the written contract. The loan from the plaintiff to the defendant, and its terms, were evidenced by a promissory note, and that note was an agreement in writing by which the defendant, for the consideration therein expressed by the words "value received," promised to pay the plaintiff, six months after date, the sum of \$150,000 in gold coin. The note having been paid and satisfied, the plaintiff now seeks to recover upon a parol contract made at the same time, and upon the same consideration, by which the defendant agreed to pay the plaintiff a further sum, equal to  $2\frac{1}{2}$  per cent. of the money loaned. We are strongly inclined to concur with the appellate court in the view that to enforce such parol contract would violate the well-established rule that where parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without any

uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, were reduced to writing, and that all oral testimony of a previous colloquium between the parties, or of conversations or declarations at the time when it was completed, must be rejected. The case does not seem to us to come within the exception frequently recognized,—that where it appears that the writing was not intended by the parties as an embodiment of their contract, but of only a part, or of some incidental matter connected with it, the rule excluding evidence of a contemporaneous oral agreement does not apply. The transaction between the parties here was a loan of money to be repaid at a stipulated time, with a stipulated rate of interest. All of these matters are embodied in the note, and the plaintiff is now insisting that, in addition to the interest reserved in the note, there was a contemporaneous agreement, not embodied in the writing, that a further sum, by way of interest on the loan, was to be paid. If there had been in fact an oral agreement to repay the loan at the end of six months with 8 per cent. interest, and the note had been executed and delivered,—as in fact it was,—evidencing an agreement to repay the loan six months after date, with 6 per cent. interest, no one, we think, would claim that the oral agreement could be proved. The admission of such evidence would be a palpable violation of the rule that an oral contemporaneous agreement cannot be proved for the purpose of changing the terms of the agreement, as reduced to writing. But the case supposed does not seem to us to differ in principle from the one now under consideration. The oral agreement now sought to be enforced has relation merely to a portion of the interest, and, as the agreement for interest was embodied in the note, the oral proof would only tend to show that the actual agreement of the parties in respect to interest was different from the one evidenced by the written agreement. The point is made in this court, which does not seem to have been urged in the appellate court, that the defendant, by stipulation that there was an oral contract for the payment of the money now sought to be recovered, has waived its right to object to the introduction of evidence of such contract. But, as we are disposed to place our decision on other grounds, we have not deemed it necessary to consider that contention with care, or to express any decided opinion in relation to it.

The substantial controversy in the case is whether the agreement to pay the money now sought to be recovered, admitting that such agreement was made, was usurious, and therefore void. According to the stipulation the agreement was, in effect, that the defendant, in addition to paying the 6 per cent. interest provided for in the note, should secure for the plaintiff, as a depositor, the Chicago & Western Indiana Railway Company,—a service which, it is admitted, would have been of value to the plaintiff,—or, in

case of its failure so to do, the plaintiff should be paid, in lieu of such deposit, 2½ per cent. commission upon the money loaned. There can be no doubt that this payment, though attempted to be disguised under the name of "commission," was, in legal effect, an agreement to pay a sum additional to the 6 per cent. as the consideration or compensation for the use of the money borrowed, and is to be regarded as, to all intents and purposes, an agreement for the payment of additional interest. The defense of usury set up by the pleas is based upon the provisions of the national bank act, and not upon the usury laws of this state. Indeed, as is admitted, the defendant, being a corporation, is prohibited by section 11 of our statute in relation to interest to interpose the defense of usury under that statute. But the laws of the state are referred to by the national bank act in such way that, in order to determine whether the defense of usury can be set up in any given case under the latter act, the provisions of both statutes must be considered. Sections 5197 and 5198 of the Revised Statutes of the United States, so far as they are material to the questions now under consideration, are as follows: "Sec. 5197. Any association may take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at the rate allowed by the state, territory, or district where the bank is located, and no more, except that where, by the laws of any state, a different rate is limited for banks of issue organized under the state laws, the rate so limited shall be allowed for associations organized or existing in any such state under this title. When no rate is fixed by the laws of the state or territory or district, the bank may take, receive, reserve, or charge a rate not to exceed seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. Sec. 5198. The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carried with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of interest thus paid from the association taking or receiving the same: provided such action is commenced within two years from the time the usurious transaction occurred." Sections 2, 4, 5, 6, and 11 of the statute of this state in relation to interest, in force at the date of the contract in question, were as follows: "Sec. 2. Creditors shall be allowed to receive at the rate of six per centum per annum for all moneys, after they become due on any bond, bill, promissory note, or other instrument of writing; on money lent or advanced for the use of another; on money due on the settlement of account, from the day of liquidating accounts between

the parties, and ascertaining the balance; on money received to the use of another, and retained without the owner's knowledge; and on money withheld by an unreasonable and vexatious delay of payment." "Sec. 4. In all written contracts it shall be lawful for the parties to stipulate or agree that eight per cent. per annum, or any less sum of interest, shall be taken and paid upon every one hundred dollars of money loaned, or in any manner due and owing from any person or corporation to any other person or corporation in this state, and after that rate for a greater or less sum, or for a longer or shorter time, except as herein provided. Sec. 5. No person or corporation shall directly or indirectly accept or receive, in money, goods, discounts, or thing in action, or in any other way, any greater sum or greater value for the loan, forbearance, or discount of any money, goods, or things in action than as above prescribed. Sec. 6. If any person or corporation in this state shall contract to receive a greater rate of interest or discount than eight per cent. upon any contract, verbal or written, such person or corporation shall forfeit the whole of said interest so contracted to be received, and shall be entitled only to recover the principal sum due to such person or corporation; and all contracts executed after this act shall take effect, which shall provide for interest or compensation at a greater rate than herein specified, on account of nonpayment at maturity, shall be deemed usurious, and only the principal sum due thereon shall be recoverable." "Sec. 11. No corporation shall hereafter interpose the defense of usury to any action.

It will be observed that, by section 2 of our statute, creditors are allowed to receive interest at the rate of 6 per cent. per annum on money lent to the use of another, and by section 4 it is made lawful, in all written contracts, to agree that interest at the rate of 8 per cent. per annum shall be taken and paid. By section 5 all persons and corporations are prohibited from accepting or receiving, either directly or indirectly, any greater rate for the loan, forbearance, or discount of money than is prescribed in the preceding sections. The rate of interest is thus expressly limited to 6 per cent. per annum in all cases where the agreement in respect to interest is not in writing, and, where the contract is in writing, 8 per cent. is allowed to be stipulated for, and no more; and the reservation of any greater rate of interest than is thus limited, by any person or corporation, is made unlawful, by express statutory prohibition. But it is urged that the effect of section 11, which prohibits corporations from interposing the defense of usury, is to create an exception in cases where corporations are debtors, so as to take all cases of that character out of the operation of the statute. The theory seems to be that, because a corporation cannot set up usury as a defense, any person or corporation dealing with a corporation, may lawfully exact such rate of interest as may be agreed upon, whether in excess of the statutory limit or not, so that, where a corporation

is the debtor, no rate of interest is fixed by the laws of this state. To this view we are totally unable to yield our assent. The defense of usury is made by setting up, and seeking to enforce, the forfeiture or penalty imposed by section 6 of the statute. That, doubtless, a corporation cannot do. But the force and efficacy of the statute, or the binding nature of its prohibitions, does not depend upon the penalty which it imposes for disobedience to those provisions. Whatever a statute forbids becomes unlawful, whether a penalty is annexed as a consequence of disobedience or not. While corporations cannot enforce the forfeitures imposed by our usury laws, it does not follow that the statutory prohibition against exacting or paying more than the lawful rates of interest has no application to them. The prohibition is general, and applies, by its terms, to every person or corporation; and no contract, whoever may be the parties to it, can be so framed as to provide for the reservation of more than the rates of interest allowed by the statute without being in contravention of the statute, and therefore unlawful. Nor does it follow that, because the debtor who has agreed to pay more than the legal rate of interest is a corporation, and therefore incapable of interposing the defense of usury, the law will treat the contract as valid, and enforce it according to its terms. No agreement between parties to do a thing prohibited by law, or subversive of any public interest which the law cherishes, will be judicially enforced. The general rule, therefore, is that any act which is forbidden either by the common or the statutory law, whether it is *malum in se* or merely *malum prohibitum*; whether indictable, or only subject to a penalty or forfeiture; or however otherwise prohibited by statute or the common law,—cannot be the foundation of a valid contract. *Bish. Cont. §§ 470, 471*, and authorities cited in notes. "If the subject-matter of an agreement be such that a performance of it would either consist in doing a forbidden act, or be so connected therewith as to be, in substance, part of the same transaction, the law cannot command the parties to perform such agreement. It will not always command them not to perform it, for there are many cases where the performance of the agreement is not in itself an offense, though the complete execution of the object of the agreement is; but, at all events, it will give no sort of assistance to such a transaction." 3 *Amer. & Eng. Enc. Law*, 869. "Where an act is expressly prohibited by statute, a contract to perform, or in furtherance of, the prohibited act, is illegal and unenforceable." *Lawson, Cont. § 279*. See, also, cases cited in note 1. A statute may render an agreement illegal in one of two ways, viz. by express prohibition, or by the imposition of a penalty. *Anson, Cont. 172*. Where the statute does no more than impose a penalty upon the carrying out of the objects of the contract, a question has sometimes arisen, whether or not the imposition of the penalty, of itself, amounts to a prohibition, although the weight of authority would seem to be that where a



statute provides a penalty for an act a contract for the performance of such act is void, although the statute does not pronounce it void, or prohibit it, in express words. But no such question can arise where the statute expressly prohibits the act. In that case the act is necessarily unlawful, and a contract for its performance is necessarily void, and incapable of enforcement. Our statute in relation to interest contains both a prohibition and a penalty. Where the party agreeing to pay illegal interest is a corporation, the penalty cannot be invoked in its favor, but the prohibition remains wholly unaffected by the provisions of section 11, which takes from corporations the right to interpose the defense of usury. *Farwell v. Meyer*, 35 Ill. 40, was a bill in chancery to set aside a judgment by confession upon a judgment note in which more than the maximum rate of interest then allowed by law was reserved. As a court of equity will not enforce a penalty, no attempt was made to set up, or take advantage of, the forfeiture then imposed by the statute for exacting illegal interest. The contract, therefore, was treated precisely as though no penalty of forfeiture were imposed. The court, however, held that the agreement as to interest, being in contravention of the statutory prohibition, was void, and incapable of enforcement, and that only the rate of interest given by law in the absence of a contract was collectible. On this point it was said: "The legal rate of interest in this state is six per cent., and although parties are allowed to stipulate for a rate of interest, not exceeding ten per cent., the privilege thus given must be exercised in conformity to the statute. An agreement which cannot be enforced as it was made will not be enforced at all. Where the parties stipulate for a higher rate of interest than ten per cent. the agreement cannot be enforced as it was made, and we cannot substitute for it an agreement which the parties did not make. In such cases the part of the agreement stipulating for a higher rate of interest than six per cent. will not be enforced; and the lender or other person contracting for an illegal rate of interest will be allowed (where no forfeitures or penalties are insisted upon) only to recover six per cent., as the measure of the value which our law has established for the use of money, where no agreement has been made for a higher rate, in conformity with its provisions."

In the present case, then, the section of the statute imposing a penalty may be left out of view, as inapplicable; but still the prohibitory part of the statute remains, making it unlawful for any person or corporation to directly or indirectly accept or receive, for the loan or forbearance of money, any greater rate than 6 per cent. by oral agreement, or greater than 8 per cent. where the contract is in writing. It follows that the rate of interest which may be taken, reserved, or charged, whether the borrower or debtor is a natural person or a corporation, is fixed by the laws of this state; and the case does not come within that provision of section 5197 of the Revised Statutes of the United

States which allows national banks to take or charge interest at a rate not exceeding 7 per cent. where no rate is fixed by the laws of the state. The rate of interest which may lawfully be contracted for being limited to 6 per cent. where the contract is oral, and to 8 per cent. where it is in writing, whoever the debtor or borrower may be, national banks are, by section 5197 of the federal statutes, limited to the same rates; and by section 5198 the reserving or charging of a greater rate than is thus fixed subjects the bank reserving or charging the same to a forfeiture of all the interest agreed to be taken, and makes it liable, in case the interest has been paid, to having twice the amount of it recovered back by the party paying the same, in an action in the nature of an action of debt. In the present case, 6 per cent. interest was reserved in the note. Eight per cent. might have been lawfully reserved in such written contract, but it was not. After the reservation, however, of 6 per cent. by the writing, the additional 2 per cent., or any other rate, could not be lawfully reserved or agreed to be taken or paid, by parol. The written agreement having provided for the reservation of all that could be lawfully reserved or agreed to be taken, by parol, an oral agreement for any further interest was manifestly in violation of the statute. There can be no doubt that the agreement by the defendant to secure for the bank the Chicago & Western Indiana Railway Company as a depositor, or, in case of failure to do so, to pay 2½ per cent. commission upon the \$150,000 borrowed, was in the nature of an agreement to pay interest upon the loan, in addition to the 6 per cent. per annum reserved in the note. The use of the money was the only possible consideration for such agreement. The bank, through its own officers, loaned its own money directly to the railway company. There is no room for the theory that this extra payment was, or was intended to be, in any legal sense, a commission, although that name was attempted to be applied to it. The transaction was directly between the bank and the railway company; no agent, broker, or go-between being employed, who might be entitled to a commission for his services. It necessarily follows that the agreement to furnish the railroad company as a depositor, or pay the bank 2½ per cent. upon the \$150,000, was in consideration of the money loaned, or it had no consideration whatever. It is admitted that the proposed deposit, if it had been obtained, would have been of value to the bank, as a part of its business. The precise money value to the bank of the deposit is not shown, nor is it material, so long as it is admitted to be of value. A fair inference may be drawn, however, from the fact that the bank exacted the payment of 2½ per cent. upon \$150,000 in case of failure to secure the depositor, that in the opinion of the bank, and in the estimation of both parties, that was its reasonable cash value. An oral contract to pay any sum of money, or to furnish anything of value, for the use of the money loaned, in addition to the interest reserved in the note, was pro-



hibited by the statute of this state, and, that being so, it was prohibited by the federal statute in relation to national banks. This suit is brought to recover the extra  $2\frac{1}{2}$  per cent. upon the \$150,000, or \$3,750, reserved by the oral agreement; and, adopting this as the measure of the extra interest thus reserved, it is manifest that the entire interest agreed to be paid was much larger than, upon any theory of the law, was permitted by either the state or federal statute. The loan was only for six months, and  $2\frac{1}{2}$  per cent. upon the amount loaned was equivalent to interest at the rate of 5 per cent. for six months. That, added to the interest reserved in the note, made 11 per cent.,—a rate forbidden by the statute of this state, and by the act of congress, as well. We are of the opinion that the legal conclusion from the admitted facts is that the agreement to pay the money now sought to be recovered is usurious and void. The rulings of the trial court upon the propositions submitted to be held as the law in the decision of the case were all in harmony with this conclusion. We are of the opinion that the judgment of the circuit court is correct, and the judgment of the appellate court, affirming that judgment, will be affirmed.

(145 Ill. 164)

**WEST v. DOUGLAS et al.<sup>1</sup>**

(Supreme Court of Illinois. May 8, 1893.)

**APPEAL—RES JUDICATA—DEED—MENTAL CAPACITY—EVIDENCE.**

1. Where a decree is reversed, and the cause remanded for further proceedings, the questions decided upon the appeal are not open for discussion on a second appeal, where there is no substantial change in the evidence introduced.

2. A deed was executed by a man 86 years old, while he was suffering both physically and mentally from the decay and decrepitude usually incident to old age. Six or eight months later he was declared insane from senile dementia. The evidence was conflicting as to his mental capacity when he signed the deed. *Held*, that a finding that he was capable of executing the deed should not be disturbed on appeal.

Appeal from circuit court, Vermillion county; Francis M. Wright, Judge.

Bill by Nellie Douglas, Stella Douglas, Leona Douglas, and Franklin Douglas against Pleasant West to perfect complainants' title to certain land, and for partition. Complainants obtained a decree. Defendant appeals. Affirmed.

C. Porter Johnson and Alexander S. Bradley, (Consider H. Willett, of counsel,) for appellant. W. R. Lawrence, for appellees.

**BAILEY, C. J.** This case is now before us a second time, a former decree in favor of the present appellant having been reversed by this court, and the cause having been remanded to the circuit court for further proceedings not inconsistent with the views expressed in the opinion then filed. *Douglas v. West*, 81 N. E. Rep. 403. Since the determination of that appeal

another hearing has been had in the court below, resulting in a decree in favor of the appellees, and the appellant now brings the record here for review. The bill was filed by the appellees to restore a lost deed executed by Thomas D. Bruer and wife, conveying to appellees certain real property in Danville, Vermillion county, and to confirm their title to the premises so conveyed. The substantial defenses, as stated and insisted upon by the answer, are: First, that Bruer did not execute the alleged deed; and, second, that at the time the deed is claimed to have been executed Bruer was of unsound mind, and incapable of transacting ordinary business, or of conveying away or disposing of his property. When the case was first heard in the circuit court the contention between the parties was confined to the first of these defenses. The fact that Bruer and wife signed and acknowledged the deed seems to have been satisfactorily proven, but it was insisted by the defendant that the deed was not delivered by the grantors, or accepted by or on behalf of the grantees, so as to convey to them the title. The evidence adduced by the parties was upon this issue, and none was offered tending to show that Bruer was of unsound mind. The circuit court reached the conclusion that the delivery and acceptance of the deed was not established, and thereupon rendered a decree dismissing the bill for want of equity. But this court, on appeal, reviewed the evidence, and held that a delivery and acceptance sufficient to pass the title to the grantees was proved, and entered a judgment reversing the decree and remanding the cause to the circuit court for further proceedings not inconsistent with the opinion filed.

Under the remanding order, parties were doubtless at liberty to introduce further evidence pertinent to any of the issues made by the pleadings. If additional evidence bearing upon the question of delivery and acceptance was in existence and available, the defendant was at liberty to present it, and if, in so doing, he had succeeded in making out a case essentially different from the one presented to this court on the former appeal, he would now be at liberty to assign for error the decision of the court below upon the case thus made as *res nova*. But he did not do so. At the second hearing the case was submitted, so far as that issue was concerned, upon substantially, if not precisely, the same evidence as before.

Under these circumstances, our former decision, so far as the question of delivery and acceptance is concerned, is conclusive, and that branch of the case must now be treated as *res judicata*. The rule is that a decision of a case by an appellate court on the merits is final as to the matters decided, and is conclusive upon the parties upon a second appeal or writ of error in the same case. The points and questions thus considered and decided cannot be again brought before such court for review, and cannot be reconsidered, except upon petition for a rehearing. *Smyth v. Nef*, 123 Ill. 810, 17 N. E. Rep. 702; *Newberry v. Blatchford*, 106 Ill. 584; *Champaign*

<sup>1</sup>Reported by Louis Boiesot, Jr., Esq., of the Chicago bar.

Co. v. Reed, Id. 389; Loomis v. Cowen, Id. 660; Moshier v. Norton, 100 Ill. 63; Tucker v. People, 122 Ill. 553, 13 N. E. Rep. 809; Miller v. Pence, 131 Ill. 122, 22 N. E. Rep. 817; Hough v. Harvey, 84 Ill. 308; Johnson v. Von Kettler, Id. 315; Ogle v. Turpin, 8 Ill. App. 453; Keiser v. Cox, 16 Ill. App. 631; Desplaines v. Poyer, 22 Ill. App. 574; Gardiner v. Bunn, 24 Ill. App. 627. In Elston v. Kennicott, 52 Ill. 272, the same rule was recognized, but it was also said that, "when a case has been determined in an appellate court, and remanded for further proceedings, and on a new trial further and material evidence was introduced, it becomes a new case in so far as to require the additional evidence to be considered in connection with the evidence previously before the court, and decided upon all the evidence then heard." And in Green v. City of Springfield, 130 Ill. 515, 22 N. E. Rep. 602, it was held that after a judgment of reversal by this court, and a remanding order for further proceedings in conformity with the opinion, the parties will not be allowed to present the same objections or issues as before, although in a different form; and that only as to such questions as are substantially new will the case be opened for further consideration.

Upon the last hearing in the court below a large amount of evidence was introduced by the respective parties, bearing upon the mental condition of Thomas D. Bruer at the time the deed to appellees was signed and acknowledged, and at the time it was delivered. It is undisputed that at that time he was far advanced in years, being about 86 years of age, and that he was then suffering to a very considerable degree, both physically and mentally, the effects of the decay and decrepitude usually incident to old age. It also appears that some six or eight months after the delivery of the deed he became so far affected with senile dementia that in proceedings instituted for that purpose he was declared insane, and committed to the insane hospital at Kankakee, where he died a few months later. The direct evidence bearing upon the question of his mental condition at and before the date of the delivery of the deed, as is usual in cases of this character, is very voluminous and very conflicting. In the opinion of a large number of witnesses produced on behalf of the appellant he was insane at that date, and had been so for a considerable time prior thereto, and for that reason was incapable of transacting or understanding ordinary business, or of comprehending the nature and effect of his act in executing and delivering the deed. A considerable number of witnesses, on the other hand, express a contrary opinion, and several of them detail business transactions had by them with Bruer at or near the date of the execution and delivery of the deed, and in which he manifested a fair business capacity. The testimony of these witnesses seems to us to be very considerably fortified and corroborated by various circumstances appearing in the record, and which it would be difficult to explain consistently with the theory insisted upon by the appellant that Bruer, at the time, had reached a condi-

tion of senile imbecility. We shall not attempt an analysis of the evidence, as our so doing would serve no useful purpose. We have given the entire evidence a careful consideration, and need only say that, while the result to be fairly drawn from it is exceedingly doubtful, we are not prepared to say that there is any such preponderance against the conclusion reached by the learned chancellor who heard the case in the court below as would justify us in disturbing the decree.

The decree will be affirmed.

(145 Ill. 620)

**GRANITE STATE PROVIDENT ASS'N v. LLOYD.<sup>1</sup>**

(Supreme Court of Illinois. May 8, 1893.)

**BUILDING AND LOAN ASSOCIATION — RIGHT OF WITHDRAWAL — FOREIGN CORPORATIONS — CONFLICT OF LAWS.**

Rev. St. 1891, c. 32, § 26, declares that "foreign corporations doing business in this state shall be subjected to all the liabilities, restrictions, and duties that are or may be imposed upon corporations of like character, organized under the general laws of this state," and the act for the incorporation of homestead loan associations (Rev. St. 1891, c. 32, § 83) provides that any stockholder may withdraw from such a corporation on 30 days' notice. *Held*, that an Illinois stockholder in a foreign homestead loan association doing business in Illinois might withdraw his stock on 30 days' notice, regardless of the provisions of his stock certificate.

Appeal from appellate court, third district.

Attachment by John H. Lloyd against the Granite State Provident Association. Plaintiff obtained judgment, which was affirmed by the appellate court. Defendant appeals. Affirmed.

The other facts fully appear in the following statement by WILKIN, J.:

Appellee recovered judgment against appellant in the circuit court of Sangamon county for \$30, being the amount of payments made by him as a stockholder in the appellant corporation, holding a charter from the state of New Hampshire, authorizing it to transact in that and other states the business of a homestead and loan association. The cause was appealed to the appellate court, where said judgment was affirmed, whereupon appellant appeals to this court. It appears that pursuant to the charter and by-laws of the appellant corporation local clubs or branches might be formed whenever a sufficient number of shareholders could be obtained. Such a club was formed in Springfield in the year 1890. The appellee subscribed for five shares of stock in that club, and made the first payment of one dollar per share thereon through one Charles Werner, who assumed to represent the appellant. A certificate of stock was furnished him by appellant, through said Werner, and he made five subsequent monthly payments thereon. It appears that there was upon the back of the certificate of stock this condition: "Sec. 28. The certificate of any member is redeemable

<sup>1</sup> Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

ble in cash after twenty-four payments thereon have been made, the shareholder being entitled to receive the amount paid in on his shares, together with 6 per cent. interest."

Charles E. Selby and Conkling & Grout, for appellant. E. L. Chapin, for appellee.

WILKIN, J., (after stating the facts.) The judgment of the appellate court having conclusively settled all questions of fact in this case, the only point to be decided by us is the naked legal question, had the plaintiff below the right to withdraw, etc., upon complying with the provisions of our statute relating to homestead and loan associations, notwithstanding the abovecondition indorsed on his certificate of stock? Section 6 of the homestead association act of this state (chapter 32, Rev. St.; 1 Starr & C. St. p. 630) provides that "any stockholder wishing to withdraw from said corporation shall have power to do so by giving thirty days' notice of his or her intention to withdraw." Counsel for appellant contend that this section does not apply to foreign homestead loan associations, where the law under which they are organized provides differently, and, as the condition upon the back of said certificate required 24 payments, and appellee had made only 6, he could not withdraw upon giving 30 days' notice; in other words, that the provisions of the charter of the corporation, as evidenced by said condition, controlled the right of the shareholder to withdraw, and not the statute of this state regulating similar associations. Section 26, p. 619, of the chapter of the statute above referred to provides: "Foreign corporations, and the officers and agents thereof, doing business in this state, shall be subjected to all the liabilities, restrictions, and duties that are or may be imposed upon corporations of like character organized under the general laws of this state, and shall have no other or greater powers. \* \* \* In describing the object and scope of that section this court, in the case of *Stevens v. Pratt*, 101 Ill. 206, used the following language: "It does not assume to define what foreign corporations shall be allowed to do business in this state, but simply to impose regulations and restrictions upon certain named classes or kinds of foreign corporations doing business in this state; that is, of those of like character as it is provided may be formed under that general law. Its exact words are: 'Foreign corporations, and the officers and agents thereof, \* \* \* shall be subject to all the liabilities, \* \* \* and have no other or greater powers.' The language is entirely that of regulation and restriction, and not that of grant or prohibition. No corporation is granted the right to do business in this state. No corporation is excluded from doing business in this state. Simply foreign corporations, and the officers and agents thereof, doing business in this state, are placed on an equality, to the extent that they shall exercise no greater or different powers, and shall be subject to the same regulations and restrictions and governed by the same rules

of law in these respects with corporations of like character organized or to be organized under the general laws of this state. The meaning will obviously not be changed, but may be placed in a stronger light by a little transposition of language, thus: 'Where the general laws of this state provide for the organization of corporations, foreign corporations of like character doing business in this state shall exercise no greater or different powers, and shall be subject to the same liabilities, restrictions, and duties.' The manifest and only purpose was to produce uniformity in the powers, liabilities, duties, and restrictions of foreign and domestic corporations of like character, and bring them all under the influence of the same law." We think this language clearly shows that, under said section 26, when a foreign corporation of any kind comes into this state to transact business, it must conform to the law of this state, if such exists, regulating similar corporations organized under the general laws of this state. Also that no law of comity between this and other states is thereby violated, it being simply a law of regulation, and in no sense one of prohibition. But counsel for appellant contend that said section cannot be applied to this appellant corporation, because they say "homestead loan associations" in this state are not organized under the general incorporation laws of this state. The act entitled "An act to enable associations of persons to become a body corporate to raise funds to be loaned only among the members of such association," in force July 1, 1879, (1 Starr & C. St. p. 629,) is certainly a general law of this state. All "homestead loan associations" in this state must be organized under that general law, and can have no legal existence unless they are so organized. Even if it could be maintained that said act is not part of the general corporation law of this state,—which we do not think can be done,—still section 26 would apply. Its language is "organized under the general laws of this state." We can conceive of no line of reasoning or argument which can make it clearer that the above-mentioned statute is a general law of this state than is apparent from the reading of the act itself. We are satisfied with the judgment below, and it will be affirmed.

(145 Ill. 624)

GRANITE STATE PROVIDENT ASS'N v. SONDERMAN.

(Supreme Court of Illinois. May 8, 1893.)

Appeal from appellate court, third district.

Attachment by Carrie Sonderman against the Granite State Provident Association, which was affirmed by the appellate court. Defendant appeals. Affirmed.

Charles E. Selby and Conkling & Grout, for appellant. M. U. Woodruff and E. L. Chapin, for appellee.

PER CURIAM. The only point presented for decision in this case is disposed of in the case of *Same Appellant v. Lloyd*, 34 N. E. Rep. 142, (decided at the present term.) For the reasons stated in the opinion filed in that case, the judgment of the appellate court will be affirmed in this.

(145 Ill. 427)

**PEOPLE ex rel. RINARD v. TOWN OF MT. MORRIS.<sup>1</sup>**

(Supreme Court of Illinois. May 8, 1893.)

**MANDAMUS—PETITION—MUNICIPAL CORPORATIONS.**

A petition for mandamus to compel the board of town auditors to audit certain bonds, and to certify the amount to the county clerk for extension upon the tax books, is fatally defective where it fails to allege that the bonds have been presented to the board, or that it has refused to audit them.

Petition by the people on the relation of Adam Rinard for a writ of mandamus to compel the town of Mt. Morris to levy a tax for the payment of certain township bonds. Writ denied.

Sanders & Bowers, for petitioners.

**WILKIN, J.** This is an original proceeding for mandamus. Leave was given to file the petition at the January term, 1892, and a summons ordered returnable to the following June term. The respondents answered to that term, to which the petitioner filed a replication. The case was continued to the January term, 1893, and taken on the petition, answer, and replication. The petition alleges "that on, to wit, the 3d day of May, 1875, said town of Mt. Morris, by its proper officers, made, executed, and delivered its twenty-five thousand dollars in town bonds in payment of a subscription voted by the people of said town in aid of the Chicago and Iowa Railroad Company, under authority of an act of the general assembly of the state of Illinois entitled 'An act to incorporate the Chicago and Iowa Railroad Company,' approved March 30, A. D. 1869. Relator further shows unto your honors that he is the owner and holder of three of said bonds, numbered 48, 49, and 50, each for the sum of \$500, due May 3, 1885, bearing interest at the rate of ten percent. per annum. That said bonds are each facsimiles of each other, save as to the numbers of the bonds, and that a copy of bond No. 48 is filed herewith, made part hereof, marked 'Exhibit A.' Relator further represents unto your honors that said bonds have been adjudged by this honorable court to be valid and subsisting obligations of the town of Mt. Morris, and that by the terms of the law in force at the time when said bonds were issued it became and was the duty of said town, through its proper corporate authorities, to provide for taxation for the payment of the interest due on said bonds, and for the principal as the same matured; that, notwithstanding this fact, said town and its corporate authorities have hitherto wholly refused and neglected to make any provision whatever for the payment of said indebtedness; that because of the failure and refusal of said town and its officers to make any provision for the payment of said bonds and interest thereon as aforesaid, formal demand has been deemed necessary for the payment of these bonds and accrued interest. Relator therefore avers that through his agent, John Wheel-

er, formal demand was made for the payment of the principal and accrued interest, amounting July 1, 1891, to \$2,425, upon R. S. Marshall, the supervisor, and William Miller, the treasurer, of Mt. Morris township, Ogle county, Illinois, the defendants herein, on the 8th day of July, 1891, all of which will more fully appear by reference to the return of John Wheeler, hereby attached to and made a part of relator's petition, and marked 'Exhibit B.'" Then follows the prayer for the writ of mandamus, which will be noticed hereafter. The answer is awkwardly drawn, and a considerable portion of it rather in the nature of an argument than a response to the allegations of the petition. The following statement therein is, however, pertinent to the question before us: "Defendants would say the said petitioner is not a party to whom our town is indebted, so far as we are or have been advised, in any other way or at any other time than by proceedings had in your honors' court. Neither are we advised of the nature or amount of the said plaintiff's claims, as we have not had access to the court record, or been advised of the contents of the amended petition, either by inspection or copy thereof. The said claim therein set forth has never been by the plaintiff or any other party presented to us for audit and allowance, to the best of our knowledge, recollection, and belief, and, until it is so presented to us for audit, do not think this court can entertain the said plaintiff's petition. Neither can it know that there is a necessity for its action, the nature of our defense, or the amount of our set-offs, if any; as, from the plaintiff's default in presenting it to us first for audit, it must, of necessity, in the condition it comes before you, be in a state of nonliquidation." The replication is substantially a reiteration of the allegations of the petition, and wholly fails to meet the foregoing statement by the answer, except to repeat that a demand was made for the payment of said bonds as stated in the petition. That demand, as shown by the written copy thereof, made an exhibit to the petition, was simply a demand on the supervisor and treasurer of the town of Mt. Morris for payment of said bonds and interest, and a statement that payment thereof was refused by those officers.

Under the former practice in proceedings for mandamus the defendant's return to the alternative writ corresponded to the answer to the petition under the present practice. *Silver v. People*, 45 Ill. 224. The petition, under the present statute, takes the place of the alternative writ, and defects therein are taken advantage of in the same manner as defects in the alternative writ were formerly reached. *People v. Davis*, 93 Ill. 133; *Same v. Glann*, 70 Ill. 232; *Dement v. Rokker*, 126 Ill. 174, 19 N. E. Rep. 33. And it has been held that defects in substance in the petition may be taken advantage of at any time before granting the peremptory writ. *Dement v. Rokker*, supra. Where, under the former practice, the return to the alternative writ controverted no fact alleged in the writ, the return was held to have the

<sup>1</sup> Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

effect of a demurrer only. *People v. Miner*, 46 Ill. 384; *Same v. Salomon*, Id. 333. And so here the answer must be treated merely as a demurrer to the petition, there being no issue of fact made by the pleadings upon which the determination of the right of the relator to the peremptory writ prayed for depends. The question, therefore, is, does the petition upon its face show that the relator is entitled to a peremptory writ as prayed? It will be observed that the allegations therein are very meager. The charge is that "it became and was the duty of said town to provide by taxation for the payment of said bonds," and the only omission of duty alleged against those authorities is that they "wholly neglected and refused to make any provision whatever for the payment of said indebtedness;" and the allegation as to a demand is, as shown above, for payment from the supervisor and treasurer of the town. Nothing whatever is said as to the presentation of the bonds to the board of auditors, or their refusal to audit the same, and yet the writ prayed for is against "the town auditors of said town, namely, the supervisor of said town, the town clerk of said town, and the justices of the peace of said town, who are each made defendants to this petition, and also their successors in office, requiring them to meet as such auditing board of said town of Mt. Morris at their next session of semiannual meeting, as required by law, and audit and allow the aforesaid bonds, issued as aforesaid, and interest thereon, as specified in the bonds, and the costs of this proceeding as a judgment or debt against said town, and, when so allowed, to certify the amount of the same to the county clerk of Ogle county, Illinois, for extension upon the tax books of the county, and the collection of the same; and also that they file with the town clerk of said town their certificate of their allowance of the amount for the payment of said bonds, and the interest and cost of this mandamus proceeding, which petitioner asks may be adjudged against said defendant, and collected or paid to the relator or his attorney of record; and grant unto relator such other and further relief as shall seem meet and proper to your honors, and as in duty bound will ever pray," etc. It thus appears that a writ is asked to compel the doing of a thing which the allegations of the petition wholly fail to show it was the duty of the board of town auditors to perform, or which they have neglected or refused to do, or which they have been called upon by the relator to perform. It is a familiar rule of universal application to proceedings of this kind that the petition must set forth distinctly all the material facts on which the relator relies, so that the same may be traversed or admitted. *People v. Glann*, supra; *Springfield & I. S. E. R. Co. v. Wayne County Clerk*, 74 Ill. 27; *Swigert v. County of Hamilton*, 130 Ill. 538, 22 N. E. Rep. 609; *Illinois & M. Canal Trustees v. People*, 12 Ill. 248. It must set forth a clear right on the part of the relator to have the act performed, and set forth

every material fact showing that it was the duty of the persons sought to be coerced. *Swigert v. County of Hamilton*, supra; *People v. Elgin*, 66 Ill. 507. The sufficiency of the petition depends upon its averments, and not upon affidavits filed in its support. *Trustees of Schools v. People*, 121 Ill. 552, 18 N. E. Rep. 526. It is clear, under the foregoing authorities, that this petition wholly fails to show that the relator is entitled to the writ prayed for. Admitting every fact set forth in it, the board of auditors of the town of Mt. Morris have failed to perform no duty which they have been called upon to perform. The petition is rather in the nature of a bill in chancery, with a general prayer for relief, than a petition for a peremptory writ of mandamus. Had a formal demurrer been presented to it, as should have been done, there would have been no question as to the result. As the case is now presented, there being no issue of fact to be certified to a jury for determination, we can only look to the petition for authority to award the writ, and, that being clearly insufficient, the writ must be denied.

(145 Ill. 156)

MAXWELL v. MAXWELL, et al.<sup>1</sup>

(Supreme Court of Illinois. May 8, 1893.)

## HOMESTEAD—CONVEYANCE—ABANDONMENT.

Under Rev. St. 1891, c. 52, § 4, which declares that no release, waiver, or conveyance of a homestead shall be valid "unless the same is in writing subscribed by said householder and his or her wife or husband, or possession is abandoned or given pursuant to the conveyance," a deed signed by the householder, but not signed by his wife, is sufficient to pass title to a homestead, where the householder, after the death of his wife, delivers possession of the property to the grantee.

Appeal from circuit court, De Witt county; George W. Herdman, Judge.

Bill by William A. Maxwell, James D. Maxwell, Caleb D. Maxwell, Nancy L. Artherton, Lewis C. Veteto, Mary Nelson, Monroe Nelson, Elizabeth Hickie, and John Hickie against Joseph P. Maxwell and John A. Maxwell to set aside a deed. Complainants obtained a decree. Defendant Joseph P. Maxwell appeals. Reversed.

Moore & Warner, for appellant.

WILKIN, J. Stating only the facts pertaining to the question presented for our decision, the case is as follows: On the 22d day of December, 1885, John Maxwell owned the E.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  of section 35, township 21 N., range 1 E., third P. M., De Witt county, this state, upon which was a dwelling house occupied by himself and wife, Elizabeth, as a residence. Said lot of land, and the buildings thereon, did not exceed in value \$1,000. On said day, John Maxwell conveyed said property, so being his homestead, to his son Joseph P. Maxwell, this appellant; his said wife, Elizabeth, not joining in the deed, and it being stated therein that the conveyance was subject to her dower and

<sup>1</sup>Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

homestead. The husband and wife both continued to occupy said premises as their home until March 20, 1886, when she died, whereupon the possession thereof was delivered by the husband to appellant, the grantee in said deed. (On January 25, 1891, said John Maxwell died intestate, leaving, him surviving, children and grandchildren, heirs at law. Shortly after his death a part of those children and grandchildren filed this bill against appellant and one John A. Maxwell, praying, among other things, that the above-mentioned deed be set aside, and said premises, with other real estate described in the bill, partitioned. On the hearing a decree was entered, granting the prayer of the bill as to the above-described real estate, and denying all other relief prayed. No brief or argument has been filed on behalf of appellees, but we understand from what is said by counsel for appellant that the ground upon which the court below set aside said deed from John Maxwell to appellant was that, it being an attempt to convey a homestead of the grantor therein, then having a wife, who did not sign or acknowledge the deed, the same was invalid; and so the question stated for our decision is: "Did the deed made by John Maxwell to Joseph P. Maxwell for the premises in controversy, together with the possession of said premises being given by John Maxwell, after the death of his wife, to Joseph P. Maxwell, pursuant to said deed, vest in Joseph P. Maxwell title, notwithstanding John Maxwell's wife did not join in its execution, and it did not contain statutory release of homestead?" As here stated the whole question is settled by section 4, c. 52, Rev. St., (1 Starr & C. St. 1103,) where, in providing how the estate of homestead may be extinguished, it is said: "No release, waiver, or conveyance of the estate so exempted shall be valid unless the same is in writing, subscribed by said householder and his or her wife or husband, if he or she have one, \* \* \* or possession is abandoned or given pursuant to the conveyance." It is clear, by the terms of this section, as well as by the previous decisions of this court, the deed in question, of itself, was ineffectual to pass the title to said homestead to appellant. *Eldridge v. Pierce*, 90 Ill. 474; *Browning v. Harris*, 99 Ill. 456; *McMahill v. McMahlill*, 105 Ill. 596; *Kitterlin v. Insurance Co.*, 134 Ill. 647, 25 N. E. Rep. 772. It is equally clear that such a deed is valid if "possession is abandoned or given pursuant to the conveyance." Under the foregoing section of the statute, there are two modes under which the homestead estate may be extinguished: "First, by a release, waiver, or conveyance in writing, subscribed by such householder and his wife; \* \* \* or, second, by conveyance of the premises, with abandonment, or giving possession." *McMahill v. McMahlill*, supra. The other cases cited also hold, in effect, that the conveyance is only invalid when possession is not abandoned or given pursuant thereto. So it was said in *Moore v. Flynn*, 135 Ill. 78, 25 N. E. Rep. 844: "It is also insisted that the law requires a certain form of the release of the homestead, and that no other form can be

substituted for the required one. The propositions thus stated have application only to a case when possession is not given pursuant to the conveyance. A surrender of possession pursuant to a conveyance of the property is not an abandonment of the estate of homestead, but is, by virtue of the statute, an appropriate mode of transferring that estate." It is true that the proposition above stated assumes that possession was delivered by John Maxwell to appellant after the death of the wife pursuant to said deed, but the proof is so clear and positive on that question that no room is left for controversy upon it. We are of the opinion that the decree below, holding said conveyance invalid, is erroneous. It will therefore be reversed, and the cause will be remanded to the circuit court, with directions to dismiss the bill.

(145 Ill. 150)

PEOPLE v. FESLER.<sup>1</sup>

(Supreme Court of Illinois. May 8, 1893.)

INSURANCE—ACTING FOR FOREIGN COMPANY—ACTION FOR STATUTORY PENALTY—DECLARATION.

In an action to recover the penalty provided by Rev. St. 1891, c. 73, § 22, for acting as agent of "any insurance company, association, or partnership incorporated by or organized under the laws of any other state or any foreign government," in taking risks in Illinois without procuring a certificate of authority from the auditor of public accounts, a declaration which alleges that the defendant acted as agent of "The Australian Fire Insurance Company of Sydney, N. S. W., a company not organized or incorporated under the laws of the state of Illinois," without alleging that such company was incorporated under the laws of any other state or government, is demurrable.

Appeal from circuit court, Green county; Lyman Lacey, Judge.

Action of debt by the people of the state of Illinois against J. H. Fesler to recover a statutory penalty. Defendant obtained judgment upon demurrer to the declaration. Plaintiff appeals. Affirmed.

George Hunt, Atty. Gen., for the People. D. J. Sullivan and F. A. Whiteside, for appellee.

WILKIN, J. The people of the state of Illinois, by George Hunt, attorney general, brought this action against appellee to recover the penalty for the violation of a statute of this state. The declaration alleges that the defendant, on the 5th day of March, 1892, at, to wit, said county of Green, \* \* \* acted as the agent of and transacted business for the Australian Fire Insurance Company of Sydney, N. S. W., a company not organized or incorporated under the laws of the state of Illinois, in taking risks and transacting the business of fire insurance in the state of Illinois, to wit, in said county of Green, and as such agent, as aforesaid, at, to wit, the county aforesaid, did procure, issue, and deliver to \* \* \* a policy of insurance, \* \* \* whereby said insurance company did insure \* \* \* against loss

<sup>1</sup>Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

or damage by fire for the period of one year," etc., "and did then and there, as such agent, do and perform other acts in and about the taking of said insurance, which said acts, and each of them, were done and performed by said defendant as agent, as aforesaid, he not having procured from the auditor of public accounts of the state of Illinois a certificate of authority stating that said the Australian Fire Insurance Company of Sydney, N. S. W., had complied with the requirements of the acts of the general assembly of the state of Illinois, entitled 'An act to incorporate and to govern fire, marine, and inland navigation insurance companies doing business in the state of Illinois,' approved March 11, 1869, which apply to said company when doing a fire insurance business in the state of Illinois, and also stating the name of the attorney appointed by said insurance company to act for it in the state; and which said acts, and each of them, so done and performed by said defendant were and are contrary to the form of the statute in such cases made and provided. And the plaintiff avers that the said the Australian Fire Insurance Company of Sydney, N. S. W., had not, at the time of the issuing and delivery of said policy and of the performing of the several acts aforesaid, theretofore, nor has it since, complied with the statute of the state of Illinois in such cases made and provided in respect to the taking of risks and the transaction of fire insurance business in the state of Illinois by insurance companies incorporated by or organized under the laws of any state of the United States other than the state of Illinois, or of any foreign government; nor had said company then and there any lawful right to transact the business of fire insurance in the state of Illinois. Wherefore, and by force of the statute, an action hath accrued to the plaintiff to demand and have of and from the said defendant the sum of \$500, part and parcel of the said sum above demanded." Additional counts, charging other and similar violations of law in the issuing of other policies of insurance, in the same form except as to names of persons, dates, and description of property insured, as the first count of the declaration. Declaration signed by George Hunt, attorney general. This action was brought, as the declaration shows, under the act of the general assembly approved March 11, 1869, entitled "An act to incorporate and to govern fire, marine, and inland navigation insurance companies doing business in the state of Illinois." To the declaration a general demurrer was filed, which the circuit court sustained, and, the people electing to stand by its declaration, judgment was entered against it, and it prosecutes this appeal.

The only question in the case is, did the circuit court rule correctly in sustaining the demurrer to the declaration? Section 22 of said act of 1869 provides that "it shall be unlawful for any insurance company, association, or partnership incorporated by or organized under the laws of any other state of the United States, or any foreign government, for any of the purposes specified in this act, directly or indirectly to

take risks or transact any business of insurance in this state unless possessed of the amount of capital required of similar companies formed under the provisions of this act, \* \* \* nor shall it be lawful for any agent or agents to act for any company or companies referred to in this section, directly or indirectly, in taking risks or transacting the business of fire or inland navigation insurance in this state without procuring from the auditor of public accounts a certificate of authority stating that such company has complied with all the requisites of this act which apply to such companies," etc. It is clear from the foregoing extracts from said section that it is aimed against foreign insurance companies attempting or desiring to do business in this state, and one of the objections urged to the declaration is that it fails to show that the company for which the defendant acted was a foreign insurance company. It will, we apprehend, be conceded that if a person should assume to act for a fictitious company having no existence whatever, and take risks or transact other business in its name, he would not be guilty of a violation of the provisions of this act, though he might be prosecuted for so doing under the Criminal Code of the state. It will be observed that all that is said in this declaration as to the company for which the defendant acted is that he acted as the agent, etc., for, "the Australian Fire Insurance Company, of Sydney, N. S. W., a company not organized or incorporated under the laws of the state of Illinois." There is an entire absence of allegation of organization of said company, except the negative one that it was not incorporated or organized under the laws of this state. Applying the well-known rule that pleadings must always to be construed most strongly against the pleader, this declaration shows no more than that the defendant acted for a company called the "Australian Fire Insurance Company of Sydney, N. S. W.," neither incorporated nor organized under the laws of any other state of the United States or any foreign government." Conceding that "of Sydney, N. S. W.," means of Sydney, New South Wales, it will not be seriously contended that that language amounts, under any rule of pleading, to an averment that the company was incorporated or organized under the laws of New South Wales. As before said, the allegation amounts to no more than a statement of the name by which the company was known. The statute under which this action is brought is highly penal, and this suit is to recover a penalty, and it is well settled that in such actions the averments of the declaration must bring the case clearly within the prohibition, and that the provisions of the statute must be strictly construed. *Edwards v. Hill*, 11 Ill. 22; *Chicago & A. R. Co. v. People*, 67 Ill. 11; *Gilbert v. Bone*, 79 Ill. 341. Every fact necessary to constitute the offense for which the recovery of a penalty is sought must be distinctly averred, and no intendments are allowed in favor of the people. *Whitcraft v. Vanderver*, 12 Ill. 235; *Waddle v. Duncan*, 63 Ill. 223; 18 Amor. & Eng. Enc. Law, pp. 278, 279, and



cases cited in note. Here, unless it be inferred that the company for which the defendant acted was incorporated or organized under the laws of some other state or foreign government, there is nothing whatever upon which to base the charge that the defendant acted for a foreign insurance company in this state. By the terms of the statute he could only be made liable for the penalty sued for by taking risks or acting for an "insurance company, association, or partnership incorporated by or organized under the laws of any other state of the United States, or any foreign government," and this the declaration wholly fails to show that he did.

We do not deem it important in this case to determine whether this act of 1869 has been so far repealed by the subsequent act of June, 1879, in relation to the same subject, as that this action could not be brought in the name of the attorney general. As before stated, the action is brought under the statute of 1869, which expressly provides that it may be brought by that officer; but we think, for the reasons above stated, the demurrer was properly sustained, without reference to the questions as to his right to bring the suit.

The judgment of the circuit court will be affirmed.

(146 Ill. 275)

**QUINN et al. v. PEOPLE, to Use of SALINE COUNTY.<sup>1</sup>**

(Supreme Court of Illinois. May 8, 1893.)

**FRAUDULENT CONVEYANCE—SUIT TO SET ASIDE—PLEADING—PARTIES—DECREE—HOMESTEAD—JUDGMENT—COLLATERAL ATTACK.**

1. In a suit to set aside as fraudulent a deed executed by one of two joint judgment debtors, the other judgment debtor is not a necessary party.

2. An allegation in the bill that executions have been issued on the judgment, and returned unsatisfied, is sufficient to show that the complainant has exhausted his legal remedy.

3. A judgment rendered upon a recognizance taken in open court in a criminal case, after the same has been remanded by the supreme court, cannot be collaterally attacked on the ground that the record does not show that the circuit court had ordered the case redocketed, or that the prisoner had been notified of the intention to redocket it, where the record shows that the case was in fact redocketed, since by appearing in court and entering into the recognizance the prisoner and his sureties waived notice and order.

4. Where a deed conveying land subject to a homestead is set aside as fraudulent at the suit of a creditor, a provision in the decree that the master in selling the land shall proceed in accordance with the homestead law does not cause the homestead estate to revert to the grantor, but simply confirms the grantee's title thereto.

Appeal from appellate court, fourth district.

Bill by the people of the state of Illinois, to the use of Saline county, against Washington Quinn, Mary Quinn, John Quinn, George Quinn, Homer Quinn, Lon E. Quinn, and May N. Quinn, to set aside certain

deeds made by Washington Quinn to the other defendants. Complainant obtained a decree, which was affirmed by the appellate court. Defendants appeal. Affirmed.

Geo. B. Leonard and John W. Burton, for appellants. A. W. Lewis and William H. Green, for appellees.

**WILKIN, J.** This is an appeal from a judgment of affirmance by the appellate court of the fourth district. The following statement of the case by Sample, J., sufficiently presents the questions raised for decision in this court:

The appellee filed its bill in chancery against appellants to set aside certain deeds made by Washington Quinn to the other defendants. It appears that one John Quinn was indicted by the grand jury of Saline county for grand larceny. On the 19th day of March, 1888, he gave recognizance in open court for his appearance at the succeeding term, with Washington, James T., and George G. Quinn as his sureties. John Quinn not appearing at the following term of court, his recognizance was forfeited, and final judgment entered thereon on the 18th day of March, 1889, for the sum of \$1,500 and costs. Thereafter executions were issued on said judgment and returned unsatisfied, whereupon proceedings were taken to set aside certain deeds which it is alleged were filed of record after the entering into said recognizance, whereby Washington Quinn fraudulently conveyed his lands to certain of his children, all of whom, together with the wife of Washington Quinn, are made parties defendant. The prayer of the bill is that said lands be made subject to execution to be issued on said judgment, or that the court decree that so much of said premises be sold as may be necessary to satisfy said judgment, and for general relief. A demurrer to the bill was overruled, and then answered by the defendant affirming the validity of the deeds. The answer further sets up as a defense that sufficient real estate had been levied upon to satisfy said judgment, and that there was no criminal charge of any kind presented against John Quinn, nor was there any record of any indictment having been returned in open court against him, upon which it is supposed he was required to give bail. Issue was joined, and the cause heard by the court. Decree was entered in favor of the complainant, setting aside the deeds, and directing the master in chancery to sell the lands to satisfy said judgment and costs, in case the same was not satisfied by payment by Washington Quinn within a certain time fixed in the decree; that said money should be paid by the master in case of sale to the state's attorney of Saline county, and the residue, if any, should be paid to Washington Quinn; that in making such sale the master should be governed by the rules applicable to such sales in dealings with the estate of homestead, which the court found to be in Washington Quinn as to certain real estate that had been so fraudulently conveyed by him.

It is first insisted by counsel for appel-

<sup>1</sup>Reported by Louis Boisoit, Jr., Esq., of the Chicago bar.



lants that the circuit court erred in refusing to sustain a demurrer to the bill of complainant, because James T. Quinn, one of the securities on the recognizance, and a defendant in the judgment thereon which is made the basis of complainant's claim, was a necessary party to the bill. This position is untenable. No relief whatever is sought against James T. Quinn in this proceeding. He was in no way connected with the alleged fraudulent conveyance, and therefore has no legal interest directly or indirectly in the result of this litigation. It has been held that a judgment debtor is a necessary party to a creditors' bill to set aside a fraudulent conveyance, but this is only so when the deed of conveyance sought to be set aside contains covenants of warranty. *Spear v. Campbell*, 4 Scam. 223; *Johnson v. Huber*, 134 Ill. 511, 25 N. E. Rep. 790. It is a matter of indifference to James T. Quinn whether the conveyance here in question be sustained or not. He was not a proper party to the bill, much less a necessary one.

But it is said it was necessary for the complainant to allege the insolvency of James T. Quinn as well as each of the other defendants to said judgment. In other words, using their own language: "If any one of these sureties is solvent, then there is a complete remedy in law, and this bill should not have been entertained on demurrer being filed." This point must have been made under a misapprehension as to the averment made in the bill. It is there expressly alleged "that, aside from the lands hereinafter mentioned and described, the said John Quinn, Washington Quinn, James T. Quinn, and George G. Quinn are each insolvent." It is also alleged that executions had been duly issued upon said judgment against each of the defendants thereto, and duly returned, "No property found." This was all the judgment debtor was required to aver and prove in order to show that it had exhausted its legal remedy. By such allegation and proof it did, for the purpose of maintaining this bill, establish the insolvency of the defendants to said judgment, and showed prima facie that it had exhausted its legal remedy. *Manchester v. McKee*, 4 Gilman, 511. In our view of the case, it is unnecessary to determine whether or not the bill is one which could be maintained without an averment and proof that the remedy at law had been exhausted, because, as we understand the record, there is, within the meaning of the law, both allegation and proof of that fact.

It appears that upon the hearing appellates offered in evidence the record of the circuit court of Saline county, showing the entering into the recognizance upon which judgment was afterwards entered, as alleged in the bill, and appellants objected thereto for the reason that it did not show that after the reversal of a judgment of conviction against said John Quinn by this court, and the remandment of the case, the circuit court had ordered the redocketing of the case, or that said John Quinn or his attorney had been notified of an intention to redocket the same. That objection was overruled, and it is now insisted that said record was im-

properly admitted in evidence. If it be conceded that the statute requiring notice and an order redocketing a case in the trial court after remandment by this or the appellate court is applicable to criminal cases, still the objection here urged is without force for the reason that the record does show that the case was in fact redocketed, and that the defendant John Quinn, with his said sureties, appeared in open court, and entered into said recognizance. By so doing he waived all notice and a formal order reinstating a case, if such notice and order were necessary. Neither he nor his sureties could afterwards be heard to question the validity of the recognizance for want of such preliminary steps in the case. "The law clothes the judge with jurisdiction of the subject-matter, and when the prisoner was before him—no matter how he came there—he had jurisdiction of his person, and then his jurisdiction was complete." *Mix v. People*, 26 Ill. 34. *Harris v. People*, 128 Ill. 585, 21 N. E. Rep. 563, in no way conflicts with what is here said. The defendant and his sureties, by voluntarily appearing in open court and entering into bond for his appearance at a future time, did not in any sense attempt to confer jurisdiction upon the court of the subject-matter, or to change the mode of trial authorized by law. That a party can give jurisdiction of his person to a court having jurisdiction of the subject-matter by consent in cases civil or criminal is so clear that it admits of no argument. Moreover, the judgment rendered upon the recognizance which is the basis of this proceeding cannot be attacked collaterally. No principle is better settled than that a judgment cannot be attacked in a collateral proceeding for mere errors or irregularities in the proceeding by which it was obtained. We entertain no doubt as to the correctness of the ruling of the circuit court upon the admissibility of the record objected to.

The decree of the circuit court found that Washington Quinn had an estate of homestead to the extent of \$1,000 in the lands found to have been fraudulently conveyed, and directed the master in chancery in making the sale to proceed in accordance with the law in relation to the homestead estate. Counsel for appellants contend that the effect of this decree is to take the homestead so found in Washington Quinn from his grantee, and force it back upon him. Such is not the scope of the decree. When the homestead is set off the conveyance will, under this decree, be good as to it, though fraudulent and void as to the remainder of the premises. It was clearly right to order the master in chancery who was directed to make the sale to set off the homestead. *Cummings v. Burleson*, 78 Ill. 281. It would have been his duty, under the terms of the decree, to have done so without specific directions. *Ammondson v. Ryan*, 111 Ill. 506; *Mitchell v. Sawyer*, 115 Ill. 650, 5 N. E. Rep. 109.

Some other grounds of reversal are urged in the brief and argument of counsel for appellants filed in the appellate court and refiled here, but we do not consider

them tenable. They were properly overruled, for the reason stated in the opinion of the appellate court. The judgment of the appellate court will be affirmed.

(146 Ill. 312)

**STONE v. VANDERMARK et al.<sup>1</sup>**

(Supreme Court of Illinois. May 8, 1893.)

**DOWER—DEVISE AS BAR—ELECTION.**

1. A devise to the testator's widow of land, to be enjoyed by her while she remains his widow, is a devise of land within the meaning of Rev. St. 1891, c. 41, § 10, declaring that a devise of land to a widow will, unless renounced, bar her dower.

2. Under Rev. St. 1891, c. 41, § 11, which declares that a widow to whom land is devised by her husband shall be deemed to have elected to take the devise unless she shall within one year after letters testamentary or of administration are issued deliver to the county court a written renunciation of such devise, a widow may make her election before letters have been issued, but she cannot be compelled to do so.

3. A widow, to whom her husband had devised some of his land and all his personal property, retained possession of the homestead and of the personalty with knowledge of the contents of the will, and stated in conversation that she had accepted the personalty under the will, and that the will was as she wanted it. On the other hand, it appeared that no inventory of the estate had been filed, that no widow's award had been made, and that the personalty would probably not much exceed in value the amount of such award. *Held*, that it was not sufficiently shown that the widow had elected to take under the will.

Appeal from circuit court, Lawrence county; E. D. Youngblood, Judge.

Bill by Lucy A. Stone against James Vandermark and others to recover dower. The bill was dismissed, and decree rendered for defendants on cross bill. Complainant appeals. Reversed.

Gee & Barnes, for appellant. Huffman & Huffman, for appellees.

**CRAIG, J.** This was a bill brought by Lucy A. Stone to recover dower and homestead in certain lands in Lawrence county, of which her husband, Cyrus Vandermark, died seised in 1886. The children of Cyrus Vandermark, and Joseph Gray, guardian of such of the children as were minors, were made defendants to the bill. The defendants put in an answer to the bill, and also filed a cross bill, in which they set up that the complainant had accepted the provisions of the will of her deceased husband, and that under the will she was not entitled to either dower or homestead in the premises. The defendants, therefore, in their cross bill prayed for a partition of the premises among themselves. The court proceeded to a hearing on the pleadings and evidence, and the court rendered a decree dismissing the bill, and decreed in favor of the complainants in the cross bill. To reverse this decree the complainant in the bill appealed.

Under the second clause of Cyrus Vandermark's will, after providing for the pay-

ment of debts, the testator gives to his wife, Lucy A. Vandermark, all the personal property of which he was possessed at the time of his death, to be disposed of as she might think proper while she remained his widow. The third clause was as follows: "I give and bequeath to my wife also all the real estate of which I may die possessed, to be used and controlled by her, the rents and profits to be derived from same to be used and enjoyed by her while she may remain my widow in caring for herself and children; and after her death, or when she shall again marry, then said real estate shall be equally divided between her children, Cyrus H., Martha E., Anna M., Omer G., and Lewis Vandermark, or such number of them as may be living; and this division shall also include any personal property then remaining in her possession. I also give and bequeath to my son James W. Vandermark all my interest in and to the following real estate, viz.: The N. E. quarter of section No. three, (3,) in township No. (2) north, range No. twelve (12) west, in Lawrence county, Illinois, subject, however, to the will of my father, James Vandermark." Following this provision was a clause appointing Joseph Gray executor. On the 15th day of November, 1886, the will was presented to the county court of Lawrence county, proof made of the death of Cyrus Vandermark, and the will admitted to probate, but no letters testamentary were issued. After the death of the testator the widow continued to reside on the farm owned by the deceased at the time of his death, consisting of 178 acres, in Lawrence county, described as follows: "N. E.  $\frac{1}{4}$ , — 34, T. 3, R. 12 W., 2d P. M. except 12 acres of S. E. corner of said quarter, which had been deeded to his son John Vandermark. Also 30 acres off of E. side of N. W.  $\frac{1}{4}$ , Sec. 34, T. 3, R. 12 W." The personal property, amounting to \$1,500, passed into the widow's hands, and from the proceeds she furnished the executor money to pay the debts, which amounted to about the sum of \$80. After residing on the farm for about two years, the widow leased it to a Mr. Price, and moved to Sumner, a small town in the neighborhood. On the 8th day of May, 1890, she married L. P. Stone, but they only remained together for a short time, when Stone deserted her. After Price's lease expired she returned to the farm, where she still resides.

Under the facts appearing in the record it is insisted, on the one hand, that the widow has not elected to take under the will of her husband, and hence she is entitled to dower and homestead on the farm in controversy; while, on the other hand, it is claimed that the widow elected to take under the will, and upon her marriage, by the terms of the instrument, all estate she acquired in the testator's lands terminated, and her children, the complainants in the cross bill, are entitled to a division. Section 10 of the dower act, (1 Starr & C. St. p. 901) provides: "Any devise of land or estate therein, or any other provision made by the will of a deceased husband or wife for a surviving wife or husband, shall, unless otherwise

<sup>1</sup>Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

expressed in the will, bar the dower of such survivor in the lands of the deceased, unless such survivor shall elect to and does renounce the benefit of such devise or other provision, in which case he or she shall be entitled to dower in the lands, and to one-third of the personal estate after the payment of all debts." The devise of the real estate passed by the testator at the time of his death to appellant, to be used and enjoyed by her while she remained his widow, was the devise of an estate in lands, within the meaning of the section of the statute, supra, and by the terms of the section such a devise will bar dower, unless otherwise expressed in the will; but the widow had the right to elect to take under the will or renounce its provisions and take under the statute. Section 11 of the dower act provides: "Any one entitled to an election under either of the two preceding sections shall be deemed to have elected to take such jointure, devise, or other provision, unless within one year after letters testamentary or of administration are issued he or she shall deliver or transmit to the county court of the proper county a written renunciation of such jointure, devise, or other provision." Under this section of the statute the widow was under no obligation to make an election whether she would take under the will or the statute until letters testamentary or of administration had been issued, and after the issue of such letters she could make her election at any time she saw proper within one year from date of letters. It would be manifestly unjust to require a widow to make her election before she had accurate and reliable information in regard to the condition of the estate, and the legislature no doubt had this fact in view when the section was formed giving the widow one year after the issue of letters to make her election. Under section 51, c. 3, of the statute entitled "Administration of Estates" it is provided that when letters are granted the executor or administrator shall make out and file within three months a full inventory of the estate of the deceased, and section 60 requires the administrator or executor to fix upon a day within six months when and where all claims may be presented to the court and adjusted. Other sections authorize appraisers to be appointed when letters are granted, who appraise the property and fix upon the amount of the widow's award. Under these provisions of the statute, which it is the duty of the county or probate court to require the executor or administrator to strictly follow, a widow of a deceased person can within one year from the grant of letters obtain accurate and full information in regard to the condition of the estate, and thus be enabled to determine whether she will take under the will or under the statute. Here no letters were issued; indeed, no steps whatever were taken to settle the estate, except that the will was proved and admitted to probate. No inventory was filed, and no opportunity given creditors to present claims for adjustment. Unless this was done, or until it was de-

termined in some legitimate manner what debts were existing against the estate, the condition and value of the estate left by the deceased could not be known, and the widow was in no position to be called upon to make an election.

But while the statute confers upon the widow the right to make an election at any time within one year after the grant of letters, the time thus given may be waived; and if the widow, with a knowledge of all her rights, elected to take under the will, she would be bound by such an election. In *Story on Equity Jurisprudence* (section 1093) the author, in speaking on the question of an election, says: "Questions have also arisen in courts of equity as to the time when, and the circumstances under which, an election may be required to be made. The general rule is that the party is not bound to make an election until all the circumstances are known, and the state and condition and value of the funds are clearly ascertained; for, until so known and ascertained, it is impossible for the party to make a discriminating and deliberate choice, such as ought to bind to reason and justice. Keeping this rule in view, did the widow elect to take under the will, as is claimed by appellees? It was proven that the will was read to the widow after it was written, and she knew its contents, and was satisfied with it; but we do not regard this as a controlling fact, as she could not be in a position to determine whether she desired to accept the provisions of the will or take under the statute unless she knew the condition of the estate. It was also proven that upon the death of her husband she took possession of and retained the personal property, and remained in possession of the farm, receiving the rents and profits. As to the personal property, if it had been appraised as required by statute, and her specific allowance fixed as required, she would have been entitled to the most, if not all, the personal property in her specific allowance. As to the possession of the farm, at the time of the testator's death it was his residence and homestead. Section 1 of the homestead act provides "that every householder having a family shall be entitled to an estate of homestead to the extent in value of \$1,000 in the farm or lot of land and buildings thereon \* \* \* and occupied by him or her as a residence." Section 2 provides such exemption shall continue after the death of such householder for the benefit of the husband or wife surviving, etc. The widow, as survivor of the testator, was entitled to occupy the farm as a homestead for the support of herself and children, the appellees herein, until such time, at least, as she might accept the provision of the will, or until her homestead might be set off or assigned as provided by law. There is, therefore, as much reason for holding that the occupancy and use of the farm was as widow as there is for holding that appellant occupied as devisee. There is also evidence that the widow, after her second marriage, told the executor that she had accepted the personal property under the will, and to another witness she said the will was as she want-

ed it. These loose expressions of the widow cannot be regarded sufficient to establish the fact that she, with a full knowledge of the condition of the estate and her rights under the will and the statute, had released her right to relinquish the provisions of the will, and had actually accepted the provisions made for her by the will. There was also evidence tending to prove an attempted leasing of the farm after the marriage to appellant and her second husband by the guardian of appellees, but the appellant never occupied under the lease, but has all the time held the farm in the same manner that she did when she was left upon it by the death of her husband. Those are the principal facts relied upon to establish an acceptance by the widow of the provisions of the will; and, while they tend to prove an acceptance, we do not regard them sufficient to establish the fact. Had appellees or their guardian desired to settle the question whether the widow accepted the provisions of the will or whether she desired to take under the statute, they had the power within their own hands by causing letters testamentary to issue. Had this course been pursued, and letters issued, within one year from that date the widow would have been compelled to renounce the provisions of the will; otherwise she would have been held to have accepted its provisions, and thus the matter would have been definitely settled. The decree of the circuit court must be reversed, and the cause remanded for further proceedings consistent with this opinion.

William M. Schuwerk, for appellant. H. Clay Horner, for appellee.

WILKIN, J. This is an action on the case, by appellee against appellant, begun in the circuit court of Randolph county, under the provisions of the dram-shop act, to recover damages for an injury to her means of support by reason of the intoxication and death of her husband, caused by the sale to him of intoxicating liquors by appellant. The plea was "Not guilty." On a trial before a jury a verdict was returned in favor of appellee, fixing her damages at \$4,000. A remittitur of \$1,000 being entered, judgment was rendered upon the verdict against appellant for \$3,000 and costs of suit. On appeal to the appellate court of the fourth district, that judgment was affirmed, and appellant now brings the record to this court. 43 Ill. App. 312. The first count of the declaration alleges that the defendant sold and gave the husband of plaintiff intoxicating liquors, and thereby caused him to become intoxicated, "and, so being intoxicated, he, \* \* \* in consequence thereof, \* \* \* while so intoxicated, \* \* \* went into the Kaskaskia river, \* \* \* and then and there drowned, and died in consequence of such intoxication, by the defendant so wrongfully caused." The second count is the same as the first, and alleges: "And so being intoxicated, in consequence of such intoxication so by the defendant wrongfully caused as aforesaid, he, the said \* \* \*, while bathing himself in the Kaskaskia river, \* \* \* then and there, in consequence of such intoxication, took sick and died."

That the defendant on the day alleged did sell or give the husband of plaintiff intoxicating liquors, and that by reason thereof he became intoxicated, and that, being so intoxicated, he went from defendant's saloon to the river, and into it, and was there drowned, is not denied. The point of controversy upon the trial and in the appellate court was as to whether the drowning was caused by the intoxication. That the evidence introduced by the plaintiff below tended to prove that it was in consequence of his intoxicated condition that the deceased went into the river at the place, and under the circumstances, that he did, must be conceded. Neither can it be denied that the evidence tended to prove, if it did not fully establish, the fact that his being drowned was the result of his intoxication. It was proved that when sober he was an expert swimmer, whereas, on the occasion of his death, he swam awkwardly, and with apparent difficulty,—his head, several times before he sank, being under the water—and that he vomited shortly before he finally went down. In other words, the evidence introduced on the trial at least tended to support the allegations of the declaration, not only as to the selling or giving of intoxicating liquors, and that intoxication resulted therefrom, but also that death was caused by such intoxication. The most that can be said is that as to this last fact the evidence was conflicting.

(146 Ill. 131.)

#### MEYER v. BUTTERBRODT.<sup>1</sup>

(Supreme Court of Illinois. May 8, 1893.)

INTOXICATING LIQUOR—CIVIL DAMAGE SUIT—EVIDENCE—INSTRUCTIONS—APPEAL.

1. Evidence that a man who, when sober, was an expert swimmer, went into the river while drunk, and was drowned; that upon that occasion he swam awkwardly, and with apparent difficulty, and vomited shortly before he sank,—is sufficient to justify a finding that his death was caused by his intoxication.

2. Whether intoxication was the proximate cause of the man's death is a mixed question of law and fact, upon which the verdict of the jury, rendered upon proper instructions, is conclusive in the supreme court.

3. In an action against a saloon keeper, under the dram-shop act, for causing the death of plaintiff's husband, an instruction stating that "if a person sells him intoxicating liquors, so as to produce intoxication sufficient to cause the person so intoxicated to lose his life, then the wife of the deceased has a right to demand and recover" damages, is not open to the objection that it authorizes a recovery even though the intoxication was not the proximate cause of the death.

Appeal from appellate court, fourth district.

Action by Sophia Butterbrodt against Joseph Meyer. Plaintiff obtained judgment, which was affirmed by the appellate court. Defendant appeals. Affirmed.

<sup>1</sup>Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

That being so, the judgment of the appellate court, affirming that of the circuit court, conclusively settles that, and all other controverted facts, against appellant. This conclusion so clearly resulting from section 89 of the practice act, and so repeatedly held by the decisions of this court, seems to have been overlooked by counsel for appellant, in his argument, or else he has failed to distinguish between matters of law and mixed questions of law and fact.

The first point is that the alleged intoxication was not the proximate cause of the death of the husband of appellee. Whether an act is the proximate cause of an injury is a question for the jury upon the evidence, under appropriate instructions. It is, in other words, a mixed question of law and fact, which must be submitted to the jury under proper instructions from the court. *Car Co. v. Bluhm*, 109 Ill. 20; *Bagley v. Grand Lodge A. O. U. W.*, 181 Ill. 498, 22 N. E. Rep. 489. And the finding of the appellate court as to mixed questions of law and fact is final, and not subject to review in this court. *St. Louis Nat. Stock Yards v. Wiggins Ferry Co.*, 102 Ill. 514. Unless, therefore, there was some error in the instructions of the court upon the question as to whether the intoxication was the proximate cause of the death of the deceased, the finding of the jury and judgment of the appellate court are as conclusive against the appellant on that as any other fact in the case. There is certainly nothing shown by the facts and circumstances under which the deceased lost his life inconsistent, as a matter of law, with the conclusion that it was the proximate result of his intoxication. Had he fallen into the stream, and been drowned, or gone upon a railroad track, and been run over by a locomotive, by reason of being incapable of exercising proper caution, or taking proper care of himself, it would be clear, under the decisions of this court, that his death was the proximate result of his intoxication. *Emory v. Addis*, 71 Ill. 278; *Brannan v. Adams*, 78 Ill. 831; *Schroder v. Crawford*, 94 Ill. 357; *Black, Intox. Liq.* § 811.

It is insisted, however, that the court below erred in giving and refusing instructions. The only exception taken to these given is to the fifth, which, it is said, fails to tell the jury that the intoxication "sufficient to cause the person intoxicated to lose his life" must be the proximate cause, etc. Only a portion of this instruction is copied into the abstract, and that portion does not give the true scope of it, when considered as a whole. Turning to the record, we find that it is an instruction informing the jury as to the right of a wife to maintain an action of this kind, regardless of the fact that she may have income or property in her own right, and only uses the language referred to by counsel as the basis of his criticism, incidentally. But even if it were otherwise the instruction does, in effect, make the death the proximate result of intoxication necessary in order to entitle the wife to recover. The language is: "And if a person sells him intoxicating liquors so as to produce intoxication sufficient to cause the person

so intoxicated to lose his life, then the wife of the deceased has a right to demand and recover," etc. No one could understand this instruction as authorizing a recovery where the death was the independent result of intoxication. Moreover, the first instruction given on behalf of plaintiff expressly told the jury that the death must be the direct consequence of the intoxication, and so did the second and third.

Counsel says: "Instructions refused appellant, we think, should have been given. The one as to the extraordinary and fortuitous event we especially think pertinent." This is a very general statement, and directs our attention to no particular reason why instructions refused should have been given, nor does it indicate which of the refused instructions counsel regard as especially pertinent. Upon this indefinite criticism of the rulings of the circuit court in refusing instructions, we can say no more than that, from an examination of those given at the instance of the defendant, we think the jury was fairly instructed as to the law of the case in his behalf; and that the refusal of others worked him no injury, without reference to the question as to whether they contained correct propositions of law or not. We find no error in this record, and the judgment of the appellate court will be affirmed.

(146 Ill. 262)

#### HAENNI et al. v. BLEISCH.<sup>1</sup>

(Supreme Court of Illinois. May 8, 1893.)

##### DEED—DELIVERY—FALSE REPRESENTATION.

1. A delivery of a deed to a third person for the grantee's benefit, followed by an assertion of title by the grantee, is a good delivery.

2. An unfulfilled promise to pay certain money, as an inducement for the execution of a deed, is not a false representation which will justify a court of equity in setting the deed aside, since a false representation must refer to some matter existing at the time it is made.

Appeal from circuit court, Madison county; Alonzo S. Wilderman, Judge.

Bill by Eva Haenni and Frederick Haenni, her husband, against Catherine Bleisch, to set aside a deed, and for partition. Defendant obtained a decree. Complainants appeal. Affirmed.

A. W. Metcalf, for appellants. Tra-vous & Warnock, for appellee.

WILKIN, J. To the October term, 1891, of the circuit court of Madison county, appellants filed their bill in chancery against appellee to set aside a deed by said Eva, conveying certain real estate to appellee, and for partition. The cause was heard on bill, answer thereto, replication, and proofs, and a decree entered dismissing the bill for want of equity, at the cost of the complainants. From that decree this appeal is prosecuted.

The only question in the case is whether, upon the allegations of the bill, and proofs made, the circuit court should have set aside said deed. It appears that on the 13th day of September, 1879, one Christian

<sup>1</sup> Reported by Louis Bolsot, Jr., Esq., of the Chicago bar.

Mettler, the father of said Eva Haenni and Catherine Bleisch, purchased the 120 acres of land described in the bill from one Jacob Leef, paying him therefor \$3,000. He caused the deed to be made by Leef to his said daughters jointly. On November 10, 1880, said Eva, at the request of her father, made a quitclaim deed of her undivided interest in said land to her sister Catherine, and delivered the same to her father, who delivered it to appellee. This deed was duly recorded, and, about the time it was executed, appellee took possession of the whole of said real estate, and has since remained in the exclusive possession and control thereof, paying all taxes assessed against it, and making lasting and valuable improvements thereon. It is the quitclaim deed of November 10, 1880, which the bill seeks to have set aside. The grounds upon which the relief prayed is asked are set forth in the bill, as amended, in the following language: That her father "came to your oratrix, then being the wife of said Fredrich, and desired her to make a deed for her half of said land to said Catherine Bleisch, promising and agreeing that, if she would do so, he would pay the value of said lands to her in money or other property, so that she and the said Catherine shared equally in all his said property. Your orator further states that it was entirely on the good faith of the representations of said Mettler that she executed and delivered said deed, and for no money or other consideration whatever by him or by said Catherine paid or given to your oratrix at any time. Your oratrix further states that she never bargained or sold said lands to said Catherine, or contracted with her about the lands, and never delivered the deed to her, but all the contracting was with said Christian, and the deed was delivered to him in the absence of said Catherine. Your orator and oratrix further state that all the representations of the said Christian Mettler in procuring said deed, and on the good faith of which your oratrix relied when she executed and delivered said deed to him, were false and fraudulent, in this, to wit: That the said Christian Mettler never did pay the value of said lands to your oratrix, Eva Haenni, in money or other property, so that she and the said Catherine shared equally in all his said property, but, on the contrary, your oratrix, Eva Haenni, entirely lost the legal title to said lands by the means aforesaid, and the same became unlawfully vested in said Catherine, where it still remains, without any legal or valuable consideration whatever, and without her husband joining in said deed, and the same has never been incumbered by her." The answer admits the execution of the deed, and delivery to said Christian Mettler, and avers that he delivered the same to appellee, and that her said father paid said Eva for said land. It sets up possession of said land by appellee under said deed, the payment of taxes, and making improvements by her, as above set forth, and pleads the seven-years statute of limitations under claim and color of title, and payment of taxes.

Conceding that the allegations of the bill

were supported by the proofs, the circuit court properly dismissed the bill. Counsel for appellants insists that there is no proof of the delivery of the deed in question. There is no such issue in the case. The bill shows that the deed was executed by the grantor for the purpose and with the intention on her part of conveying her interest in said lands to the grantee, Catherine Bleisch; that the procuring of the conveyance by the father was for the benefit of said grantee, and that the delivery of the deed to the father was for the purpose of perfecting the conveyance intended to be made; and that appellee accepted the deed, and has ever since claimed title under it. "If a deed is delivered to a stranger, who has no authority to receive it, the grantee may ratify the act of the stranger, and the delivery will be good, even in cases where the deed is made without the grantee's knowledge." *Morrison v. Kelly*, 22 Ill. 626. The unconditional delivery of a deed to a third person for the benefit of the grantee is a sufficient delivery of the same, if accepted by the grantee. *Ferguson v. Miles*, 3 Gilman, 358; *Rivard v. Walker*, 39 Ill. 413; *Crocker v. Lowenthal*, 83 Ill. 579. And when the deed is unconditional, and beneficial to the grantee, an acceptance will be presumed. *Ferguson v. Miles*, supra; *Thompson v. Candor*, 60 Ill. 244. A delivery to a third person by authority or with the assent of the grantee is as effectual as a delivery to the grantee himself. *Henrichsen v. Hodgen*, 67 Ill. 179. Under the foregoing authorities the bill itself shows that there was a sufficient delivery of said deed.

Does the bill show such fraud on the part of Christian Mettler in procuring the execution and delivery of the deed as will authorize a court of equity to set it aside? What were the representations by him which induced the grantor, Eva Haenni, to make the conveyance? Simply, "if she would do so, that he would pay the value of said lands to her, in money or other property, so that she and the said Catherine shared equally in all his said property."—a mere promise to do a thing in the future. Wherein was the so-called representation fraudulent and false? Only in the fact "that the said Christian Mettler never did pay the value of said lands to your oratrix, Eva Haenni, in money, etc.,"—a breach of the promise, and nothing more. There is nothing whatever in the bill tending to show that undue influence was exercised over the grantor by her father because of his parental control over her. On the contrary, it shows that his dominion over her had ceased prior to the conveyance. If, therefore, a court of equity can be resorted to, on the facts here alleged, to annul a deed of conveyance to real estate, then, in every case in which there is a breach of the vendee's contract to pay for the land conveyed, the vendor can avoid the deed. Certainly, no one will contend that such is the law. A false representation, within the meaning of the law, "must be as to a past or present state of facts, not merely as to an intention as to the future." *Gage v. Lewis*, 68 Ill. 604, citing *Kerr, Fraud & M. 88*, wherein it is said: "As distinguished from the false repre-

sensation of a fact, the false representation as to a matter of intention, not amounting to a matter of fact, though it may have influenced a transaction, is not a fraud in law." Also, *Gallager v. Brunel*, 6 Cow. 346, holding "that, to warrant an action for a deceitful representation, it must assert a fact or facts as existing in the present tense. A promise to perform an act, though accompanied at the time with an intention not to perform, is not such a representation as can be made the ground of an action at law. The party should sue upon the promise, and if this be void he has no remedy." Without reference to other grounds upon which the decree of the circuit court should be affirmed, we are clearly of the opinion that the bill, on its face, shows no ground for equitable relief. Affirmed.

(50 Ohio St. 305)

### HECKMAN v. ADAMS.

(Supreme Court of Ohio. May 9, 1893.)

PROBATE COURTS—JURISDICTION IN LUNACY PROCEEDINGS—GUARDIAN OF INSANE WIFE'S ESTATE—APPOINTMENT—IMPEACHMENT.

1. The jurisdiction acquired by the probate court in an inquisition of lunacy, under our statutes, continues until the discharge of the patient.

2. Before the amendment of section 6302, Rev. St., (March 1, 1880), a guardian of the estate of an insane wife might be appointed by the probate court at any time after the inquisition of lunacy and before her discharge, without notice to her husband.

3. Such guardianship cannot be impeached by the husband in a collateral proceeding.

4. Sections 6255, 6302, 6304, Rev. St., authorize the appointment of a guardian for the estate of a lunatic, without appointing a guardian of the person.

(Syllabus by the Court.)

Error to circuit court, Wayne county.

Action by George A. Adams against Andrew G. Heckman for the conversion of property. On a judgment for plaintiff, defendant brings error. Reversed.

The other facts fully appear in the following statement by BURKET, J.:

On the 30th day of September, 1886, George A. Adams was married to Amelia Heckman, the daughter of Andrew G. Heckman, and they resided together as man and wife, in Medina county, until March 29, 1887, when she was adjudged insane by the probate court of that county, and on April 4th of the same year she was committed to the asylum for the insane, at Cleveland, by her husband, on the warrant of said court, where she remained until about the 1st day of November, 1887, when she was brought back by her husband to her father's residence in the village of Seville, where he left her, while he moved the household goods and other property and her clothing to a house which he had rented, but his wife refused to go there with him. Shortly afterwards he moved all the property to the house of Peter Rich, in Wayne county, and advertised it for sale. On November 7, 1887, Andrew G. Heckman, father of Amelia, was, on his own application, and without notice to her husband, appointed guardian of the estate of Amelia Adams by the

probate court of Medina county. On November 9, 1877, Andrew G. Heckman, as such guardian, by action before a justice of the peace, replevined all of said property from said Peter Rich, in whose house the same had been placed by said Adams, and gave bond, and the property was delivered to him. Peter Rich disclaimed any and all interest in the property, and on the trial before the justice of the peace the property was adjudged to Mr. Heckman, at his costs. On March 28, 1888, said guardian resigned, and the probate court found that Amelia Adams was restored to reason, and was capable of managing her own business affairs. She and her father claimed the property so replevined by her father, as her guardian, to be her separate property, purchased in part with her money, and partly given to her by her parents at and after her marriage. George A. Adams claimed to own most, if not all, of the property, under some arrangement with Mr. Heckman. The property consisted of the wife's clothing and household goods. About the last of November, 1887, said George A. Adams brought an action against said Andrew G. Heckman before a justice of the peace, charging him with having converted said property to his own use, to the damage of said Adams in the sum of \$300. The action was taken by appeal to the court of common pleas of Wayne county, and in his amended petition Mr. Adams gives an itemized list of the property, consisting of household goods and woman's clothing, and avers that said Andrew G. Heckman, on or about the 9th or 10th days of November, 1887, unlawfully, wantonly, recklessly, and maliciously seized, took, and carried away from plaintiff's possession said goods and chattels, the property of said Adams, of the value of \$300, and that said Heckman converted the same to his own use. Defendant below, for his first ground of defense, denied each and every allegation of the amended petition. For his second ground of defense, said defendant below averred that he was the guardian of Amelia; that the property belonged to her as her separate property; and further averred that, as such guardian, he had recovered said property from said Peter Rich in said replevin proceedings, which are fully and properly pleaded; and avers that, as such guardian, he is entitled to the right of property and possession of said goods and chattels. Plaintiff below, for his reply, admits that said replevin suit was brought as averred, and denies each and every other allegation in said second ground of defense. A trial was had in the common pleas court to a jury, and verdict for the defendant below. A motion was made for a new trial, which was overruled, and judgment rendered on the verdict, to all of which plaintiff below excepted. A bill of exceptions was allowed and filed, containing all the evidence. A petition in error was filed by Mr. Adams in the circuit court of Wayne county, and upon the hearing of the same the judgment of the court of common pleas was reversed, and the case remanded to the court of common pleas for a new trial. Thereupon Mr. Heckman filed his petition



in error in this court to reverse the judgment of reversal of the circuit court, and to affirm the judgment of the court of common pleas.

Lee Elliott and Yocum & Taggart, for plaintiff in error. Alfred J. Thomas and John C. McClarren, for defendant in error.

BURKET, J., (after stating the facts.) The whole case turns upon the single question whether or not the appointment of Mr. Heckman as guardian of the estate of Mrs. Adams was void or valid. Mr. Adams and his wife were married, and the property in controversy acquired, while section 3108, Rev. St., as amended April 16, 1885, and section 3109, as amended April 14, 1884, were in force. Section 3108 provides as follows: "Any estate or interest, legal or equitable, in real or personal property, including rights in action belonging to a woman at her marriage, or which may come to her during coverture, by conveyance, gift, devise, or inheritance, or by purchase with her separate money or means, or due as the wages of her personal labor, or growing out of any violation of her personal rights, shall, together with the rents, incomes, issues, and profits thereof, be and remain her separate property." There is a further provision in this section as to his curtesy in her real estate, and as to her leasing the same, but nothing further as to personal estate. Section 3109 is as follows: "The separate property of the wife shall be under her sole control, and shall not be taken by any process of law for the debts of the husband, or be in any manner conveyed or incumbered by him, and she may, in her own name, during coverture, contract to the same extent, and in the same manner, as if she were unmarried." Under and by virtue of these two sections, the separate property of the wife belongs to her in her own right, and is under her sole control, and the husband, as such, has no interest in or control over the same. As to the wife's separate property, the husband stands as a stranger to her. While the case of *Levi v. Earl*, 30 Ohio St. 147, has been overruled as to another point, it has never been doubted as to the point here in question. In that case this court held that the separate property of the wife as fixed by the married woman's act of 1861, as amended in 1866, became, by virtue of that statute, her separate property, and under her sole control, "free from the marital rights of the husband at common law over the same." And this court further held in the same case that "by these statutes the marital rights of the husband were divested as to the wife's general estate, and the wife was invested with control of the same." In the case of *Patten v. Patten*, 75 Ill. 446, the court says: "The effect of the married woman's act is such that the rights of the husband at common law, in respect to the wife's property, are swept away and gone. As to her separate estate, and her relations thereto, she has no husband, and he is, as to such estate, even during coverture, a stranger." (Of course, these statutes as to the rights of married

women do not affect or change the common-law rule that, in the absence of the husband, the wife is his agent for the care and protection of his property; and as a necessary result of these statutes the husband is now held, in the absence of the wife, to be her agent for the care and protection of her property. While thus acting for her in her absence, his rights and relations to her property are the same as hers were to his property at common law, under the same circumstances. The legal effect of the statutes as to the property rights of married women is to place husband and wife upon an exact equality as to the property of each; that is, "neither husband nor wife has any interest in the property of the other," except as to dower, distribution, and support. It therefore follows that Mr. Adams had no interest in or control over the property of his wife as against her or her representative.

Mr. Heckman claimed to be her representative, her guardian, and Mr. Adams claimed that the appointment of Mr. Heckman as guardian of Mrs. Adams was void, for the reason that Mr. Adams had no notice of the application for the appointment of a guardian for his wife; and he offered on the trial to prove that he had no such notice. The court refused to admit the testimony on that point, and exceptions were duly taken. The court also charged the jury that, if Mr. Heckman was appointed and qualified as guardian of Mrs. Adams, he was entitled, as such guardian, to the property in controversy, and had the right to take the property from the possession of any person who refused to deliver the same to him on demand; to which charge exceptions were taken by Mr. Adams. The appointment of Mr. Heckman as guardian of Mrs. Adams was for her estate only, and not for her person and estate; and it is claimed that under section 6302 there is no authority for the appointment of a guardian of the estate only of a lunatic. Section 6304 provides that "all laws relating to guardians for minors and their wards, \* \* \* in force for the time being, shall be applicable to guardians for \* \* \* lunatics, \* \* \* except as otherwise specially provided." Section 6255 was in force for the time being at the time of this appointment, and that section provides that "a guardian may be appointed to take charge only of the estate of a minor." The appointment of a guardian for the estate only of a lunatic, it will thus be seen, is authorized by the letter of these two sections of the statute. Section 6302 is made up in the Revision of 1880 out of sections 41, 43, and 44 of the act of April 7, 1856. Section 41 provides that the probate judge, upon satisfactory proof that any person resident of the county \* \* \* is an idiot or lunatic, and that it is necessary in order to preserve the property of such idiot or lunatic, shall appoint a guardian. Section 43 was in the same words, except that the words, "and that it is necessary in order to preserve the property," were omitted. The guardian to be appointed under section 41 was for the preservation

of the property,—that is, of the estate only; while the appointment under section 43 was general for both person and estate. As these two sections are now combined into one, (6302,) the new section must be construed to be as broad as both of the old ones taken together. The new section is more general in its terms, but not more narrow in its provisions. In the case of *King v. Bell*, 36 Ohio St. 460, this court held that all laws relating to guardians for minors and their wards are made applicable to guardians for lunatics. True, the question as to appointing a guardian for the estate only of a lunatic did not arise in that case; but the question as to whether the appointment of the guardian for the lunatic, who was also a minor in that case, was or was not authorized by said section 6304, was directly in question, and said section was held to be applicable, and to give such authority. In the case of *Leffel v. Knoop*, decided at the present term of this court, and not reported, this court held that sections 6304 and 6255 applied to the appointment of guardians for lunatics, and that such guardians might be appointed for the estate only. We still regard that decision correct, and therefore hold that the statute authorizes the appointment of a guardian for the estate only of a lunatic or insane person. What now forms section 6302, Rev. St., was, before the Revision of 1880, a part of the chapter on lunatic asylums, and said section must still be read and construed in pari materia with the sections providing for the admission of persons to the lunatic asylum.

By sections 702, 703, Rev. St., it is provided that, upon an affidavit being filed by some resident citizen with the probate judge to the effect that he believes the person charged with insanity to be insane, the probate judge shall issue his warrant for such person, and have such person brought before him, on a day to be named in the warrant, and witnesses shall be subpoenaed, and an inquest of lunacy held upon the person, and if the person cannot be present before the court the judge shall personally visit the patient, and certify that he has ascertained the condition of the person by actual inspection, and thereupon the inquest of lunacy may proceed in the absence of such person. By section 704 it is provided that if upon the hearing the probate judge is satisfied that the person so charged is insane, he shall cause the proper certificate to be made out. By section 705 the judge is required to issue his warrant to the sheriff, commanding him to take charge of and convey such insane person to the asylum. Upon being received at the asylum the superintendent is required to receipt for the patient on the back of the warrant, and the sheriff is required to return the warrant so receipted to the probate judge. In case the patient cannot be admitted to the asylum, he may be confined in the infirmary or county jail; and all things needful, if not otherwise provided, shall be paid for out of the county treasury on the warrant of the probate judge. Should such insane person be restored to reason, the probate judge may, upon the proper certificate of the at-

tending physician, release such person. By section 709 the superintendent of the asylum is authorized, when he deems it proper, to discharge such patient from the asylum; and if the superintendent deems it proper to allow such patient to leave the asylum unattended he may do so, but otherwise the superintendent notifies the probate judge and the patient is conveyed to his or her home upon the warrant of the probate judge. Such insane person may also be allowed to make a trial visit to his or her home for a period not exceeding 90 days, but such visit and return to the asylum is under the supervision of the probate judge. By section 710 it is provided that upon the return of an escaped patient, or the discharge of a patient from the asylum, the superintendent shall at once notify the probate judge. By section 714 the probate judge is required in all cases to file and preserve all papers left with him, and make such entries upon his docket as will, together with the papers so filed, preserve a perfect record of each case.

From these and other provisions of the statute it is clear that the probate judge upon an inquest of lunacy obtains jurisdiction of the person of the patient, and that such jurisdiction continues until the patient is finally discharged. The status of the patient as being insane and a fit person for guardianship is fixed by the finding of the probate judge upon the inquest of lunacy, and such status continues until it is changed by the discharge of the patient; and any time before such discharge the probate judge is authorized by section 6302 to appoint a guardian for such insane person. The statute seems to contemplate the appointment of a guardian immediately upon the status of insanity being fixed, but delay in the appointment could not have the effect to take away the jurisdiction of the probate court, so long as the delay is not extended beyond the discharge of the patient. The time of making such appointment of guardian, or whether there is any necessity for an appointment at all or not, is largely in the discretion and sound judgment of the probate judge.

Was the appointment of Mr. Heckman as guardian for Mrs. Adams void for the reason that it was made without notice to her husband? Mr. Adams had notice of the inquest of lunacy, and conveyed his wife to the asylum, under the warrant of the probate judge, and also brought her back not discharged, and left her at her father's house. He therefore had notice of the status of insanity of his wife, and that she was a fit subject for guardianship. The statute, as it stood when this appointment was made, did not require any notice to any person of the application for guardianship of a person adjudged insane by the probate court; and this court held in *Leffel v. Knoop*, supra, that no notice to the patient was necessary in such case. As the patient is the owner of her own property, and as this property can be placed in the hands of a guardian without notice to her, we see no good reason why the husband, who has no interest in or control over her property, should have

notice. If it be said that the guardian of the wife might invade the household of the husband, and despoil it of the furniture and household goods, the answer is that at common law the guardian of the insane husband, appointed without notice to the wife, might do the same thing as against the wife; and what then had to be endured by her should not now be complained of by him. Husband and wife are put upon an exact equality as to their property rights, even to the extent that neither can be excluded from the other's dwelling; and, while he is to support himself and his wife, if he is unable to do so she must assist him so far as she is able. Sections 8110, 8111, Rev. St. Suppose a judgment should be rendered against the wife without notice to the husband, could it be claimed that the sheriff, holding an execution against her, would be required to notify the husband before seizing the wife's property to satisfy the execution? We think not.

Many cases, of which *Eslava v. Lepretre*, 21 Ala. 504, is a fair sample, hold that an inquisition of lunacy, followed by the appointment of a guardian, all without notice to the alleged lunatic, is void; but in all such cases the decision is put upon the ground that the status of the person cannot be changed from sound mind to lunacy without notice to such person. But, the status of lunacy being once fixed by a proper inquisition, the right to appoint a guardian without further notice seems to be conceded. *McCurry v. Hooper*, 12 Ala. 823; *Wait v. Maxwell*, 5 Pick. 217. The case of *Shroyer v. Richmond*, 16 Ohio St. 455, is a very important case upon the point in question, and, being in our own state, and under a statute the same in effect as the one now in force, it should have great weight, and be practically conclusive of this case. The proceeding in that case was to appoint a guardian for a mute, under section 17 of the act of March 9, 1838, (*Swan & C. 679*), which was a part of the act regulating lunatic asylums, and which act then contained the same provisions for appointing guardians for lunatics as is now contained in section 6302, Rev. St. Said section 17 of the act of 1838 provides that the court "shall have power to appoint guardians to all such deaf and dumb persons of full age, who may prove to be incapable of taking charge of their affairs." On December 6, 1860, the probate court of Montgomery county appointed David Shroyer guardian of Harry Long under said act of 1838, describing said Long as a "mute," and the only entry on the journal of the probate court as to the facts constituting jurisdiction is as follows: "This day came David Shroyer, and made application to be appointed guardian of Harry Long, (a mute,) and the court being satisfied that said Harry Long is a mute, and that said mute is a resident of this county." Then follows a statement on the journal to the effect that, having filed the proper statement as to the value of the estate, said Shroyer gave bond, and was appointed guardian, and took the oath of office. Afterwards, in a litigation, the validity of this appointment as guardian

was called in question, and it was claimed that the appointment was void, for the reason that the court did not acquire jurisdiction, and did not find that said Harry Long, at the time of the appointment, belonged to a class of persons over whose estate the court had jurisdiction to appoint a guardian; and averred that said Harry Long at the time of the appointment did not belong to any class of persons over whom the court had jurisdiction to appoint a guardian, and further averred that the appointment was made without authority of law. A demurrer to this answer was overruled, and on the trial parol evidence was received to prove the facts set forth in the answer, and the verdict was against the guardian; to all of which he excepted. The case was reserved to this court, and the following are the 5th, 6th, and 7th syllabi of the case: "(5) Such proceedings are not inter partes or adversary in their character. They are properly proceedings in rem, and the order of appointment, made in the exercise of jurisdiction, binds all the world. The actual presence of the ward is not essential to the jurisdiction, unless, by reason of his right to choose a guardian, or for other cause, the statute so require. (6) The probate courts of this state are in the fullest sense courts of record. They belong to the class whose records import absolute verity; that are competent to decide on their own jurisdiction, and to exercise it to final judgment, without setting forth the facts and evidence on which it is rendered. (7) Hence an order appointing a guardian, made by a probate court in the exercise of jurisdiction, cannot be collaterally impeached. The record showing nothing to the contrary, it will be conclusively presumed in all collateral proceedings that such order was made upon full proofs of all the facts necessary to authorize it." This case is cited and approved in *Wheeler v. State*, 84 Ohio St. 394, in which the court say: "Inquests of this character [lunacy] are analogous to proceedings in rem, affecting the general and public interest, and no one can strictly be regarded as a stranger to them." This case is also cited in *Knapp v. Thomas*, 39 Ohio St. 387, where Judge Okey says: "The record of the probate court appointing a guardian is, in all collateral proceedings, conclusively presumed to be correct." This case of *Shroyer v. Richmond* is cited and approved in *Slagle v. Enteklin*, 44 Ohio St. 687, 10 N. E. Rep. 675, and in *Railroad Co. v. Village of Belle Centre*, 48 Ohio St. 278, 27 N. E. Rep. 464, and in several other cases. In the case in 48 Ohio St., 27 N. E. Rep., the same question was made as to want of notice that is made in the case at bar, and an effort was made to impeach the judgment of the probate court collaterally, by showing by parol that no notice was served on the railroad company in the appropriation case in the probate court. This court held that such evidence could not be received, and that the judgment of the probate court must be held in a collateral proceeding to be conclusive.

In view of these authorities, it is clear that, as between Mr. Heckman and Mr.

Adams, in a collateral proceeding, the guardianship was valid, and could not be impeached, and that the court of common pleas properly excluded the evidence offered by Mr. Adams to show that the appointment of the guardian was without notice to him. The record of the probate court bound all the world, including Mr. Adams.

It is also clear that the charge of the court of common pleas was correct, or, at least, that Mr. Adams could not complain of the same, as it was, perhaps, more in his favor than the evidence would warrant. The identity of the parties being admitted, the record of the guardianship was conclusive, and the court should so have instructed the jury, without submitting that question to them for their determination. The probate court is always open, and under section 6316, Rev. St., a motion can be made at any time for the removal of a guardian improperly appointed, or for other cause; and Mr. Adams should have availed himself of the provisions of this statute, instead of treating the action of the probate court as void. With the question of the guardianship thus determined, there is no other error in the record of the common pleas court, and it follows that the judgment of the circuit court should be reversed, and that of the common pleas affirmed.

Judgment accordingly.

(50 Ohio St. 346)

SMITH et al. v. LOEWENSTEIN et al.

(Supreme Court of Ohio. May 9, 1923.)

**PERPETUAL LEASE—OPTION OF PURCHASE—EQUITABLE CONVERSION.**

1. Upon exercising the option, the equitable doctrine of constructive conversion of real into personal property is applicable to leases in which an option to purchase the demised premises is granted to the lessee.

2. Where a lessee of a perpetual lease, with the privilege of purchasing the land at any time, duly exercises the option of purchase after the death of the lessor, who is the owner in fee, the conversion of the realty into personalty will take place at the time of exercising the option, and will not relate back to the time of the execution of the lease; and the purchase money, if not required to pay debts or legacies of the lessor, will go to the heirs of the lessor, as between the heirs, on the one side, and the personal representatives of the lessor, on the other.

3. In the year 1848, W., then a resident of the state of Ohio, and seised in fee simple of a parcel of land situated in that state, leased the same to B. for the term of 99 years, renewable forever. The lease contained a covenant that upon the payment of the sum of \$800, and all accrued rents, to the lessor, her heirs or assigns, the lessor, her heirs or assigns, would convey the premises in fee simple to the lessee, his heirs or assigns. All the interest of the lessee thereafter became vested in L. by mesne conveyances. The lessor, in 1854, married T., and thereafter resided with him in the state of New York until 1861, when she died intestate, leaving her husband and E., a son, her only child and issue, surviving her. Her son died unmarried and intestate in 1872, and her husband died in 1884. The husband and son lived and died residents of the state of New York. In April, 1886, L., desiring to exercise the option of purchase, filed a bill of interpleader, making the administrator of the lessor and of

her husband, and also the heirs at law of E., the son, and others, parties in the action, as being claimants of the fund. There was no claim made upon the fund for the payment of any debts of the lessor. *Held:* (1) That the demised premises were not converted into personalty until the exercise by L. of the option of purchase. (2) That upon the death of the lessor the premises were inherited by her son, and upon his death passed by inheritance to his heirs at law, as real estate, under the Ohio statute of descent, subject to the lease, and to the husband's estate by the curtesy. (3) That upon the husband's death the heirs at law of the son became the sole owners of the premises, subject only to the lease, with the right to the accrued rents and the purchase money.

(Syllabus by the Court.)

Error to circuit court, Hamilton county.

Action by Henry Loewenstein and another against Samuel W. Smith, Jr., administrator, and others. On the judgment entered, the administrator brings error. Affirmed.

Stephens, Lincoln & Smith, Ledyard Lincoln, and S. W. Smith, Jr., for plaintiffs in error. Joshua H. Bates and Henry P. Kaufman, for defendants in error.

DICKMAN, J. In March, 1848, Hannah Louisa Wade leased for the term of 99 years, and renewable forever, unto John James Burnett, a parcel of land situated in the city of Cincinnati, Ohio. The lease, among other covenants, contained the following: "The party of the first part covenants and agrees with the party of the second part that upon the payment to her, her heirs or assigns, by the party of the second part, his heirs and assigns, of the sum of eight hundred dollars, in addition to all rents that have accrued up to the time of such payment, the party of the first part, her heirs or assigns, shall and will, at the charges in the law of the party of the second part, his heirs and assigns, convey and assure the inheritance or fee simple of the hereby demised premises unto the party of the second part, his heirs or assigns, or to the heirs or assigns of him or them, who shall have and hold the same free and acquit of rent thenceforth forever." All the interest of Burnett in the leasehold, thereafter, by proper assignments, became vested in Henry Loewenstein and Herman Loewenstein, two of the defendants in error. Hannah Louisa Wade, in the year 1854, married Thomas E. Townsend, and resided with him thereafter in the state of New York, until the year 1861, when she died intestate, leaving, surviving her, Thomas E. Townsend, her husband, and Edward W. Townsend, her only child and issue. Edward W. Townsend died unmarried and intestate, in the year 1872, and Thomas E. Townsend died in 1884. Both father and son lived and died residents of the state of New York. Samuel W. Smith, Jr., plaintiff in error, was duly appointed administrator of Hannah Louisa Townsend, deceased, and Lucy E. Townsend, one of the defendants in error, was appointed administratrix of Thomas E. Townsend, deceased. Henry Loewenstein and Herman Loewenstein, desirous of exercising the option of pur-

chase granted in the lease, and being in doubt as to who was entitled to receive the purchase money, and empowered to make to them the proper conveyance of the premises, filed their petition, in April, 1886, in the court of common pleas of Hamilton county, making the administrator of the lessor and of her husband, and the heirs at law of the son, and others, parties defendant. They asked in their petition that the defendants be required to set up their respective rights, and offered to pay the purchase money into court, or to the parties whom the court might find entitled to receive the same, and asked that the court compel such parties, upon payment to them of \$800, and all rents then due on the premises, to execute to the plaintiffs such proper conveyance; and, further, that all the defendants be perpetually enjoined from setting up any claim to the premises. No claim was made upon the fund arising from the purchase money and accrued rents, for the payment of any debts of the lessor. The cause was heard in the court of common pleas, and taken by appeal to the circuit court. The circuit court rendered a final decree, finding that upon the death of Hannah Louisa Townsend the leased premises were inherited by Edward W. Townsend, her son; that upon the death of the son his heirs became the owners of the fee simple of the premises, under the statute of descent of the state of Ohio, subject to the lease and to the estate by the curtesy of Thomas E. Townsend, and upon the death of the latter became the sole owners thereof, subject only to the lease, with all the rights reserved in the lease, including the right to the rents and the purchase money; that the heirs at law of Edward W. Townsend were entitled to receive the whole of the sum paid to the clerk of the court as purchase money and accrued rents; and that the claim of the other defendants to receive any or all of such money and rents, by reason of any conversion in equity of the lessor's interest into personalty, or for any other reason, was not well taken. To reverse the judgment of the circuit court, Samuel W. Smith, Jr., administrator, and Lucy E. Townsend, administratrix, have respectively filed their petition and cross petition in this court.

The only question which we need consider is whether, as between the heirs at law of Edward W. Townsend, as the real representative of his mother, the lessor, on one side, and the administrator of the lessor and of her husband, on the other, the fund arising from the purchase money of the demised premises should go to the heirs, or the personal representatives. It is contended in behalf of the plaintiffs in error that by virtue of the equitable doctrine of constructive conversion the option to purchase at a future time, granted in the lease, converted the real estate into personalty; that the exercise of the lessee's option after the death of the lessor was retrospective in its operation, and converted the realty into personalty as of the time of making the lease, while it is urged on the other

side that the lessor's estate was not thus converted until the declaration of the option, at which time the lessor's estate had become vested in the heirs at law.

The doctrine now most in accord with the general course of authority and principle is that as between lessor and lessee, with the privilege to the latter to purchase, the conversion will be deemed to have taken place at the time of declaring the option, and not from the date of the contract giving the option. Such was the holding in *Edwards v. West*, 7 Ch. Div. 558, where, under the terms of a lease, the landlord covenanted to insure, and the tenant had the option to purchase for a fixed sum. Before the time for exercising the option the buildings demised were burned, and the landlord received the insurance money. The tenant then exercised his option to purchase, and claimed the insurance money as part of his purchase, on the ground that the option to purchase, when exercised, related back to the time of the contract giving the option, since which, it was argued, the property had been partially converted into personalty by the fire and the receipt of the insurance money, and that the purchaser was entitled to it in that shape. It was held that conversion, according to general principles, cannot relate back to an earlier date than that of the contract constituted by the exercise of the option; that as between the vendor and the purchaser, themselves, the conversion did not and could not take place until the purchaser declared his option. Until the option to purchase was exercised by the defendants in error, Loewensteins, by the payment of the purchase money, there was only an incomplete contract. It was executory in its nature. There was no agreement capable of being specifically enforced by the lessor, nor could the lessee, without declaring the option, and making the required payment, compel a conveyance of the premises in fee simple. For aught that appeared, the privilege of purchase acquired by the lease might never be exercised.

After the death of the lessor the demised premises descended to Edward W. Townsend, the son and heir at law, and became vested in him as an estate of inheritance. Clothed with the legal estate and the freehold title, he was entitled to receive the rents and profits, and had the right to enter for condition broken, and all other rights of the owner in fee, subject to those of the tenant. It was subsequent to the death of the lessor, and after the estate had thus vested in the heir, that the Loewensteins exercised the option of purchase, and called for a conveyance of the premises. In our judgment, it was at that time that there was a conversion of the real estate into personalty; and we see no good reason why the doctrine of relation back to the date of the lease should be applied for the purpose of divesting the heirs who held the freehold title when the option was declared, and handing over the purchase money to the personal representatives. The descent to the heir was in the legal channel which the statute had marked out; and after executing the lease

the lessor did nothing to curtail the rights of the heir, upon whom the law would cast the real estate immediately upon the death of the ancestor. The estate having thus devolved, and the lessee having failed or neglected to exercise the option to purchase while the lessor was alive, we do not discover upon what satisfactory ground the real estate should be deemed converted into personality as of the date of the lease, for the purpose of diverting the purchase money from the heir to the administrator.

The case of *Lawes v. Bennett*, 1 Cox, 167, is cited by counsel as establishing the doctrine that conversion may be made to depend upon the option to purchase at a future time, which, when exercised after the death of the owner of the estate, will—at any rate, as between his real and personal representatives—have a retrospective operation, to the time when the agreement giving the option was entered into. There is no adjudication of this court in which the doctrine of equitable conversion as applied to optional contracts, with a retrospective operation, is accepted. In *Gilbert v. Port*, 28 Ohio St. 276, 296, the court recognized the rule that equity looks upon things agreed to be done as actually done, and, when a contract is made for the sale of an estate, considers the vendor as a trustee for the purchaser of the estate sold, and the purchaser as a trustee of the purchase money for the vendor. But the court did not hold, either with or without qualification, that the rule applied “to optional contracts, as well as to those absolute.” An examination of authorities, English and American, makes manifest that the doctrine of *Lawes v. Bennett* does not rest upon a firm foundation. In *Townley v. Bedwell*, 14 Ves. 591, Lord Chancellor Eldon says: “That case [*Lawes v. Bennett*] was very much argued, and I do not mean to say that a great deal may not be urged against it.” It was not overruled, however, but was evidently followed as a precedent of impaired authority. In *Collingwood v. Row*, 3 Jur. (N. S.) 785, a lessee of real estate, with an option to purchase at the expiration of a term of years, made the purchase after the death of the lessor. The vice chancellor said: “The only question, then, is whether this is to be taken as realty or personality; and I confess I should have felt very great doubts if it were res integra, as very great inconveniences might follow, for after the enjoyment for many years by the devisee, on the expression of an option the realty may be converted into personality, and not only converted, but the whole may be taken away and given to another. It is a very singular and inconvenient state of things; but if the question has been decided by so great a man as Lord Kenyon,” in *Lawes v. Bennett*, “whatever doubts I might entertain as to that decision, I am bound to follow it.” In *Edwards v. West*, supra, Fry, J., in speaking of the same decision, said: “Whether it is or is not consistent with the general principle upon which conversion has been held to exist, it is not for me to say. It is enough for me to say that the case has been followed in

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numerous other cases, though it has been observed upon by more than one judge as somewhat difficult of explanation. \* \* \*

I do not think I am at liberty to extend it so as to imply that there is conversion from the date of the contract giving the option, as between the vendor and the purchaser who claim under it.” In *Lawes v. Bennett* there was a lease for seven years from October, 1758, with a privilege of purchase at any time after September, 1761, and before September, 1765. In *Townley v. Bedwell* the lease had been executed in 1795, for 33 years, with the privilege of purchase within 6 years. In *Collingwood v. Row* there was a lease of the premises for the term of 14 years, with the choice of purchasing at the end of the term. In *Edwards v. West* there was a demise of the premises for 21 years, with the option to purchase before the expiration of 5 years. In these and similar cases, where the conversion awaits an expression of the option, there exists the difficulty that it is left to the election of the lessee whether the demised premises shall be real or personal property. There is, however, the probability that a tenant who has made improvements on the premises may, in view of avoiding loss, take advantage of an option to purchase within the prescribed term of a few years, and thus settle the character of the property while the lessor is alive. But in the case at bar there is a perpetual lease, with a perpetual right to purchase. According to the contention of the plaintiffs in error, the option may be declared at any time in the future, and the fund be paid to the administrator. In *Graves v. Graves*, 15 Ir. Ch. 357, the master of the rolls, referring to *Lawes v. Bennett* and *Townley v. Bedwell*, says: “In one of those cases the option was to be exercised within six years, and in the other within seven years, which is very different from an option to be exercised at the end of any number of centuries.” If after the death of the lessor, and the lapse of over thirty-five years, under the perpetual lease in controversy, the option of purchase may be declared, and the fund paid to the administrator instead of the heir, for the same reason it may be done at the end of a hundred or more years, when, in the natural course of things, it would be impossible to find a personal representative of the lessor, or to ascertain who might be the distributees. Nor can we think that the lessor,—Mrs. Townsend,—having executed the lease for ninety-nine years, renewable forever, intended that after her son had inherited the land, and enjoyed the rents for a series of years, the lessee, upon exercising his option of purchase, might retrospectively convert the real estate into personality, so that the purchase money would go to her personal representatives instead of her son and heir.

To what extent a conversion takes place, and to whom the proceeds should go, when land is converted into money, must be determined by looking to the contract or instrument as indicating the intention of parties. Thus, where a will contains a specific devise by name of property, subject to the option, it has been held to carry to the devisee the purchase money, also,

when the option is exercised. *Drant v. Vause*, 1 Younge & C. 580; *Emuss v. Smith*, 2 De Gex & S. 722. So, also, when, in the instrument by which the option is given, there is a direction that the purchase money is to be paid to the person who is the owner of the estate when the option is exercised, he alone will be entitled to it. *Graves v. Graves*, supra, 369, 370. The contract of lease, in the case before us, provided expressly for the payment of the purchase money, and all accrued rents, to the party of the first part, "her heirs or assigns;" and it is covenanted that "her heirs or assigns" shall and will convey and assure the inheritance or fee simple of the demised premises. These provisions in the lease might ordinarily be deemed "too slight to act upon," as said by the vice chancellor in *Weeding v. Weeding*, 1 Johns. & H. 482; but, when we consider the duration of the lease, running "for, during, and to the full end and term of ninety-nine years, fully to be completed and ended, and renewable forever," and the further fact that by operation of law, which the lessor is presumed to have known, the rents and profits would go to her son until the option to purchase should be exercised, we are not prepared to say that the lessor did not have in mind the benefit to be derived by her son, if he survived her, and the option to purchase should not be exercised in her lifetime.

Upon payment of the purchase money and accrued rents by the lessee, as no claim is made upon the fund to satisfy debts of the lessor, there would be no need of the circuitous process of paying the money and rents to the personal representative of the lessor, that he might in turn pay over the same to the heirs. The parties all being before the court, it was right, therefore, that the fund should be ordered paid directly to the heirs at law of Edward W. Townsend. Judgment affirmed.

(60 Ohio St. 370)

**NILES v. SHAW**, County Treasurer.

(Supreme Court of Ohio. May 9, 1893.)

**TAXATION—CREDITS—NATIONAL BANK SHARES.**

Our tax laws do not authorize the deduction from the value of shares in a national bank, entered on the duplicate for taxation, of legal, bona fide debts owing by the holder of such shares of stock.

(Syllabus by the Court.)

Error to circuit court, Hancock county.

Action by Charles E. Niles against Oliver P. Shaw, treasurer, to restrain defendant from collecting certain tax assessments. The petition was dismissed on demurrer, and plaintiff brings error. Affirmed.

Statement by the Court:

The plaintiff's action was commenced by the filing of a petition in the court of common pleas, as follows: "Charles E. Niles, plaintiff above named, says that Oliver P. Shaw, defendant above named, is the county treasurer of said Hancock county, duly elected and qualified and acting as such, and as such treasurer charged with the collection of the taxes upon the grand duplicate of said county. Plaintiff, complaining of said defendant,

says that on and before the month of May, A. D. 1890, he was, since then has been, and now is the owner and holder of 275 shares of the capital stock of the First National Bank of Findlay, a banking corporation duly organized under the laws of the United States; that in said month of May, 1890, the cashier of said bank duly made out and returned to the auditor of said county the reports required by section 2765 of the Revised Statutes; that afterwards such action was had under the provisions of section 2766 of the Revised Statutes that the valuation of said 275 shares so owned by plaintiff was fixed at the sum of \$26,129.00, and were placed by said auditor upon the tax duplicate of said county for said year 1890, at said valuation for taxation against plaintiff, and without notice to him; that at said time plaintiff's collectible credits amounted to \$850.00, and no more, while his bona fide liabilities amounted to \$24,000.00, of which sum plaintiff is right, and by the laws of Ohio, was and is entitled to have \$23,150.00 deducted from said valuation of said shares, leaving the true amount to be placed upon said duplicate for taxation against this plaintiff at \$3,000.00. Yet, notwithstanding the premises, the said auditor wrongfully and unlawfully placed upon said duplicate as aforesaid, for taxation against plaintiff, the said full valuation of \$26,129.00. Plaintiff says that the rate of taxation in said city for said year was and is 18.35 mills; that in December, 1890, said defendant treasurer required said bank to pay, and said bank did pay, and said treasurer collected from said bank, the taxes upon the shares of the several shareholders, and, among others, the sum of \$479.47, being the amount of the December installment of taxes for said year 1890, upon the valuation of plaintiff's said shares; that the June installment of the said taxes of 1890 is now due and payable; yet the amount of said installment placed upon said duplicate as the tax upon plaintiff's said shares is \$453.43, being the tax assessed upon \$26,129.00 at the rate of 18.35 mills, while the true amount which plaintiff justly and of right should pay is \$52.05, being the full and true amount of tax justly chargeable to plaintiff, and being the tax on said sum of \$3,000, the amount properly taxable after deducting said liabilities from said gross valuation of said shares. On the 25th day of July, 1891, this plaintiff presented to said auditor his written statement and demand, duly verified, embodying the facts hereinabove set forth, claiming that his said liabilities be deducted from said valuation, and requesting that said auditor, in compliance with the mandatory provision of section 1038 of the Revised Statutes of Ohio, correct said tax duplicate, and give to plaintiff, to be presented to said treasurer, a certificate of said erroneous taxes for the sum of \$401.29, the amount so erroneously assessed; but the said auditor, notwithstanding the premises, refused to make said correction, or give to plaintiff said certificate. Thereupon, and on said day, plaintiff duly tendered to said treasurer the sum of \$52.05 in payment of the June installment of the taxes



of 1890, so being the true amount justly chargeable as aforesaid, which sum this plaintiff is fully able, ready, and willing to pay, and here and now tenders the same and brings it into court; yet the said treasurer refused to receive or accept said sum and payment, and threatens to, and is about to, use his statutory power, and by distraint or otherwise enforce the payment of the whole amount of said installment, to wit, \$453.34. Plaintiff thereupon prays that defendant be temporarily restrained from enforcing the collection of said erroneous sum of \$401.29, and that, upon the final hearing of this cause upon its merits, said injunction be made perpetual, and for such other and further relief, etc. In the common pleas a general demurrer to the petition was sustained, and the petition dismissed. On appeal by plaintiff to the circuit court a like judgment was there rendered.

A. Blackford and J. A. & E. V. Bope, for plaintiff in error. Burket & Burket and John Poe, for defendant in error.

**PER CURIAM.** We think the demurrer was properly sustained. Irrespective of the question whether or not, in arriving at the correct amount of property subject to taxation, legal, bona fide debts owing by a debtor can be deducted from credits owing to him, (considered in *Bank v. Hines*, 3 Ohio St. 1, and in *Latimer v. Morgan*, 6 Ohio St. 279,) we are of opinion that shares of stock in a national bank are, within the meaning of sections 2730, 2731, Rev. St., "investments in stocks," and not "credits," and that, in determining the amount to be charged on the duplicate for taxation against a stockholder in a national bank, bona fide debts owing by such stockholder cannot be deducted from the value of his shares.

Judgment affirmed.

BURKET, J., did not sit in this case.

(50 Ohio St. 222)

**KING et al. v. ARMSTRONG.**

(Supreme Court of Ohio. April 25, 1893.)

**NATIONAL BANKS—INSOLVENCY—LIABILITY OF STOCKHOLDERS—SET-OFF.**

1. When a person entitled to share in the distribution of a trust fund is also indebted to the fund, and is insolvent, his indebtedness may in equity be set off against his distributive share; and the right of set-off will not be defeated by the assignment of his claim, though made before the amount of his indebtedness or distributive share is ascertained.

2. Each shareholder of a national banking association is individually liable for its debts, to the extent of the amount of his stock at its par value, in addition to the amount invested in the shares held by him; and a receiver appointed to wind up the affairs of such an association that has become insolvent is authorized, under the direction of the comptroller of the currency, to enforce the liability of its stockholders, and collect from each of them the necessary amount, up to the extent of his liability, for the payment of the creditors.

3. The indebtedness of the stockholders on their individual liability, together with the other assets of the insolvent bank, constitute a trust fund for the benefit of its creditors; and in equity such indebtedness of a stockholder

who is insolvent may be set off against a dividend, payable out of the trust fund, on a balance due him on his deposit account with the bank at the time of its failure.

4. An assignment by the stockholder of his claim against the bank, before the direction of the comptroller to enforce his liability, but after the insolvency of the bank, does not affect the right to set off his liability against the dividend due on his claim, nor does the fact that the comptroller, at the time of the assignment, had not determined the amount necessary to be collected from the stockholders for the payment of the creditors. It is sufficient that such direction has been given, and amount so determined, when the set-off is made.

(Syllabus by the Court.)

Error to superior court of Cincinnati.

Action by Joseph King and others against David Armstrong, receiver of the Fidelity National Bank of Cincinnati. Defendant had judgment, and plaintiffs bring error. Affirmed.

Bateman & Harper, for plaintiffs in error. Herron, Hatch & Herron, for defendant in error.

**WILLIAMS, J.** The Fidelity National Bank of Cincinnati, a banking association organized under the national bank act, became confessedly insolvent, and suspended business, on the 21st day of June, 1887, and on the 27th day of that month the defendant, David Armstrong, was appointed, by the comptroller of the currency, receiver to wind up its affairs. The franchises of the bank were adjudged forfeited, and the association dissolved, by a decree of the circuit court of the United States, at Cincinnati, on the 12th day of July, 1887. When the bank failed, it was indebted to Charles A. Brownell in the sum of \$3,330.52, that being the balance then standing to his credit on his deposit account, which balance, on the 30th day of July, 1887, he assigned to the plaintiffs, Joseph King, M. Schroder, and Charles E. Brownell, as a security for, or payment on, a pre-existing debt which he owed them. The plaintiffs soon afterwards presented their claim to the receiver, and on the 15th day of September, 1887, obtained from him a certificate stating they had made satisfactory proof of the assignment, and that they were creditors of the bank to the amount of the balance due Charles A. Brownell on the deposit account. On the 1st day of November, 1887, the comptroller of the currency declared a dividend of 25 per cent. on the claims of the creditors, and issued to the receiver checks for the amount of the dividend due each creditor, payable to the creditor. Among them was a check for \$832.63, the dividend on the claim assigned to the plaintiffs. The defendant refused to pay that dividend to the plaintiffs, who thereupon brought the action below to recover it.

At the time of the failure of the Fidelity Bank, Charles A. Brownell was the owner of 50 shares of its capital stock, of the par value of \$100 each, on which, under the provisions of the national bank act, he was liable for the indebtedness of the bank to the amount of his stock, in addition to the sum invested in the stock held by him. That act provides that "the

shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock herein, at the par value thereof, in addition to the amount invested in such shares." Rev. St. U. S. § 5151. When the bank failed, as well as when Brownell assigned the balance due on his deposit account to the plaintiffs, he was, and still is, insolvent, and, immediately after the transfer to the plaintiffs of the balance due him from the bank, he made a general assignment for the benefit of his creditors. At the time the plaintiffs obtained from the receiver the certificate alluded to, he was not aware of the liability of Brownell as a stockholder of the bank, but became aware of it before the checks for the dividend on the claims of creditors were received; and they were received with instructions from the comptroller to withhold them from all stockholders and others in any way indebted to the bank. Afterwards the comptroller decided that it was necessary to enforce the stockholders' liability to the full extent of \$100 on each share, in order to pay the indebtedness of the bank, and made his order accordingly, declaring such necessity, and directing the defendant to collect, by suit or otherwise, from each stockholder, including Charles A. Brownell, the full amount of his liability. On the liability of Brownell, which amounts to \$5,000, nothing has been paid; and the receiver sought, in the action below, to have it set off against the dividend in his hands upon the claim assigned by Brownell to the plaintiffs. The superior court allowed the set-off, and it is of that the plaintiffs are here complaining.

The question in the case, therefore, is whether, upon the facts stated, the receiver is entitled to retain the amount of the dividend due on the debt which the bank owed Charles A. Brownell at the time of its failure, and apply it on his liability as a stockholder of the bank. His right to do so is controverted by the plaintiffs, chiefly on the ground that the cross demands are not due to and from the parties, respectively, in the same right, or, more definitely stated, that the stockholder's liability is for the exclusive and equal benefit of the creditors, and is not a debt due the bank or an asset of the bank, while the balance due on Brownell's deposit account is a debt of the bank, payable out of its assets, which he could not set off against his stockholder's liability, and consequently the receiver, it is claimed, cannot set off the liability against the debt, or dividend due upon it. There is a noticeable difference, of some importance, between the administration of the effects of an insolvent Ohio corporation and those of a national banking association. With respect to the former the stockholder's liability does not pass to the assignee or receiver as assets for administration, and no right of action can accrue thereon in his favor. It can be enforced only at the suit of the creditors; and hence the assignee may not lawfully withhold from a creditor of such corporation a dividend

due him from its assets, on the ground that he is liable as a stockholder, and the creditors, on account of his insolvency, might not otherwise be able to enforce the collection of any part of his liability. The creditors in such case undoubtedly could, by appropriate action, reach the dividend, and compel its application to the payment of the indebtedness of the stockholder; but, as between a stockholder and the assignee, the latter would not have the legal right to set off the former's liability against a dividend due him as a creditor, for the assignee is wholly without authority to collect or receive any part of the amount owing by the stockholder. It is different with a receiver of a national bank. By the provisions of the national bank act the comptroller of the currency may appoint a receiver of such banking association whenever he is satisfied that it is in default in the payment of its circulating notes, or has become insolvent; and the receiver is required, under the direction of the comptroller, to "take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, \* \* \* and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders." Rev. St. U. S. § 5234; Act June 30, 1876, Supp. Rev. St. U. S. (2d Ed.) p. 107. The receiver is authorized to collect from each stockholder the necessary amount, up to the full extent of his liability, to meet the demands of the creditors, and appears to be charged with that duty. The amount due from the stockholders becomes assets, to be administered by him as the other assets of the bank in his hands; and all of the assets, including the individual liability of the stockholders, constitute a trust fund for the benefit of all creditors having valid claims against the bank. It therefore becomes the duty of the receiver, under the direction of the comptroller, to so administer the fund as to secure to each beneficiary his just proportion of it. In his trust capacity he is the representative of all the creditors and of all the stockholders, both in the collection of the assets and their proper distribution; and the fund collected from the stockholders goes into that arising from the other assets, and is distributed in the same way to the creditors, without separation or distinction on account of the source from which it is derived. It altogether constitutes one common fund, for the equal benefit of all the creditors, according to their respective rights; so that whatever is due from Charles A. Brownell on his individual liability as a stockholder is due the receiver in the same relation in which he owes the dividend on the claim of Brownell against the bank. If Brownell were solvent, so that the amount of his liability could be collected, the fund for the creditors would be increased \$5,000 by its collection; and by the payment of the dividend to him or his assignees, the plaintiffs, it would be reduced \$832.63. If the dividend were paid to Charles A. Brownell, and not placed beyond the reach of legal process, it might be immediately subjected by the receiver to the payment of his indebtedness on his

stockholder's liability; but, if it is required to be paid to the plaintiffs, the creditors' fund will be permanently diminished to that amount, which, at the same time, will lose the amount due it from Brownell, because, on account of his insolvency, nothing can be collected from him, unless the receiver is allowed to retain the dividend now in his hands, and have Brownell's indebtedness set off against it. While the relation of Brownell to the receiver may not, strictly speaking, be that of debtor and creditor, in the sense essential to the right of set-off at law, he was, before he assigned his claim to the plaintiffs, both a debtor to, and creditor of, the fund which the receiver represents. Equity will enforce the set-off, or compensation of cross demands so far as they equal each other, when necessary to prevent one of the parties from losing his demand on account of the insolvency of the other. Upon the same principle, when a person entitled to share in the distribution of a trust fund is also indebted to the fund, and is insolvent, his indebtedness may, in equity, be set off against his distributive share; and, as a general rule, the right of set-off will not be defeated by the assignment of his claim, though made before the amount of his indebtedness or of his distributive share is ascertained.

That application of the principle is not in conflict with the case of *Sawyer v. Hoag*, 17 Wall. 610, which is relied on by counsel for plaintiffs. Sawyer was indebted to the Lumberman's Insurance Company of Chicago in the sum of \$4,250 on his stock subscription, and, after the company became insolvent by reason of its losses in the great fire in that city, bought up, for a small sum, a certificate of an adjusted loss of \$5,000 against the company, and sought to have it set off against his stock liability after the company had been adjudged a bankrupt. The court held that the stock subscription was a trust fund for the equal benefit of all the creditors of the company, and Sawyer was not entitled to the set-off he was demanding, because to allow it would give him an undue proportion of the fund, and deprive other creditors of their just share. It was contended in behalf of Sawyer that the right to the set-off was given by the bankrupt act, which provided that, "in all cases of mutual debts or credits between the parties, the accounts between them shall be stated, and one debt set off against the other, and the balance, only, shall be allowed or paid." That provision of the bankrupt law, it was held, was not intended to enlarge the doctrine of set-off, and, in speaking of the right of set-off under it, Mr. Justice Miller said: "The debts must be mutual; must be in the same right. The case before us is not of that character. The debt which the plaintiff owed for his stock was a trust fund, devoted to the payment of all the creditors of the company. As soon as the company became insolvent, and this fact became known to the plaintiff, the right of set-off for an ordinary debt to its full amount ceased. It became a fund belonging equally, in equity, to all the creditors, and could not be appropriated by the debtor to the

exclusive payment of his own claim." The case is essentially different from the one we have before us. The debt which Sawyer owed the insurance company was due to a trust fund, in which all the creditors were entitled to share equally. The debt which the company owed him was one which was only entitled to receive its proportion of the fund, and not entitled to payment out of it in full. He could not, therefore, set off the whole amount of the debt due him against that which he owed the fund, for that would result in an unequal distribution of the fund, and enable him to obtain more of it, proportionately, than the other creditors, and more than his proper share. That was the reason for denying the set-off which he sought to have made. The reason is wholly wanting in the present case. Here the set-off allowed by the court below was not of the entire claim which the bank owed Brownell, against his obligation to contribute to the trust fund on his stockholder's liability, but only of his proper share and proportion of that fund payable on his claim against the bank, as ascertained by dividend duly made and declared. The allowance of the set-off took nothing from the other creditors to which they were entitled, and gave nothing to the claim of Brownell except what it was justly entitled to receive,—its proper share of the trust fund. It in no way interferes with the equal rights and equities of the other creditors, but, on the contrary, preserves and protects their rights, and inures to their benefit, by increasing the fund. We see no valid objection to the set-off adjudged by the court below, unless the right was defeated by the assignment of Brownell's claim against the bank to the plaintiffs; and we think it was not.

It is contended by counsel for the plaintiffs, that the liability of Brownell as a stockholder had not accrued when the assignment to them was made, and therefore could not be set off against the dividend due on the claim. The position of counsel is that the liability was not complete, and so not due, until the comptroller of the currency directed the receiver to enforce it, which was subsequent to the assignment. In support of this position, *Kennedy v. Gibson*, 8 Wall. 498, 505, is cited, in which it is said: "It is for the comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and, if a part, how much, shall be collected. These questions are referred to his judgment and discretion, and his determination is conclusive. \* \* \* He may make it at such time as he may deem proper, and upon such data as shall be satisfactory to him. This action on his part is indispensable whenever the personal liability of the stockholders is sought to be enforced, and must precede the institution of suit by the receiver. The fact must be distinctly averred in all such cases, and, if put in issue, must be proved." The power appears to be vested in the comptroller to determine when it is necessary to collect from the stockholders, and the amount to be collected, but not to establish the liability,

or determine when it accrues. The liability is complete, and subject to proceedings for its enforcement, when the banking association becomes insolvent and suspends business. The comptroller simply directs at what time, and to what extent, the liability shall be enforced. It may require an investigation of the condition of the bank, its assets and liabilities, in order to determine whether resort to the stockholders is necessary, and for what amount; and while that duty is devolved upon the comptroller, and no proceeding can be instituted against the stockholders until directed by him, the maturity of the liability is not postponed until such direction is given. The proceeding, only, is so postponed. By the provisions of the national bank act already quoted, the receiver is required, "under the direction of the comptroller, to collect all debts," etc., belonging to the banking association; and it might as well be said that, inasmuch as the receiver could only collect the debts due the bank under the direction of the comptroller, a matured note held by the bank at the time of its failure does not become due until the comptroller has directed it to be sued, as that the liability of stockholders does not mature until instructions are received from the comptroller to institute proceedings for its enforcement. Receivers generally institute suits under the direction of the courts by which they are appointed; and, though the order of the court authorizing the suit may be essential to its maintenance, it does not follow that the claim sued on matured only upon the order being made. The receiver of an insolvent national bank obtains his appointment from the comptroller of the currency, and acts under his directions and orders, which are analogous to an order of court to a receiver appointed by it. It is well settled that the statutory liability of stockholders of Ohio corporations is complete, so as to set the statute of limitations running in their favor, when the corporate property has been placed in the hands of an assignee in bankruptcy or insolvency, or of a receiver to wind up its affairs. The exact amount of the liability of each stockholder may not then be known, and can only be ascertained in the progress of the action; yet the court may retain control of the cause and parties until the amount is definitely fixed, and the ultimate rights of the parties are adjusted. *Younglove v. Lime Co.*, 49 Ohio St. 663, 33 N. E. Rep. 234. The liability of Charles A. Brownell, as a stockholder of the Fidelity Bank, was due, we think, in every sense essential to the set-off, when the bank failed; and the assignment of his claim against it to the plaintiffs therefore presented no obstacle to the allowance of the set-off. Nor did the certificate which the plaintiffs obtained from the receiver. That gave them no new right, and amounted to nothing more than an acknowledgment of the correctness of the claim, and its assignment to them. Their position was in no way changed on account of it. We are of opinion the court committed no error in retaining the cause until the amount of Brownell's liability was determined, and

then setting it off against the dividend due on his claim against the bank.

The judgment is affirmed.

(50 Ohio St. 330)

DOYLE v. DOYLE et al.

(Supreme Court of Ohio. May 9, 1893.)

STATUTORY CONSTRUCTION—WILLS—DESCENT AND DISTRIBUTION—ELECTION BY WIDOW—WHEN HUSBAND DIES INTTESTATE.

1. That which is plainly implied in the language of a statute is as much a part of it as that which is expressed.

2. A widow is not deprived of a distributive share of the personal estate of her deceased husband by his leaving a will in which he disposes of all of it to others, without making any provision for her. As to her, in such case, he is regarded as dying intestate.

(Syllabus by the Court.)

Error to circuit court, Summit county.

Suit by William B. Doyle, Jr., against Louisa E. Doyle and others, for a construction of the will of William B. Doyle, deceased. To review the judgment entered, Louisa E. Doyle brings error. Reversed.

Baird & Voris and John C. Hale, for plaintiff in error. Newton Chalker, for defendants in error.

MINSHALL, J. William B. Doyle, having executed his will, died August 6, 1890, leaving a considerable estate in real and personal property. By his will, after making a bequest of \$1,000 to a daughter, and a like sum to the children of his brother, he disposed of all the residue of his property, real and personal, to his other children, making no provision whatever for his wife, Louisa E. Doyle, who survived him. The estate being substantially settled and ready for distribution, the executor, one of the sons of the testator, commenced a suit in the common pleas of the county for instructions as to the distribution of the personalty, all interested being made parties. The petition avers that the widow, being cited by the probate court, "refused to take under the will;" that some of the children claim that, as no provision is made for her in the will, the widow is entitled to no portion of the personalty on distribution, and have requested him, if there is any doubt about the justice or legality of the claim, to have it settled in the proper legal tribunal. The common pleas held that she is entitled to the same portion of his personalty that she would have been had her husband died intestate; that is, one-half of the first \$400, and one-third of the balance on distribution. On appeal the circuit court held otherwise, and directed the distribution to be made to the legatees as provided in the will. The widow prosecutes error to reverse this judgment, and for a judgment that, as to her, the distribution should be made under section 4176, Rev. St., as if her husband had died intestate.

The question depends upon the proper construction of this section, found in the chapter of the Revised Statutes regulating the descent and distribution of the estates of persons dying intestate, read in con-

nection with certain sections of the chapter regulating the making and construction of wills. These sections, so far as applicable to the question, are here inserted for convenience in its discussion: "Sec. 4176. When a person dies intestate, and leaves no children or their legal representatives, the widow or widower shall be entitled, as next of kin, to all the personal property which is subject to distribution upon settlement of the estate; but if the intestate leaves any children, or their legal representatives, the widow or widower shall be entitled to one-half of the first four hundred dollars, and to one-third of the remainder of the personal property subject to distribution." "Sec. 5963. If any provision be made for the widow or widower in the will of the deceased consort, the probate court shall forthwith, after the probate of such will, issue a citation to such widow or widower to appear and elect whether to take such provision, or be endowed of the lands of the deceased consort, and take the distributive share of the personal estate; \* \* \* but the widow or widower shall not be entitled to both, unless it plainly appears by the will to have been the intention that the widow or widower should have such provision in addition to the dower and such distributive share. Sec. 5964. The election of the widow or widower to take under the will shall be made in person, in the probate court of the proper county, except as hereinafter provided; and on the application of a widow or widower to take under the will it shall be the duty of the court to explain the provisions of the will, their rights under it, and by law in the event of a refusal to take under the will. The election of the widow or widower to take under the will shall be entered upon the minutes of the court, and, if the widow or widower shall fail to make such election, the widow or widower shall retain the dower and such share of the personal estate of the deceased consort as the widow or widower would be entitled to by law in case the deceased consort had died intestate, leaving children. If the widow or widower elect to take under the will, the widow or widower shall be barred of dower and such share, and take under the will alone, unless as provided in the next preceding section; but such election by the widow or widower to take under the will shall not bar the right to remain in the mansion of the deceased consort, or the widow to receive one year's allowance for the support of herself and children, as provided by law, unless the will shall expressly otherwise direct."

The argument of the residuary legatees against the claim of the widow to one-half of the first \$400 and one-third of the remainder of the personal estate of her deceased husband on distribution is based upon a construction given to the language of the foregoing sections, and the power given him by statute to dispose of all his real and personal estate by will. Section 5914, Rev. St. Noting the fact that section 4176, giving her this portion of her husband's estate, is limited to where he dies "intestate," leaving children, and that sections 5963 and 5964 of the chapter

relating to wills apply in terms only to where provision is made for her in the will of her deceased husband, they claim that, as he did not die "intestate," and made no provision for her in his will, she is within the provisions of neither of these sections, and is therefore entitled to no part of his personalty subject to distribution, since, in the exercise of the power given him by statute to make a will, he has bequeathed it all to his children. We do not accept this construction. A careful consideration of the language of these sections shows, as we think, a clear recognition of the right of a widow to a portion of the personalty of her deceased husband on distribution that is beyond his power to affect by any will he may make, unless she assent to it; and this is in accordance, not only with the general understanding on the subject, but also with the liberal policy that has always prevailed in our law towards the widow. The only ground for any question as to her rights arises where the husband makes a will disposing of all his property to others, without making any provision for his wife. Where he makes no will,—dies intestate, leaving children,—the right of the widow to one-half the first \$400, and to one-third of the remainder of his personalty subject to distribution, is secured to her by the provisions of section 4176; and this seems to have been the law from the formation of the state. Where he makes a will containing a provision for his wife, she is not compelled to accept the provision so made, but may renounce it, and take under the provisions of section 4176, as if her husband had died intestate. But where provision is made for her in the will of her deceased husband, the statute requires that she shall be cited by the probate court to elect whether she will take such provision, "or be endowed of the lands of the deceased consort, and take the distributive share of the personal estate;" and it is in the language of the statute regulating this subject that we get the clearest recognition of the independent right of the widow to a distributive share of the personal estate of the deceased husband,—a right that she may renounce, but of which she cannot be deprived by his will. Why cite her to make an election, if she has not a right at law which she may retain if she chooses? No election can be made by any one between something and nothing. There is no alternative. The term necessarily connotes at least two things between which a choice can be made; hence the requirement "to appear and elect" necessarily implies that the widow has a right at law to a distributive portion of her deceased husband's personal estate, which she may retain or renounce at her election. But again, the language is, "if she shall fail to make such election" she "shall retain her dower and such share of the personal estate" as she "would be entitled to by law" had [her husband died intestate; and finally, if she elect to take under the will, she "shall be barred of her dower and such share," unless it plainly appears by the will to have been the intention that she should have both. One cannot, in any proper sense, be

said to retain that which he does not possess, nor to be barred of it by electing to take something else; so that the language employed in these two sections, regulating the matter of her election, import as plainly as language can make it that the widow's right to a distributive share of her deceased husband's personal estate exists at law, and is not dependent either upon his dying intestate or upon his making some provision for her in his will where he dies testate. That which is plainly implied in the language of a statute is as much a part of it as that which is expressed. End. Interp. St. § 417, finis. No statute should be so construed as to lead to an absurd result. A contrary construction leads to this: That, if a husband makes any provision in his will for his wife, however small, and dies, leaving children, she may renounce this, and take her distributive share of his personality, as if he had died intestate; but, if he makes no provision for her, then she can receive nothing as a distributee. This could not have been the intention of the legislature, and can only be arrived at by the most rigid adherence to the letter of the statute, and a total disregard of the intention as disclosed by the language, and the liberal policy of the law on the subject. "Qui haeret in litera, haeret in cortice." Courts are not confined to the letter of the law in giving it a construction. A statute must be construed with reference to the subject-matter of it, and its real object and true intent. Gholson & O. Dig. 490. The evident understanding of the legislature of the case where a husband dies leaving a will in which no provision is made for his wife is that, as to her, he dies intestate, and she takes a distributive portion of his personality, under the provision of section 4176. No citation is required in such case, for, nothing being given her by the will, she can make no election between its provisions and her rights at law, and she takes the latter under the provisions of the above section, as the widow of one who, as to her, died intestate.

By the statutes of Kentucky, a widow, when not satisfied with the provision made for her in the will of her deceased husband, may renounce the same, and is then entitled to such share of his personal estate as if he had died intestate; but if she makes no renunciation she takes no more of his personal estate than is given her by the will. In *Cummings' Ex'r v. Daniel*, 9 Dana, 361, no provision had been made in the will of the testator for his wife. He left a considerable personal estate, which he devised to his own kindred. The widow made no renunciation, and legatees claimed all. The court said: "It is very clear that the renunciation contemplated by the twenty-fourth section can have application only to cases in which some provision has been made for the wife by the will of her deceased husband. \* \* \* But when no provision is made for her by the will, there is nothing to release or renounce; and to require a release or renunciation in such a case, would be to require a vain and idle act, which could accomplish no object, as there is nothing

upon which the release or renunciation could operate, and which is not enjoined by the letter or spirit of the section." Then, referring to the two sections of the statute, and the claim, based upon their letter, that the widow could take nothing under either, said: "Though the literal import of the two sections may tend to such a conclusion, we cannot believe that such is the spirit of the enactments, or was within the contemplation or intention of the legislature. \* \* \* We cannot believe that the legislature intended that, where something was left to her [the widow] by will, she might release, and throw herself upon the provision made and intended to be secured to her by law; but, where nothing was left to her by will, that she was entitled to nothing by law." And finally held that "in such case, as to the widow, there is an intestacy, there being no provision made for her by the will; and she may, as in the case of intestacy, betake herself to the provision made for her by the law."

It seems that the wills act of 1840 first gave to the widow a share of the personality of her deceased husband where she failed to make an election on being cited. In 1842 an amendment was made to the effect that nothing in the act of 1840 should be so construed as to vest in the widow personal estate bequeathed by the husband to other persons; but this amendment was repealed in the following year, and the act remained without change in this regard until 1846, when it was so amended as to provide that, on the failure of the widow to elect, "or if no provision be made for her in the will of her husband," she should retain her dower "and such share of the personal estate" as if her husband had died intestate. In the revision of the wills act made in 1852 this provision was dropped, and there is no substantial difference between the act as revised in 1852 and the subsequent legislation on the subject. Considerable importance is attached to this omission by counsel for the residuary legatees in his argument. Why this clause was dropped, appears, however, from a reason that would readily occur to most minds: If the husband could not disinherit his wife by giving her something, he could not by giving her nothing; and was dropped from the apparent absurdity of citing a widow to elect between the provisions of a will that gave her nothing and her rights at law, and not from any disclosed purpose of narrowing the rights given her under the previous legislation. The right of the widow, in any event, to a portion of her deceased husband's personality subject to distribution, seems so just and reasonable as hardly to have been questioned since the act of 1840. The author of a note to Walker's American Law, in the edition of 1869, page 249, in discussing the liberal policy of our law towards the wife as contrasted with that towards the husband, says: "She can, by will, deprive him of any share of her personality; he cannot, in any way, deprive her of her thirds." We are aware of no intimation to the contrary at any later or earlier time. In the case of *Hartshorne v. Ross*, 2 Dian

15, 26, decided in 1839 by the superior court of Cincinnati, it was held that the right of a widow to all the personalty of her deceased husband, who died testate, leaving no children, was not limited to the undisposed-of property after paying legacies, but included the whole, to the exclusion of legacies. This decision was not placed on the ground that he had made provision for her in his will, but that her interest in his personalty subject to distribution was such that she could not be deprived of it by his will. Judge Storer, in deciding the case at special term, said: "There can be no difficulty, we think, in arriving at the conclusion that it is the intention of the statute to provide for the widow, at all events, from her husband's estate; to allot to her a certain portion of his personalty, in addition to her ordinary interest in the realty, that is not to be affected by any disposition he may make by his will. If he die intestate, there is manifest propriety that she should receive a liberal allowance; and should he devise his estate, without providing as generously for his widow as did the statutes, she should have the option to abide by the will or take her portion at law. The election to receive less than her legal allowance should be hers. \* \* \* The husband executes his will, subject to the law in force when it shall take effect, and therefore his devisees cannot complain. He might have cut off his heirs without any token of remembrance. Not so with his wife. Her right is paramount. It depends not upon his kindness, much less his caprices." He then vindicates this view by a reference to the prior legislation on the subject, and the justice and policy of the law, where, in a country like ours, the estate of the husband is, in most instances, "the result of the mutual industry of the husband and wife." And so, in *Bane v. Wick*, 14 Ohio St. 505, where it was held that the election of a widow to take under the will does not bar her right to a distributive share of the personal estate not disposed of by the will, White, J., said: "By empowering the husband to dispose of all his estate by will the legislature evidently did not intend to empower him, against the consent of the widow, to abridge her right to dower and a distributive share of the personalty under the statute in relation thereto." Then, referring to the provisions requiring an election where provision is made for the widow in her deceased husband's will, said: "The object was not, in case of nonelection, to create a new source of title, but to prohibit the power of testamentary disposition, then being created by the act, from being made effectual to impair the rights vested in the widow under the law in relation to dower and distribution. It enabled her, whatever disposition the will made of the property, to set up her title and rights under the law in opposition to the will, and to this extent defeat its provisions." The point here made is that nonelection does not create a new source of title in the widow to what she takes by renouncing the provisions of the will; she simply retains her rights at law. Counsel for the residuary

legatees call attention to the fact that in each of these cases the will made provision for the widow, and therefore claim that what is said in each decision cannot apply here; but it will be observed that what is said is a part of the ratio decidendi in each case, and therefore not mere obiter. But, if it were otherwise, what was said is entitled to much weight, as the opinion of two distinguished judges, meeting with no dissent at the time, as to the proper construction of the law.

There is nothing anomalous in giving to an owner the right to dispose of his property as he may please during his lifetime, with a restriction upon the power to dispose of it by will. The power to make a will is not an incident of the *jus disponendi*. It is conferred by statute; and, if the wills act were repealed, all the property of a deceased person would descend and be distributed as provided by law. Hence the extent of the power—what property, and what interest in it, may be disposed of by will, and to whom—may be and is prescribed by statute. No argument, then, against the right of the widow in the personalty of her deceased husband can be drawn from the fact that the husband possessed unlimited power to dispose of it in his lifetime. Unless he should give it away, (which seldom happens, and cannot be done in fraud of her rights,—*Manikée's Adm'r v. Beard*, 85 Ky. 20, 2 S. W. Rep. 545; *Thayer v. Thayer*, 14 Vt. 107,) the exercise of this power can be of no greater prejudice to her than to himself. Their interests being mutual, they participate alike in the gains and losses until death works a separation, when her right to a portion of the personalty subjected to distribution is fixed and ascertained by law, independently of any will he may have made. Judgment reversed, and judgment for the widow.

(159 Mass. 115)

**BULLMAN v. NORTH BRITISH & MERCANTILE INS. CO. SAME v. INSURANCE CO. OF NORTH AMERICA, (two cases.) SAME v. FRANKLIN FIRE INS. CO. SAME v. NATIONAL FIRE INS. CO. SAME v. COMMERCIAL UNION ASSUR. CO.**

(Supreme Judicial Court of Massachusetts.  
Hampshire. May 18, 1893.)

**INSURANCE POLICY — PARTIAL ASSIGNMENT BY WIFE TO HUSBAND — REFERENCE AS TO LOSS — INTEREST OF REFEREE — RECEPTION OF EVIDENCE.**

1. In an action on an insurance policy, though the court, with the consent of counsel, arranges to submit to the jury only the questions whether plaintiff voluntarily caused the fire, and whether the use of the property was changed after issuance of the policy so as to avoid it, it is within the court's discretion to allow plaintiff to rebut evidence that in her proofs of loss she concealed the use made of the premises, by testimony that she told defendant's agent before the issuance of the policy that she intended to so use them.

2. The fact that one of three referees appointed, under a provision in a policy of in-



insurance, to fix the amount of loss, was indorser on an unmatured note made by the insured, and secured by mortgage, does not render the reference void, in the absence of anything to show that such referee was actually interested in the recovery on the policy.

3. Where insured property is transferred by a woman to her husband, and the policy is assigned to him with the insurer's assent, he becomes the insured, and may maintain an action on the policy in his own name.

4. Where an insurance policy covers both real and personal property, and the personal property is conveyed to another, an assignment of the policy, so far as relates to the latter, made with the consent of the insurer, is valid, and thereafter the assignee may recover on the policy for loss of the personalty; and the assignor, for a loss on the real estate.

Report from superior court, Hampshire county; P. Emory Aldrich, Judge.

Action by Harriet B. C. Bullman against the North British & Mercantile Insurance Company on a policy of fire insurance. Same plaintiff against the Insurance Company of North America. Same plaintiff against the Franklin Fire Insurance Company. William F. Bullman against the National Fire Insurance Company. Same plaintiff against the Commercial Union Assurance Company. Same plaintiff against the Insurance Company of North America. Reported to the supreme court. Judgment for plaintiffs.

W. G. Bassett, for plaintiffs. J. C. Hammond and H. P. Field, for defendants.

ALLEN, J. 1. The amended answers impute fraud or bad faith to the plaintiffs in several particulars, and among them in this: That the plaintiffs, in their proofs of loss, did not set forth the purposes for which, and the persons by whom, the building insured was used, and concealed the fact that it was used as an hotel and summer resort. The defendants, at the close of the plaintiffs' evidence, called several witnesses in support of this ground of defense, and also introduced evidence tending to show that, for boarding houses having more than 10 boarders, a higher rate of premium would be charged than for dwelling houses. To meet this evidence, Mrs. Bullman was permitted to testify, in rebuttal, that before the policies were issued, and at about that time, she told the agent of the defendants that it was her intention to keep boarders. This agent had already testified that he made no difference between the rates for insuring dwelling houses, and those for insuring boarding houses, in Amherst. The defendants, in effect, concede that Mrs. Bullman's testimony would have a tendency to meet the issues presented by their answers and testimony, as above set forth; but they rest their objection to its admission on the ground that those issues were no longer material at the trial, because the presiding justice had arranged, with the consent of counsel, to submit two questions only, to the jury, namely, whether the plaintiffs had voluntarily set the fire, and whether the use of the property had been so changed after the policies were issued as to avoid the same. There are two satisfactory answers to this position of the defendants:

In the first place, it does not appear at what stage of the case the questions to be submitted to the jury were settled, or whether it was before or after the admission of Mrs. Bullman's testimony. And, secondly, even after the defendants had withdrawn this ground of defense, it was within the discretion of the presiding justice to allow the plaintiffs to meet a charge of concealment made against them in the answers, and supported by testimony. *Dorr v. Bank*, 128 Mass. 349, 360; *Dawson v. Railroad Co.*, 156 Mass. —, 30 N. E. Rep. 446.

2. In respect to the three actions in favor of Mr. Bullman, to recover for the loss of personal property, the objection was taken that a reference of the amount of loss to three disinterested men was a condition precedent to the plaintiff's right of action, under the terms of the policies, and that no such reference had been made, because Palmer, one of the referees who was selected, and who acted, was not disinterested. The policies were in the form prescribed by St. 1887, c. 214, § 60, called the "Massachusetts Standard Policy." It appeared that Palmer was not selected nor named by Bullman, or on his behalf, but by the two other referees. The fact that Palmer had been so selected was not known to Bullman till several weeks after the award had been made; he having been very sick with fever, and delirious and unconscious. There was no claim on the part of the defendants that the damages found by the referees were excessive. But Palmer, at the time of his appointment, and when he acted as referee, was the holder of a note for \$1,486, made by Mr. and Mrs. Bullman, which note was secured by a second mortgage on real estate, including the house and barn destroyed by the fire; and he held said note and mortgage to secure him for his indorsement of a note for the same amount given by Mrs. Bullman to a third person, which had not then become due. Under this state of things, the defendants did not ask to have the jury or the court find, as a matter of fact, that Palmer had an actual interest, or felt such a degree of interest, in the subject of the reference, as to affect his judgment or his action as referee; but they asked the court to rule, as a matter of law, that he was not a disinterested referee. The question is not whether, on proper proceedings taken in advance of the hearing, the court would interpose to set aside the selection of such a referee, (*Beddow v. Beddow*, 9 Ch. Div. 89;) but whether the court should say, as a matter of strict law, upon the facts which appeared, that he cannot be considered as disinterested, although no complaint whatever is made of the manner in which he performed his duties, or of the result to which the referees came. And it is obvious that there is no rule of law which requires the reference to be treated as invalid. The mere fact that he was liable as indorser on an unmatured note for \$1,486, and so was liable to become a creditor of Mr. and Mrs. Bullman to that amount, does not show, necessarily, that he was interested. He held a second

mortgage on real estate as security, and this may have been ample. There was nothing to show the value of the premises, nor the amount of the first mortgage, nor the amount of other property owned by the Bullmans. Palmer may or may not have been interested in the amount to be recovered by Mr. Bullman upon these policies. The facts which were shown are consistent with either hypothesis. The mere fact that he was a creditor, or a possible creditor, is not sufficient to show that he was disqualified. *Wallis v. Carpenter*, 18 Allen, 19, 24. See, also, *Leominster v. Railroad Co.*, 7 Allen, 88; *Dolliver v. Insurance Co.*, 131 Mass. 39; *Fisher v. Townner*, 14 Conn. 28; *Rand v. Redington*, 13 N. H. 72; *Morgan v. Morgan*, 1 Dowl. 611; *Morse*, Arb. 100. In like manner, when interest disqualified a witness, a creditor might testify for his debtor. *Luke v. Leland*, 6 Cush. 259, 262; *Barney v. Newcomb*, 9 Cush. 46, 57; *Nowell v. Davies*, 5 Barn. & Adol. 368; 1 Greenl. Ev. § 389. We do not consider the question whether, on the facts stated, the referee's interest, if established, would necessarily defeat the actions.

It is further objected that the assignment of policies from Mrs. Bullman to her husband did not convey to him any legal interest in the policies, and that, therefore, the actions brought by Mr. Bullman cannot be maintained. It is, however, well settled in this commonwealth, that where insured property is transferred, and the policy is assigned to the new owner with the assent of the insurer, each assignee, therefore, becomes the insured, and may maintain an action on the policy in his own name. The principle is fully explained in *Fogg v. Insurance Co.*, 10 Cush. 337, 345, 346, and it has often been recognized, both here and elsewhere. A new relation is created between the insurer and the assignee, just as if the original policy were surrendered, and a new one issued. See *Insurance Co. v. Allen*, 138 Mass. 24, 29; *Lynde v. Insurance Co.*, 139 Mass. 57, 29 N. E. Rep. 222; *Kingsley v. Insurance Co.*, 8 Cush. 393; *Phillips v. Insurance Co.*, 10 Cush. 350, 353; *Wilson v. Hill*, 3 Mete. (Mass.) 66, 69; *Carrol v. Insurance Co.*, 8 Mass. 515; *Bates v. Insurance Co.*, 10 Wall. 34, 36; *Cummings v. Insurance Co.*, 55 N. H. 457; *Shearman v. Insurance Co.*, 46 N. Y. 528; *Hooper v. Insurance Co.*, 17 N. Y. 424; *Flanagan v. Insurance Co.*, 25 N. J. Law, 506, 514; *Insurance Co. v. Munns*, 120 Ind. 30, 22 N. E. Rep. 78; *New v. Insurance Co.*, (Ind. App.) 31 N. E. Rep. 475; *Ellis v. Insurance Co.*, 64 Iowa, 507, 20 N. W. Rep. 782. The defendants' argument has rested largely on the ground that a married woman cannot transfer property directly to her husband. But the policy, in such a case, is not transferred as property. It is not even assigned as a chose in action. The property insured being transferred, the policy, by force of its provisions and of the statute, would cease. It is not a negotiable contract, but it has a value for the purpose of surrender to the company which issued it; and the effect of the transaction is that the insurance company says the policy shall be valid, according to its terms, to the new owner

of the property. It is quite immaterial that such new owner is the husband of the original owner, or that the form of the writing upon the policy would be insufficient for a transfer of property between them. It is the assent of the insurer which gives efficacy to the transaction.

4. The policy of the Insurance Company of North America insured \$500 on the house, \$500 on the barn, \$1,500 on furniture, \$650 on live stock, and \$250 on vehicles. The personal property was conveyed by Mrs. Bullman to Mr. Bullman, through a third person; and the policy, so far as it related to the personal property, was assigned to him, and the consent thereto of the company was indorsed upon the policy with the assignment; and accordingly she has brought an action to recover for the loss upon the real estate, and he has brought another action, upon the same policy, to recover for the loss upon the personal estate. The consent of the company was given, and signed by its agent, whose power of attorney authorized him to "consent to the transfer and assignment of policies of insurance." This included authority to consent to the assignment of the policy, so far as it related to the personal property. There is no legal difficulty in making an assignment in such form that, if assented to, the policy will thenceforward run to different persons and insure different interests, each of which will be the subject of a distinct and independent remedy. *Phil. Ins. §§ 234, 383, 396*; *Hagedorn v. Bazett*, 2 Maule & S. 100. In this case, the personal property having been alienated, the policy would be void, so far as that property is concerned, but not as to the real estate. *Clark v. Insurance Co.*, 6 Cush. 342. But the consent of the company made it valid to the new owner of the personal property. Judgments for the plaintiffs.

(159 Mass. 142)

#### DRISCOLL v. WEST END ST. RY. CO.

(Supreme Judicial Court of Massachusetts.  
Suffolk. May 19, 1893.)

ACTION AGAINST STREET-CAR COMPANY — COLLISION WITH WAGON — EVIDENCE.

In an action against a street-car company for personal injuries caused by an electric car colliding with a heavily loaded wagon which plaintiff was driving across the tracks from one cross street to another, there was evidence that plaintiff saw the car nearly 400 feet away when he started to drive across; that it was daylight; that when he saw the car was getting close to him he "stirred up" his horses to get over the tracks; and that the driver of the car put on brakes only when the front of the car was about 20 feet from plaintiff. *Held*, that the question of due care by both parties was for the jury.

Exceptions from superior court, Suffolk county; John Hopkins, Judge.

Action by Patrick Driscoll against the West End Street-Railway Company for personal injuries. The court directed a verdict for defendant, and plaintiff excepts. Exceptions sustained.

On December 11, 1890, plaintiff was driving a wagon weighing 3,850 pounds, load-

ed with coal to the amount of  $3\frac{1}{4}$  tons, and, after coming through Portland street, drove into Hanover street, and was crossing Hanover street diagonally, in order to reach Elm street, which runs from the side of Hanover street opposite Portland street, and about 50 feet south. The cars were going down Hanover street. The collision took place nearly opposite Elm street. The distance from the nearest point on Court street to the nearest point on Elm street, measuring on Hanover street, was 440 feet. The distance along Hanover street, between the nearest points on Portland and Elm streets, was 50 feet, and the width of Hanover street in the vicinity of Elm street was 61 feet between the buildings. The plaintiff testified that when he reached Hanover street, as soon as he could see, he looked up and down Hanover street, and saw the cars which struck him coming towards him on Hanover street, and at that time about 50 feet from Court street; that he continued along, and, when he found that the car was approaching too close to him, he "stirred up" his horses to get over the track; that there were two car tracks running through Hanover street; that he crossed the one on the side nearest Portland street, and he had reached a point where his horses were just over the other track towards Elm street, with his front wheels on the further rail of this track, when the car struck the forward wheel, his team, breaking the axle, and throwing him to the ground.

J. H. Ponce, for plaintiff. M. F. Dickinson and W. B. Sprout, for defendant.

FIELD, C. J. Street-railway companies are not subject to the provisions of Pub. St. c. 98. By Pub. St. c. 113, § 37, whoever maliciously delays or obstructs the passing of the cars on the tracks of such a company is to be punished, and by section 38, *Id.*, the company is to be punished if it willfully or negligently obstructs the passing of carriages over a street or highway. Street-railway companies, under the decision of *Com. v. Temple*, 14 Gray, 69, in running their cars, have certain rights in the streets different from those which belong to the drivers of ordinary vehicles, but none of these rights is directly involved in the case at bar, although it may perhaps be a fact to be considered that the plaintiff's wagon could proceed in any direction along the streets, while the defendant's car must proceed, if at all, on the line of its tracks. The drivers and conductors of street-railway cars, whatever the motive power, have in general the same rights and duties with reference to other vehicles crossing their course that the drivers of omnibuses have, for example, or that the driver of any other vehicle has. *O'Neil v. Railroad Co.*, 129 N. Y. 125, 29 N. E. Rep. 84. It was said in *Com. v. Temple*, that "where the entire public, each according to his own exigencies, has a right to the use of the highway, in the absence of any special regulation by law, the right of each is equal." "Each may use it to his own best advantage, but with a just regard to the like right of others. Persons in

light carriages, for the conveyance of persons only, have occasion, and of course a right, when not expressly limited by law, to travel at a high rate of speed, so that they do not endanger others. But all foot passengers, including aged persons, women, and children, have an equal right to cross the streets, and all drivers of teams and carriages are bound to respect their right, and regulate their own speed and movements in such a manner as not to violate the rights of such passengers. So in regard to the drivers of fast and slow carriages, each must respect the rights of the other." In *Garrigau v. Berry*, 12 Allen, 84, it was said: "There being no statute regulating the manner in which persons should drive when they meet at the junction of two streets, the rule of the common law applies, and each person is to use due and reasonable care, adapted to the circumstances and the place." See *Norris v. Saxton*, (Suffolk, January, 1893,) 82 N. E. Rep. 954. The plaintiff cannot recover if he was guilty of negligence which contributed to the collision, although the defendant's servants were negligent. Each party is bound to exercise due care. *Parker v. Adams*, 12 Metc. (Mass.) 415. What each ought to do when a collision may reasonably be anticipated as possible or probable if each continues to go on as he is going is usually a practical question eminently fit for a jury to determine. *Schlenfeldt v. Norris*, 115 Mass. 17; *Wynn v. Jones*, 111 Mass. 360. In the present case we think the questions of due care on the part both of the plaintiff and of the defendant's servants were for the jury. One circumstance to be considered is that the plaintiff's horses were across the defendant's track at the time his wagon was hit. When two vehicles are proceeding at reasonable rates of speed on converging lines, and the question arises as to which should give way, one circumstance to be considered is which, according to the rates of speed they are going, will first reach the point where the lines of travel cross each other. The plaintiff's testimony is that the car was nearly 400 feet from him when he proceeded to cross Hanover street diagonally to Elm street. It seems to have been daylight, and, although it does not appear when the driver of the car first saw the plaintiff, no reason appears why he should not have seen him long before he applied the brakes. The evidence was that he put on the brakes five or ten seconds before the collision, or when the front of the car was about twenty feet from the plaintiff. It was the duty of the driver to keep a reasonable lookout for teams coming from cross streets, and reasonable control of his car so as to avoid collisions, and we think that there was evidence for the jury that this was not done. Neither can we say that there was not evidence for the jury that the plaintiff was in the exercise of due care. Apparently, if the speed of the car had been seasonably checked, the collision would have been avoided, and the danger was not immediate when the plaintiff undertook to cross the tracks. See *Kerrigan v. Railway Co.*, (Suffolk, March, 1893,) 83 N. E. Rep. 523.

Exceptions sustained.

(159 Mass. 193)

**CLEMENT v. BULLENS et al.**(Supreme Judicial Court of Massachusetts.  
Suffolk. May 19, 1893.)**INSOLVENCY — PETITION FOR ORDER OF ATTENDANCE FOR EXAMINATION — AFFIDAVIT — SUFFICIENCY — SUMMONS — RECITALS.**

1. Where a petition to the insolvency court for an order of attendance for examination, purporting to be brought by the assignee, is signed by him without official addition to his name, such signing impliedly affirms that he is the person named as assignee in the petition, and the words "the above named," before his name in the affidavit thereto, identify the person sworn as the one named in the petition.

2. The words "then personally appeared," as used in such affidavit, mean that the signer personally appeared before the notary administering the oath.

3. Such affidavit is not void because the notary did not attach his seal thereto.

4. An affidavit, reciting that such petition is true to the best of the assignee's knowledge and belief, is sufficient.

5. Though the summons, issued to the person to appear and be examined, follows the language of the statute as to the various matters of suspicion or knowledge which are cause for such summons, and goes beyond the subjects for which foundation was laid by the affidavit, it is not void, since its operative part is to require an appearance for examination, and to that extent it is good.

Report from supreme judicial court, Suffolk county; John Lathrop, Judge.

Petition by Charles W. Clement against George S. Bullens and John Brooks, assignees in insolvency of the Potter-Lovell Company, to vacate an order of the court of insolvency commanding petitioner to appear and submit to examination. The case was reported for the determination of the supreme judicial court. Petition dismissed.

Samuel Hoar, for plaintiff. J. C. Coombs and J. J. Myers, for defendants.

**HOLMES, J.** The objections urged to the order of the court of insolvency that Clement should appear and answer are as follows:

It is said that the petition on which the order was made purports to be brought by two assignees, but only is signed and sworn to by one person, and by him without official addition, so that, as far as appears, "the above-named George S. Bullens" mentioned in the affidavit may be another man than the assignee of that name, and may not be a "person interested in the estate," as required by Pub. St. c. 157, § 70.

The answer to this is that the person signing the petition by doing so impliedly affirmed that he was the person of the same name alleged in the body of the petition to bring it as assignee, and that the words, "the above-named," just quoted from the affidavit, identify the Bullens sworn as the one named in the petition. These considerations, without more, would have warranted the judge of the court of insolvency in finding that the affidavit was made by an assignee. But for all we know, Mr. Bullens, the assignee, presented the petition to the judge in person. It is alleged in the bill before us

that the petition "was filed \* \* \* by one or both of said assignees."

The affidavit is objected to because the notary public subscribing it did not insert the words "before me," and did not attach his seal. However it may be as to affidavits before a commissioner required to obtain a certiorari, (Reg. v. Bloxham, 6 Adol. & E. [N. S.] 528,) or as the basis of an appeal, (Smart v. Howe, 3 Mich. 590.) the words "before me" have not been held necessary in all cases. Empey v. King, 13 Mees. & W. 519. We are of opinion that the words "then personally appeared," which did not occur in any of the foregoing cases, mean personally appeared before the signer, by their only fair interpretation. Furthermore, unless the allegation in the bill that the summons was issued "on said petition and affidavit" excludes the possibility, we cannot say that the notary did not attend Mr. Bullens before the judge, and make an oral statement. As to the want of a seal, a justice of the peace adds no seal to his certificate. If it is not true that when notaries public were given "the same authority to administer oaths as justices of the peace," (Pub. St. c. 18, § 1,) it was not intended to require of them formalities which were not exacted from justices of the peace, then the case is disposed of by Jackson v. Gloucester, 143 Mass. 380, 9 N. E. Rep. 740.

It is objected that an affidavit that the petition is true to the best of the affiant's knowledge and belief is insufficient, citing Hadley v. Watson, 143 Mass. 27, 9 N. E. Rep. 906. But that was as far as the affiant could be expected to go with regard to most of the facts alleged, and may be quite sufficient to show cause for examining a person under section 70. O'Neill v. Glover, 5 Gray, 144; Carpet-Lining Co. v. Chipman, 146 Mass. 385, 16 N. E. Rep. 1; Binney v. Bank, 150 Mass. 574, 23 N. E. Rep. 380.

The summons is in an unusual and bad form. It commands the present plaintiff to appear and to submit to an examination touching any estate of the insolvent debtor fraudulently received, concealed, embezzled, etc., by the plaintiff, or any assets of the insolvent debtor in his possession, or "anything material relating to the assets or dealings of said insolvent debtor of which you have knowledge," following the language of the statute as to the various matters of suspicion or knowledge which severally are cause for a summons, and going beyond the subjects for which a foundation was laid by the affidavit, and we imagine beyond anything intended to be imputed to the plaintiff. It may be a question whether, when any cause is shown for an examination, the examination may not extend beyond the affidavit to anything material relating to the assets or dealings of the debtor. The statute, after providing for an examination of the debtor touching "all matters which may affect the settlement of his estate in insolvency," provides that upon cause shown other persons may be summoned to submit to an examination "in like manner," which would seem to open a broad field. But even if the summons mentioned matters on which the plaintiff is

not liable to examination, it is not void. Its operative part is to require the plaintiff to appear for examination, and to that extent it is good. It could not adjudicate in advance what questions the plaintiff is bound to answer, and must not be construed as purporting to do so. If at the examination questions shall be put to him which he deems unauthorized, he can raise the objection then, before the judge of insolvency.

We have not found it necessary to consider the other objections to the bill. Bill dismissed.

(159 Mass. 161)

**KEITH v. WHEELER.**

(Supreme Judicial Court of Massachusetts.  
Suffolk. May 19, 1893.)

**TAXATION—NOTICE—REDEMPTION—MERGER.**

1. A release to the mortgagee of the equity of redemption, after a tax sale, does not work a merger of the mortgagee's title affecting his right to redeem as such under Pub. St. c. 12, § 49, as it is to his interest, in view of the intervening sale, to maintain such title.

2. The words, "subject to any and all unpaid taxes," in such a release, are not equivalent to "actual notice" of a tax sale, within Pub. St. c. 12, § 49, allowing the mortgagee a certain time in which to redeem after notice.

3. Such words do not estop the mortgagee to deny knowledge of a sale.

Appeal from superior court, Suffolk county.

Writ of entry by George W. Keith against Asa B. Wheeler to recover land. Judgment for defendant. Defendant appeals. Affirmed.

S. H. Dudley, for appellant. F. L. Hayes, for appellee.

ALLEN, J. By Pub. St. c. 12, § 49, real estate which has been sold for taxes may be redeemed, when the person offering to redeem is a mortgagee of record, at any time within two years after he has actual notice of the sale. There are two principal questions in the case: (1) Whether the demandant is to be deemed to be a mortgagee of record; (2) whether he offered to redeem within two years after he had actual notice of the tax sales.

1. At the time of the tax sales the demandant was mortgagee of record, but the tenant contends that he lost that character by reason of the release to him from the owner of the equity of redemption several months after the last tax sale. Such release did not have the effect to work a merger and to extinguish his title as mortgagee, he having a clear interest to maintain the same, in view of the intervening tax titles. *Loud v. Lane*, 8 Metc. (Mass.) 517; *Evans v. Kimball*, 1 Allen, 240, 242; *Jewelry Co. v. Merriam*, 2 Allen, 390; *Tucker v. Crowley*, 127 Mass. 400, 402; *Insurance Co. v. Murphy*, 111 U. S. 738, 744, 4 Sup. Ct. Rep. 679; 2 Washb. Real Prop. (5th Ed.) 208-220c.

2. The words, "actual notice of the sale," as used in the statute, mean something more than knowledge of such facts as might be sufficient to put one on inquiry. Assuming that actual notice to the demandant's agent is the same thing

as actual notice to the demandant, the principal fact relied on to show actual knowledge on the part of the agent is the language of the two releases. The first one says, "subject to any unpaid taxes;" the second one says, "subject to any and all unpaid taxes." These words might be sufficient to put him on inquiry, but they are not equivalent to actual notice of the sales for taxes. See *Lamb v. Pierce*, 113 Mass. 72; *Parker v. Osgood*, 8 Allen, 487; *Crocker's notes to Pub. St. c. 120, § 4*, and cases there cited,—for illustrations of the meaning given to the words "actual notice," when referring to unrecorded deeds. Knowledge that in 1888 the taxes were assessed to Welch is not equivalent to actual notice that Welch held under a sale for taxes.

3. The words in the release from the owner of the equity to the demandant, "subject to any and all unpaid taxes, and to a mortgage given to said Keith by one Geo. W. Gay," do not estop the demandant to deny that he knew of the sales for taxes. Judgment affirmed.

(159 Mass. 200)

**PERRY v. SHEDD.**

(Supreme Judicial Court of Massachusetts.  
Bristol. May 20, 1893.)

**NEW TRIAL—DISCRETION OF TRIAL JUSTICE—REVIEW ON APPEAL.**

A motion to set aside a verdict in favor of admitting a will to probate on the ground that it is against the weight of evidence, that improper statements were made by counsel, and because of newly-discovered evidence, is addressed to the sound discretion of the trial justice, and is not reviewable on appeal.

Report from supreme judicial court, Bristol county; James M. Morton, Judge.

Petition by Arthur E. Perry for the admission to probate of the will of Ann S. M. Buckley, deceased. A decree of the probate court allowing the will, from which Lucy Ann Shedd appealed, was affirmed by a single justice. On report to full bench. Affirmed.

G. W. Parke, for contestant. W. Clifford and O. Prescott, for petitioner.

FIELD, C. J. On appeal from a decree of the probate court allowing the will of Ann S. M. Buckley the usual issues of testamentary capacity, fraud, and undue influence were submitted to a jury, and were found by them in favor of the executor, and a decree was entered by a single justice of this court affirming the decree of the probate court. From that decree an appeal was taken to the full court. The verdict of the jury has not been set aside, and, if the single justice heard evidence upon matters not covered by the issues, the evidence has not been reported, and upon this part of the case there is no question of fact or law before us. After the verdict of the jury the appellant filed a motion for a new trial, and submitted certain affidavits. The grounds of this motion which are now insisted on are, in substance, that the verdict was against the weight of evidence; that improper statements were made in argument before the jury by the

counsel for the petitioner; that after the jury had been charged, and were about to leave the court room, an improper statement concerning a decree theretofore entered in the cause was made by the counsel of the petitioner in presence of the jury; and that new and material evidence had been discovered since the trial to the effect that the will was not written in the house where the testatrix was at the time, but was written elsewhere. The report of the justice who heard the cause states that "after a full hearing upon said motion, and a consideration of the affidavits and arguments in support thereof, in the exercise of my discretion I overruled said motion," etc., and from this order the appellant appealed. This motion was addressed to the discretion of the court, and no exception or appeal lies from the exercise of such discretion. It was a motion on the common-law side of the court, to which the issues had been sent to be tried, and follows the analogy of motions in a suit at common law. But if the appeal from the order overruling the motion were regarded as an appeal in equity or probate, as it does not appear that the justice ruled on any question of law, or what he found the facts to be with reference to the averments contained in the motion, there is nothing for the full court to revise. *Groustra v. Bourges*, 141 Mass. 7, 4 N. E. Rep. 623; *Behan v. Williams*, 123 Mass. 366; *Com. v. White*, 148 Mass. 429, 19 N. E. Rep. 222; *Id.*, 147 Mass. 76, 16 N. E. Rep. 707. Decree affirmed.

(159 Mass. 114)

# PRESIDENT AND FELLOWS OF HARVARD COLLEGE v. WELD.

(Supreme Judicial Court of Massachusetts.  
Suffolk. May 18, 1893.)

## CONSTRUCTION OF WILL—ESTATE DEVISED.

A testator devised certain land to trustees in trust for the payment of certain annuities, and directed them, after the payment of all such annuities, to convey the land to Harvard College. The trustees were authorized to rent the land, and were empowered by a codicil to sell some of it, though the will itself, in providing for the annuitants, directed that the land "be not sold or alienated, but reserved for the purposes of this will." Other land was devised to the college in trust to retain the same. *Held*, that the college had power to sell the land first mentioned after it had been conveyed to it by the trustees upon expiration of the annuities.

Appeal from superior court, Suffolk county.

Action by the President and Fellows of Harvard College against Stephen M. Weld to enforce the specific performance of a contract for the sale of land. The defense was that the plaintiff had no power to sell. The land formerly belonged to Benjamin Bussey, and he devised it to certain trustees, "to have and to hold the same, to them and their assigns, and the survivors of them and their assigns, and to the survivor of them, his heirs, executors, administrators and assigns; but in special trust and confidence to hold, manage, and dispose of the same, and the rents, income, and profits thereof, as herein directed." The

will directed the trustees to pay certain annuities, and then provided as follows: "I do further order and direct that after the payment or security or payment of all the several sums of money and annuities hereby ordered to be paid by my said trustees, and after all the purposes of said trusts, so far as respects my family, and all annuities herein mentioned, shall have been secured and accomplished, all the residue of said trust property and estates, real, personal, and mixed, with the proceeds and accumulations thereof, shall be conveyed and transferred by my said trustees to the President and Fellows of Harvard College." Defendant obtained judgment. Plaintiff appeals. Reversed.

Russell & Putnam, for appellant. Lowell, Stimson & Lowell, for appellee.

HOLMES, J. The direction in Mr. Bussey's will that certain real estate, including that in question, "be not sold or alienated, but reserved for the purposes of this will," is inserted in the midst of the provision for his family and for annuitants, which are to be made or secured before the final transfer to Harvard College. It is surrounded by other directions, addressed, in terms, to the trustees, who hold only until that transfer. The reason expressed for the direction is the testator's opinion that such real estate is the safest property from which "to raise a permanent fund for the accomplishment of the purposes of my will." The trustees are authorized to let the land in question for a term not longer than 99 years, but no similar power is given to Harvard College when the land comes to its hands. In the third codicil the trustees are empowered to sell some of the land ordered by the will to be reserved, but no similar power is given to the college. In the gift to the college, certain land is given upon the trust that the college will retain the same for reasons expressed in the will, but no such trust is expressed with regard to the land in question. The foregoing considerations seem to us sufficient to show that the testator did not intend or attempt to make the land in question inalienable when it reached Harvard College, and that the first words of the trust imposed upon it, to "manage and invest the same to the best advantage," carry a power to sell. *Trust Co. v. Mixer*, 146 Mass. 100, 104, 15 N. E. Rep. 141. See, further, *St. 1889, c. 104*.

Judgment for the plaintiff.

(159 Mass. 219)

# SIMMONS v. BROOKS et al.

(Supreme Judicial Court of Massachusetts.  
Suffolk. May 20, 1893.)

## ACTION FOR BREACH OF CONTRACT—EVIDENCE.

Plaintiff alleged that defendants agreed to sell for him stock of a corporation, and that they neglected and refused to do so, or to return the stock. It appeared that after the agreement had been made, as alleged, plaintiff delivered to defendants, to sell, "pool receipts" or "pooled stock," instead of stock certificates. He testified that he explained the difference

when he delivered them. Defendants produced the receipts at the trial, none of them having been sold. *Held*, that as defendants may not have understood plaintiff's explanation, and as purchasers may have refused to accept the receipts for stock certificates, a finding for defendants would not be disturbed.

Exceptions from superior court, Suffolk county; Charles P. Thompson, Judge.

Action by Moyses R. Simmons against George C. Brooks and another. There was a judgment for defendants, and plaintiff excepts. Exceptions overruled.

Plaintiff's declaration alleged that he delivered to defendants 1,000 shares of the stock of the Standard Coal & Fuel Company, and instructed defendants to sell the same, which they agreed to do, but that said defendants refused and neglected to make sale thereof, or to return said shares of stock to plaintiff, whereby plaintiff was injured and damaged, etc. The following papers were introduced in evidence:

"Exhibit A. George C. Brooks & Co., Bankers, 40 State street. Boston, Jan. 30, 1891. No. 2,063. Received of M. R. Simmons one thousand shares Standard Coal and Fuel Co., which we credit to your account as margin, subject to our disposing of the same without notice to you, at public or private sale, whenever it is deemed necessary by us for our protection; also, subject to our lending or hypothecating the same whenever we see fit to do so. Geo. C. Brooks & Co. G. W. Burr."

"Exhibit B. George C. Brooks. Richard G. Elkins. George C. Brooks & Co. (Members New York and Boston Stock Exchanges, and Chicago Board of Trade.) No. 40 State Street Boston, Jan. 30, 1891. Mr. M. R. Simmons, Boston—Dear Sir: In accordance with your instructions, we have this day sold for your account:

1000 Stand. Coal and Fuel, 25%... \$25,625 00  
Com. .... 125 00

\$25,500 00

"Yours, respectfully, George C. Brooks & Co. Per Lothrop."

"Exhibit C. 100 Shares. No. 252. Standard Coal and Fuel Company. Capital stock, \$5,000,000. 250,000 shares. Par value, \$20.00. This is to certify that E. M. Donnelly is the owner of one hundred shares of the capital stock of the Standard Coal and Fuel Company, and has deposited the same in trust to be held until December 1st, 1891, the termination of said trust, unless sold, said stock having been put into the selling pool to be sold at a price not less than twenty dollars per share. Said stock, or any portion thereof not sold, to be returned to E. M. Donnelly, or his order, assigns or heirs. Witness our hands and seals this fifteenth day of December, 1890. Geo. W. Armstrong, [Seal.] W. H. Trumbull, [Seal.] I. P. Cook, [seal.] Trustees. [And on the back thereof:] No. ——— Shares. For value received, ——— hereby sell, assign, and by this instrument have sold and assigned, to ———, of ———, ——— shares of the capital stock of the Standard Coal and Fuel Company, subject to the conditions named within, and to the by-laws of the company. E. M. Donnelly. Signature

Guarantied, Geo. C. Brooks & Co. Witness: I. Andresen." (A pen had been drawn through the words, "Signature Guarantied," and "Geo. C. Brooks & Co.")

"Exhibit D. Boston, Jan. 30, 1890. To George C. Brooks & Co., Stock Brokers: Sell for my account and risk, order good until countermanded, 1,000 Standard Coal and Fuel, at 24. Waiving all notice, I hereby authorize the sale or purchase of this or any other stocks, bonds, oil certificates, cotton, or securities, in my account, at public or private sale, when it is deemed necessary by you for your protection, and, should there be any loss, I agree to make it good; and I hereby authorize you to lend or dispose of the stocks or property above directed to be purchased, and any collateral that has been or may be deposited as security for such purpose, whenever you see fit. (Name) M. R. Simmons, (Address) 85 Water street."

Plaintiff testified that he requested defendants to sell 1,000 shares of Standard Coal & Fuel stock, which the latter agreed to do; that, after receiving from them the notice marked "Exhibit B," he delivered to them receipts, (Exhibit C,) and that he explained to one of defendants, when making the delivery, that it was "pool stock," but that he did not understand that said defendant "knew anything about this selling pool," except what he told him.

R. M. Morse and H. H. Pratt, for plaintiff. Bartlett & Anderson and W. C. Loring, for defendants.

FIELD, C. J. This case was tried without a jury. The plaintiff was the only witness, and at the conclusion of his testimony the presiding justice found for the defendants. When the case came on for argument in this court it was suggested that the bill of exceptions raised no question of law, and an opportunity was given to the plaintiff's counsel to obtain an amendment of the exceptions from the justice who tried the case. The concluding part of the bill of exceptions, as amended, is as follows: "The court, assuming the plaintiff was a credible witness, found on the evidence for the defendants, and directed judgment to be entered for them. To this the plaintiff duly excepted," etc. The unsatisfactory character of this statement was noticed at the argument. If there had been any ruling upon any question of law to which the plaintiff excepted, it should have been made to appear. If the justice did not believe the witness, or if, believing him generally, yet drew inferences of fact from his testimony which were fatal to the plaintiff's case, it would have been proper that some statement to this effect should be made. Taking the exceptions as they stand, however, we think it appears that the justice found for the defendants on the evidence, and did not rule against the plaintiff on any question of law. The phrase, "assuming the plaintiff was a credible witness," is not, we think, to be taken to mean that every scintilla of his testimony is true, and there are certain inferences of fact necessary to the plaintiff's case which the justice might well refuse to draw from it, even although



he regarded the plaintiff as a truthful witness.

The plaintiff had pool receipts, and not certificates of stock. It was open to the justice to find that although the plaintiff testified that he told Mr. Elkins that it was "pooled stock," Mr. Elkins did not so understand, but thought that it was the stock which was bought and sold on the stock exchange. The justice might have found, also, that the defendants sold it as stock, and that the purchasers declined to accept it because it was not stock, but "pooled stock," and that, the defendants having produced at the trial the 10 pool receipts which the plaintiff delivered to them, it appeared that none of it had been sold and delivered by the defendants, and the money received for it. It is probable, on the face of the plaintiff's testimony, that the real difficulty between the parties, if they were honest, was that the defendants were negotiating with reference to certificates of stock which had a market value on the exchange, while the plaintiff had only receipts for such stock as had been put into a selling pool to be held there until December 1, 1891, unless previously sold by the trustees of the pool at a price not less than \$20 per share. We are of opinion that no error of law appears in the exceptions.

Exceptions overruled.

(159 Mass. 84)

**AYER v. PHILADELPHIA & BOSTON  
FACE BRICK CO.**

(Supreme Judicial Court of Massachusetts.  
Suffolk. May 17, 1893.)

**MORTGAGE—COVENANT—WARRANTY—BANK-  
RUPTCY.**

1. Where a mortgagor gives a second mortgage subject to the first mortgage, but containing covenant of warranty as against the first mortgage, and afterwards obtains title through a foreclosure of the first mortgage, his title thereby acquired inures to the benefit of the second mortgagee, even though the mortgagor has in the interval been discharged in bankruptcy.

2. A purchaser from the mortgagor without actual notice of the second mortgage takes no better title than the mortgagor.

Exceptions from superior court, Suffolk county; John W. Hammond, Judge.

Writ of entry to foreclose a mortgage, brought by Frederick N. Ayer against the Philadelphia & Boston Face Brick Company. Demandant obtained judgment. The tenant excepts. Exceptions overruled.

W. G. Russell and F. W. Kittredge, for demandant. H. G. Parker, J. O. Gray, and E. L. Rand, for tenant.

HOLMES, J. When the case was before us the first time (31 N. E. Rep. 717) it was assumed by the tenant that the only question was whether the covenant of warranty in the second mortgage should be construed as warranting against the first mortgage. No attempt was made to deny that, if it was so construed, the title afterwards acquired by the mortgagor would inure to the benefit of the second mortgagee under the established American doctrine. The tenant now desires to reopen

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the agreed facts for the purpose of showing that after a breach of the covenant in the second mortgage, and before he repurchased the land, the mortgagor went into bankruptcy, and got his discharge. The judge below ruled that the discharge was immaterial, and for that reason alone declined to reopen the agreed statement, and the case comes before us upon an exception to that ruling.

The tenant's counsel frankly avow their own opinion that the discharge in bankruptcy makes no difference; but they say that the inuring of an after-acquired title by virtue of a covenant of warranty must be due either to a representation or to a promise contained in the covenant, and that, if it is due to the former,—which they deem the correct doctrine,—then they are entitled to judgment on the agreed statement of facts as it stands, on the ground that there can be no estoppel by an instrument when the truth appears on the face of it, and that in this case the deed showed that the grantor was conveying land subject to a mortgage. If, however, contrary to their opinion, the title inures by reason of the promise in the covenant, or to prevent circuitry of action, then they say the provision is discharged by the discharge in bankruptcy.

However anomalous what we have called the "American doctrine" may be, as argued by Mr. Rawle and others, (Rawle, Cov., 5th Ed., § 247 et seq.) it is settled in this state as well as elsewhere. It is settled also that a discharge in bankruptcy has no effect on this operation of the covenant of warranty in an ordinary deed when the warranty is coextensive with the grant. *Bush v. Cooper*, 18 How. 82; *Russ v. Alpaugh*, 118 Mass. 369, 376; *Gibbs v. Thayer*, 6 Cush. 30; *Cole v. Raymond*, 9 Gray, 217; *Rawle, Cov. § 251*.

It would be to introduce further technicality into an artificial doctrine if a different rule should be applied where the conveyance is of land subject to a mortgage against which the grantor covenants to warrant and defend. No reason has been offered for such a distinction, nor do we perceive any.

But it is said that the operation of the covenant must be rested on some general principle, and cannot be left to stand simply as an unjustified peculiarity of a particular transaction without analogies elsewhere in the law, and that this general principle can be found only in the doctrine of estoppel by representation, if it is held, as the cases cited, and many others, show, that the estoppel does not depend on personal liability for damages. *Rawle, Cov. § 251*.

If the American rule is an anomaly, it gains no strength by being referred to a principle which does not justify it in fact and by sound reasoning. The title may be said to inure by way of estoppel when explaining the reason why a discharge in bankruptcy does not affect this operation of the warranty, but, if so, the existence of the estoppel does not rest on the prevention of fraud, or on the fact of a representation actually believed to be true. It is a technical effect of a technical representa-

tion, the extent of which is determined by the scope of the words devoted to making it. A subsequent title would inure to the grantor when the grant was of an unincumbered fee, although the parties agreed by parol that there was a mortgage outstanding. (*Chamberlain v. Meeder*, 18 N. H. 381, 384. See *Jenkins v. Collard*, 145 U. S. 546, 560, 12 Sup. Ct. Rep. 868;) and this shows that the estoppel is determined by the scope of the conventional assertion, not by any question of fraud or of actual belief. But the scope of the conventional assertion is determined by the scope of the warranty which contains it. Usually the warranty is of what is granted, and therefore the scope of it is determined by the scope of the description; but this is not necessarily so, and when the warranty says that the grantor is to be taken as assuring you that he owns and will defend you in the unincumbered fee, it does not matter that by the same deed he avows the assertion not to be the fact. The warranty is intended to fix the extent of responsibility assumed, and by that the grantor makes himself answerable for the fact being true. In short, if a man by a deed says, "I hereby estop myself to deny a fact," it does not matter that he recites as a preliminary that the fact is not true. The difference between a warranty and an ordinary statement in a deed is that the operation and effect of the latter depend on the whole context of the deed, whereas the warranty is put in for the express purpose of estopping the grantor to the extent of its words. The reason "why the estoppel should operate is that such was the obvious intention of the parties." *Blake v. Tucker*, 12 Vt. 39, 45.

If a general covenant of warranty following a conveyance of only the grantor's right, title, and interest were made in such a form that it was construed as more extensive than the conveyance, there would be an estoppel coextensive with the covenant. See *Blanchard v. Brooks*, 12 Pick. 47, 66, 67; *Bigelow, Estop.* (5th Ed.) 403. So in the case of a deed by an heir presumptive of his expectancy with a covenant of warranty. In this case, of course, there is no pretense that the grantor has a title coextensive with his warranty. *Trull v. Eastman*, 3 Metc. (Mass.) 121, 124. In *Lincoln v. Emerson*, 108 Mass. 87, a first mortgage was mentioned in the covenant against incumbrances in a second mortgage, but was not excepted from the covenant or warranty. The title of the mortgagor under a foreclosure of the first mortgage was held to inure to an assignee of the second mortgage. Here the deed disclosed the truth, and for the purposes of the tenant's argument it cannot matter what part of the deed discloses the truth, unless it should be suggested that a covenant of warranty cannot be made more extensive than the grant, which was held not to be the law in our former decision. See, also, *Calvert v. Sebright*, 15 Beav. 156, 160.

The question remains whether the tenant stands better as a purchaser without actual notice, assuming that he had not actual notice of the second mortgage.

"It has been the settled law of this com-

monwealth for nearly forty years that, under a deed with covenants of warranty from one capable of executing it, a title afterwards acquired by the grantor inures by way of estoppel to the grantee, not only as against the grantor, but also as against one holding by descent or grant from him after acquiring the new title. *Soines v. Skinner*, 3 Pick. 52; *White v. Patten*, 24 Pick. 324; *Russ v. Alpaugh*, 118 Mass. 369, 376. We are aware that this rule, especially as applied to subsequent grantees, while followed in some states, has been criticised in others. See *Rawle, Cov.* (4th Ed.) 427 et seq. But it has been too long established and acted on in Massachusetts to be changed except by legislation." *Knight v. Thayer*, 125 Mass. 25, 27; *Powers v. Patten*, 71 Me. 583, 587, 589; *McCusker v. McEvey*, 9 R. I. 523; *Tefft v. Munson*, 57 N. Y. 97.

It is urged for the tenant this rule should not be extended; but if it is a bad rule that is no reason for making a bad exception to it. As the title would have inured as against a subsequent purchaser from the mortgagor had his deed made no mention of the mortgage, and as by our decision his covenant of warranty operates by way of estoppel, notwithstanding the mention of the mortgage, no intelligible reason can be stated why the estoppel should bind a purchaser without actual notice in the former case, and not bind him in the latter.

Upon the whole case we are of opinion that the demandant is entitled to judgment. Our conclusion is in accord with the decision in a very similar case in *Minnesota. Manufacturing Co. v. Zellmer*, 51 N. W. Rep. 379.

Exceptions overruled.

(159 Mass. 95)

#### FLANDERS v. HALL

(Supreme Judicial Court of Massachusetts. Suffolk. May 17, 1893.)

##### REDEMPTION FROM MORTGAGE—RES JUDICATA.

Where a mortgagor brings suit to redeem, obtains a decree allowing redemption within a certain time, and then fails to make redemption within the time limited, whereupon his suit is dismissed with costs, such dismissal is conclusive against his right to bring a second suit for redemption, even though, after dismissal of the first suit, the mortgagee advertises the land for sale under the power of sale in the mortgage, since such dismissal operates as a foreclosure of the mortgage.

Appeal from superior court, Suffolk county.

Bill by Charles W. Flanders against Dexter A. Hall to redeem from certain mortgages. Defendant obtained a decree. Plaintiff appeals. Affirmed.

H. G. Sleeper, for appellant. F. L. Hayes, for appellee.

KNOWLTON, J. This case was heard on the bill and plea, the facts set out in the plea being taken as true. *Perkins v. Nichols*, 11 Allen, 542; *Carpet-Lining Co. v. Chipman*, 146 Mass. 385, 16 N. E. Rep. 1. It appears from the plea that all the matters stated in the present bill have been

heard on other bills between the same parties or their privies, and that after decisions on the merits, and the failure of the plaintiffs in those suits to avail themselves of their rights, as determined and defined by the court, final decrees were entered, dismissing the bills, with costs for the defendant. These decrees effectually foreclosed the mortgages. The decrees fixing a time within which the plaintiffs might redeem were in proper form, and, on the failure of the plaintiffs to pay the amounts due within the time prescribed, their rights to redeem were lost. *Stevens v. Miner*, 110 Mass. 57; *Dennett v. Codman*, (Mass.) 33 N. E. Rep. 574, and cases cited. The former adjudications are therefore a complete bar to the present suit. The contention that the defendant, by advertising the property under the power of sale in the several mortgages, has opened the foreclosure, is not well founded. By the decrees in former suits his title became absolute, and nothing has been done by either of the parties which changes his relation to the other, or which affects his legal rights. Decree affirmed.

(159 Mass. 33)

# INHABITANTS OF WRENTHAM v. COREY et al.

(Supreme Judicial Court of Massachusetts. Norfolk. May 17, 1893.)

## ESTABLISHMENT OF HIGHWAY—ASSESSMENT OF DAMAGES—PRACTICE.

Pub. St. c. 49, § 79, which declares that "a person aggrieved by the assessment of his damages," occasioned by laying out a road, may apply for a jury to revise the assessment, does not give a town which has laid out a town way by the action of its road commissioners, and the acceptance of their report, the right to apply for a jury to revise their estimate of damages on the ground that the damages awarded are too great.

Exceptions from superior court, Norfolk county; John Hopkins, Judge.

Petition by the inhabitants of Wrentham against D. C. Corey and others for a jury to revise the assessment of damages made by the road commissioners. A demurrer to the petition was sustained. Petitioners except. Exceptions overruled.

H. E. Fales and S. H. Tyng, for petitioners. T. E. Grover, for respondents.

KNOWLTON, J. The respondents, by their demurrer, raised the question whether a town which has laid out a town way by the action of its road commissioners, and the acceptance of their report, can have a jury to revise their estimates of damages on the ground that the sums awarded are too large. It has long been held that neither a county nor a town can maintain a petition for a jury to revise the estimates of damages made by the county commissioners for land taken in laying out a highway. *Baker v. Thayer*, 3 Metc. (Mass.) 312, 314; *Marshall Fishing Co. v. Hadley Falls Co.*, 5 Cush. 602. The county commissioners are a board that so far represents the county out of whose treasury the damages are primarily to be paid that the county is bound by their ad-

judication. The same reason applies to the action of selectmen or road commissioners in laying out a town way which cannot be legally laid out without a confirmatory vote of the town upon their report. Under former statutes there was a right in towns, as well as individuals, to have a revision by a jury of the action of county commissioners in determining the location of a way laid out, and under statutes then existing it was held that towns might ask for a jury on the ground that damages awarded by the county commissioners in laying out a town way were too large. Rev. St. c. 24, § 13; Gen. St. c. 43, § 19; *Lanesborough v. County Com'rs*, 22 Pick. 278; *West Newbury v. Chase*, 5 Gray, 421; *Westport v. County Com'rs*, 9 Allen, 204. But it has never been held that a town, after laying out a town way by the action of its own officers, whether selectmen or road commissioners, and by its own confirmatory vote, can complain of the assessment of damages. Moreover, by later legislation, the functions of juries, and the rights of towns to appeal in cases of this kind, have been much limited. St. 1870, c. 75, § 2. The language of the statute under which this petition is brought differs somewhat from that used in the statutes under which the decisions in regard to the damages awarded by county commissioners were made, and it implies that the landowner is the only party entitled to apply for a jury. Rev. St. c. 24, § 76; Gen. St. c. 43, § 78; Pub. St. c. 49, § 79. The words are: "A person aggrieved by the assessment of his damages occasioned, either by the laying out, \* \* \* or of the sum awarded him as indemnity therefor, may," etc. The words at the end of the same section also seem to recognize two parties,—one, the town; and the other, the applicant or person recognizing,—and to imply that the town is not to be an applicant. We are of opinion that the town cannot maintain this petition, and that the demurrer was rightly sustained. As this decision disposes of the case, the question whether the way was legally laid out does not properly arise; and, without intimating that the proceedings at the town meeting, although irregular, were invalid, we do not deem it necessary to express an opinion in regard to them. Demurrer sustained. Exceptions overruled.

(159 Mass. 97)

# BRIGGS et al. v. WHITNEY et al.

(Supreme Judicial Court of Massachusetts. Norfolk. May 17, 1893.)

## PARKS—ASSESSMENT FOR BETTERMENTS.

1. Under St. 1875, c. 185, § 16, which provides that cities adjoining Boston may elect park commissioners "who shall have powers similar to those hereinbefore given to the park commissioners of the city of Boston, to lay out and improve parks within said adjoining city," and section 7, Id., which makes it the duty of the Boston park commissioners when they lay out a park, to determine whether benefits have been received by landowners, and whether betterments should be assessed, the park commissioners of an adjoining city may assess betterments received from laying out a park.

2. Such assessment is not invalidated by the fact that the creation of the park has improved the sanitary condition of the district, where the park was not laid out for sanitary purposes.

Report from supreme judicial court. Norfolk county; James M. Morton, Judge.

Petition by Richard Briggs and others against Henry M. Whitney and others for a writ of certiorari to review the action of the defendants as park commissioners of the town of Brookline. Petition denied.

C. H. Drew and F. L. Creesy, for petitioners. M. & C. A. Williams, for respondents.

**KNOWLTON, J.** The principal question in this case is whether, under the statute of 1875, c. 185, entitled "An act for the laying out of public parks in or near the city of Boston," assessments may be made for benefits received from the laying out of a public park in a town adjoining the city of Boston, which has accepted the provisions of the statute. Section 16 is as follows: "The mayor of any city adjoining the city of Boston may, at any legal meeting called for the purpose, elect park commissioners, who shall have powers similar to those hereinbefore given to the park commissioners of the city of Boston, to lay out and improve parks within said adjoining city or town, in conjunction or connection with any park laid out in Boston, and any park laid out by the park commissioners of such adjoining city or town shall be subject to similar provisions to those hereinbefore made, regarding parks in Boston, and such adjoining city or town have similar rights, and be subject to similar duties, to those hereinbefore given and imposed upon the city of Boston in relation to incurring debts for the purpose of defraying expenses incurred under this act: provided, however, that the provisions of this section shall not apply to any such adjoining city that has not accepted the same by a vote of a majority of the legal voters at the annual meeting for the choice of municipal officers." It is contended by the petitioners that, inasmuch as there is no mention of the assessment of betterments in this section, no authority to adopt this particular mode of taxation is conferred. The object of the section seems to be to apply to cities and towns adjoining the city of Boston the same provisions in regard to laying out parks in connection with parks laid out in Boston as are made in the preceding sections for the laying out of parks in that city. The most general language is used, without specification or statement in detail, and we think any one reading the section, without attempting analysis of it, would say at once that the purpose of the legislature was to put the cities and towns referred to in the same position, in reference to laying out adjacent parks, as Boston itself. In regard to those within its own boundaries. If we look at the section more critically, in connection with the other parts of the chapter, we reach the same result. In the first place, park commissioners chosen in one

of these towns have powers similar to those given to the park commissioners of Boston, "to lay out and improve" the parks referred to. Now, under section 7, it is the duty of the park commissioners of Boston, when they lay out a park, to determine whether benefits have been received by landowners, and whether betterments should be assessed. The performance of this duty is necessarily incident to laying out a park, and, in a broad sense, may be said to be part of the proceedings of laying out a park. Secondly, the adjoining city or town has similar rights, and is subject to similar duties, to those given to and imposed upon the city of Boston, in relation to incurring debts, and for the purpose of defraying expenses incurred under the act. They therefore have the right which is given to the city of Boston under section 12, to issue bonds to be called the "Public Park Loan," and they are required, in such a case, to establish a sinking fund to provide for its payment, and to pay into the fund all sums received for betterments until the fund is sufficiently large to meet the indebtedness when it becomes due. Here is a plain implication that the powers of the park commissioners, and the rights and duties of the town, are the same in regard to the assessment of betterments as those of the park commissioners and of the city when parks are laid out in Boston. We are of opinion that the statute gives the respondent authority to assess betterments received from the laying out of this park.

The remaining question is whether the assessment is void because it includes expenses incurred for the sanitary improvement of the neighborhood. The petitioners contend that the action of the town in raising money to defray the expenses of laying out and improving the park since the passage of the statute of 1889, c. 190, has been under and in accordance with this statute, and that, therefore, part of the money has been spent for sanitary purposes, and not for the purpose of procuring a park, as contemplated by the statute of 1875, c. 185. But the respondents, in their answer, aver "that the park way was not constructed by them with reference to the sanitary improvement of Muddy river, but purely and simply as a park in connection with a park laid out by the city of Boston," etc., although they at the same time admit that the carrying out of the contemplated "improvement has relieved the district in which said park was to be constructed from possible future sanitary troubles." The petitioners admit the truth of these averments. We are of opinion that the action of the park commissioners, as set forth in their answer, was within the authority of the statute of 1875, c. 185, and that a mere incidental sanitary benefit, to be derived from the construction of the park, although referred to in the statute of 1889, c. 190, does not change the character of their proceedings. When the original authority to lay out and construct parks was given by the legislature, it was contemplated that a variety of incidental benefits might result from work done under the statute; and

the improvement of the sanitary condition of the land included in a park, and of other land in the vicinity, would not be an unnatural or improbable incident, in many cases, and would not render the work done any less a legitimate work under the authority originally given. We find nothing in the case which requires us to issue a writ of certiorari.

Petition denied.

(159 Mass. 185)

### DUDLEY v. SANBORN et al.

(Supreme Judicial Court of Massachusetts. Middlesex. May 19, 1893.)

#### EXECUTORS AND ADMINISTRATORS—LIABILITY—ACCOUNTING.

1. An administratrix sold at auction 10 shares of corporate stock, and an \$800 mortgage on land in another state, and kept for her own use 10 shares of the same stock, and another \$800 mortgage, similar to the other, and guarantied by the same investment company. The distributees elected to hold her liable for the value of the stock and mortgages in money. *Held* that, in estimating her liability, all the stock and both mortgages should be valued at the rate for which they were sold, though this was less than their appraised value.

2. Where an administratrix has obtained leave to spend \$600 for erecting a monument to her intestate "in the burial lot of said intestate," and then moves his body to another lot, bought with her own money, and puts up the monument there, it is proper to allow her for the expense of such monument, since Pub. St. c. 144, § 6, authorizing an allowance for that purpose, does not confine the court to the case of a monument on a lot bought with the intestate's money.

3. The expense of legal services incurred in obtaining leave to erect such monument may properly be allowed to the administratrix in her account, and so may the rent of a box in a safety-deposit vault.

Appeal from probate court, Middlesex county.

Accounting of Alice M. Dudley, administratrix of Albion J. Dudley, deceased. From the judgment of the probate court, Julia A. Sanborn and others appeal.

J. J. Pickman, for appellants. G. W. Poore, for appellee.

HOLMES, J. This is an appeal by all parties interested from a decree of the probate court upon the first and final account of the administratrix of the estate of Albion J. Dudley. The main questions are whether the administratrix shall be allowed an item of \$900 charged as a loss on 20 shares of the Belvidere Woolen Company, and one of \$1,400 charged as a loss on two \$800 mortgages of the Kansas Farm Loan & Trust Company. The facts, in brief, as found by the master, are as follows: The administratrix is the widow of the deceased, and is entitled to one-half of his personal estate. She desired to take one-half of certain stocks and bonds belonging to the estate in specie, including those above mentioned. The distributees refused to assent. Thereupon she sold 10 of the 20 shares and 1 of the mortgages at public auction, after proper advertisement, for a price which was fair, but below the appraised value; bought them in

herself; took the other 10 shares and the other mortgage as her own; charged herself with them at the auction prices; and now asks to be allowed the differences between these prices and the appraised values, which are the losses in question. At a later date the distributees elected, in writing, to hold the administratrix liable for the value of the stock and bonds in money.

We are relieved from considering what otherwise would have been the rights of the widow and the administratrix by the election just mentioned. See *Marvel v. Babbitt*, 143 Mass. 226, 9 N. E. Rep. 566; *Pierce v. Gould*, 143 Mass. 234, 255, 9 N. E. Rep. 563; *Bank v. Waite*, 160 Mass. 234, 235, 22 N. E. Rep. 915; *Reed's Estate*, 82 Pa. St. 428. There is no doubt that the interested parties could confirm the sale. *Litchfield v. Cudworth*, 15 Pick. 23, 31; *Yeackel v. Litchfield*, 13 Allen, 417, 419. Their election, once signified, was final. *Raphael v. Reinstein*, 154 Mass. 178, 179, 28 N. E. Rep. 141. Therefore the transactions in question must be taken to have been legal. The only question is how the value of the stocks and bonds is to be fixed. The distributees claim the right to charge the administratrix with the appraised value, where, as in the items mentioned, that was greater than the auction price. But we see no reason for such a claim. She is to be charged with the actual value of the property at the time when she took it. The appraisal is not conclusive as to that. Pub. St. c. 144, § 8; *Mead v. Byington*, 10 Vt. 116, 121. A fair auction sale is better evidence. As to the 10 shares of the Belvidere Woolen Company, actually sold, we think that there can be no question. As to the 10 kept, it is suggested that, if sold, they might have brought a different price. But, according to common experience, when equal small lots of the same stock are sold at the same time, the variations are not likely to be large, and we see no sufficient reason for not accepting the sale as a criterion.

As to the mortgages, the report is not so full as we could wish. But we understand that they both were issued, or at least were guarantied, by the Kansas Farm Loan & Trust Company. If they were bonds issued by the company, secured by the same mortgage, of course their values were equal. If they were private notes, secured by different parcels of land, and guarantied by the company, theoretically, they might have very different values. But they were for small sums, and the public here would not be likely to inquire into the details of the real estate mortgaged, or to go beyond the general reputation of the company which took the mortgages in the first instance. Practically, the standing of the mortgages in a Massachusetts market would be determined by the standing of the company which guarantied them. If, when the single justice comes to consider the decree to be framed he shall see reason to suppose that the master's report ought to be recommitted on this question, he will order it to be; but, as we understand the facts, we are of opinion that

the two mortgages properly may be assumed to be of equal value. On the same understanding, we regard the sale as a sufficient test of the value. The master finds that the one sold probably was worth no more than it fetched, and is not satisfied that the other was worth more than the sum at which it was reckoned in the account.

The principles which we have laid down dispose of the items of this class. The administratrix has charged herself with interest on the price of the stocks and bonds taken by her, from the time of the taking. Of course, she is entitled to keep the dividends paid since that time.

The only other item in question, of any size, is a charge of \$600 for erecting a monument to the deceased. The administratrix had obtained leave to spend that sum for the erection of a monument, etc., "in the burial lot of said intestate," but afterwards, preferring that he should be buried elsewhere, bought another lot, with her own money, moved her husband's body, and put up the monument there. The master finds that the sum should be allowed. The fact that the expenditure is not within the terms of the decree is not conclusive against it, but simply leaves on the administratrix the burden of justifying it when she renders her account. *May v. Skinner*, 149 Mass. 875, 21 N. E. Rep. 870. See *Sweeney v. Muldoon*, 139 Mass. 304, 306, 307, 31 N. E. Rep. 720. The statute authorizing an allowance for that purpose is not to be construed as confining the court to the case of a monument on a lot bought with the intestate's money. Pub. St. c. 144, § 6. We see no reason to disturb the decree of the single justice, affirming that of the probate court, so far as it allows this item, or so far as it allows a charge for legal services in obtaining the leave mentioned from the probate court, or for preparing the lot.

The charge of \$6.75 for the rent of a box in a safety-deposit vault seems to us proper, under the circumstances of this case. Nothing else calls for particular remark. We are of opinion that the account should be allowed, subject to a slight correction made by the master, and not excepted to, except as to the charge of the administratrix. Her administration has been beneficial to the estate, but we see no sufficient reason for not following the master's report, which agrees with the finding of the judge of probate.

Decree accordingly.

(159 Mass. 172)

MOORS et al. v. WASHBURN.

(Supreme Judicial Court of Massachusetts.  
Suffolk. May, 1893.)

PLEDGE—RIGHTS OF PLEDGER—REVIEW ON APPEAL—OBJECTION NOT RAISED BELOW—WAIVER.

1. Where defendant was advised by plaintiff that he had a claim on a fund in defendant's hands which was the proceeds of an action of trover for certain wool pledged to plaintiff as security for a loan, he was not justified in paying over a portion of that fund to the general owner, though plaintiff failed to give him a statement of the amount of his claim when

requested; and in a proceeding by plaintiff to recover such fund, or so much thereof as might be due him, defendant was not entitled to an allowance for such payment.

2. Plaintiff was entitled to interest on the fund in defendant's hands from the time defendant received it, there being nothing to show that he kept the fund identified as a separate trust fund, or that he had not the use of the money.

3. Plaintiff not having appealed from the decree in such action, the objection by him that the greater number of items allowed defendant should not have been deducted from the fund is not permissible.

Appeal from superior court, Suffolk county; Justin Dewey, Judge.

Bill by J. B. Moors & Co. against C. E. Washburn to recover a fund in defendant's hands arising from an action of trover for certain wool pledged to plaintiffs to secure a loan. Decree for plaintiffs. Defendant appeals. Affirmed.

C. E. Washburn, in pro. per. H. L. Harding, for appellees.

HOLMES, J. This case was originally an action at law, and afterwards was amended into a bill in equity, to establish the plaintiff's rights in and to recover a fund of \$750, or that part of it to which he might be entitled. The fund is the proceeds of an action of trover for certain wool brought by a warehouseman, (*Pratt v. Leather Co.*, 134 Mass. 300,) and is in the hands of the defendant, Washburn, as attorney. The plaintiff claims under a blanket pledge or mortgage of the wool, made to secure all indebtedness of Moore, the general owner. The case has been before this court on a former occasion, and it is settled by the decision then made that whatever portion of the money does not belong to the defendant, Washburn, belongs to the plaintiff. 147 Mass. 344, 17 N. E. Rep. 884. After that decision a decree was made upon the same report which was passed upon by us, charging the defendant, Washburn, with \$234.15 and costs. He appeals.

We presume that the amount of the decree was reached in the following way: The sum of \$575, being the amount of the defendant's charges for expenses, services, etc., as found in the report, was deducted from the principal sum, leaving \$175. On the last-named sum interest was computed from the date of the writ, November 25, 1884, to the date of the decree, July 15, 1890, being 5 years, 7 months, and 20 days. This would be .338%, which, neglecting the fraction, would give \$59.15. That sum, added to the principal, gives the amount of the decree. The defendant was not allowed for a payment of \$93 made in July, 1883, to Moore, the general owner. This was the only sum not allowed to which the report disclosed any claim on the part of Washburn.

When this sum was paid, the plaintiff had the same right that he has now, as against Moore. Washburn had notice that the plaintiff made a claim as pledgee, and did not know the amount of his claim. He was not aware that it extended beyond a specific loan, which in fact had been paid; but he knew that the plaintiff still made a claim. He had made several

requests to the plaintiff for a statement of his account, but had not received it. Under these circumstances, the court are of opinion that he paid the \$93 at his peril, and that this payment properly was disallowed. The defendant argues that he is entitled to further allowances, but there is no sufficient foundation for them in the report, and it is now too late to go beyond the facts there stated. The parties were content to have a decree framed on those facts, and, if the defendant got all to which the report entitled him, he has no ground of complaint. We see no reason for denying the plaintiff interest from the date of the writ and costs. There is nothing to show that Washburn kept this fund identified as a separate trust fund, or that he has not had the use of the money belonging to the plaintiff. By his answer he denied the plaintiff's right to any part of the sum. Furthermore, when a decree is affirmed on appeal, usually we should not disturb the discretion of the court of first instance as to costs. The *Maggie J. Smith*, 123 U. S. 349, 356, 8 Sup. Ct. Rep. 159.

The plaintiff argues that the greater number of the items allowed to the defendant should not have been deducted from the fund. But the plaintiff did not appeal, and the objection is not open. *May v. Gates*, 137 Mass. 389. The allowance seems to have accomplished substantial justice, as the suits in which the services were rendered really were for the benefit of the plaintiff, and it would seem from the report that it was understood between the parties that the expenses of the litigation should be deducted before any payment to the plaintiff.

Decree affirmed.

(159 Mass. 124)

**FLETCHER v. STEDMAN et al.**

(Supreme Judicial Court of Massachusetts. Middlesex. May 18, 1893.)

**LIEN FOR MATERIALS—PURCHASE BY OWNER OF PREMISES—NOTICE.**

Where an owner of property ordered materials in behalf of a firm of which he was a member, he was a purchaser thereof, within the exception of Pub. St. c. 191, § 3, requiring notice in writing of an intention to claim a lien to be given the owner of the property "if such owner is not the purchaser."

Appeal from superior court, Middlesex county.

Petition by Silas W. Fletcher against George R. Stedman and another to enforce a lien. Heard on agreed facts. Judgment for petitioner. Defendants appeal. Affirmed.

C. S. Lilley and G. W. Poore, for appellants. N. D. Pratt and E. B. Quinn, for respondent.

**HOLMES, J.** This is a petition to enforce a lien, under Pub. St. c. 191. The only ground on which the petitioner's right is denied is that he failed to give notice in writing to the owner of the property that he intended to claim such lien, as required by section 3, "if such owner is not the purchaser of the material." The own-

er of the property ordered the material in person, on behalf of a firm of which he was one of the two members. He was one of the two joint purchasers in the technical sense of those who acquired the title to the materials before they were annexed to the land, and who became liable for the price. He was the only one who conducted the transaction. He had the actual knowledge which it is said to be the object of this provision that he shall have. *Whitford v. Newell*, 2 Allen, 424, 426. We have no doubt that he was a purchaser of the materials within the exception of section 3. See *Smith v. Johnson*, 2 MacArthur, 481; *Van Court v. Bushnell*, 21 Ill. 624; *Roach v. Chapin*, 27 Ill. 194; *Mellor v. Valentine*, 3 Colo. 255.

Judgment for petitioner.

(159 Mass. 164)

**EVANS v. WALL et al.**

(Supreme Judicial Court of Massachusetts. Suffolk. May 19, 1893.)

**WILLS—CONSTRUCTION—TRUSTS—LIABILITY OF FUND FOR DEBTS OF BENEFICIARY—PARTIES.**

1. A will gave money to a trustee to hold "for the following uses, purposes, and objects, and none other whatsoever," and then provided that he should pay over the income as received by him to testator's daughter S. during her life, without in terms investing the trustee with any discretion in such payments; and then authorized him to pay her any part of the principal when he should regard it expedient. The will was carefully drawn, and other provisions, in which discretion was given the trustee in paying income to beneficiaries, were in apt terms. *Held*, that the trustee has no discretion in paying the income of the fund to S., but it is payable to her absolutely, and therefore her receiver in insolvency is entitled to receive it.

2. A will gave a fund to a trustee to hold, and to pay the income to testator's daughter S. during her life, authorizing him also to pay her any part of the principal when he should regard it expedient, and provided that if at her death any part of the principal should remain unexpended it should be paid over to her children. *Held*, that the children were not necessary parties to a suit by the receiver in insolvency of S., to reach her interest in the trust fund.

3. A defect of parties defendant, where the omitted parties are not necessary in order that a decree may be rendered, is waived where objection is not taken in the trial court.

Appeal from superior court, Suffolk county.

Bill by Brice S. Evans, as assignee in insolvency of Sarah E. Balcom, against George F. Wall and Sarah E. Balcom, to reach the income of a trust fund given by the will of James H. Wall, deceased. There was a decree for complainant, and defendants appeal. Affirmed.

The provision of the will by which the trust was created was as follows:

"Item fourteenth. I give and bequeath unto George F. Wall, of the city of Worcester, aforesaid, the sum of five thousand dollars, to have and to hold the same to him and his legal representatives, in trust, however, for the following uses, purposes, and objects, and none other whatsoever, to wit: (1) The same to hold, manage, invest, and reinvest from time to time, in



such way and manner as he, in the exercise of a sound discretion, shall deem wise and prudent, always having regard to such securities as shall yield the largest amount of income consistent with unquestioned safety to the principal. (2) The income thereof, as it shall become due and payable, and be received by him, to pay over to my daughter Sarah Elizabeth Balcom, formerly the wife of Sumner W. Balcom, for and during her life. (3) In addition to said income, said trustee or his successor is hereby authorized to pay over any part of the principal sum at any time to the said Sarah Elizabeth Balcom, when he shall regard such payment wise and expedient, and demanded by the needs and necessities of the beneficiary. (4) If at the decease of the said Sarah Elizabeth Balcom any part of said principal shall remain unexpended or unpaid, to pay over such balance to the children of the said Sarah Elizabeth Balcom, George F. Wall, and James H. Wall, Jr., share and share alike, free and discharged of this trust."

H. E. Hill and W. G. Thompson, for appellants. G. R. Fowler and John Prentiss, for appellee.

ALLEN, J. The defendants at the argument in this court contend that those who at the decease of Mrs. Balcom will be entitled to the principal of the trust fund, or to such part thereof as shall then remain unexpended or unpaid, ought to have been made parties to the bill. This objection was not taken by demurrer, plea, answer, or otherwise in the superior court, but is presented for the first time, and, so far as appears, without previous notice to the plaintiff, in the argument here. Under such circumstances, the objection is entitled to no consideration, unless it appears that a decree for the plaintiff cannot be rendered without joining new parties. *Jewett v. Tucker*, 139 Mass. 566, 578, 2 N. E. Rep. 680. It is obvious, upon an examination of the provisions on which the rights of the possible remainder-men depend, that they have no interest which is entitled to be represented in court. The trustee is "authorized to pay over any part of the principal sum at any time to the said Sarah Elizabeth Balcom, when he shall regard such payment wise and expedient, and demanded by the needs and necessities of the beneficiary." If the trustee, by virtue of this authority, were proposing to make a payment to her from the principal, he would not be bound to consult them, nor would they have any right to be heard before him, or to ask the court to interpose and regulate or control such payment. The only interest which they have consists in the power or privilege of receiving so much of the principal of the trust fund as at her decease may remain unexpended or unpaid. *Williams v. Bradley*, 3 Allen, 279, 281. Such possible interest is sufficiently represented by the trustee, who has every motive to defend the trust fund. *Jewett v. Tucker*, 139 Mass. 566, 2 N. E. Rep. 680; *Sears v. Hardy*, 120 Mass. 524; *Danbridge v. Washington's Ex'rs*, 2 Pet. 370, 377; *Story*, Eq. Pl. § 140.

Upon the main question discussed, whether the plaintiff is entitled, as assignee in insolvency, to the income payable under item 14 of the will to Mrs. Balcom, it is obvious that he is so entitled if a creditor of Mrs. Balcom could maintain a bill to reach and apply such income. *Billings v. Marsh*, 153 Mass. 311, 26 N. E. Rep. 1000. The general rule is that income may be reached by a creditor, unless there is something in the language of the instrument creating the trust clearly showing an intention to the contrary. *Sears v. Choate*, 146 Mass. 395, 398, 15 N. E. Rep. 786; *Maynard v. Cleaves*, 149 Mass. 307, 308, 21 N. E. Rep. 376. In applying this rule it has been held that, when one is entitled to the whole income, his creditors may reach it, even though it is mentioned that it is given for his support; but, when one is entitled merely to be supported out of a trust fund, the value of his support cannot be reached. *Slattery v. Wason*, 151 Mass. 266, 23 N. E. Rep. 843; *Maynard v. Cleaves*, 149 Mass. 307, 21 N. E. Rep. 376; *Baker v. Brown*, 146 Mass. 369, 15 N. E. Rep. 783.

Looking now to the language of the bequest in question, (item 14, cl. 2,) the provision is as follows: "The income thereof, as it shall become due and payable, and be received by him, to pay over to my daughter Sarah Elizabeth Balcom, for and during her life." There are no words here authorizing the trustee, in his discretion, to withhold any portion of the income. The next clause is the one already quoted, giving to him a certain discretion in regard to the payment of the principal to her. This shows an intention on the part of the testator that she should have the whole income at all events, with an authority in the trustee as to further payments from the principal. There is a plain distinction between the words used in relation to the income and to the principal. The will was obviously drawn with great care, and the testator, in a later item, expressly declares that its provisions have been carefully weighed and considered. The change in the terms of the provisions in reference to income and principal must, therefore, be deemed to have significance. A reference to other parts of the will also shows that when the testator wished to confer a discretionary power upon trustees he carefully expressed such intention. In item 15, in bequeathing to the same trustee the same sum of \$5,000, in trust for the benefit of another daughter, he says: "The income thereof, as it shall become due and payable and be received by him, to pay over to my daughter Emma Isabella Connell, if, in the exercise of a wise discretion, it shall seem to him proper to do so." And, in order to make it more clear, he adds with unnecessary repetition in respect to this second fund: "It being my object to put the disposition of this trust fund, principal and interest, in the hands of said trustee, to be used for the benefit of my said daughter Emma Isabella Connell, at his discretion." He thus made a clear distinction between this fund and the former one. In item 18 the testator devised the residue of his estate in trust, for the benefit of his four chil-

dren, the income of one-fourth part to be paid to the trustee for each of his two daughters. In respect to the income received by the trustee from this larger trust fund for the benefit of Mrs. Balcom, the provision is as follows: In item 20, cl. 2: "The income arising from the fourth part of said rents, profits, issues, and income so paid to him, as it shall become due and payable and be received by him, to pay over to my daughter Sarah Elizabeth Balcom, for and during her life, at his discretion." The insertion of the words "at his discretion" in this clause, and the omission of them in the former clause relating to her income from the other fund, furnish strong evidence that the testator's intention was different in respect to them. In item 21, cl. 2, a similar discretion is given to the trustee in reference to the payment of the income received by him from the larger trust fund for the benefit of the other daughter, Mrs. Connell. Some confirmation of the view that, when the testator wished to vest in a trustee a discretion as to the payment of income, he knew how to express that intention clearly, and that in some instances he wished to give such discretion and in others not, may be found in item 9, respecting the payment of income to his brother; and in item 16, respecting the payment of income to two children of Mrs. Connell; and in item 17, respecting the payment of income to his widow. The words in the will which are chiefly relied on by the defendants as showing an intention to exempt the income going to Mrs. Balcom from liability for her debts are the following: The bequest of the trust fund of \$5,000 is said to be "for the following uses, purposes, and objects, and none other whatsoever." Then follow the clauses providing for the trustee's duties, and for the payment of income and principal, the latter of which have been already quoted. These words, in our opinion, do not qualify or explain the provision that the income is to be payable to Mrs. Balcom. When paid to her, she may use it as she pleases. The other words are those authorizing the trustee to pay over to her any part of the principal sum "at any time when he shall regard such payment wise and expedient and demanded by the needs and necessities of the beneficiary." It is urged that a discretionary power is thus given to destroy the principal of the trust fund by paying it over to her, and that this involves a discretion also on his part in relation to the income. Even if it be true that under this provision the trustee may pursue such a course that there will no longer be any income from the trust fund, because the trust fund itself will have ceased to exist, and that the plaintiff may in this manner lose all claim, (a question which we do not enter upon, as it is not before us for determination,) it certainly is the duty of the trustee to pay over the income as long as there is any. There is nothing in the language of the provision which at all looks to any curtailment of his duty in that respect. Whatever income has been received in the past, or may be received in the future, is by the terms of the will payable absolutely to Mrs. Balcom, and,

being thus payable absolutely, it is subject to be reached by creditors and by the plaintiff as assignee in insolvency.

Decree affirmed.

(159 Mass. 70)

# MOODY v. HAMILTON MANUF'G CO.

(Supreme Judicial Court of Massachusetts.  
Middlesex. May 17, 1893.)

INJURY TO SERVANT—NEGLIGENCE OF SUPERIOR  
SERVANT—LIABILITY OF MASTER.

A master is not liable for injuries received by a servant working as a yard man because a yard master, exercising control over him, negligently gave orders, where no negligence is shown in the selection of the overseer; the rule in Massachusetts being that a master is not liable to one servant for the negligence of another, notwithstanding that the latter is a superior servant, and has control over the other.

Exceptions from superior court, Middlesex county; John Hopkins, Judge.

Action by Augustus H. Moody against the Hamilton Manufacturing Company to recover damages for personal injuries. There was a judgment for defendant, and plaintiff excepts. Exceptions overruled.

Among other evidence was the testimony of plaintiff and two other witnesses that plaintiff was at work for defendant in its yard, as a yard hand, and worked in the coal shed, as a third hand; that he was subject to the direction of one Garner, who was defendant's yard master, overseer, or boss; that on the day of the injuries received by plaintiff the latter was at work in the coal shed, when he was called out to a wagon on which was a load of carboys filled with vitriol or sulphuric acid, and that he was directed by said Garner to remove one of the carboys from the wagon, and in doing so the vitriol was spilled over him, and destroyed his eyesight, and he was otherwise injured; that he did not know that the carboy, which was inside a box, was broken, or that its contents were liable to be spilled over him; that he had to grab hold of it in an instant, and everything was done in a hurry; that the defendant, or nobody else, gave him any warning about this carboy having been broken, and that he did not know it was broken; that he never worked, taking off carboys of vitriol, before; and that the carboy at this time looked all right to him when he went to take it off.

P. J. Hoar, for plaintiff. G. F. Richardson, G. R. Richardson, and D. M. Richardson, for defendant.

LATHROP, J. There is no evidence in this case of any negligence on the part of the defendant in respect to its selection of a competent overseer and competent servants. So far as the evidence shows negligence on the part of any one, it is on the part of one Garner, who was the defendant's yard master, and who exercised authority over the plaintiff, who was a yard man. While there is a conflict of authority in this country on the subject, the rule is well established in this commonwealth that the fact that one servant has control

over another is immaterial, and that a master is not responsible, at common law, for the negligence of a superior servant, even in giving orders whereby injury is sustained by an inferior servant. In *Rogers v. Manufacturing Co.*, 144 Mass. 198, 203, 11 N. E. Rep. 77, it is said by Mr. Justice Field: "It is settled in this commonwealth that all servants employed by the same master in a common service are fellow servants, whatever may be their grade or rank." The following cases illustrate the rule that a master is not liable to an inferior servant for the negligent act of a superior servant: *Hodgkins v. Railroad Co.*, 119 Mass. 419, (a case of a brakeman and a station agent); *Walker v. Railroad Co.*, 128 Mass. 8, (a case of a laborer and a road master.) The same rule applies, too, where the superior servant is the foreman of a contractor, and the inferior servant a laborer, (*Summersell v. Fish*, 117 Mass. 312; *O'Connor v. Roberts*, 120 Mass. 228; *McKinnon v. Norcross*, 148 Mass. 533, 20 N. E. Rep. 183; (or the superintendent,.) *Zeigler v. Day*, 123 Mass. 152; *Floyd v. Sugden*, 184 Mass. 563. A negligent order falls within the same rule, whether given to the servant injured, or to another servant, whose act in obedience to the order causes the injury. Thus in *Albro v. Canal Co.*, 6 Cush. 75, a corporation was held not to be liable to a spinner in its employ by the negligent order to a third person of its superintendent, who had the general supervision and charge of its establishment. In *Benson v. Goodwin*, 147 Mass. 27, 17 N. E. Rep. 517, the owners of a vessel were held not to be liable for a negligent order given by the mate to one sailor, whereby another sailor was injured. In *Duffy v. Upton*, 113 Mass. 544, workmen were raising a piece of timber by a derrick, when, the timber meeting with an unlooked-for check, the foreman cried out, "Give another hoist, and take it up." They did so, the derrick broke, and one of the workmen was injured. The employer was held not to be liable. In *Flynn v. Salem*, 184 Mass. 351, the plaintiff, a laborer, was employed by the defendant to assist in digging a trench. He was injured by the caving in of the sides of the trench. The declaration alleged, as the act of negligence, that the superintendent of the work directed the plaintiff to dig in the trench when it was dangerous to do so, and when the superintendent knew that it was dangerous. A demurrer to the declaration was sustained on the ground that the only negligence alleged was that of a fellow servant with the plaintiff. There is nothing in the case of *Patnode v. Cotton Mills*, (Mass.) 32 N. E. Rep. 161, which conflicts with this well-settled doctrine, or which was intended by the court to countenance the view which prevails in some jurisdictions, that a superior servant is a vice principal, or an alter ego. The plaintiff, in *Patnode v. Cotton Mills*, was a boy of 14, who was set to work on a dangerous machine by one McKeown, without receiving proper instructions. There was a conflict of evidence on the question whether McKeown had authority to direct the plaintiff to work on the machine, and whether the plaintiff was

not a volunteer. The remarks of the court are directed to this question. The question of the effect of a negligent order given by a superior servant to an inferior servant, upon the liability of the master, was not argued by counsel in that case, nor considered by the court.

Exceptions overruled.

(169 Mass. 238)

**GAY v. ESSEX ELECTRIC ST. RY. CO.**  
(Supreme Judicial Court of Massachusetts.  
Essex. May, 1893.)

NEGLIGENCE—STREET-CAR COMPANY.

A street-car company that leaves its cars standing in the public street, with unfastened brakes, contrary to a city ordinance, knowing that the cars would be likely to attract children, is not liable for injuries, caused by the flying back of a brake, to a 10 year old boy who goes upon the cars to play.

Appeal from superior court, Essex county.

Action by Granville Gay, as administrator of Albert Gay, deceased, against the Essex Electric Street-Railway Company, for causing the death of said decedent. Defendant obtained judgment on demurrer to the declaration. Plaintiff appeals. Affirmed.

C. G. Fall, for appellant. F. L. Evans, for appellee.

**MORTON, J.** The plaintiff relies upon the amended declaration. It is difficult to understand from it precisely what the cause of action is, or precisely how the injury complained of was received by the plaintiff's intestate. It would seem, taking the declaration as a whole, that he was not a traveler on the highway, though there is an allegation to that effect inserted, nor a mere spectator, injured while looking for a moment at what other children were doing, as was the case, in both respects, with the plaintiff in *Lane v. Atlantic Works*, 107 Mass. 104, 111 Mass. 136. As we construe the declaration it alleges, in substance, that the defendant left several cars standing in a public street for several days, in violation of a city ordinance, knowing that they would entice children, and that they did in fact entice children, to play upon them; that the brake chains were so arranged that when one brake was wound up the other would violently unwind and recoil, and that the brakes were not fastened, and the cars were not guarded; that the plaintiff's intestate, and other children, were playing on the cars, and with the brakes, and that while doing so one of the brakes unwound, and caused the injury complained of; that the leaving of the car in the street, unguarded, and with brakes unfastened, was an invitation by the defendant to plaintiff's intestate, and other children, to play with it, or, if not, that the defendant should have known that the cars would entice children, and that it was its duty to keep the brakes fastened, and the cars guarded, so that children could not play upon them, and not to do so was negligence on its part, which rendered it liable for the injury to the plaintiff's intestate.

If the cars had been left standing by the defendant on its own premises, near the highway, in the same condition in which they were left standing on the street, it is clear, under the decisions of this court, that, however attractive they might have been to children, if the plaintiff's intestate had been injured by them while at play upon them, he would have been a trespasser, and the defendant would not have been liable. *Daniels v. Railroad Co.*, 154 Mass. 349, 28 N. E. Rep. 233; *McEachern v. Railroad Co.*, 153 Mass. 515, 23 N. E. Rep. 231; *Morrissey v. Railroad Co.*, 126 Mass. 377; *Lane v. Atlantic Works*, 107 Mass. 104, 111 Mass. 136. In such a case the only duty which the defendant would have owed him would have been not to injure him wantonly, or by conduct recklessly careless on its part. *Daniels v. Railroad Co.*, supra; *Morrissey v. Railroad Co.*, supra.

Assuming that there was evidence for the jury of defendant's negligence in leaving the cars in the street as it did, (see *Powell v. Deveney*, 3 Cush. 300,) we then come to the question whether plaintiff's intestate is to be regarded as a trespasser, and joint actor with the other children. If he is, then the question whether he was in the exercise of due care becomes immaterial. His wrongdoing as a trespasser and joint actor would, in such event, be a cause contributing to the injury, though in doing what he did he might be doing no more than would naturally be expected from a child of his age. We think he must be regarded as a trespasser and joint actor with the other children. Leaving the cars in the street as it did was not an invitation or license by the defendant to him to play upon them, even though defendant knew that they were calculated to attract children, and did in fact attract them. Knowledge on the defendant's part that they attracted children was not an invitation or license to them; otherwise, the fact that one knowingly maintained on his own premises an object that allured children would constitute an invitation to them. Nor could an invitation or license be implied from the negligence of the defendant, if there was negligence, in leaving the cars in the street. The most that can be said for the plaintiff is that the defendant, knowing that the cars would be, and were, attractive to children, was bound to anticipate what actually occurred, and to exercise a corresponding degree of care to see that the cars were securely fastened and guarded, and is liable for an injury occurring to the plaintiff's intestate through its failure to do so. This assumes that all that the plaintiff is required to show is that his intestate acted as reasonably might be expected of him. But he might do that, and still be a wrongdoer and trespasser, and contribute by his conduct to the injury which he received. If he did, then the fact of his youth, and the fact that the defendant's negligence also contributed to it, would not render the defendant liable. If the cars had been set in motion by other children, and the plaintiff's intestate had been injured by them while lawfully upon the highway, the defendant, clearly, would have been liable. *Lane v. Atlantic Works*,

supra. But he was using the highway and the cars for play, and was a joint actor with other children in causing that to happen which resulted in his injury. We might fairly assume, if it were necessary, that a boy 10 years of age, and of ordinary intelligence, would know that he had no right to play upon cars which a street-railway company had left standing in the streets. Upon the declaration, as we interpret it, we do not think that, under the decisions in this state, the plaintiff is entitled to recover. See cases, supra; also, *McAlpin v. Powell*, 70 N. Y. 126. It is possible a different result might be reached in the English courts, though the law does not seem to be finally settled there, (*Lynch v. Nurdin*, 1 Adol. & E. [N. S.] 29; *Hughes v. Macfie*, 2 Hurl. & C. 744; *Mangan v. Atterton*, L. R. 1 Exch. 239; *Clark v. Chambers*, 3 Q. B. Div. 327.) or in other courts in this country, (*Railroad Co. v. Stout*, 17 Wall. 657; *Koffe v. Railway Co.*, 21 Minn. 209; *Railway Co. v. Fitzsimmons*, 22 Kan. 686.)

Judgment affirmed.

(159 Mass. 151)

### SLY v. HUNT.

(Supreme Judicial Court of Massachusetts.  
Bristol. May 19, 1893.)

#### RES ADJUDICATA—PROBATE OF WILL.

Where an issue in an action against an administrator is the testamentary capacity of decedent from a certain date, down to the time when she made her last will, the record of the probate of her will, such probate having been contested by plaintiff on the ground that decedent was mentally incapable, and tried by a jury, who found that she was of sound mind, is conclusive that, at the time of making the will, decedent was of sound mind, so far as making a will was concerned. *Brigham v. Fayerweather*, 5 N. E. Rep. 265, 140 Mass. 411, distinguished.

Exceptions from superior court, Bristol county; Elisha B. Maynard, Judge.

Action by Elisha C. Sly against John Hunt, executor of Mary C. Wilmarth, deceased, on a contract made by plaintiff and decedent. There was a judgment for defendant, and plaintiff excepts. Exceptions overruled.

J. & R. C. Brown, for plaintiff. H. J. Fuller, for defendant.

LATHROP, J. The physical condition of Mrs. Wilmarth from 1885 down to the time of making her will, in October, 1886, and afterwards, was an issue in this case. The defendant put in evidence, without objection, the record of the probate of her will, which had been contested by the plaintiff, and tried by a jury. It appeared from this record that the jury found that Mrs. Wilmarth was of sound and disposing mind and memory at the time of signing the will. The judge ruled, in effect, that the record of the case was conclusive, as between the plaintiff and the defendant, that Mrs. Wilmarth was, at the time of making the will, of sound and disposing mind and memory, so far as making a will was concerned. The correctness of this ruling is the only question

open on these exceptions. In *Brigham v. Fayerweather*, 140 Mass. 411, 5 N. E. Rep. 205, the executor of the will of Azubah Brigham brought a bill in equity to have declared void a mortgage deed executed by said Azubah on June 15, 1882, on the ground that he was not of sufficient mental capacity to execute the deed. The defendant offered in evidence the probate of the will of Azubah, executed by him on October 11, 1882, with evidence that his mental capacity was no less on June 15, 1882, than on October 11, 1882. This evidence was excluded, and this court held that it was rightly excluded. That case differs from the one at bar in this particular: The defendants in that case were not parties to the probate of the will, in the sense that they were entitled to be heard, or to take an appeal. In the case at bar the plaintiff and the defendant were parties to the proceeding in the probate court. The question how far a verdict and judgment are conclusive between the parties and their privies was considered at length by this court in *Burien v. Shannon*, 99 Mass. 200. Mr. Justice Foster, in delivering the opinion of the court, states the rule thus: "A verdict and judgment are conclusive, by way of estoppel, only as to those facts which were necessarily involved in them, without the existence and proof or admission of which, such a verdict and judgment could not have been rendered. An estoppel is an admission or determination under circumstances of such solemnity that the law will not allow the fact so admitted or established to be afterwards drawn in question between the same parties or their privies. \* \* \* When a fact has been once determined in the course of a judicial proceeding, and a final judgment has been rendered in accordance therewith, it cannot be again litigated between the same parties without virtually impeaching the correctness of the former decision, which, from motives of public policy, the law does not permit to be done. The estoppel is not confined to the judgment, but extends to all facts involved in it, as necessary steps, or the groundwork upon which it must have been founded." *Burien v. Shannon*, 99 Mass. 203. See, also, *Morse v. Elms*, 131 Mass. 151 152; *Barre v. Jackson*, 1 Phil. Ch. 582, reversing 1 *Younge & C. Ch.* 585; *Doglion v. Crispin*, L. R. 1 H. L. 301, 311, 314; *Spencer v. Williams*, L. R. 2 Prob. & Div. 230; *Trafford v. Blanc*, 36 Ch. Div. 600. In *Caujolle v. Ferrie*, 13 Wall. 465, a bill in equity was filed in the circuit court of the United States for the district of New York, by persons alleging themselves to be the next of kin of a person deceased, and asking for distribution of the estate. The defendant was the administrator of the estate, appointed by the surrogate of the county of New York, on the ground that he was the legitimate son, and sole next of kin, of the intestate. This issue had been tried by the surrogate, and the plaintiffs were parties to the proceeding. It was held by the supreme court of the United States that the adjudication in the surrogate's court was a bar to the bill in equity. In the case at bar the ground-

work of the admission of the will to probate was the adjudication that the testatrix was of sound and disposing mind and memory at the time of the signing of the will, so far as making a will was concerned. As this was within the time when the plaintiff contended that the mental and physical faculties of Mrs. Wilmarth had materially deteriorated, and as the plaintiff was a party to the proceedings in the probate court, we are of opinion that the ruling, which was carefully guarded, was right.

Exceptions overruled.

(159 Mass. 203)

#### ASHCROFT v. SIMMONS.

(Supreme Judicial Court of Massachusetts.  
Suffolk. May 20, 1893.)

REPLEVIN—WHEN LIES—AGAINST CONSTABLE ATTACHING MORTGAGED PROPERTY—DEMAND.

Pub. St. c. 161, §§ 74, 75, providing that personal property of a debtor that is subject to a mortgage, and of which the debtor has the right of redemption, may be attached, as if unincumbered, if the attaching creditor pay the mortgagee the amount due him, and such mortgagee shall, when demanding payment of the money due him, make an account of the debt for which the property is liable, and deliver it to the attaching officer, has no application to an attachment of mortgaged property in a suit against a person who has no interest in it; and such mortgagee, if entitled to immediate possession, may replevy the property from a constable making the attachment without demanding payment of his mortgage.

Exceptions from superior court, Suffolk county; Caleb Blodgett, Judge.

Replevin by Frank A. Ashcroft against Simon Simmons. There was a judgment for defendant, and plaintiff excepts. Exceptions sustained.

N. D. A. Clarke, for plaintiff. G. E. Curry, for defendant.

FIELD, C. J. The exceptions recite that the plaintiff "had a valid title, and the right of possession, under a duly-recorded mortgage." The defendant is a constable, who, after the mortgage had been recorded, attached the property "as the property of the mortgagor, by virtue of a writ wherein the mortgagor was named as sole defendant." The court found for the defendant, "solely on the ground that no demand was made upon the defendant by the plaintiff, as mortgagee, after the goods replevied were attached by the defendant." See Pub. St. c. 161, §§ 74, 75.<sup>1</sup> The plaintiff "offered evidence tending to show that previously to said attachment, and subsequently to the execution of said mortgage, the mortgagor had sold said property to one Estes. The court excluded said evidence," to which the plaintiff excepted. We construe the language of the excep-

<sup>1</sup>Pub. St. c. 161, §§ 74, 75, providing that personal property of a debtor, that is subject to a mortgage, and of which the debtor has the right of redemption, may be attached, as if it were unincumbered, if the attaching creditor pays the mortgagee the amount due him, and such mortgagee shall, when demanding payment of the money due him, make an account of the debt for which the property is liable,

tions to mean that the plaintiff offered evidence that the mortgagor had sold the property subject to the mortgage to one Estes, by a sale which was valid as against the creditors of the mortgagor, so that the property was no longer subject to attachment by the creditors of the mortgagor. Independently of the statute, mortgaged personal property could not be attached by the creditors, either of the mortgagee or of the mortgagor. *Sherman v. Davis*, 137 Mass. 132; *Prout v. Root*, 116 Mass. 410; *Dadlam v. Tucker*, 1 Pick. 389, 899. By statute, "personal property of a debtor that is subject to a mortgage, pledge, or lien, and of which the debtor has the right of redemption, may be attached and held in like manner as if it were unincumbered, if," etc. Pub. St. c. 161, § 74. The suit must be against the debtor who has "the right of redemption." If the suit is against a person who at the time of the attachment has no interest in the property the attachment is void, and we see no reason why the mortgagee, if entitled to the immediate possession, cannot replevy the property without demanding payment of his mortgage. If the defendant in the writ has no interest in the property, the attaching officer is a trespasser. *Spring v. Baker*, 8 Allen, 267; *Jordan v. Farnsworth*, 15 Gray, 517. See *Leonard v. Hair*, 133 Mass. 465; *Copp v. Williams*, 185 Mass. 401; *Crocker v. Atwood*, 144 Mass. 588, 12 N. E. Rep. 421. The statutes cited were designed to enable a creditor to attach the interest of one holding an equity of redemption in personal property on a suit against him, and we think they have no application to an attachment of mortgaged property in a suit against a person who has no interest in it. We think the fact offered to be proved was a material fact in the cause.

Exceptions sustained.

(159 Mass. 190)

#### TITCOMB v. BRADLEE et al.

(Supreme Judicial Court of Massachusetts.  
Suffolk. May 19, 1893.)

#### TRUSTS—INSOLVENCY—EQUITABLE ATTACHMENT.

1. Pending a suit by a creditor against his debtor and the latter's trustee to compel the trustee to pay the debt out of the trust fund in his hands, the debtor was adjudged insolvent, and his estate transferred to assignees. *Held*, that they took title to the trust estate free from any claim of said creditor, since the latter did not, by beginning his suit, acquire any lien on said estate.

2. A sale of an insolvent's estate by his assignees by authority of the insolvency court after the institution of composition proceedings passes good title, since such institution does not revert the insolvent with title to the estate.

Appeal from superior court, Suffolk county.

Bill by Frank W. Titcomb against Harry H. Bradlee and William E. Gutterston to compel defendant Gutterston, out of funds held by him in trust for defendant Bradlee under the will of Bradlee's father, to pay a debt due from defendant Bradlee to the complainant. Pending the suit defendant Bradlee was adjudged an insolvent, and an assignment of his estate

was made. Complainant obtained judgment against defendant Bradlee, but his bill was dismissed as to defendant Gutterston. Complainant appeals. Affirmed.

J. M. Hall, for appellant. S. L. Whipple and F. J. Hutchinson, for appellees.

MORTON, J. It is clear that the interest of defendant Bradlee in his father's estate under the latter's will could have been reached by the complainant, and applied in satisfaction of his claim, but for the insolvency proceedings. *Forbes v. Lathrop*, 137 Mass. 523. It is also clear that the complainant did not acquire, by filing his bill, any lien upon that interest, so as to prevent it from passing to the assignees, or so that the assignees took the property subject to it. *Fish v. Fiske*, 154 Mass. 302, 28 N. E. Rep. 278, and cases cited. The subsequent sale of the interest by the assignees under leave of the court of insolvency to the mother of the defendant Bradlee for \$2,000 vested in her an absolute title to it, unless, as we understand the complainant to contend, the effect of the composition proceedings was to revert the property in respondent Bradlee, and therefore to make it subject to be reached by the complainant in this proceeding, or to give the complainant an equitable lien upon it. Neither position can be sustained, we think. Although composition proceedings differ in material respects from the usual course of insolvency proceedings, there is nothing in the original composition act or in the amendatory acts which provides that upon the institution of composition proceedings after the insolvent's estate has been conveyed to assignees in insolvency it shall ipso facto revert in the debtor, and become subject to any attachment or lien existing or proceeding pending in favor of a creditor at the time when the warrant in insolvency was issued. St. 1884, c. 236; St. 1885, c. 353; St. 1889, c. 406; St. 1890, c. 387. It is expressly provided that upon the granting of the discharge the property of the debtor shall revert to and be revested in him; plainly implying that it shall not till then. St. 1884, c. 236, § 10. The property that is to revert to and revert in the debtor must be such property of his as then remains in the assignee's hands. Although it is provided that the court of insolvency may, upon the filing by the debtor of a proposal for composition, stay or suspend insolvency proceedings, there is nothing which forbids it from thereafter authorizing the assignees to sell the estate at public or private sale. It may be necessary to sell it, as appears to have been the case in this instance, to obtain funds with which to pay the proposed dividend. If the property had been sold by the assignees in the usual course of insolvency proceedings, we understand the complainant to admit that he would have had no lien on it. There is no reason why one purchasing from an assignee selling by authority of the insolvency court after the institution of composition proceedings should stand in any different position from one purchasing at a sale by as-

signees authorized by the court in the usual course of insolvency proceedings.

Decree affirmed.

(159 Mass. 226)

**HOLMES et al. v. COATES et al.**

(Supreme Judicial Court of Massachusetts.  
Suffolk. May 20, 1893.)

CONSTRUCTION OF WILL—CHARITABLE BEQUEST.

1. A direction to executors to pay money "for the benefit of disabled soldiers and seamen who served in the Union army in the late war of Rebellion in the United States, their widows and orphans," is good as a public charitable bequest.

2. A direction in a will that, "in case at my decease my books of account shall not show that I have given said sum of \$500 annually for said purpose," then the executors shall pay over "such sums of money as will make up in full to the time of my decease said annual amount of \$500 per annum," is not void as being dependent upon the contents of books of account not in existence when the will was made, since the proper construction of the direction is that the executors are to pay the money, unless it appears from the testator's books that he has paid it in his lifetime.

Case reserved from supreme judicial court, Suffolk county: John Lathrop, Judge.

Bill by Elizabeth Holmes, H. Crawford Coates, Edmund W. Holmes, and Alpheus H. Hardy, executrix and executors of the estate of Gideon Skull Holmes, deceased, against Sarah P. Coates, Catherine B. Peabody, Thomas W. Holmes, and Caroline A. F. Holmes, to determine the validity of the following clause in the will of said testator: "Sixth. Whereas, I formed the purpose in July, eighteen hundred and sixty-one, of giving during my lifetime the sum of five hundred dollars annually for the benefit of disabled soldiers and seamen who served in the Union army in the late war of Rebellion in the United States, their widows and orphans, and made the first of said gifts July, eighteen hundred and sixty-two: Now, I declare my will to be that, in case at my decease my books of account shall not show that I have given said sum of five hundred dollars annually for said purpose, then and in that case I direct my executors, as soon as conveniently may be after my decease, to pay over, for the use and benefit of said disabled soldiers and seamen, their widows and orphans, such sums of money as will make up in full, to the time of my decease, said annual amount of five hundred dollars per annum, reckoning the payment July, eight hundred and sixty-two, as for parts of years eighteen hundred and sixty-one and eighteen hundred and sixty-two."

C. T. & T. H. Russell, for complainants. Wm. A. Gaston, guardian ad litem, for infant heirs. G. C. Travis, First Asst. Atty. Gen., for the charity.

FIELD, C. J. A bequest for the use and benefit of disabled soldiers and seamen who served in the Union army in the late war of the Rebellion in the United States, their widows and orphans, is a good public charitable bequest. Malmed

soldiers and mariners, as well as orphans, are expressly mentioned in St. 43 Eliz. c. 4; Jackson v. Phillips, 14 Allen, 539; Powell v. Attorney General, 8 Mer. 48; Thompson v. Corby, 27 Beav. 649; Attorney General v. Comber, 2 Sim. & S. 98; 2 Perry, Trusts, § 699. The persons described in the bequest are in most, if not all, respects the same as those entitled to receive pensions under the laws of the United States at the time when the will was executed and at the time when the testator died. Rev. St. U. S. §§ 4692, 4693, 4702-4706. It is contended that the bequest is void, because it is dependent upon the contents of books of account of the testator, which were not in existence when the will was made. The direction is that, "in case at my decease my books of account shall not show that I have given said sum of five hundred dollars annually for said purpose," then the executors shall pay over "such sums of money as will make up in full to the time of my decease said annual amount of five hundred dollars per annum," etc. See Thayer v. Wellington, 9 Allen, 283, 292; Newton v. Society, 130 Mass. 91; Olliffe v. Wells, Id. 221. We think that the construction of this article of the will is that the executors are to pay the amount specified unless it appears by his books of account that the testator has paid it in his lifetime. As thus construed, it is a valid disposition of property by a will duly executed. See Treadwell v. Cordis, 5 Gray, 341; Cummings v. Bramhall, 120 Mass. 552; Langdon v. Astor's Ex'rs, 16 N. Y. 9. All the parties who have argued the case agree that for the last year the amount should be apportioned, as the testator lived eight months of that year. Either this is true, or nothing should be paid for that year. As the payments are to be made "in full to the time of my decease," a proportional payment for that year is perhaps what the testator intended. It must be left for a single justice to determine to whom the money shall be paid, and in what way the gift can be made effectual.

Decree accordingly.

(159 Mass. 229)

**DURANT v. SMITH et al.**

(Supreme Judicial Court of Massachusetts.  
Suffolk. May 20, 1893.)

CONSTRUCTION OF WILL—ESTATE DEVISED.

A devise by a married woman to her husband, "to him and to his heirs and assigns, forever," followed by a request "that my dear husband assign by will what, of this property I now leave him, he has not expended, to such of my relatives as he, in his judgment, may think need it," gives the husband absolute title, free from any trust in favor of the relatives.

Report from supreme judicial court, Suffolk county; James M. Morton, Judge.

Bill by William B. Durant, administrator with the will annexed of the estate of Mary A. Holmes, against Edward M. Smith and Lysander F. Holmes, to obtain a construction of the third clause of said will, which reads as follows: "Thirdly. I give, devise, and bequeath all the rest, residue, and remainder of my property,



real, personal, and mixed, wheresoever the same may exist at the time of my decease, that I may now have, or may hereafter acquire, to my beloved husband, Samuel T. Holmes, to him and to his heirs and assigns, forever, meaning and intending to include all trust estates over which I may have disposing power; it being my request that my dear husband assign by will what, of this property I now leave him, he has not expended, to such of my relatives as he, in his judgment, may think may need it. It is also my request that what property my dear husband may leave to our beloved son Harry M. S. Holmes may be left to him in trust."

W. B. Durant, prose. Jabez Fox, for defendant Holmes. C. T. Gallagher and H. B. Bailey, for defendants J. M. Allen and A. M. Allen.

FIELD, C. J. Mary A. Holmes, the testatrix, died November 28, 1890, leaving no issue, and no father, mother, or sister, and, as her only brother, the defendant Edward M. Smith, who was her sole next of kin. Her other near relations were uncles and aunts, and the children of deceased uncles and aunts. The will was executed in November, 1887, and her husband and son then were both alive. Her son died September 4, 1890. Her husband died December 24, 1891, intestate, leaving, as his only heir and next of kin, his father, the defendant Lysander F. Holmes. One of the answers avers that her husband, after the making of her said will, "became insane, and was thereby rendered incapable of exercising any discretion or judgment in the matter" of the disposition of the property under the third clause of the will; and, as the case is reserved on the bill and answers, this averment must be taken to be true. There is no doubt that the will is a valid execution of the power of appointment reserved in the deed of trust; and the question is whether, by the third article of the will, the husband took the property therein given him absolutely, for his own benefit, or took only a life estate, or took the property partly upon trust for the benefit of some of the relatives of the testatrix. The words clearly give the entire legal estate to the husband. It is also clear, we think, that the right is impliedly given him to expend for his own use so much of the property as he may choose. The request "that my dear husband assign by will what, of this property I now leave him, he has not expended, to such of my relatives as he, in his judgment, may think may need it," recognizes the power of the husband to give by his will the part of the property which he does not spend to such of the relatives of the wife as he may think need it. We are of opinion that the husband took the property absolutely, and that the request does not constitute a trust, but a recommendation to the husband, which, if he had continued sane, he might have regarded, and in his own way carried into effect, but which did not affect his title to the property. *Joella v. Rhoades*, 150 Mass. 301, 23 N. E. Rep. 42; *Sears v. Cunningham*, 122 Mass. 538; *Stur-*

*gis v. Paine*, 146 Mass. 354, 16 N. E. Rep. 21; *Bank v. Raynor*, L. R. 7 App. Cas. 321. Decree for Lysander F. Holmes.

(150 Mass. 216)

# BOURGO v. WHITE et al.

(Supreme Judicial Court of Massachusetts.  
Suffolk. May 20, 1893.)

NEGLECT—DANGEROUS PREMISES—ELEVATORS.

St. 1882, c. 208, which declares that "all elevator cars shall be provided with some suitable mechanical device, to be approved by the inspectors, whereby the cars will be securely held in the event of accident," does not require the use of such devices as will surely, under all circumstances, hold the car in case of accident. It is sufficient to provide a car with some suitable mechanical device for that purpose, such device to be approved by the state inspectors.

Exceptions from superior court, Suffolk county; Edgar J. Sherman, Judge.

Action by Frank Bourgo against William H. White and others to recover damages for personal injuries received by plaintiff while employed in defendants' tannery. There was a verdict for defendants. Plaintiff excepts. Exceptions overruled.

P. J. Hoar, for plaintiff. G. F. Richardson and Blaney & Robinson, for defendants.

FIELD, C. J. The exception in this case is founded upon St. 1882, c. 208, which amended Pub. St. c. 104, § 14, by adding these words: "All elevator cars or cars, whether used for freight or passengers, shall be provided with some suitable mechanical device, to be approved by the said inspectors, whereby the cars or cars will be securely held in the event of accident to the shipper rope, or hoisting machinery, or from any similar cause." The accident happened on December 16, 1886. The exceptions recite that "Mr. White, a witness for the defendants, said that he was, and had been for many years, a state inspector of elevators; that he had inspected this elevator in March, 1886, as a state inspector, having been sent for by the defendants, and that he then carefully tested it, and found it in good working order; that it was the same kind of freight elevator that was used in nine cases out of ten at that time; that it had all the safety catches and suitable mechanical devices on it that were known and in use at that time, and that they worked all right; but that about that time there was an invention, called a 'governor,' which would securely hold an elevator in case the gear broke, but that this invention was not then used, nor generally known." "The plaintiff asked the court to rule that the defendants were bound to provide such an elevator, and have such safety catches on it as would, under any circumstances, hold the elevator in case of the breaking of machinery, or some similar case, but the court refused, and the plaintiff excepted; and the court instructed the jury in way not otherwise objected to." The contention is that St. 1882, c. 208, imposes on the defendants the duty of having such a mechanical device attached to the elevator as will surely and securely, under all circum-

stances, hold the cab in the event of an accident such as described in the statute. We think that this is not the meaning of the statute, but that the meaning is that the elevator is to be provided with some suitable mechanical device, to be approved by the state inspectors of factories and public buildings, designed for the purpose of securely holding the cab in the event of an accident. To construe the statute as the plaintiff contends might require the defendants to do what could not possibly be done. The statute did not intend that the defendants should be made insurers that the device should absolutely and perfectly perform its work under all circumstances. The intention was that they should procure a suitable device, to be approved by the state inspectors, and should see to it that it was kept in order. The words of the statute, "whereby the cabs or cars will be securely held in the event of accident," are intended to describe the nature and design of the device. It would require very clear language to create any such extraordinary responsibility as the plaintiff contends for, and the words of this statute are capable of a more reasonable construction.

Exceptions overruled.

(159 Mass. 177)

**WHEATLAND v. SILSBEE et al.**

(Supreme Judicial Court of Massachusetts.  
Suffolk. May 19, 1893.)

**CONTRACT—OPTION TO PURCHASE INTEREST IN  
LAND—PERFORMANCE.**

Where, under a written contract with the owner of land, a person has an option to purchase an undivided half interest therein within a specified time and on conditions stated, and within such time is able and offers to pay the price and comply with such conditions, and fails to do so only by request of such owner, the latter is in default, and the former may compel such owner's executors to account to him for one-half the profits in the land.

Report from supreme judicial court, Suffolk county; Charles Allen, Judge.

Action by George Wheatland against George Z. Silsbee, executor of the will of William D. Pickman, deceased, Dudley L. Pickman and William F. Wharton, executors of and trustees under such will, and Walter Hunnewell, trustee under such will, for an accounting under a contract for the sale and purchase of an interest in certain real estate, entered into between plaintiff and William D. Pickman. A demurrer to plaintiff's bill was overruled, and the case reported to the supreme court. Affirmed.

The contract referred to in the opinion is as follows: "Exhibit C. Know all men by these presents that whereas I, William D. Pickman, of Beverly, in the county of Essex and commonwealth of Massachusetts, am lawfully seised in fee of one undivided third part of a certain parcel of land situated in that part of Boston, in the county of Suffolk and said commonwealth, known as the 'Back Bay,' bounded and described as follows, viz. [describing it;] and whereas, said parcel of land was bought on joint account with George

Wheatland, Jr., of said Boston: Now, therefore, in consideration of the premises and of divers other good and valuable considerations to me paid by the said Wheatland, the receipt whereof is hereby acknowledged, I hereby covenant and agree with the said Wheatland, his executors and administrators, that if at any time during my life, or within six months after my decease, and while I am, or my heirs or devisees are, seised of said one undivided third part, he, the said Wheatland, his executors or administrators, shall pay or tender to me or my executors or administrators one-half of the purchase money which I paid for said one undivided third part, and one-half of the taxes and other assessments which I have already paid, or may hereafter be obliged to pay, on account of said undivided third part, with interest on all sums so paid by me, compounded annually, then I will, and my heirs and devisees shall, remise, release, and quitclaim to the said Wheatland, his heirs and assigns, forever, subject, however, in all respects, to the agreements, conditions, stipulations, and restrictions contained in the deeds to me above referred to, one-half of the said undivided third part: provided, however, and it is expressly understood, that I may at any time, upon notifying the said Wheatland in writing of my intention so to do, and upon his failure, within ninety days from the receipt of said notice, to pay or tender me the sums of money hereinbefore specified, sell the said one undivided third part for such sum, and to such purchaser, as I may think proper."

J. B. Warner, for plaintiff. H. W. Swift, for defendants.

MORTON, J. We think it does not matter whether the agreement of December 20, 1888, be construed as the defendants contend it should be,—as giving to the plaintiff only an option to purchase,—or as constituting, as the plaintiff contends, a joint venture on the part of the plaintiff and defendants' testator. If it was an option, then the plaintiff, according to the allegations contained in the bill as originally filed and as amended, exercised, during the testator's life, the right to purchase which the agreement gave him. The bill alleges that, several times after the agreement was executed and delivered to the plaintiff by Pickman, the plaintiff told Pickman that he had the money to pay for his half, and that he wanted to do so and take a deed of it, but that Pickman declined to take the money and deliver the deed, saying that he did not wish the money, and preferred to let it lay. The amendment alleges that the plaintiff was abundantly able at all times, as Pickman well knew, to pay his share of the purchase price, with interest and charges; that he relied upon Pickman's statement that payment was not desired; and that his failure to make payment was due to such statement and refusal. The purport of these allegations is that the plaintiff was able to take and pay for the deed, as Pickman knew, and was desirous and offered to do so, but

that defendants' testator declined to take the money and deliver the deed; or, in other words, that plaintiff availed himself of the right to purchase, and offered and was able to do what the agreement required him to do, but the defendants' testator declined to receive the money and deliver the deed. Upon these facts it is clear that Pickman was in default at the time of his death. The plaintiff was not obliged to make an actual tender of the money so long as he was able, ready, and willing to take a deed, and was desirous to do so, and Pickman had notice thereof. *Linton v. Allen*, 154 Mass. 432, 439, 28 N. E. Rep. 790; *Brown v. Davis*, 138 Mass. 458; *Cook v. Doggett*, 2 Allen, 439. The plaintiff's yielding for the time being, at each effort to get a deed, to Pickman's desire not to take the money and to let it lay, did not affect the plaintiff's rights. The delay was at Pickman's request, and without consideration, and there was nothing to prevent the plaintiff from bringing suit at any time when he chose to do so. Decree affirmed.

(138 N. Y. 468)

**SOCIETA ITALIANA DI BENEFICENZA  
v. SULZER.**

(Court of Appeals of New York. June 6, 1893.)

**APPEAL—HARMLESS ERROR—JURISDICTION—COUNTERCLAIM—CONTRACT—PAROL EVIDENCE.**

1. In an action on a contract, though it was probably error to require defendant to elect between the defense in her answer and a counterclaim, on the ground that they were inconsistent, it was harmless where she abandoned the counterclaim, which was invalid by reason of not being properly pleaded.

2. Where it appears that the cause of action stated in the complaint involves a sum less than \$500, the court of appeals will not obtain jurisdiction to review the judgment by the mere fact that what purports to be a counterclaim for a greater amount appears on the record, but it will examine the pleading, and if no facts are stated which would enable defendant to give proof under the counterclaim, or to recover on it, the court will dispose of the appeal as if no counterclaim had been filed.

3. In an action on a written contract to recover a sum which defendant contracted to pay in case certain united societies held a picnic on her land, defendant set up a counterclaim, and alleged that the committee of the societies made certain statements as to the number of people who would attend and the benefits defendant would derive, which were untrue. *Held*, that if the statements were not mere expressions of opinion, but were in the nature of promises, they were merged in the writing, and could not be proved.

Appeal from superior court of New York city, general term.

Action by the Societa Italiana Di Beneficenza against Catherine Sulzer to recover the sum of \$400 on a contract. From a judgment of the general term affirming a judgment for plaintiff, (19 N. Y. Supp. 824,) defendant appeals. Appeal dismissed.

Lorenz Zeller, for appellant. Warren W. Foster, for respondent.

O'BRIEN, J. The action was brought to recover upon a written contract of a

peculiar nature. It is admitted by the answer that the plaintiff is a domestic corporation, and that it holds by assignment whatever claim the parties who signed or executed the contract could enforce against the defendant. The complaint avers that on June 29, 1889, certain united Italian societies in the city of New York, for and in behalf of the plaintiff, a corporation organized for benevolent purposes, entered into an agreement with the defendant whereby, in consideration of the promise or agreement of such societies to hold their annual picnic and festival on her grounds, which were a park or place maintained for such purposes by her, she agreed to pay to these societies, for the benefit of the plaintiff, \$400. The festival was held upon these grounds, but the defendant never paid the sum so agreed upon. The answer, after putting in issue the making of the agreement, avers for defense and counterclaim, in a separate count, that the alleged agreement was signed by three persons who claimed to be a committee of the united Italian societies, who stated to the defendant that they represented all said societies; that they were united and not split up; that they were composed of many thousand persons; that it would be the largest picnic ever held in New York, and large profits would be derived therefrom; but they did not represent all the societies; that they were not united, but split up; that but a small number of persons attended; and that she went to great expense in preparing for it by employing persons to attend upon them and in purchasing goods therefor; and that, owing to the small attendance, she sustained a loss by the contract. It was not claimed that any fraudulent statement was made. The written contract is a very brief one. It states that "the undersigned committee," in behalf of the societies, for the plaintiff, "hereby engage the use of the grounds of the above-named place" for the purpose of the picnic and summer night's festival, and they agreed to be governed by the rules and regulations adopted by the defendant for the good conduct and government thereof, as set forth in a paper attached to the contract, under the penalty of forfeiting all right or claim to the use of the park and all moneys paid or deposited on account thereof. The defendant, on her part, agreed to pay the \$400 for holding the festival in her park. At the general term, the defendant's counsel stated that he did not rely upon a breach of any of the covenants in the agreement, but upon the exceptions taken at the trial. This referred to another defense set up in the answer, to the effect that the rules of the park, which were made part of the contract, had been violated, and consequently the contract was forfeited by the sale of wine and cigars by the societies or the committee at the festival, as such sales were expressly prohibited. That question had been submitted to the jury at the trial, and a finding had in favor of the plaintiff, and the court below was not asked to pass on any question growing out of it. Therefore, there are no questions here but such as were raised by exceptions at the trial, and

there are but one or two exceptions that require any notice. (1) At the opening of the trial the court, at the request of plaintiff's counsel, required defendant's counsel to elect whether he would rely upon the defenses set up in the answer to the counterclaim, on the ground that they were inconsistent. The defendant's counsel excepted to this ruling. (2) At the close of the case defendant's counsel moved to dismiss the complaint on the ground, among others, that the contract was not proved. This was denied and exception taken. In regard to the last question, it is sufficient to say that the writing was produced, and on its face purported to have been made by the committee for the plaintiff. It was therefore a contract made by others for the benefit of the plaintiff, and it therefore had such an interest in the claim as enabled it to maintain the action. *Lawrence v. Fox*, 20 N. Y. 268. In this view the assignment was not necessary, although it is possible that the parties who signed the contract bond, as the officers or representatives of unincorporated societies or associations, could maintain the action under section 1919, Code Civil Proc., and if they could the assignment would carry that right to the plaintiff. Under the present system of pleading a defendant may set up as many defenses as he may have, whether inconsistent or not. *Burr v. Burr*, 67 N. Y. 237; *Goodwin v. Wertheimer*, 99 N. Y. 149, 1 N. E. Rep. 404; Code Civil Proc. § 507.

It is possible that an error was committed in compelling the defendant to elect which defense she would stand upon, and requiring her to abandon the other, but, if there was, it is wholly immaterial, because no valid counterclaim was pleaded, and hence the defendant lost nothing by being required, in effect, to abandon a pleading that was clearly insufficient. The counterclaim did not allege any breach of the written agreement. All that it alleged was that the committee made oral statements at the time of and preceding the execution of the paper, which were mere expressions of opinion as to the number of people that would attend, and the benefit the defendant would derive from the festival. Even if they were not opinions, but in the nature of promises, they were all merged in the writing, and it could not be enlarged or altered by proof of the parol statements and negotiations that preceded the final execution of the agreement. It is not claimed that there was any fraud or mistake, or that the writing itself does not embody all the obligations of the parties. Under such circumstances the writing must be conclusively presumed to express all the binding stipulations of the parties, and hence the pleading did not state any facts constituting a defense or counterclaim. The court might have held that no proof was admissible under it, and, therefore, the fact that the defendant abandoned it, under a ruling of the court requiring him to make an election, constitutes no ground of error. When the counterclaim is thus eliminated from the case, as it must be, the amount in controversy is less than \$500, and consequently no appeal lies to this court from the judgment.

When it appears that the cause of action stated in the complaint involves a sum less than \$500, this court will not obtain jurisdiction to review the judgment by the mere fact that what purports to be a counterclaim for a greater amount appears upon the record, but will examine the pleading, and, if it is plain that no facts are stated which would enable the defendant to give proof under it or to recover any counterclaim in fact, will dispose of the appeal in the same manner as if no attempt whatever had been made to interpose a counterclaim. The appeal should therefore be dismissed, with costs. All concur.

(128 N. Y. 361)

WING et al. v. ROGERS.

(Court of Appeals of New York. June 6, 1893.)

ACTION ON UNDERTAKING—STAY OF PROCEEDINGS—RETURN OF PROCESS.

A surety signed an undertaking for a stay of proceedings in certain actions till the deposition of a witness in a foreign country could be taken for use by defendant in the actions. The undertaking recited that, whereas defendant obtained an order in "said actions staying the trials thereof until a return of a commission issued to take the testimony of J.," etc., after which followed an absolute undertaking to pay any judgment against defendant in those actions. The order in pursuance of which the undertaking was given was entered December 7, 1888, and provided that the trial of the actions be stayed until the return of the commission. The commission was never returned, and J. having arrived in New York in May, 1890, the stay was vacated in the following August. *Held*, that as the substantial object of the undertaking, the procurement of J.'s testimony, was realized, the fact that the deposition was never returned did not affect plaintiff's right of action on the undertaking. 17 N. Y. Supp. 153, reversed.

Appeal from supreme court, general term, first department.

Action by John D. Wing and another against Amos Rogers. From a judgment of the general term (17 N. Y. Supp. 153) reversing a judgment on a verdict for plaintiffs, they appeal. Reversed.

Paul D. Cravath and John W. Houston, for appellants. Clarke & Culver, (R. Floyd Clarke, of counsel,) for respondent.

O'BRIEN, J. The plaintiffs recovered judgment against the defendant as surety upon an undertaking given to stay proceedings in an action pending, in behalf of the plaintiffs, against one Rowland N. Hazard. The general term has reversed the judgment, and the appeal brings that decision here for review. It appears that there were three actions, and that two of them were consolidated, and that the undertaking applied to the action as consolidated, and another. In order to ascertain the consideration, scope, and purpose of the instrument sued upon, it will be more convenient to give it here in full, with its recitals: "Whereas, Rowland N. Hazard, the defendant in the above-entitled actions, on December 7th, 1888, obtained from this court an order, in both of said actions, staying the trials thereof until a return of a commission issued to take testimony of Jared E. Lewis, as a witness for

the defendant, provided that the said defendant should give an undertaking, with sufficient sureties, conditioned that said defendant will pay any judgments that may be recovered against him in these actions; and whereas, the defendant has given an undertaking executed by the American Surety Company, conditioned to pay any judgments that may be recovered in these actions, or either of them, up to the amount of \$7,500; and whereas, Amos Rogers has given a bond for any amount which may be recovered against the defendant, which bond, upon the execution hereof, is to be considered canceled and null and void; whereas, the plaintiffs have stipulated to accept as sufficient an undertaking by the American Surety Company and this undertaking: Now, therefore, in consideration of the premises and one dollar to me in hand paid, I, Amos Rogers, of No. 45 Broadway, New York city, do, pursuant to the above order and stipulation, undertake that the said Rowland N. Hazard will pay any judgments that may be recovered against him in these actions, or either of them, over and above the sum of \$7,500, secured to be paid by the American Surety Company, as aforesaid; it being understood that my liability hereunder is limited to the amount of the said judgment or judgments, with interest, less \$7,500. In witness whereof, I have hereunto set my hand and seal, this 12th day of April, 1889. Amos Rogers. [Seal.] This instrument was executed and delivered in pursuance of an order of the court, entered on the 7th day of December, 1888, upon the application of the defendant in the actions, and which directed, among other things, that a commission issue out of, and under the seal of, the court, to a commissioner named, at Santiago, Chili, to examine one Jared E. Lewis, as a witness in behalf of the defendant, upon interrogatories to be annexed. It was further ordered that the trial of the actions be stayed until the return of the commission, provided that the defendant, within 10 days from the date of the order, give and duly file an undertaking, with one or more sureties, to be approved by the court, conditioned that the defendant will pay any judgment or judgments that may be recovered against him in the actions, or either of them. After the execution and delivery of the undertaking the interrogatories were settled, and the commission issued. The witness was a resident of New York, but sojourning at Santiago, where he was from early in December, 1888, to about the middle of September, 1889. The commission was received by the commissioner, who handed or sent it to the witness for the purpose of enabling him to write out his answers to the interrogatories, which he did, and then returned it to the commissioner; but he never appeared before the commissioner to sign or verify the deposition, and thus the commission was never actually executed or returned. In the month of May, 1890, the witness returned to New York, and, on the 8th of August following, the court, upon the plaintiff's application, vacated that part of the previous order which stayed all proceedings until the return of the commission. In November the

action was brought to trial, and judgment rendered for the plaintiffs therein, and executions issued and returned unsatisfied. The American Surety Company paid, and this action was brought to recover from the defendant that part of the judgment covered by the terms of his undertaking. At first the defendant in the actions referred to attempted to comply with the order for a stay by an undertaking for the whole liability executed by the defendant. But that bond was never approved, and subsequently it was arranged to accept bonds with separate liability for distinct parts of the demand from the surety company and the defendant, and thus the instrument in question was made and delivered. On the trial of this action both sides asked the court to direct a verdict, thus eliminating from the case all questions of fact. The trial judge held that the plaintiffs were entitled to recover, and directed a verdict in their favor. The ground upon which the learned general term reversed the judgment, and, in effect, held that the direction should have been in favor of the defendant, was that the consideration for and condition of defendant's liability was the stay of proceedings until the return of the commission, and as it had not been returned, and the stay had been vacated, the defendant was not liable.

When an action is brought against sureties upon a bond or undertaking given in an action, or upon appeal, the validity and force of the instrument depend upon its efficacy in performing the office, or accomplishing the end or result, contemplated by the parties at the time it was given. An instrument, though properly executed and filed, which for any valid reason is disregarded, or fails to secure the stay or accomplish the object for which it was given, is virtually without consideration, and cannot be enforced against the sureties. When an undertaking on appeal to stay proceedings upon the judgment appealed from fails, for any legal reason, to secure the stay, and the judgment is enforced as if the bond had not been given, the sureties cannot be held liable. The cases of *Hemingway v. Poucher*, 98 N. Y. 281, and *Collins v. Ball*, 81 Hun, 187, illustrate this principle, and that the rule there sanctioned is sound and just cannot be questioned. The defendant in this case is liable if the instrument which he executed secured for his principal the advantages and benefits which the court had in view when granting the order, and which were fairly within the contemplation of the parties. This leads us to inquire what it was that Hazard wanted when he applied to the court for a commission with a stay. Clearly, what he wanted was the testimony of an absent witness. The main purpose of the order was to enable him to procure this testimony, and the stay was an incident made necessary by the principal purpose. Surely, this stay was not asked or granted for the mere purpose of delay, but in order to enable him to have the commission executed and returned, and thus procure testimony material to his defense. He certainly had all the benefit

of that stay from December, 1888, when it was granted, until August, 1890, when it was vacated. The stay was not vacated until the witness had returned to New York, and the commission could not then be executed, and, moreover, he was then within the jurisdiction of the court, and the party could procure his attendance at the trial; so that the instrument in question operated to stay all proceedings in the case until the witness returned to New York, when the party desiring his testimony could procure his attendance in open court. In view of this it cannot be said that the undertaking failed to secure the end and object which the court and the parties had in view, and if it did it is supported by a good consideration. On its face its conditions are simply that, if the plaintiff in the actions recovered, the surety would pay the judgments. He did recover, and the judgments were not paid. But we have a right to look at the recitals and the legal proceedings out of which it grew in order to determine its real consideration and conditions. Looking at all these, we think it is plain that the substantial thing which the party wanted, and which he obtained, was, not so much the return of a commission, executed or not, but an opportunity to procure the testimony of a witness who left South America before the commission was executed, and who returned to New York, where the trial was to be had, many weeks before the stay was vacated. As the commission could not be executed at the place to which it had been sent, it cannot be that the rights of the obligee in the bond depended upon such an idle ceremony as the return to the clerk's office of the blank documents, which were no longer of the slightest use to any one. The return of the witness was equivalent to the return of the commission, and the stay until that time satisfied every condition of the bond, and every substantial right it was intended to procure. Had the commission been executed and returned and on file when the motion was made to vacate the stay, the court could have suppressed it on proof of the fact that the witness had returned to his place of residence, and could be examined by the party desiring his testimony in open court, and at the trial. Code Civil Proc. § 910. But under such circumstances it could not very well be shown that the surety on the bond was discharged because the party was not allowed the benefit of the commission, but was obliged to procure the testimony in the regular way, by compelling the attendance of the witness at the trial. There was no way that either party could compel the return of the commission. The court could only operate upon the stay, and as that was not disturbed until ample time had elapsed for the return, and until the witness himself had returned, and was subject to subpoena, there is no substantial ground of defense for the surety. To insist that he is entitled to have the paper issued under the seal of the court actually returned before an action can be maintained against him on his promise is to subordinate important rights and obliga-

tions to the most trifling and meaningless forms. If the instrument, on its face, made that a condition of liability, the surety could, no doubt, insist upon it, because he may stand upon the very terms of the obligation; but, as we have seen, it does not, nor was it the substantial end and object which was sought to be secured by the execution and delivery of the instrument. For these reasons the order of the general term should be reversed, and that entered upon the verdict affirmed, with costs.

Judgment accordingly. All concur.

(N. Y. 435)

**CENTRAL NAT. BANK OF CITY OF NEW YORK et al. v. SELIGMAN et al.**

(Court of Appeals of New York. June 6, 1893.)

**ASSIGNMENT FOR CREDITORS—PREFERENCES.**

1. Laws 1887, c. 503, declaring that "any preference" in a general assignment, other than for salaries of employees, shall not be valid except as to one-third the assigned estate, does not invalidate an assignment containing excessive preferences, but operates merely to reduce the preference within the limit mentioned.

2. A preference cannot be created by confessing judgment after the assignment has been executed, and the assignee has taken possession, though but a few moments intervene between the assignment and the confession.

Appeal from supreme court, general term, first department.

Action by the Central National Bank of the City of New York, George F. Victor, Carl Victor, Thomas Achelis, Jr., and John Achelis against Sigmund J. Seligman, Philip Seligman, Abraham H. Herts, Simon M. Herman, Isaac H. Herts, Benjamin H. Herts, Moses H. Moses, and Jonas Sonneborn. The general term rendered judgment (19 N. Y. Supp. 362) modifying and affirming a judgment of the special term in favor of plaintiffs. Both parties appeal. Reversed.

Blumenstiel & Hirsch, (Alex. Blumenstiel, of counsel,) for plaintiffs. Dittenhoefer & Gerber, (Nathaniel Myers and A. J. Dittenhoefer, of counsel,) for defendants.

ANDREWS, C. J. The firm of Seligman Bros. & Co., on the 2d day of July, 1888, made a general assignment of their property for the benefit of creditors. This action was brought by the plaintiffs, to whom the firm was indebted at the time of the assignment, and who subsequently procured judgments against the assignors for their debts, to set aside the assignment for fraud, and to have the property of the assignors applied to the payment of the judgments of the plaintiffs. The plaintiffs joined, as defendants with Seligman Bros. & Co., and the assignee, one Moses, and the members of the firm of Herts Bros. & Co., and one Sonneborn. Moses and the firm of Herts Bros. & Co. obtained judgments against the assignors, which were entered on the same day the assignment was made, but a few minutes after the filing of the assignment. They were obtained upon suits commenced, followed by offer and acceptance under the Code. The plaintiffs in these judgments issued execution thereon, and the sheriff levied on the

stock of goods assigned, and subsequently, on being indemnified, sold the property on the executions, and realized thereon sufficient to satisfy the Moses judgment of \$4,218.53, and the additional sum of \$19,289.85, which was applied on the judgment of Herts Bros. & Co. The assignors, on the day of the assignment, but, as is to be inferred, prior to its execution, assigned to Sonneborn accounts due the assignors, upon which he collected the sum of \$7,806.32 to apply on a debt owing by the assignors to him. The plaintiffs demanded, in addition to the other relief, that the judgments in favor of Moses and Herts Bros. & Co., and the executions thereon, be vacated and set aside, and that they account for and pay over to a receiver, to be appointed for the benefit of the plaintiffs, the sums severally collected by them on the executions, and that the transfer of accounts to Sonneborn be set aside, and that he likewise be required to account for and to pay over the sums collected by him thereon. The judgment at special term set aside the general assignment, the judgments and executions in favor of Moses and Herts Bros. & Co., the transfer made to Sonneborn, and adjudged that these parties respectively account for and pay over to a receiver the sums severally received by them as above stated, with interest, to be applied in satisfaction of the judgments obtained by the plaintiffs, which, in the aggregate, are nearly equal in amount to the sums which the defendants Moses, Herts Bros. & Co., and Sonneborn are required to pay. The general term modified and affirmed the judgment of the special term as modified; the modification, however, not affecting the theory of the action or of the special term judgment.

This case presents an important question arising under chapter 503 of the Laws of 1887, which has not been considered or decided by this court. That question is whether a preference in a general assignment by insolvents for the benefit of creditors, made either in the assignment itself, or by separate instruments which may be construed as parts of the assignment, where such preferences exceed in amount one-third of the assets of the assignors, after making the deductions mentioned in the act, renders the assignment void. In considering this question it will be for the present assumed that the judgments in favor of Moses and Herts Bros. & Co., and the transfer of accounts to Sonneborn, constituted preferences exceeding the statutory limit. These alleged unlawful preferences furnish the only ground upon which, upon the evidence, the validity of the assignment can be assailed. There were no facts shown upon which any common-law fraud could be predicated, or to bring the case within the statute as to fraudulent conveyances. 2 Rev. St. p. 137, §§ 1-8. It is not claimed that the assignors withheld any of their property from their creditors. It was formally admitted on the trial that the debts for which the judgments were obtained, and the debt of Sonneborn, were bona fide.

The only ground of attack upon the assignment and the other transactions mentioned is that the assignors, in contempla-

tion of the assignment, promoted a scheme by which certain creditors holding just and valid debts were given preferences exceeding the statutory limit, and that the creditors had knowledge at the time that a general assignment was contemplated. The assignors, in giving such preference, violated no rule of the common law. The giving of such preference was not a hindering, delaying, or defrauding of their other creditors, as these terms have been uniformly understood and interpreted. Whether, under the statute of 1887, an excessive preference makes an assignment wholly void, has not been hitherto decided in this court. The cases of *Berger v. Varrelmann*, 127 N. Y. 281, 27 N. E. Rep. 1065, and *Spelman v. Freedman*, 130 N. Y. 421, 29 N. E. Rep. 765, were actions by creditors in aid of a general assignment to set aside preferences exceeding the statutory limit, and for an accounting by the preferred creditors to the assignee for the proceeds collected or received by them. The actions assumed that the assignments to which they related were not invalidated, but only the preferences. The question whether an excessive preference made the assignment void, or only affected the preference, was not decided in either of the cases mentioned. In *Manning v. Beck*, 129 N. Y. 1, 29 N. E. Rep. 90, this court reversed a judgment setting aside a general assignment and an alleged preferential transfer, in an action brought by a judgment creditor of the assignor, on the ground that the creditor who took the bill of sale from the insolvent had no knowledge at the time that a general assignment was contemplated. Judge Peckham, in his opinion, carefully reserves the question of the effect of an excessive preference on the assignment, and the further question, whether such preference affects the whole claim of the preferred creditor, or only makes it subject to reduction within the statutory limit. These questions, therefore, being *res nova*, must be decided in view of the language and policy of the act of 1887. The object of the act is plain and unmistakable. It was intended to insure to the general body of the creditors of an insolvent debtor, upon a transfer of his property by general assignment, the right of participation in the distribution of the debtor's property to the extent of at least two-thirds of the assets of the insolvent after certain deductions. In order to secure this result the act declares that "any preference" contained in a general assignment, other than for wages or salaries of employees, "shall not be valid except to the amount of one-third of the assigned estate left after deducting such wages or salaries, and the costs and expenses of executing such trust." The statute operates upon the preference only, and not upon the assignment or the title of the assignee. It does not undertake to destroy or affect the assignment, except in so far as it provides for preferences beyond the prescribed limit. When the preferences made exceed this limit, the statute intervenes, and declares the consequence. It reduces the preference to the limit mentioned in the statute. The "preference," it declares, shall not



be valid "except" to the amount of one-third of the assets. The statute enacts a rule for the administration of the trust in case of preferences. It may not in many cases be known until the closing of the trust, and the ascertainment of the amount due for wages and salaries and the expenses of administration, whether the preferences exceed the statutory limit. Creditors may or may not know in advance that they are to be preferred, and, if they know that preference is intended, they may or may not know the amount of the assets, or whether the intended preference exceeds the statutory limit. They do know the rule, and other creditors are not defrauded by a preference in excess of the one-third. The statute, we think, only operates to scale down the preference, if in excess. This construction accomplishes the purpose of the statute.

The consequences which follow from the theory upon which this case was decided, viz. that an excessive preference makes the assignment absolutely void, where the assignors and the preferred creditors are cognizant, when the assignment is made or securities taken, operating as a preference, that the preference exceeds the statutory limit, would involve great inconsistency. Such a rule would defeat the purpose of the statute, and enable a creditor, who by reason of the maturity of his debt, or favorable circumstances enabling him to commence his action earlier than other creditors, to appropriate the property of the insolvent to the payment of his debt, to the exclusion of the other creditors. The violation of the act of 1887 would be the very circumstance which would enable him to exclude other creditors from sharing in the assets. The present case is an apt illustration. The plaintiffs complain that the assignors have given preferences in excess of the statutory limit, thereby depriving the general body of creditors of participation in the insolvent's property, intended to be secured by the statute of 1887. Thereupon they claim, and the judgment awards to them, nearly the whole available property of the assignors, to be applied to the satisfaction of their debts exclusively, wholly ignoring the rights of the other creditors.

We are of the opinion that the judgment proceeds upon an erroneous view of the statute. An assignment is not, we think, invalidated because it provides for preferences exceeding the statutory limit. Nor, in our opinion, does an excessive preference deprive the party preferred of all benefit of the preference. The statute, and not the direction in the assignment, is, in such a case, the rule by which the assignee is to be guided in administering the trust. The preference is to be reduced so as to make it conform to the statutory limit, and is not annihilated; and if the statute has been violated, and the judgments in favor of Moses, Herts Bros. & Co., and the transfer of accounts to Sonneborn, constituted unlawful preferences, the right of creditors can, we think, only be asserted by the assignee, or by an action in aid of the assignment for the benefit of the body of creditors, as in the case of *Spelman v. Freedman*, *supra*.

But the assumption which has been made, that the judgments in favor of Moses and Herts Bros. & Co., and the transfer of accounts to Sonneborn, constituted preferences, within the act of 1887, is not sustained by the record. The judgments, though entered on the same day on which the assignment was executed and filed, were subsequent in fact, and the property vested in the assignee, who took possession under the assignment, before the judgments were entered or the executions were issued. The entry of the judgments was intentionally postponed until after the execution and filing of the assignment. It was disclosed by the evidence introduced by the plaintiffs that the assignees refused to permit the judgments to be entered so as to give them priority over the assignment. "They were to stand like all creditors; whatever value a judgment gave them after the assignment, they were to have, but no other value." The case of *Berger v. Varrelmann*, *supra*, is authority for the proposition that a preference, within the act of 1887, may be obtained through separate instruments executed before, but in contemplation of, the execution of a general assignment. But it is legally impossible that a preference can be created by the confession of a judgment made and entered after the assignment is executed and filed, and the assignee has taken possession of the assigned property, and the fact that but a few moments intervened between the two transactions can make no difference. The finding that the execution of the assignment and the entry of the judgments were parts of a scheme to create an unlawful preference does not alter the fact that the sequence of events made the scheme impossible of execution. The levy and sale of the property on the executions were in hostility to the rights of the assignee, and he brought an action for the conversion of the property. It so happened that chapter 294 of the Laws of 1888 went into force July 1, 1888,—the day before the execution of the assignment,—whereby it was required that in all general assignments the assignor should state his residence and the kind of business carried on by him. It was held by the court of common pleas in the city of New York, in the case of *Bloomingtondale v. Seligman*, 3 N. Y. Supp. 243, which was another attack on the assignment now in question, that the noncompliance with the act of 1888 rendered the assignment void, and the suit brought by the assignee for the levy and sale of the property under the judgments of Moses and Herts Bros. & Co. was thereupon discontinued. This court, in *Insurance Co. v. Van Wagoner*, 132 N. Y. 398, 30 N. E. Rep. 971, held that the omission to comply with the act of 1888 did not invalidate an assignment. In this case it is true that the assignors promoted the securing of the judgments; but in so doing they violated no rights of the creditors. The judgments were for valid debts, and they were not suffered to be entered until the right of the assignee under the assignment had become vested and perfect. The judgments and executions constituted, and

could constitute, no preference under the act of 1887. If no assignment had been made, the judgments could not have been assailed by the other creditors, (*Manning v. Beck*, 129 N. Y. 1, 29 N. E. Rep. 90;) and, having been entered after the assignment, the other creditors have no ground for complaint. We can perceive no way in which Moses and Herts Bros. & Co. can be compelled to account for the proceeds of the property sold on the executions, except in an action brought by the assignee, or in his right, asserting title under the assignment. Assuming, as we must, that the property sold under the judgments and executions of Moses and Herts Bros. & Co. belonged to the assigned estate, it was not made to appear that the accounts assigned to Sonneborn exceeded in amount one-third of the assets of the insolvents, after making the deductions specified in the act of 1887. These views lead to a reversal of the judgments of the special and general terms, and the granting of a new trial. All concur.

Judgments reversed.

(138 N. Y. 461)

### GARNSEY v. RHODES.

(Court of Appeals of New York. June 6, 1893.)

EVIDENCE—DECLARATIONS—BUILDING CONTRACT—CONSTRUCTION—SHOWING HOSTILITY OF WITNESS.

1. In an action to recover a balance due on a building contract, it is error to admit evidence of conversation about defects in the work, had during its progress, and in plaintiff's absence, between defendant and his architect, who in no manner represented plaintiff. 18 N. Y. Supp. 484, affirmed.

2. The provision in a building contract that, if any dispute should arise as to the meaning of the drawings or specifications, it should be decided by the architect, does not render admissible, in an action for a balance due on the contract, admissions of defects in the work by the architect, made in the absence of the contractor.

3. In an action by the contractor for a balance due on a building contract, where a witness for defendant testified that, by agreement between the architect and plaintiff, alterations were made in the specifications to reduce the cost of the work to plaintiff, it is proper to show by cross-examination that witness is unfriendly to the architect.

Appeal from supreme court, general term, first department.

Action by Erasmus D. Garnsey against Joseph E. Rhodes to recover a balance due on a contract for the erection of a house, and for extra work. A judgment on the report of referee, dismissing the complaint on the merits, was reversed at general term, (18 N. Y. Supp. 484,) and defendant appeals. Affirmed.

Joseph J. Burr, for appellant. Edward S. Clinch, for respondent.

MAYNARD, J. The defendant has appealed from an order of the general term reversing a judgment in his favor entered upon the report of a referee, and granting a new trial. The order does not state that the reversal was upon the facts, and we are confined to a review of the ques-

tions presented by the numerous exceptions in the record, and the order must be affirmed if any material error of law appears to have been committed.

The action was upon a building contract, and the defendant was permitted to show, against the objection of the plaintiff, several conversations between him and one of the architects, in which he complained that the work had not been done in accordance with the requirements of the plans and specifications, and in which the architect admitted the default of the plaintiff in the respects pointed out by the defendant. One of the main issues litigated involved the question whether the plaintiff had substantially performed the stipulations of his contract, upon which the referee has found adversely to him, and this evidence had a direct and material bearing upon this branch of the controversy. The architect was in no sense the agent of the plaintiff, but was employed by and represented the defendant. The admission in evidence of the declarations of the defendant and his agents in his own favor was manifestly an infraction of an elementary rule of evidence, unless it is brought within some well-recognized exception. The defendant seeks to sustain it upon the ground that he alleged and proved, and the referee has found, that after the execution of the contract the architects, in collusion with the plaintiff, and without the knowledge or consent of the defendant, prepared other plans for the construction of a house essentially different from that called for by the contract, plans, and specifications signed by the parties, and of much less value, and alterations were made in the specifications to reduce the cost of the building, and that therefore the declarations of the architect were admissible in evidence against the plaintiff, because both were engaged as conspirators in the same scheme to defraud the defendant. But the rule regulating the admission of such proof is well settled and clearly defined, and is limited to cases where it is shown that two or more persons have combined for an illegal purpose, and the acts and declarations of one of them, sought to be proven against the others, were done or made in pursuance of the original concerted plan, and with reference to, and for the promotion of, the common object. 1 Phil. Ev. (5th Amer. Ed., Cow. & H.) 205-211; *Dewey v. Moyer*, 72 N. Y. 70; *Indemnity Co. v. Gleason*, 78 N. Y. 503. A mere statement, however, made by one conspirator, or any act of his not done in pursuance of the conspiracy, is not evidence for or against his associates. The only act of collusion in this case of which there was any proof, or which the referee has found, consisted in the substitution of different plans and specifications for those originally agreed upon by the parties; and the conversations with the architect occurred several months after this had been done, and his admissions and declarations had no reference to the conspiracy, and were not of a character designed to promote its successful accomplishment. It is urged that it was a part of the unlawful scheme to keep the defendant in ignorance of the substitu-

tion of different plans and specifications, and to quiet him, whenever he discovered that deviation had occurred from the original plan, by false promises that they should be corrected. But there is no evidence that the plaintiff suggested such a course of conduct by the architect, or consented to its adoption, and there is no finding to that effect by the referee. There is a paragraph in the contract which provides that, if any dispute should arise respecting the true construction and meaning of the drawings or specifications, it should be decided by the architects, and their decision should be final and conclusive; and it is claimed that complaints made by the defendant to the architects in the absence of the plaintiff, and their statements in reply, are admissible under this provision. It is difficult to see upon what principle such a claim can rest. The reference in this clause is to disagreements between the parties, in which case the matter in difference was to be submitted to the architects, who, after hearing both sides, were to render a final decision in the premises. Ex parte statements by the defendant to his own agent, and the opinion of the latter based upon them, evidently were not within the contemplation of the parties when this stipulation was adopted.

We also think it was error to sustain the objections of the defendant to the questions put to the witness King, on cross-examination, in which he was asked whether there had been any disagreement between him and the architects, or whether he left their employ in consequence of a disagreement, or whether, when he left, it was with friendly feelings towards them, and whether his relations with them were then friendly. This was the principal witness for the defendant to establish the alleged conspiracy. He was at the time employed as a draughtsman in the office of the architects, and testified to transactions between them and the plaintiff tending to show the collusion which the referee found. A few months after this he left their employ, and we think it was competent for the plaintiff to prove, if he could, that the witness was unfriendly to the architects. The object of the defense was to charge the plaintiff with the consequences of a conspiracy between him and the architects, and it was therefore quite as material and important for the plaintiff to show that the witness by whom it was sought to establish the unlawful combination was hostile to one of the parties to it as it would have been to have shown hostility on his part towards the plaintiff himself. The admission or rejection of the evidence was not discretionary with the trial court. It is a material fact which may be proved by any competent evidence, as was held by this court in *People v. Brooks*, 131 N. Y. 321, 30 N. E. Rep. 189. It was not there held, as the counsel for the defendant seems to suggest, that it was in the discretion of the court whether such questions should be allowed. All that was said upon the point was that the extent to which such an examination may go, must be in some measure within the discretion of the trial judge. This

must be so, or else it might become interminable. But here the whole inquiry was ruled out. Even general questions were disallowed, and, as it must be assumed for the purposes of this appeal that, if answered, the responses would have shown bias, the plaintiff may have been prejudiced by the exclusion of the evidence.

Inasmuch as the order must, for these reasons, be affirmed, the right of the plaintiff to recover for extra work need not be considered. The defendant may have a just defense, but he has chosen to take the risk of an appeal, with the sequence of a judgment absolute in case of an affirmance, and this court has no alternative except to affirm the order, and direct judgment for the plaintiff, with costs. All concur. Order affirmed.

(123 N. Y. 446)

**EMPIRE STATE INS. CO. v. AMERICAN CENT. INS. CO.**

(Court of Appeals of New York. June 6, 1893.)

INSURANCE—AUTHORITY OF AGENT.

An insurance agent who has been directed by a company which he represents to reduce a risk either by cancellation or by reinsurance cannot reinsure in another company, for which he is also agent, without assent of the latter company. 19 N. Y. Supp. 504, affirmed.

Appeal from supreme court, general term, fifth department.

Action by the Empire State Insurance Company against the American Central Insurance Company on a reinsurance agreement. From an order of the general term (19 N. Y. Supp. 504) denying a motion for a new trial, and entering judgment for defendant upon a verdict, plaintiff appeals. Affirmed.

David Hays, for appellant. I. N. Ames, for respondent.

**EARL, J.** The firm of Straub & Morris were agents of the plaintiff at Pittsburgh, Pa., in August, 1889, and on the 7th day of that month, as such agents, they issued a policy of insurance whereby the plaintiff insured the Ridgway Lumber Company against loss by fire to the amount of \$2,500. Subsequently, on the 20th day of August, the defendant appointed them its agents also. They reported that policy to the plaintiff on the 19th day of August, and it wrote to its special agent, Frank Aull, to have the risk reduced to \$1,000, and he notified the agents to cancel the policy, or reduce the risk to \$1,000, by reinsurance. Thereafter, on the 21st day of September, Straub & Morris, being then agents for the plaintiff and defendant, reinsured plaintiff's risk with the defendant, to the amount of \$1,500, by entering the agreement for reinsurance in their binder book. Subsequently, on the 12th day of October, the property insured was destroyed by fire, before the reinsurance had been reported to the defendant or had come to its knowledge. The plaintiff paid the amount of its liability under its policy for the loss, and then brought this action against the defendant to recover three-fifths thereof under its reinsurance

agreement. The defendant refused payment, and defended the action on the ground that Straub & Morris could not bind it by the agreement for reinsurance, because they were at the same time the agents of the plaintiff, and could not act in the dual capacity of agents for both parties in effecting the reinsurance. The court below upheld the contention of the defendant, and whether it was right in so doing is the sole question for our determination.

It is not doubted that the same person may sometimes act as agent for the two parties in the same transaction; but he can do so only in case he has no discretion to exercise for either party. An agent to sell for one party may also act as agent for the buyer, but only in case the price and terms of sale have been fixed by each party, so that nothing is left to his discretion. But an agent to sell, intrusted with a discretion, and thus bound to obtain the best price he can, cannot buy for himself or as agent for another. In such a case he would occupy an antagonistic position, and there would be a conflict of interests. He could not faithfully serve the one party without betraying the interests of the other. He would at least be under great temptation to betray the interest of one of the parties. So a person may sometimes act as agent of both parties in the making of any contract; but he cannot do so when he is invested with a discretion by each party, and when each is entitled to the benefit of his skill and judgment. The rules of law upon this subject have been laid down and illustrated in many cases, of which it is sufficient for the present purpose to cite the following: *Utica Ins. Co. v. Toledo Ins. Co.*, 17 Barb. 132; *Ritt v. Insurance Co.*, 41 Barb. 353; *New York Cent. Ins. Co. v. National Protection Ins. Co.*, 14 N. Y. 85; *Clafin v. Bank*, 25 N. Y. 293; *Murray v. Beard*, 102 N. Y. 505, 509, 7 N. E. Rep. 353; *Porter v. Woodruff*, 36 N. J. Eq. 174; *Michoud v. Girod*, 4 How. 503. Contracts thus negotiated are void at the option of any non-assenting party thereto. The policy of the law condemns them. It matters not that the agent has acted fairly and honestly, and even that neither party to the contract has suffered injury. It is enough to condemn the contract that the common agent in fact had any, even the least, discretion to exercise for the parties. As said by the chancellor in *Porter v. Woodruff*: "So jealous is the law upon this point that it will not even allow the agent or trustee to put himself in a position in which to be honest must be a strain upon him."

Those principles of law are not disputed by the counsel who argued this case, and they are so thoroughly embodied in the law that they could not be. Their difference is as to their application to this case. The learned counsel for the plaintiff contends that Straub & Morris had no discretion to exercise for the plaintiff in effecting the reinsurance; that, so far as they had any discretion to exercise, it was for the defendant alone; and thus, that there was no antagonism or incompatibility between the duties they owed to each of

their principals; and here we think is his mistake. Straub & Morris were ordered to reduce the plaintiff's risk by canceling the policy, or by reinsuring three-fifths thereof, and this order they were absolutely bound to obey. They had a discretion to exercise in determining whether they would cancel or reinsure, and in making that determination they acted solely for the plaintiff. They determined to reinsure, and thus the option they had to cancel disappeared as if it had never existed, and it can play no part in this case. They then owed the duty to the plaintiff to reinsure, if they could. It does not appear why the plaintiff was unwilling to carry the \$2,500 of insurance. It may have been because it thought there was overinsurance, or that the risk was too hazardous, or that, for some other reason, the insurance was unprofitable or undesirable. It might have been difficult to obtain the reinsurance from any other good company. It is quite clear from what appears in this record that the defendant would not knowingly have reinsured the risk. In order to procure the reinsurance the agents owed the plaintiff their utmost diligence and skill. They had issued an improvident or undesirable policy, and they must have felt under a very strong obligation to reduce the risk as directed. They owed a duty to the plaintiff to take the reinsurance, even if they were convinced that it was undesirable, hazardous, and unprofitable, and the more thoroughly they were convinced of these things the more urgent was their duty to protect the plaintiff. On the contrary, as agents of the defendant, they were bound to exercise their discretion on its behalf, and not make the reinsurance without inquiring and knowing that the risk was a proper one for it to take. It was their duty to it not to take the risk if there was overinsurance, or if it was too hazardous, or if it was unprofitable and undesirable; and hence this was a case where they could not in this transaction serve the two masters. There was conflict in their duties, and they were under a strong temptation to fall in their allegiance to one or the other of their principals; hence this agreement is clearly one which the policy of the law condemns, and we see no reason to doubt that the court below properly applied the principles of law; and its judgment should be affirmed, with costs. All concur.

(133 N. Y. 480)

## CURNAN v. DELAWARE &amp; O. R. CO.

(Court of Appeals of New York. June 6, 1893.)  
RAILROAD CONTRACT — CONSTRUCTION OF ROAD —  
SUSPENSION OF WORK — LIQUIDATED DAMAGES.

1. Where the president of a railroad company owned nearly all the stock, and furnished all the money to build the road, and he and his private secretary, who was also secretary of the company, attended to all its business, a letter to a contractor written by the secretary on the death of the president, saying that the president's executor desired the work suspended, constituted a suspension by the company, especially when the company made no demand on the contractor to proceed.

2. A contract for the construction of a rail-

road provided that a certain per cent. of the money paid on the monthly estimates should be retained by the company until the completion of the work, and that the contractor should make no claim for damages in case the work be suspended or delayed. *Held*, that the contractor was entitled to recover the per cent. withheld where the company had suspended work for six months and refused to give him any assurance that it would be resumed.

3. A contract for the construction of a railroad reserved to the company the right to terminate the contract at any time by formal notice in writing, and upon payment to the contractor for all labor performed, and the further sum of \$3,000 as liquidated damages. *Held*, where the company suspended the work, and then failed to resume it, that the contractor could not recover the \$3,000, since a payment of liquidated damages was not reserved for a breach of the contract, but as a means to dissolve it.

Appeal from supreme court, general term, second department.

Action by Francis Curnan against the Delaware & Otsego Railroad Company upon a contract for the construction of a railroad. From a judgment of the general term (17 N. Y. Supp. 714) affirming a judgment for plaintiff for \$20,406.89, rendered on the decision of the trial judge, defendant appeals. Modified.

The facts appear in the following statement by ANDREWS, C. J.:

This appeal is from a judgment of the general term in the second department, affirming a judgment rendered on the decision of the trial judge awarding damages to the plaintiff in the sum of \$20,406.89, against the defendant. The parties entered into a contract, dated June 30, 1887, for the construction by the plaintiff for the defendant of the roadbed of the defendant's proposed road, about 25 miles in length, in the county of Delaware, in this state, for which payment was to be made to the plaintiff at prices fixed for the several kinds of work, according to the amount. The contract required that the work should be commenced within ten days after its date, and that it should be completed within one year and six months. The company agreed to pay the contractor monthly, on or about the 15th day of each month, for all work done and materials furnished by him up to and including the last day of the preceding month, on the certificate of the chief engineer, at the rates specified in the contract, "less ten per centum of such amount," to be withheld until the final completion and acceptance of the work, at which time the sum retained, together with the balance due on the final estimate, was to be paid by the company to the contractor on the certificate of the chief engineer "that the whole work provided for in this contract is completed and acceptably finished within the time specified." By the eighth article of the contract it was provided that the contractor should make no claim for damages from hindrance or delay from any cause, in the progress in any portion of the work, or in case the work for any reason should be suspended or delayed, "and that in no event shall the contractor claim or have a right to extra compensation for damage arising from any suspension or delay in the

prosecution of the work," but his time for the performance of the contract was extended in case he was delayed by the acts or omission of the company, "or on account of failure to secure right of way, or for any other reasons," for a time equal to the hindrance or delay in the prosecution of the work so occasioned. The fourteenth article is as follows: "Fourteenth. It is further mutually agreed by and between all the parties hereto that the party of the first part reserves the right to dissolve this contract at any time; and the party of the second part hereby agrees to discontinue all work provided to be performed by the party of the second part for the party of the first part by this agreement upon five days' notice by the party of the first part, in writing, to the party of the second part, notifying the party of the second part to discontinue all work provided by said contract. It is, however, further provided and agreed by and between the party of the first part and second part hereto that the power to dissolve this agreement can only be exercised by the party of the first part upon the notice aforesaid; and the payment of all sums due the party of the second part for all labor performed for the party of the first part, and the payment of the further sum of three thousand dollars hereby agreed upon to be paid to the party of the second part as liquidated damages, which payment shall be in full for labor performed, for all material furnished, and damages that the party of the second part may sustain by the nonperformance and completion of the work provided for in and by the above agreement, and the offer or tender of the sums above mentioned by the party of the first part to the party of the second part shall be accepted by him in full for all claims, charges, demands he may have against the party of the first part for any cause whatever because of the above contract, or and the dissolution of the same, and shall be a bar to any action brought or attempted to be brought by the party of the second part, his heirs or assigns, against the party of the first part or its assigns." The defendant was organized as a general railroad corporation, and its stock consisted of 3,551 shares of \$100 each, of which one Thomas Cornell held about 3,400. He was the promoter of the road, and the defendant requested a finding "that Thomas Cornell was building the roadbed of the defendant through the agency of this company," which finding was made by the trial judge. The enterprise of building the road was his, and he was substantially the principal in the transaction. He furnished the means for building the road, and whatever gains might accrue from the enterprise would inure almost wholly to his benefit, or in case of loss it would fall upon him. Cornell was president of the defendant, and one Dimmick (who was the confidential clerk and agent of Cornell) was its secretary, treasurer, and also a director of the company. The contract was executed in behalf of the company by the president and secretary. The plaintiff, within a few days after the execution of the con-

tract, entered upon its performance, and diligently prosecuted the work until November, 1887, when by direction of the defendant the work was suspended, and the plaintiff was not permitted to resume the work until November, 1888, although he desired and kept himself in readiness to proceed. The work done and materials furnished up to the suspension of the work in November, 1887, had been certified by the chief engineer of the company. In November, 1888, the defendant directed the plaintiff to resume work, which he did, and continued its prosecution until March 31, 1890, when he received the following letter: "Rondout, N. Y., March 31, 1890. Francis Curnan, Esq.—My Dear Sir. The death of Mr. Cornell has left the executive office of the Delaware & Otsego Railroad Co. vacant. The vice president resides in New York city, and it is desired by Mr. Edwin Young, the executor of Mr. Cornell's estate, that you suspend your work until he can officially take action, at which time you will be duly informed, and he hopes that no serious delay will occur. Very truly, yours, Samuel G. Dimmick, Sec. D. & O. R. R. Co." Mr. Cornell died March 30, 1890, the day before the letter was written. The plaintiff, immediately after receiving the letter, called on Dimmick at the office of the company at Rondout, and there met Mr. Young, the executor of Mr. Cornell's estate, and there the direction to suspend work was substantially repeated, and he was informed that the suspension would probably be for about four months, and, as the plaintiff testifies, he was requested by Dimmick and Young to keep his teams upon the work so as to be ready to resume when required. The plaintiff suspended the work, and kept his teams, and men to take care of them, employed for several months, until July, when he was directed, as he testifies, by Dimmick and Young to keep them no longer awaiting the resumption of the work, and he then took them away. The plaintiff repeatedly applied to Dimmick for permission to resume work, but was put off, and he was informed by Mr. Young that it was impossible for him to say what would be done with the road, and that "the whole question would ultimately turn upon whether or not the Ulster and Delaware Railroad would take the road and conclude to finish it, and what their action would be I told him I could not state." In September, 1890, the plaintiff made application to the vice president of the defendant, in New York, for payment of amount due him, and that officer informed him that he knew nothing about the matter, and that he had never met with the board of directors since its first organization. Similar demand was made of Dimmick. The work on the road has never been resumed. When the work was stopped, on the death of Mr. Cornell, there were a few hundred dollars only in the company's treasury, and the company had no means then or afterwards with which to carry on the work. It would have required an expenditure of about \$10,000 to complete plaintiff's contract. This action was commenced in October,

1890. The plaintiff was allowed to recover (1) the sum unpaid for work and materials furnished, including the 10 per cent. reserved; (2) the expenses incurred by him between March 31, 1890, and July in the same year, in keeping men and teams in readiness to proceed with the work pursuant to the request of Dimmick; (3) the sum of \$3,000, liquidated damages mentioned in the fourteenth article of the contract. Other facts are stated in the opinion.

G. D. B. Hasbrouck, for appellant. P. Cantine and John Hackett, for respondent.

ANDREWS, C. J., (after stating the facts.) The finding that the work was suspended in March, 1890, by direction of the defendant is supported by evidence. The letter of March 31, 1890, addressed by Dimmick, secretary of the company, in his official character, to the plaintiff, was justly interpreted by the trial judge as containing a request by the defendant to suspend work under the contract. It is true that the letter states that "it is desired by Mr. Edwin Young, the executor of Mr. Cornell," that the work shall be suspended. But the relations between the Cornell estate and the defendant were of such a character that the work could only be prosecuted with the consent and co-operation of the former. Cornell in his lifetime was the promoter of the enterprise of building the road, and the only source from which funds could be obtained for continuing the work. He owned nearly the whole stock, and seems to have been vested with the exclusive management of the affairs of the corporation. The board of directors does not appear to have had any meetings, but all its powers were exercised by Mr. Cornell and the secretary, Dimmick. In view of the circumstances, when the secretary informed the plaintiff of the wish of the representative of the Cornell estate that the work should be suspended, which was confirmed at the subsequent interviews between the plaintiff and Dimmick and Young, he had a right to regard the letter as a notification by the company to suspend the work. There were no funds in the treasury. The work could not go on unless the means should be furnished out of Cornell's estate. The executor was not ready to act. Both the plaintiff and Dimmick, the secretary, understood the situation, and, when the plaintiff was informed by the secretary of the company that the executor desired that the work should be suspended, he had a right to understand that this was also the wish of the company. The actual authority conferred by the corporation upon Dimmick does not appear. But his authority may be implied from the power he had been accustomed to exercise without dissent of the company, and presumably with its acquiescence. He was a director of the company, and its secretary and treasurer. He was the person through whom the directions of the company to the plaintiff were communicated, and the plaintiff was justified in regarding directions given

by him in his official character respecting the prosecution or suspension of the work under the contract as authorized by the company. That the company was an actor in suspending the work, and that the letter of March 31, 1890, was intended as a direction by the company to the plaintiff to suspend the work, is also a reasonable inference from other facts. The company treated the work as suspended. It made no request upon the plaintiff to proceed. On the contrary, he was unable to get the consent of the company to resume the work, although he made repeated applications for this purpose to the secretary at the company's office, and, upon application to the vice president, that officer disclaimed any knowledge of the affairs of the company. The chief engineer of the defendant in charge of the work testified that on March 31, 1890, he received orders to stop the work from Mr. Dimmick, the secretary, and that he was the official through whom he was accustomed to receive the orders of the company, and thereupon he discontinued engineering work which was necessary to be done before the plaintiff could proceed.

The right reserved to the company in the eighth article of the contract, to suspend or delay the work, is to be reasonably construed. It could not abandon the enterprise or delay it for an indefinite and unreasonable time, and still refuse to pay the plaintiff the 10 per cent. withheld, on the ground that by the contract that amount was to be retained until the completion and acceptance of the work. When the action was commenced the ability of the company to further prosecute the work was, upon the evidence, contingent upon the action of third parties. The company refused to give the plaintiff any assurance that the work would ever be resumed. The last suspension had already continued six months. Under these circumstances we think the eighth article was not available to the defendant as a defense when called upon for payment of the sum retained, which represented an indebtedness for work done and materials furnished under the contract. The trial judge awarded to the plaintiff, in addition to the 10 per cent. withheld under the contract, the sum of \$2,000 for the value of the use of teams and property which the plaintiff kept unemployed upon the line of the road from March 31, 1890, to July 22, 1890, and for the wages of men for a period of about 10 days from April 1, 1890. There was evidence tending to show that Dimmick, the secretary, on suspending the work March 31, 1890, and Young, the executor of Cornell, requested the plaintiff to keep the men and teams upon the line of the road in readiness for the resumption of the work, and that at their request the men were discharged on the 11th of April, and the teams on the 22d of July. Under the circumstances an implied contract arose on the part of the defendant to compensate the plaintiff for his loss in foregoing the use of his teams and property during this period, and for his expenses in retaining the men, provided the arrangement was

one which Dimmick was authorized to make in behalf of the company. We think the arrangement was within the incidental powers possessed by Dimmick as the representative of the company in directing a suspension of the work. When the suspension was directed it seems to have been supposed by all the parties that it would continue for a short time only, and it may well have been regarded that any delay in resuming the work when its resumption was decided upon would be to the detriment of the company.

We are unable, however, to concur with the courts below in the award of the sum of \$3,000 liquidated damages under the provisions of the fourteenth article. By that article the right was reserved to the company to terminate and end the contract at any time by formal notice in writing of its election so to do, and upon payment to the contractor for all labor performed, and of the further sum of \$3,000 as liquidated damages, "which payment," the contract declares, "shall be in full for all labor performed and materials furnished, and damages that the party of the second part may sustain by the non-performance and completion of the work provided for in and by the above agreement." The provision as to liquidated damages applies only in case the contract should be terminated by the election of the company before the work was completed, which election was to be signified by written notice to the plaintiff, and notice alone would be ineffectual to dissolve the contract, unless the payments, including the sum paid for liquidated damages, should be made. The liquidated damages were not fixed for a breach of the contract. The dissolution of the contract, under the terms of the fourteenth article, would in no sense constitute a breach, but would be a power reserved in the contract itself. The company never exercised the power conferred by the article. It never terminated the contract. The contract was binding upon the company at all times up to the commencement of this action. By its refusal to permit the plaintiff to proceed with the work, and its unreasonable delay, it had subjected itself to liability to pay the plaintiff in full for the work done and materials furnished by him under the contract, and could no longer insist on retaining the ten per centum under the provisions of the contract. By its own acts the company had forfeited the right longer to withhold payment. Any damages which the plaintiff sustained by the unreasonable delay of the company and its practical abandonment of the enterprise the plaintiff was entitled to recover as upon a breach of the contract by the defendant. But the provision for liquidated damages had no application to this situation, and it cannot be extended beyond its obvious scope and purpose. For the reasons indicated we think the judgment, so far as it embraces the allowance for liquidated damages, is erroneous. The judgment should, therefore, be modified by striking out the sum awarded as liquidated damages, and, as so modified, al-



armed, without costs in this court to either party. All *concur*.  
Judgment accordingly.

(133 N. Y. 369)

# HOLMES v. GILMAN et al.

(Court of Appeals of New York. June 6, 1893.)

LIFE INSURANCE — PAYMENT OF PREMIUMS WITH PARTNERSHIP MONEY.

Decedent misappropriated money of a partnership of which he was a member, and applied a portion thereof to the payment of premiums on life insurance procured by him for his wife's benefit. The amount misappropriated exceeded the amount of the policies. *Held*, that the surviving partner could recover such proceeds, the wife's insurable interest in the life of decedent not being property in the sense that it was mingled with the money converted, so that only the amount of premiums could be recovered. 18 N. Y. Supp. 56, affirmed. 19 N. Y. Supp. 151, reversed.

Appeal from supreme court, general term, first department.

Action by Charles S. Holmes against Bessie L. Gilman, widow of Arthur C. Gilman, deceased, impleaded with William B. Davenport, administrator with the will annexed of decedent, Stephen H. Olin, trustee, and the Union Trust Company of New York. From a judgment of the general term (19 N. Y. Supp. 151) reversing so much of the judgment on the report of the referee as is in favor of plaintiff, (18 N. Y. Supp. 56,) plaintiff appeals. Reversed.

The other facts fully appear in the following statement by PECKHAM, J.:

This is an appeal by the plaintiff from an order of the general term of the supreme court of the first department, which reversed upon the facts as well as the law so much of a judgment entered upon the report of a referee as was in favor of the plaintiff, and granted a new trial of the issues involved before another referee. The action was brought for the purpose of having an account taken of all of certain moneys alleged to have been wrongfully abstracted from a partnership by one Arthur C. Gilman, who was one of the partners, and invested by him in certain policies of insurance in favor of his wife and children. The complaint asked also that the amount of the insurance money collected on such policies might be impressed with a trust in favor of the plaintiff, who was one of the partners in such firm, and the assignee of the other members excepting Gilman, and that the defendant the Union Trust Company (with which the moneys collected on the insurance policies had been deposited) might be directed to pay such moneys over to the plaintiff. Other relief was asked which was appropriate to the case stated in the complaint. The answer denied the chief allegations contained in such complaint, and upon the issues thus raised the parties proceeded to trial before a referee. The following are the material facts:

In December, 1880, Arthur C. Gilman became a member of the firm of J. H. Labaree & Co., dealers in teas and coffees in New York city, and continued such member until his death, which occurred suddenly on the 15th of December, 1890. Dur-

ing all this time he was a trusted member of the firm, and practically had exclusive charge of its office affairs, which included the management of the firm bank account and the making of all notes and other paper issued in the business of the firm. For several years prior to his death he had prepared semiannual statements purporting to show the financial condition of the firm, and these statements he had rendered to its different members. The last one had been rendered as of the date December 1, 1890, and showed the firm with assets exceeding liabilities by nearly the amount of \$200,000. This statement was received by the plaintiff (who resided in Cincinnati) about December 11, 1890. For some reason, which is not made plain by the proof, and soon after the above date, the members of the firm commenced an examination as to its condition, and the examination was not concluded until after Gilman's death, when it was discovered that the firm was insolvent by more than \$36,000. Further investigation brought to light the fact that Gilman, commencing in the year 1882, and continuing down to his death, had wrongfully and fraudulently taken from the assets of the firm large sums of money, which he had wrongfully appropriated to his own use. By reason of this dishonest conduct on the part of Gilman the firm was, in December, 1890, insolvent. Instead of having a surplus of nearly \$200,000, as shown by his last statement. The amount wrongfully taken by him was over \$220,000, and it was done by means of false entries in the books of the firm, spread over the period of about eight years. There were found among his papers in the safe at the office of the firm four policies of insurance upon his life; one for \$5,000, issued and dated March 9, 1880, and three other policies, aggregating \$45,000, and issued between the dates of April, 1884, and January, 1888. Also two certificates of his membership in a benefit association, one dated in August, 1881, and the other in January, 1885. Each of the four policies was issued on Gilman's application, made in the name of his wife, and each was in terms payable to her. The certificates were also issued on his application, signed by him, in which he stated he desired his death loss to be paid to his wife. It does not appear that any of the premiums upon any of the policies were paid by Mrs. Gilman, or with funds provided by her, or that she had any knowledge of the existence of the policies prior to her husband's death. All of the premiums on the above-mentioned policies, aggregating about \$4,000, were paid by Gilman out of the firm funds, and the premiums which fell due after the year 1882 on the above-mentioned \$5,000 policy were also paid from such funds.

When the firm was discovered to be insolvent, the plaintiff provided funds for the payment of its debts and the continuance of its business. The policies of insurance having been collected and paid into the trust company, the plaintiff and the defendant Mrs. Gilman each claimed the right to recover the whole sum, amounting to over \$56,000. The referee awarded the above-mentioned \$5,000 poli-

cy, which was dated and issued in March, 1880, to the defendant, subject to the lien of about \$1,000 of premiums becoming due subsequent to 1882, and paid by Gilman out of the funds of the firm. The policy itself was taken out prior to any conversion of firm funds, and the premiums thereon prior to 1882 were paid by Gilman out of his own funds. The policies aggregating \$45,000 were obtained and maintained, as the referee finds, from the funds of the firm, which the evidence traces and identifies as thus invested. The referee, therefore, awarded all the moneys collected on those three policies to the plaintiff. He awarded to the defendant Mrs. Gilman the amounts of the two certificates of insurance in the benefit associations, on the ground that the plaintiff had failed to show that they had been either procured or maintained from the funds of the firm. The defendant Mrs. Gilman appealed from this judgment entered upon the report of the referee to the general term, where the judgment was reversed, and a new trial granted as to the amount awarded to the plaintiff. For the purpose of facilitating an appeal by the plaintiff to this court, the defendant Mrs. Gilman has stipulated that, if the order granting a new trial be here affirmed, the judgment to be entered in her favor shall nevertheless award to the plaintiff the amount of the aggregate premiums found by the referee to have been paid out of the firm money, together with interest thereon from the time of their payment, and that the rest of the proceeds of the policies shall be paid to her.

Hoadly, Lauterbach & Johnson, (George Hoadly, of counsel,) for appellant. Jane-way, Thacher & Richards, (James G. Jane-way, of counsel,) for respondents.

PECKHAM, J., (after stating the facts.) It is stated in the order which reverses the judgment herein that it is reversed upon questions of fact as well as of law. In such case it is the duty of this court to review the determination of the court below upon both questions of fact and of law. Code Civil Proc. § 1388. A careful review of the case convinces us that the findings of fact made by the referee are amply sustained by the evidence, and that the judgment should not be reversed on the facts. We are confirmed in the correctness of this view upon a perusal of the opinions delivered by the learned judges at the general term. We there find that the order reversing the judgment upon questions of fact as well as of law was formal merely, the judgment being actually reversed because the court below took a different view of the law from that adopted by the referee upon his own findings of fact.

The claim of the plaintiff to recover the moneys arising from the payments of these policies is based upon the principle which allows a cestui que trust to follow trust funds, and to appropriate to himself the property into which such funds have been changed, together with the increased value of such property, provided the trust fund can be clearly ascertained, traced, and identified, and provided the rights of

bona fide purchasers for value without notice do not intervene. The right has its basis in the right of property, and the court proceeds on the principle that the title has not been affected by the change made of the trust funds, and the cestui que trust has his option to claim the property and its increased value as representing his original fund. The right to follow and appropriate ceases only when the means of ascertainment fail. It is a question of title. *Van Alen v. Bank*, 52 N. Y. 1; *Newton v. Porter*, 69 N. Y. 183; *Ferris v. Van Vechten*, 73 N. Y. 119; *Cavin v. Gleason*, 105 N. Y. 256, 260, 11 N. E. Rep. 504; *In re Hallett's Estate*, 13 Ch. Div. 696. It is somewhat akin to the principle decided in *Slisbury v. McCoon*, 3 N. Y. 379, where corn was wrongfully taken from its owner, and converted into whisky. The court held the property was not changed in the hands of the wrongdoer, and the whisky belonged to the owner of the original material, no matter how much it had been increased in value. The case of *Pennell v. Duffell*, 53 Eng. Ch. 372, 388, 389, discusses the principle as thus stated, and agrees to it. That a partner occupies a fiduciary position with regard to his copartners and the funds of the firm, and will not be permitted to make a personal profit out of the use of such funds, is, I think, clearly established. 1 Lindl. Partn. (2d Amer. Ed.) 303; *Featherstonhaugh v. Fenwick*, 17 Ves. 298; *Anderson v. Lemon*, 8 N. Y. 236; *Mitchell v. Reed*, 61 N. Y. 123; *Riddle v. Whitehill*, 135 U. S. 621, 10 Sup. Ct. Rep. 924. Although partners do not, in the strict sense of the term, occupy the position of trustees towards each other and towards the firm funds, yet the position is one of a fiduciary nature, calling for the maintenance and exercise of the greatest good faith between them. Such a relationship authorizes the same remedy on behalf of the wronged partner as would exist against a trustee, strictly so called, on behalf of a cestui que trust. *Per Jessel, M. R., in Re Hallett's Estate*, 13 Ch. Div. 696, 712. While legally incorrect to describe the fraudulent abstractions made by Gilman of the funds of the firm as embezzlements, the description is harmless. It was a monstrous and gross breach of the duty he owed the firm, and the right of the firm to follow the funds is not affected because the act could not be regarded in law as an embezzlement. The right to follow the funds springs from the fiduciary nature of Gilman's position with regard to them. These general positions are not really denied by the defendant. It is claimed, however, that the tracing and identification of the funds have not been sufficiently proved in fact, and it is also urged that there has been an actual mingling of firm funds with the private funds of Gilman in the purchase and maintenance of the policies. I have looked carefully through the evidence upon these questions of fact, and I think the findings of the referee are fully sustained, and that no exception can prevail on such grounds. If these preliminary questions be decided against him the counsel for defendant then urges that the rule clearly is, if the trust fund has become mingled with money or

property of the trustees or others, equity impresses the proceeds with a trust to an amount equal to the original trust fund and interest, and will go no further. He then claims that the firm funds which went to the purchase of the policies and the payment of the annual premiums were mingled with the property right of the wife, called her "insurable interest" in her husband's life, and so the policies were not wholly the result of the use of those firm funds, and therefore the plaintiff can have only a lien on the policies or the moneys arising from their payment, to the amount of the premiums paid with the firm funds, and the interest thereon. This is really the chief question in the case.

Where moneys have been misapplied, and have been used as a portion of a larger amount, which has been invested in other property, the property thus acquired does not, as a whole, belong to the owner of the moneys misapplied. It does not belong to him because it has not been purchased or acquired wholly with his money or funds, and hence it is that such property is held charged with a lien at least to the amount of the trust funds invested in it. It is not necessary to here decide it, because we take another view of the facts, but I am not all prepared to admit that under no circumstances is the cestui que trust entitled to recover back anything more than the amount of his property and interest, where there has been a mingling of funds. In case the trustee took a thousand dollars of trust funds and five hundred of his own, and purchased property, which advanced in value to twice its original sum, I have seen no case where the point has been determined that the whole increased value belongs to the trustee, and that only the original sum wrongfully taken, and interest, can be given to the cestui que trust, although it was by reason of the wrongful use of the trust funds that the trustee was enabled to realize such value. If, in such case, the cestui que trust were not allowed to at least participate proportionately in this increased value, it would appear to be a violation of the principle that the trustee cannot ever be permitted to make a profit out of the use of the trust funds. It seems to me to be a case for the application of the doctrine that the parties became co-owners of the property at the option of the cestui que trust, in the proportion which their various contributions bore to the sum total invested. In this case, however, the defendant is enabled to claim a mingling of funds and property only by treating the right of a wife to insure the life of her husband for her benefit as a species of property which has been mingled with the funds of the firm, the result of the combination being the procurement of the policies.

We do not regard this right as property in any such light as to bring the case within the principle of the authorities upon the subject of a mingling of funds in the purchase or acquisition of other property. The right of a wife to insure the life of her husband for her own benefit is not property. It is more in the nature of a power or a privilege to make a valid contract. It is

a status and not a property right. The common law upon motives of public policy held that there must be what was termed an "insurable interest" in the life which was insured, or else the policy was a dangerous kind of a wager, and therefore void. To take a policy out of such a class it was necessary to show that the insured had some interest in the continuance of the life of the cestui que vie. Who had such an interest as to give a right of insurance was frequently a matter of some discussion and of possible doubt. It may not even now perhaps be said that the precise nature, character, and extent of the interest in another's life, which shall render that life insurable, have been formally and plainly laid down. It is said by the federal supreme court that one essential is that the policy shall be obtained in good faith, and not for the purpose of speculating upon the hazard of a life in which the insured has no interest. *Insurance Co. v. Schaefer*, 94 U. S. 457, 460. An interest which is insurable must be an interest in favor of the continuance of the life, and not an interest in its loss or destruction. If any person could be thought to have an interest in the continuance of the life of another it would be a wife in the life of her husband. Judge Allen, in *Baker v. Insurance Co.*, 43 N. Y. 283, regarded the question as decided that a wife had at common law an insurable interest in the life of her husband. Judge Andrews held to the same effect in *Brummer v. Cohn*, 86 N. Y. 11, 14. These cases favor the view that the statutes upon the subject of the insurance of the husband's life in favor of his wife, while it regulates, does not create, the right. I do not intimate that, if the statute created the right, it would in any way alter its nature. That such a policy was valid at common law simply makes it clearer that it is the nature of the relationship between man and wife that makes the policy valid, and relieves it from the objection that it is a wager policy. That relationship is not property in any fair sense of the term. It creates an insurable interest in the life of another, of a nature the same as a parent has in a child or a child in a parent; that is, an interest in the preservation of the life, and not in its destruction. Being so circumstanced, a policy of insurance upon such life is not a wager policy, and is therefore a valid policy. It is the same question, but it may perhaps appear a little clearer when it is asked whether the power or privilege of a parent or child or creditor to insure the life of his parent or child or debtor is property. A man has an insurable interest in his own life. If he take trust funds and procure such insurance, has he thereby mingled those funds with other property, i. e. with his right to insure his own life? And can it be said that the policy is the product of such mingled funds and property, so that nothing but the original amount of the trust funds and interest can be recovered back from the estate? The fact is apparent that a policy of insurance upon a life is not a policy of indemnity. The sum named in the policy is to be paid when the insured life has ceased, no matter how really val-

neless such life may have in the mean time become. The power of the wife to procure insurance is not in the least unfavorably affected by the fact that insurance in her favor has already been secured. As was said by Shaw, C. J., in *Loomis v. Insurance Co.*, 6 Gray, 396, the amount of the insurance is immaterial. The premium is computed, upon the law of averages, to be the exact equivalent for the risk. So, if insurance had been taken out by the husband on his life in the wife's name, she could herself take out more upon just as favorable terms, and just as expeditiously as if none had been taken. No one company might desire to go above a certain amount upon any one risk, but the ability to procure further insurance is practically unrestrained. The wife has therefore suffered no loss by the original procurement of this insurance, and its subsequent maintenance unknown to her, so long as the premiums have not been paid with her moneys or in any way from her estate. In other words, her property has not been used for any purpose. Her power to obtain valid insurance upon his life remained wholly unimpaired and unaffected by the insurance already obtained. The fact that she had what is termed an "insurable interest" was only material for the purpose of upholding the validity of the insurance in question. I cannot see how it can be regarded as property in any event. That a life insurance policy has not the features of a contract of indemnity, and is not such a contract, has been unquestioned for a number of years. *Rawls v. Insurance Co.*, 27 N. Y. 232; *Olmstead v. Keyes*, 85 N. Y. 593.

The case of these policies is very much like that in *Baker v. Insurance Co.*, supra, where Judge Allen said the insurance was effected by the husband for the benefit of his wife, and as a provision for her in case of his death. It was there stated that the case would not be changed if the policy were regarded as having been procured by the wife, because the husband was in truth the actor, and represented the wife, and she, in claiming the benefits of the policy, necessarily ratified and confirmed the compact as it was made, and with all its terms and conditions. Therefore this case is to be looked at with reference to the fact that every dollar of the moneys which procured and maintained these policies in existence belonged to the firm represented by the plaintiff, and that Gilman had no more right to invest or use these funds in the manner he did than would any third person who had procured them without any right or title. It has been said that the husband, when he procures an insurance for his wife's benefit, acts as her agent, or represents her, and that she has a vested interest in the policies the moment they are delivered by force of the statute permitting them to be made in this form. *Whitehead v. Insurance Co.*, 102 N. Y. 143, 6 N. E. Rep. 267. This is doubtless true in the case of the husband procuring the insurance with funds which belong to him or to his wife, but where the premiums are paid with moneys which in truth do not belong to him, and which the husband misapplies in so paying, and

by which he violates his obligation to the true owner of the moneys thus used, the wife in such case must claim the policy subject to the means by which the husband procured it, and she must adopt all his methods. The moneys in the hands of the company could not be recovered back by the cestui que trust if received by the company in good faith, because it would stand in the position of a bona fide purchaser, yet the policy itself would stand as the representative of these trust moneys, and the right of the wife would be to that extent subordinate. This principle has, in effect, been decided in New Jersey in the case of *Shuler v. Trowbridge*, 28 N. J. Eq. 593. It was there held, upon almost identical facts, that there was no public policy which favored the wife at the expense of the principle that trust funds could be followed, and that no profit could in any way arise in favor of the trustee who used them. It also held that the wife could not be permitted to avail herself of the proceeds of policies paid for by her husband with trust funds. It is true, in that case the policies were originally taken out in the name of the husband, and subsequently made payable to the wife, and it is urged that there is a difference in the two cases, because in the New Jersey case it was the husband's insurable interest which was insured, and then assigned, and that in this case it is the wife's interest which was originally insured; but we hold, upon the facts in this case, that the taking out of the policies in the name of the wife does not alter the principle as to trust funds. The cestui que trust is entitled to follow his funds, and to take the moneys or the policy at his option.

The case of *Bank v. Hume*, 128 U. S. 195, 9 Sup. Ct. Rep. 41, is not in point. The moneys there used were in truth the property of the husband, although he was insolvent, and he used some of his property to purchase insurance for the benefit of his wife and children. The supreme court held that a policy of insurance taken out by the husband in the name and for the benefit of the wife made the contract a contract with the wife, and that, even though the premiums were paid by the insolvent husband, with moneys which, or some part of which, ought to have been used for the payment of his debts, yet, if there were no fraud as between the wife and the company, the wife could hold the policy as against the creditors of the husband, except the amount which had been wrongfully used in the payment of premiums. If the amount of the husband's estate used to pay premiums were no more than reasonable and moderate under the circumstances, it was further held that the creditors could not recover back the moneys so paid for them, although the husband was, at the time of their payment, insolvent. It was said the interest insured did not belong to the husband or his creditors; that the contracts were not payable to the husband, his representatives, or his creditors; that no fraud on the part of the wife, the children, or the insurance company was shown or pretended; and that there was no gift or transfer of the debtor's property, unless the amounts paid for

premiums were to be held as excessive. That is a very different case from the one under consideration. It was no trust fund (within the meaning of that term when used to authorize the following thereof) which went to pay for the policy in that case. The moneys belonged to and were the property of the husband. They might, under certain circumstances, be reached in proceedings after judgment and return of execution, but the title was in the husband, and he used his own property to procure the insurance. Having done so, the policy thus procured became a contract with the wife, and her insurable interest in her husband's life was thus made effectual. The creditors could not follow the moneys into other property, and demand such property. No principle of following trust funds was involved.

In this case, however, there is the fact which alters and colors the whole transaction, and is fundamental and controlling in its nature, and that fact is that the moneys which procured the insurance were trust moneys, and, although invested in the policies, they were subject at the very moment of such investment to the right of the owner of the funds to follow them in to whatever change of form they might assume, and to claim the thing into which they were changed as if it were the original fund. In the case in the federal court the whole matter was discussed with reference to the violation of the statute of Connecticut, based upon the statute of Elizabeth (13 Eliz. c. 5) prohibiting the transfer of the property of an individual in fraud of his creditors. We have a statute to the same effect, 2 Rev. St. p. 137, § 1. The learned chief justice said that the statute was passed to prevent debtors from dealing with their property to the prejudice of their creditors, but dealing with that which creditors irrespective of such dealing could not have touched was within neither the letter nor the spirit of the statute. This was spoken of the insurable interest of the wife, and it was spoken in regard to creditors as that term is generally used. In this case it is not in the simple character of a creditor of Mr. Gilman, or of the defendant Mrs. Gilman, that the plaintiff asks relief. He seeks the aid of a court of equity to enable him, in the character of a cestui que trust, to follow his property which was wrongfully converted by one bearing towards him the obligations of a trustee, and by such trustee invested in these policies, and such cestui que trust now asks, in substance, for his own property, or for the property into which his trust funds were wrongfully converted; and we think he has the right to recover the property which represents and stands in the place of the original trust fund. The case in the federal court is not at all parallel, and is, therefore, no authority against our contention. Whether at common law or under the provisions of our statute the procurement of policies of insurance in the wife's name, under the facts developed in this case, does not prevent the cestui que trust from following and claiming the trust funds or their proceeds, if the proceeds of these policies had been greater than the whole amount of the in-

debtedness of the husband to the cestui que trust, arising out of the husband's breach of trust, we do not decide what might in equity be the different rights of the wife and such cestui que trust in the balance, or whether any different rule could be logically applied. The husband in this case converted over \$200,000 of what stood in the nature of a trust fund, and the plaintiff recovers only a little over one-fourth thereof in case the judgment on the referee's report be affirmed. We simply decide the case now before us. As to other questions discussed in the defendant's brief, we have carefully considered them, and we think there was no error in the result arrived at by the referee. The order of the general term is therefore reversed, and the judgment entered upon the report of the referee is affirmed, with costs to the plaintiff at general term and in this court. All concur. Judgment accordingly.

(133 N. Y. 425)

## ROBINSON v. GOVERS et al.

(Court of Appeals of New York. June 6, 1893.)

ABATEMENT—DEATH OF PLAINTIFF BEFORE JUDGMENT.

Plaintiff sued to recover dower, and obtained judgment. Defendants asked for leave to pay, in lieu of dower, a gross sum, which plaintiff had signified her willingness to accept. The court thereupon ordered a reference to ascertain such sum, and afterwards rendered a decision in writing confirming the report, and giving plaintiff a specified sum. Before a formal order embodying such decision was prepared and signed, plaintiff died. *Held*, that the action did not abate, but might be continued by plaintiff's executor. *Andrews, C. J.*, dissenting.

Appeal from supreme court, general term, first department.

Action by Mary Ann Robinson (Henry Mottet, executor, etc.) against Robert Govers, individually and as executor, and others, to recover dower in certain real estate. The general term made an order (22 N. Y. Supp. 249) reversing an order continuing the action in name of the executor of the original plaintiff. Plaintiff appeals. Reversed.

See, also, 20 N. Y. Supp. 571, and 22 N. Y. Supp. 1105.

John B. Pine and Austen G. Fox, for appellant. Gratz Nathan, for respondent George K. Griffin. John O. Shaw, for respondent William J. Govers. James E. Carpenter, for respondent Robert G. Robinson.

O'BRIEN, J. The court at special term in this case, after the death of the plaintiff, in an action to recover dower, made an order directing that the action be continued in the name of the executor, and that the money which she was to receive in lieu of dower be paid to him. The general term has reversed the order, holding virtually that the action has abated by the plaintiff's death. We agree with the learned general term that section 763 of the Code has no application to the question. That applies to cases in which the cause of action survives, and, unless the order appealed from can be questioned upon some other ground, it should stand.

The widow's estate in dower in the lands of her husband terminates at her death, and in an incomplete proceeding for admeasurement there would be nothing for the court to act upon after the plaintiff's decease. The real question here, however, is whether the plaintiff, at the time of her death, was vested with the right to a sum of money in lieu of dower, which passed to her executor, and could be claimed by him. In determining that question the various steps taken by both sides in the progress of the action up to the time of the death of the plaintiff become important. The husband and wife had lived separate for some time before his death, and she was in receipt of a stipulated allowance in money from his property, which was paid to her up to the time of her death. Under the husband's will his collateral relatives took the real estate subject to the widow's dower. She brought this action to recover it, and filed her consent to accept a gross sum under the provisions of the Code, section 1617. The defendants were the executor and trustee and the devisees under the will, and they having answered, the issue was tried before the court and a jury, October 22, 1891, and a verdict rendered that the plaintiff was entitled to dower. The plaintiff moved for an interlocutory judgment upon the verdict, and an inquiry whether there ought to be admeasurement or a sale. At the same time the defendants moved, under section 1618 of the Code, for leave to pay the gross sum in lieu of dower. The court ordered a reference to ascertain the sum to which the plaintiff would be entitled as the equivalent of her estate in the lands, and the referee made and filed his report that the plaintiff was entitled to a sum of money therein specified as the value of her dower interest. A motion to confirm this report was argued and submitted to the court on the 30th day of January, 1892. On the 15th day of February, 1892, the court decided to confirm the report, and its decision was expressed in the form of an opinion in writing. This decision gave to the plaintiff a specified sum of money as the value of her dower, and disposed of the question of costs between the parties. The formal order embodying this decision was not prepared and signed by the judge presiding, and who made the decision, until February 18, 1892, at 30 minutes past 2 o'clock in the afternoon of that day, when it was immediately entered. The plaintiff died on the same day, at 10 minutes past 12,—2 hours and 20 minutes before the order was signed and entered. Had the order been entered at any time before the moment of the plaintiff's death, it is not suggested that there would then be any question as to the right of her next of kin or executor to demand and receive the money. By the plaintiff's consent filed, and the motion to the court by defendants for permission to pay a gross sum, all parties virtually assented that the plaintiff's interest in the lands of her husband should be satisfied and discharged by the payment to her of a sum of money. The plaintiff had consented to receive it; the defendants,

by their motion to the court, had expressed their willingness to pay it, and nothing remained to be done except to ascertain the amount or the exact sum which would represent the value of the plaintiff's interest. This involved an inquiry as to little more than two facts, namely, the plaintiff's age, and the value of the whole property. The referee's report fixed the sum to which the plaintiff was entitled. True, it was not operative or final until confirmed. But it was confirmed. The necessary judicial action to accomplish that result was had. The decision was expressed in writing, and it had all the certainty of a formal judgment. The formal order entered is but the evidence of the decision or judgment, and not the decision itself, which must always precede the entry of the order. The entry of a formal order may have been necessary for the enforcement of the right, but the right itself—that is to say, the plaintiff's right to demand and receive a certain sum of money in lieu of dower from the defendants or from the land—was established and declared when the court delivered its decision of the questions before it in writing. The claim or right thus acquired was capable of transmission or transfer when judicially ascertained and determined, and the fact that the formal order, which is required by rules of practice to be signed and entered as evidence of the action of the court, was not so signed and entered till after the moment of her death, did not defeat the right which resulted from such judicial action. When the court had decided to confirm the report of the referee, the plaintiff was vested with the right to the sum of money therein specified, and the delay in entering upon the records the formal expression and evidence of that decision did not affect the right, though it might affect the remedy for its enforcement. The material fact is that, before the death of the plaintiff, the court had acted upon the case, and adjudged what her rights were. What remained was mere formality, and not matter of substance. If the clerk of the court or her attorneys failed to place upon the records of the court, before her death, the formal evidence of its action which conferred the right, that may in equity be regarded as done at the time the decision was made. For the purpose of computing the time to appeal or making an appeal, the decision of the court must be made to assume the form of a judgment or order in the technical sense of those terms, (*Knapp v. Roche*, 82 N. Y. 366;) but when the right to money in lieu of dower depends upon the confirmation of the report of a referee, as in this case, that may be regarded as done at the time the decision was actually made, as then the party acquired the right to have the order entered. The proceedings had reached such a stage before the plaintiff's death as to vest in her a right to the money representing the value of her estate in the land, and this right passed to her executor. *Fulton v. Fulton*, 8 Abb. N. C. 210; *McLaughlin v. McLaughlin*, 22 N. J. Eq. 503-512; *Mulford v. Hiers*, 18 N. J. Eq.

13, 15; *Livermore v. Bainbridge*, 49 N. Y. 123, 129; *Mackay v. Rhinelander*, 1 Johns. Cas. 410. It follows that the order of the general term should be reversed, and that of the special term affirmed, with costs. All concur, except ANDREWS, C. J., dissenting. Ordered accordingly.

(133 N. Y. 333)

FOLEY et al. v. MUTUAL LIFE INS. CO.  
OF NEW YORK.

(Court of Appeals of New York. June 6, 1893.)

GUARDIAN IN SOCAGE—POWER OVER PERSONALTY  
—CLAIM BY WARDS—SET-OFF—MONEYS APPLIED  
FOR THEIR BENEFIT.

1. A guardian in socage has neither common-law nor statutory right to control the personal estate of his ward. 18 N. Y. Supp. 615, affirmed.

2. Where a father assigns an endowment policy to his wife and minor children, and, after the former's death, surrenders the policy to the underwriter, for its present value, without having authority as guardian of the children so to do, the underwriter is not entitled to set off against a claim by the children for the amount of the policy after its maturity, expenditures made by the father for the benefit of the children out of the money received by him on his unauthorized surrender of the policy. 18 N. Y. Supp. 615, affirmed.

Appeal from supreme court, general term, first department.

Action by John Foley, Jr., and others, against the Mutual Life Insurance Company of New York, to have the surrender of a life insurance policy adjudged void. From a judgment of the general term (18 N. Y. Supp. 615) affirming a judgment for plaintiffs, defendant appeals. Affirmed.

The other facts fully appear in the following statement by EARL, J.:

On the 30th day of January, 1876, the defendant issued to John Foley an endowment policy, whereby, in consideration of certain annual payments to be made, it promised to pay him the sum of \$10,000 on the 3d day of January, 1891, or, if he should die before that time, then to make payment of that sum to his executors, administrators, or assigns, within 60 days after notice and proof of his death. On the 25th day of July, 1879, he assigned the policy to his wife and eight children. In November, 1879, his wife died, and afterwards one of the children also died. His wife left a will in which she gave all her property, real and personal, to her children, and nominated her husband executor of the will, and appointed him guardian of the children during their minority. On the 16th day of April, 1888, the premiums on the policy having been regularly paid, and the policy then being in force, Foley, assuming to act as executor of his wife's will and guardian of the children, surrendered the policy to the defendant, in consideration of the sum of \$7,229 paid by it to him, and thereupon it canceled the policy, and has ever since remained in its possession. At the time of such surrender the seven children interested in the policy were all minors. Thereafter the plaintiff John Foley, Jr., and Madeleine Foley became of age, and John Foley, Jr., was appointed guardian of his infant brothers and sisters, and in January, 1890, the plaintiffs tendered to the defend-

ant all the premiums on the policy which became due after its surrender, and demanded that it should be reinstated. The defendant refused to accept the money so tendered and to reinstate the policy, and then this action was commenced by the plaintiffs, and they prayed judgment that the surrender of the plaintiffs' interest in the policy be set aside and adjudged void, and that the policy be declared to be in full force, and a subsisting policy of insurance in their favor. The defendant answered the complaint, and the action was brought to trial at a special term of the supreme court, and the court adjudged that the surrender of the policy was illegal and void, and, the policy having then by its terms matured, it ordered judgment in favor of the plaintiffs for seven-ninths of the \$10,000, less seven-ninths of the premiums remaining unpaid thereon. From the judgment entered at the special term the defendant appealed to the general term, and, from affirmance there, to this court.

Davies, Short & Townsend, (Edward Lyman Short and Julien T. Davies, of counsel,) for appellant.

A guardian in socage has control of the personal estate of his ward. *Torry v. Black*, 58 N. Y. 187; *Porter v. Bleiler*, 17 Barb. 151; *Co. Litt. (1st Amer. Ed., Butler & H. Notes, 88, B; Chamb. Inf. (London Ed., 1842.) pp. 65, 425, 511, 515; 2 Kent, Comm. 224; Macph. Inf. pp. 71, 77; Blng. Inf. (1st Amer. Ed., 1824.) p. 168; Jackson v. Vredenberg, 1 Johns. 164; Byrne v. Van Hoesen, 5 Johns. 67; Emerson v. Spicer, 46 N. Y. 598; Fonda v. Van Horne, 15 Wend. 431; Beecher v. Crouse, 19 Wend. 306; Whitlock v. Whitlock, 1 Dem. Sur. 161.*

Wilcox, Adams & Green, (Herbert Green, of counsel,) for respondent.

A guardian in socage has no control of the personal estate of his ward. *Bedell v. Constable, Vaughan*, 186; *Thomas v. Bennett*, 56 Barb. 197; *Schouler, Dom. Rel. (4th Ed.) § 286; Emerson v. Spicer*, 46 N. Y. 594; *Holmes v. Seely*, 17 Wend. 75; *Thomas v. Bennett*, 56 Barb. 197; *Segelken v. Meyer*, 94 N. Y. 478.

EARL, J., (after stating the facts.) Mrs. Foley had no power by her will to constitute her husband guardian of her minor children, and, while he assumed to act as such, it is now conceded that he was not their testamentary guardian, and that he derived no power under the will of his wife to act as such. But they took under the will of their mother real estate, and hence it is claimed on behalf of the defendant that he became the guardian in socage for his minor children, under the provisions of the Revised Statutes, where it is provided, in section 5, (4 Rev. St. [8th Ed.] p. 2418.) as follows: "Where an estate in lands shall become vested in an infant, the guardianship of such infant, with the rights, powers, and duties of a guardian in socage, shall belong (1) to the father of the infant; (2) if there be no father, to the mother; (3) if there be no father or mother, to the nearest and eldest relative of full age, not being under any



legal incapacity, and, as between relatives of the same degree of consanguinity, male shall be preferred." Section 6 provides that "to every such guardian all statutory provisions that are or shall be in force relative to guardians in socage shall be deemed to apply." As a guardian constituted by this statute is clothed with the rights, powers, and duties of a guardian in socage, it becomes important to know what were the powers, duties, and authority of a guardian in socage at common law prior to the Revised Statutes.

Guardianship in socage was an incident of the feudal tenures existing under the English common law of real estate, and existed only where an infant under 14 years of age was seised of real estate. No person could be a guardian in socage who could inherit from the infant, but the right of guardianship was in such of the infant's next of kin as could not take by inheritance from him the socage estate in respect of which the guardianship arose; and, if there was one or more in common degree of relationship, he who first obtained possession of the infant generally had the custody of him. The guardian in socage was recognized as having an estate in the land of his ward, and he could maintain in his own name any appropriate action to recover the rents and profits, and to recover damages for trespass or waste upon the land, and to recover possession of the land itself. As the common-law socage tenure was swept away by the Revised Statutes, the statutory guardianship was constituted by those statutes to take the place of the common-law guardianship in socage, and it may for convenience be called by the same name. The guardianship there constituted was like the guardianship in socage at common law, except that it continued until the infant reached the age of 21 years, and relatives who could inherit from the infant were not excluded. It is claimed by the plaintiffs that Foley, as guardian in socage, under these provisions of the Revised Statutes, had no power to surrender the insurance policy. The defendant, on the contrary, claims that he did have such power, and the counsel on both sides have, with great diligence and industry, examined and brought to our attention numerous authorities which are claimed to bear upon this controverted question. We have carefully examined them all, and are satisfied that, as such guardian, Foley had no power to surrender the policy.

It is claimed on the part of the plaintiffs that guardians in socage at common law had to do only with the real estate of their wards, and we think that is substantially true. Such a guardian could have no being whatever, except when the infant was seised of real estate in socage tenure, and as that was essential, it may be inferred that his powers and duties related to the real estate on account of which his guardianship was constituted. In the early history of the common law there was very little personal property, and the guardianship of the infants and of their real estate was very naturally the main object of the law. It is probable that, as the guardian in socage was enti-

tled to the possession of the real estate, he also took possession of the animals, implements, and other personal property connected with the real estate, and, having possession, he could probably maintain an action for any interference with such personal property without right or authority by a mere stranger, and that he thus had the control of such personal property, as well as all the real estate. Our own researches, aided by the industry of counsel, have not brought to our attention a single case in England or in this country where the question has directly arisen as to the power of a guardian in socage over the personal property of his ward; and it has never been decided or intimated in any judicial opinion that such a guardian could reduce to possession the choses in action of his ward, or release, discharge, or dispose of them. In Coke upon Littleton (1st Amer. Ed., Butler & H. Notes) 88, B, the learned editors say: "But whether the guardian in socage is entitled to take into his custody the infant's personal estate we have not yet been able to ascertain by any express authority." But they also say that they are inclined to think that the personality was under the control of the guardian in socage, except where, by the custom of the particular place, it happened to be liable to a different custom; and they claim that their views are strongly confirmed by the manner in which the act 12 Car. II. c. 24, regulated the powers of a guardian which it enabled the father to appoint. That act authorized the father, by will or deed, to appoint a guardian for his minor children, and the guardian thus appointed was authorized to take the custody of the infant's personal estate, as well as his real estate, tenements, and hereditaments, and bring such actions in relation thereto "as a guardian in common socage might do;" and the reasoning of the learned editors is that these words necessarily import that the personal estate of infants was, equally with their real estate, subject to the custody and control of the guardian in socage. The provisions of that statute were substantially enacted in this state by chapter 47 of the Laws of 1787, and they have continued ever since, and are now found in the Revised Statutes, (4 Rev. St. p. 2612,) and the provision now is in section 3 that the guardian thus appointed by the father shall "take the custody and management of the personal estate of such minor, and the profits of his real estate, during the time for which such disposition shall have been made, and may bring such actions in relation thereto as a guardian in socage might by law." We think the inference to be drawn from this statute, that a guardian in socage had the control and possession of all the personal estate of his ward, and could bring any action in reference thereto as he could in reference to any of the real estate, is very uncertain and unsatisfactory. As before stated, it is probably true that a guardian in socage, having the possession of the personal property of his ward, used on and connected with his land, could bring actions in reference to the same; but we do not think it is a legitimate inference from these

statutes that a guardian in socage had the control at common law of all the personal property of his ward, and that he could use, manage, and dispose of it like a general owner passing the title to the same. There was no reason for giving such a power to the guardian in socage growing out of the feudal tenure or the policy of the common law. An infant, even below the age of 14, possessed of personal property, could select his own guardian, and a guardian of such an infant could also be appointed by the ecclesiastical courts and by the chancellor. If the infant possessed choses in action which he desired to reduce to possession, he could bring an action in his name, and have a guardian ad litem appointed for that purpose. There was therefore no occasion to vest a guardian in socage—usually a distant relative—with the power and control over the infant's personal estate. Soon after the passage of the statutes of Charles the Second, Chief Justice Vaughan, in *Bedell v. Constable, Vaughan*, 188, expressed the opinion that a guardian in socage did not have the custody of the goods and chattels of the ward. That was merely an expression of opinion of the learned chief justice, as it was not necessary to the decision of the case then under consideration. Our attention is called to text writers and to the opinions of judges, some of which affirm, and some of which deny, that guardians in socage had the custody and control of the personal estate of their wards. There is more said upon the subject in *Thomas v. Bennett*, 56 Barb. 197, than in any other case that has come to our attention. In that case the action was brought by the general guardian in his own name, to recover a debt due to the infant, and the question was whether the action was maintainable, and the learned judge went into a discussion of the power of statutory guardians and guardians in socage. Among other things, he said: "The guardian in socage may sue for claims covering the real estate of his ward, but cannot sue to recover his personal property;" and "It is true that the guardian in socage can bring no suit except in regard to the real estate, and for the rents and profits of it; but this is so because he has no control whatever over the other personal estate of his ward; and, therefore, I think, although the language of the section is somewhat loose, [section 3 of the Revised Statutes, above cited,] the legislature intended to confer the same right upon the general guardian to sue in relation to any of the property under his control that the guardian in socage possessed in reference to the property of which he had charge." When the lawmakers came to deal with the subject of guardians in socage in the Revised Statutes, personal estate had come to be a very large share of the property of the country, and, if they had intended that the guardian in socage should have control of the personal property of his ward, they would have said so in plain and unmistakable terms. If the contention of the defendant is well founded, then the personal estate of an infant who possesses a real estate, however small, will be at the absolute disposal of

the near relative who may assume to act as guardian in socage under the statute, without any of the guards or the security with which the law, with great care and particularity, surrounds the estates of infants, to protect them against the misconduct or maladministration of guardians. Such a guardianship of the infant's personal property is against the entire policy of our laws, and is sanctioned by no precedent and no practice in this state, and is, we believe, against the general understanding of lawyers and judges. Therefore, without a fuller discussion, and without a criticism of the authorities to be found in the briefs submitted to us, we have reached the conclusion that Foley had no power or right to surrender the policy to the defendant for cancellation.

It is, however, claimed by the defendant that the plaintiffs so far acquiesced in and ratified the surrender of the policy that they cannot now repudiate it, and reclaim the policy. It was surrendered without their knowledge, when they were minors. There is no satisfactory proof that they ever intentionally or consciously acquiesced in the surrender, or ratified it, or that they ever took the fruits of it. They did nothing to mislead or to prejudice the defendant. They have in no way deprived it of its remedy against their father for wrongfully obtaining the money for the policy, and, before infants thus situated can be held estopped from enforcing their claim to the policy, their acts of ratification and acquiescence should be very clear and explicit. Mere acquiescence alone would not be sufficient to estop them from asserting their rights. We need to add nothing to what has been said in the opinions of the special and general terms upon this point.

The defendant alleged in its answer that some of the money received by Foley upon the surrender of the policy was applied to the use and benefit of the plaintiffs; and upon the trial, having Foley under examination as a witness, defendant's counsel, after proving that he received \$7,229 from the defendant upon the surrender of the policy, asked him: "Did you apply that money to the benefit of these plaintiffs?" This question was objected to generally by the plaintiffs, and the court replied: "I will allow him to state that generally, simply for the purpose of a reference, if it should be necessary." The witness then answered: "I did." He was asked no further questions, and gave no further evidence of the use made by him of the money. It is now claimed by the defendant that the court at special term should have ordered a reference to ascertain whether any of the money had been used for the benefit of the plaintiffs in such a way that they could be charged with the same, or that the defendant would be entitled to a credit for the sum that would otherwise be recoverable from it. There was no proof that Foley was not perfectly able to respond to the defendant for the amount of money received by him from it upon the surrender of the policy. He was bound to support his own children, out of his own means, and it does not appear that he was not abundantly able to do so; and if

he took this money, and used it for the support of his children, instead of using his own means for that purpose, the children did not become responsible for the money so used. The defendant was permitted to give all the evidence it offered upon the subject, and, upon all the evidence in the case, it was impossible for the court to find that the money received by Foley from the defendant was so applied for the benefit or use of the plaintiffs as to make them accountable for it to the defendant. It was bound to make a case showing that there was something to be accounted for to apply upon the demand against it, and then, and not till then, would a reference have been proper to ascertain the amount. Therefore, after a full consideration of the very able argument submitted to us on behalf of the defendant, we are not convinced thereby, but have reached the conclusion that the judgment should be affirmed, with costs. All concur, except PECKHAM, J., taking no part.

(138 N. Y. 318)

**BLACKMAN v. RILEY.**

(Court of Appeals of New York. June 6, 1893.)

DEED—DESCRIPTION OF LAND—BOUNDED BY ROAD—EJECTMENT—TITLE TO MAINTAIN—SUFFICIENCY OF EVIDENCE.

1. A deed which describes the boundaries of the land as beginning "at a point on the east side" of a road, and thence running north a certain number of feet, continuing the line to the place of beginning, does not convey the fee of the road.

2. A conveyance of land bounded by a road should be construed as referring to the actual road as worked and used, and not to an abstract legal line, invisible and practically unknown.

3. In ejectment it appeared that land in the city of New York, which was formerly bounded by a road, was conveyed in 1809 without the fee to the road, and the question was whether the locus in quo formed a part of the road at that time. If in 1809 the road was only two rods wide, the premises in dispute did not form a part of it. The western boundary of the road always remained the same, and was not in dispute. The road as originally laid out was four rods wide, and in 1751 an act was passed reciting that the road "was double the width necessary," and enacting that a surveyor be appointed who should survey the road, "and lay out the same of the breadth of two rods," but there was no record to show that the act was ever complied with. In 1787 the common council were authorized by law to widen roads, provided they did not make them exceed in width four rods. In 1793 a resolution was passed providing for opening the road to "its proper and legal width of four rods," though counsel admit that this resolution was permitted to sleep. In 1799 another resolution was adopted on a petition for opening the road to "its proper width of four rods," and a committee was appointed to see that the abutting owners moved back their fences. There were maps made in 1820 by city officials, in which the road was laid down as four rods wide. *Held*, that it would be presumed that the surveyor reduced the road under the act of 1751, though it could not be presumed that the committee of the common council moved back the fences under the resolution of 1799, and consequently that plaintiff failed to show that the road as worked and used in 1809 was more than two rods wide.

Appeal from supreme court, general term, first department.

Action by John E. Blackman against Charles Riley to recover possession of land. From a judgment of the general term affirming a judgment for defendant on the report of a referee, (18 N. Y. Supp. 476,) plaintiff appeals. Affirmed.

George Hoadly, for appellant. Henry H. Anderson, for respondent.

PECKHAM, J. In 1759 Cornelius Cosine, the elder, was the owner of a farm of about 200 acres, the northern and southern boundaries of which were nearly, but not quite, coincident with the lines of what are now Fifty-Seventh and Fifty-Third streets, in the city of New York. The North river formed the western boundary, while the eastern was formed by what was termed in the descriptions of the day the "common lands" of New York. The Bloomingdale road, running about north and south, cut through the farm, leaving land on each side of it. It ran a little distance west of and parallel with the line now forming Seventh avenue. If a full recital were given of all the facts relating to the disposal of the farm thus mentioned, and out of which has grown the present controversy, we should be taken back to Colonial times, when, in the year above mentioned, (1759,) the elder Cosine is alleged to have deeded this farm to his two sons, Cornelius, Jr., and Balm Johnson, Cosine, and thereby excluded three other living children from any benefit arising from his ownership of such farm. We do not intend to enter upon either a recital of the facts surrounding and following the claim made under this alleged deed, or to make a statement of the many legal questions which, in one aspect, abound in this case. We refrain from so doing because, in our opinion, the case can and should be decided for the defendant upon a question of fact, and, therefore, a discussion of the interesting legal propositions becomes unnecessary. This question of fact is based upon a deed to one Jacob Harsen and wife from the widow and heirs of the above-mentioned Balm Johnson Cosine, one of the two grantees in the alleged deed from the elder Cosine, made in 1759. This deed to the Harsens was executed in 1809, and it may be assumed all questions arising prior to that date should be decided in favor of the plaintiff. The deed of 1809 conveyed to the Harsens the southern portion of the old Cosine farm, extending from the common lands of New York on the east to the North river on the west, and through it ran the Bloomingdale road. The portion thus conveyed consisted of all the land lying on both sides of the road, between the northern and southern boundaries of such portion. The deed describes, by two separate descriptions, the lands conveyed, one description being used for the land on the west and the other for the land on the east side of the road. The land on the west was first described, and then the deed continues, "and the other of the said two lots, pieces, or parcels of land begins at a

point on the east side of the Bloomingdale road aforesaid, \* \* \* and runs from thence north \* \* \* along the east side of said road" a certain number of feet, and the description is continued until the line is brought to the place of beginning. It is argued by the defendant that the deed in fact conveys the fee in the road. He claims that the parties to it were then engaged in carrying out a compromise in regard to the title to this farm, and that it was clearly the intention of the grantors to convey to the grantees all the interest which the former had in any portion of the farm contained within the limits of the description, and that there could have been and was no intention to reserve from such conveyance any interest in the land forming the bed of the road which ran through this portion of the farm. It is difficult to conceive of any reason for consciously reserving or failing to convey the roadbed of this road, subject to the public easement. We cannot think it was ever really intended, yet, nevertheless, we are disposed to hold that, by the language actually used, the grantors in fact failed to convey any portion of the land forming the bed of the road in question.

The plaintiff alleges that the premises in question formed a part of the southern portion of the Cosine farm, and also a part of the bed of the Bloomingdale road, at the date of the deed in 1809, and that the premises did not pass to Jacob Harsen and wife by virtue of that deed. The plaintiff claims, by various mesne conveyances, a certain portion of the title which he alleges was in the widow and heirs of Balm Johnson Cosine at the time of the execution of the deed by them to the Harsens. The respondent, on the other hand, claims title under several conveyances which passed to him all the title which the Harsens took from the widow and heirs as stated. It is further alleged, on the part of the defendant, that the premises in question did pass by the deed of 1809, and that such premises formed at that time no part of the old Bloomingdale road. The defendant sets up many other defenses to the claim of the plaintiff, but if the plaintiff has failed to prove that the land in controversy formed a part of the Bloomingdale road, and that, therefore, it did not pass to Jacob Harsen and wife by virtue of the deed to them in 1809, he has, in that event, failed to prove title to the locus in quo. He maintains that he has made such proof, while it is claimed on the part of the defendant that he has not. This is the question of fact arising out of the execution and delivery of the deed of 1809. We think the plaintiff has failed to show that the premises did form a part of the roadbed at the time when the deed was executed. As the action is one in ejectment, the burden is upon the plaintiff to show that he has title to the premises, and he must recover, if at all, upon the strength of that title, and not by reason of any weakness in that of his adversary. The question whether the premises formed part of the roadbed in 1809 depends upon the width of the road at that time. The western boundary thereof is not

disputed, and it always remained fixed and unaltered. If, in 1809, the road was actually of the width of four rods, then these premises formed part thereof; and if the road at that time were only of the width of two rods, they did not form part of such road, and they passed to the Harsens under the deed to them. The referee finds as a fact that the road, at the time of the death of the elder Cosine, was only two rods wide at the point in question. We think there is evidence upon which to base this finding. He also finds that, upon maps made in 1820, the road appeared to be of the width of four rods at this point, and that the widening of the road prior to 1820 was exclusively from the eastern side of the road. He does not find when the widening actually took place, nor does he, in terms, find what was the width in 1809, and the evidence is not of such a nature as to compel a finding that a widening took place prior to 1809. Indeed, the plaintiff claims that the whole matter of any widening of the road is a myth, and that the width was never less than four rods in law, whatever may have been the fact as to the width which was kept in repair and actually used. But if the space really occupied by and used as a road in 1809 were but two rods in width, we think that a description in a deed conveying land bounded by the road should, in the absence of some words indicating the contrary, be construed as referring to the actual road as worked, kept in repair, and used, and not to an abstract legal line, invisible, unused, and practically unknown. The road was laid out in 1703, (or possibly re-established under the act of that year,) a very early period in the history of the laying out of roads under statutory authority in this state. Bradford's Ed. New York Colony Laws, 1691-1774, p. 52. The act provided for laying out the road four rods wide, and commissioners to carry the act into effect were therein appointed. There was not, however, any provision made for the payment to the owners for the land to be taken for the highway, nor was there any provision for a compulsory taking of the land for highway purposes. The land taken for the laying out of the road must, therefore, have been taken by the permission or acquiescence of the owners. While the land was in actual use as a part of the highway, it was under the control of the commissioners, but, if any part ceased to be used, worked, or kept in repair as a road, such nonuser in that case might very likely amount to an abandonment of the land not used, and in that event a deed bounding lands by the road would, as has been said, probably be construed to mean the road as actually worked and used. Although the act of 1703 provided for the laying out of roads four rods wide, such width was unnecessary, and accordingly, in 1751, by chapter 910, an act was passed for keeping in repair the public road through Bloomingdale division, which included the point in controversy. Laws N. Y. 1691-1773, (Van Schaack's Ed.) p. 303. This act recited that, in pursuance of the act of 1703, a road had been laid out of the breadth of four rods through Blooming-

dale district or division, and the inhabitants of the district, who were but few in number, had been under great hardships, not only by keeping the said road in repair, ("which was double the breadth necessary,") but also by being obliged to work on repairing the post road between New York and Kings Bridge; therefore, in order to remedy these hardships, it was enacted that a surveyor should be appointed, and such surveyor was then required to view and survey this road or highway, "and lay out the same of the breadth of two rods, as the same now runs," and thereafter the surveyor was to call out the inhabitants upon due notice and work the road, repairing, cleaning, amending, and making good the same. This act is not of the limited effect spoken of by plaintiff's counsel. It gave the right to, and made it the duty of, the surveyor to lay out the road "of the breadth of two rods," and under the act the surveyor was bound to so lay it out. It was not a mere permission to thereafter keep the road in repair for a width of two rods only, and under the act the laying out of the road by the surveyor of the width of two rods "as the same now runs" would seemingly operate as an abandonment of the user of the two rods not included in such laying out, and upon such abandonment the right to occupy the land would revert to the abutting owner. It is true the case contains no evidence of any legal proceedings, on the part of the surveyor appointed under the act of 1751, laying out the road of the width of two rods only, "as the same now runs." The act did not provide any particular procedure for so laying out the road, nor for the filing in any public office of the description of the road so to be laid out under the decision of the surveyor. The absence of such evidence is not to be wondered at. The proceedings taken and the decisions arrived at in those days regarding such matters as these, particularly when no statute commanded it, were not often made matters of record, and, as we are inquiring regarding things which may have happened more than a century and a quarter ago, we need not be surprised at the scantiness of the evidence we are enabled to procure. That it was a hardship to keep this road in repair for a width of four rods is reasonably certain, and is so stated in the act of 1751. It is also there provided that the road shall be laid out by a surveyor of the breadth of two rods only. It was the official duty of the surveyor to do it. It would have been a criminal neglect on the part of such officer to fail to lay out the road of the width of two rods as directed in terms by the statute. In such case it will be intended that he performed his duty, unless the contrary be shown. Broom, Leg. Max. (8th Ed.) 949. There is here no evidence which shows nonperformance. I think it entirely justifiable, under such circumstances, to presume that the surveyor, who was a public officer, performed his official duty, and that the provisions of the act were in fact carried out, and the road was actually thereafter laid out of the width of two rods only. There would seem to be no dispute as to

the western boundary of the road, and if the road were only two rods wide there is no dispute that the deed to the Harsens passed the title to this property, because it was in that event no part of the old road. We have no evidence as to the changing of fences at this point subsequent to the act of 1751. But we have no evidence of the existence of any fences before that time along the road, assuming its width of four rods. There is enough in the evidence to permit the inference which the referee has drawn, that in 1765, at the time of the death of the elder Cosine, the road was only two rods wide. There is evidence drawn from the map of the Hopper farm, made in 1782 by Evert Bancker, Jr., city surveyor, that the road at that time and at that point was only two rods in width. The Hopper farm was situated on the south of the Cosine farm. Although the map was for private parties, and was in no wise conclusive against the plaintiff, yet it was evidence of the fact that, in 1782, a map was made by the official city surveyor, which included this road, and it was laid down on that map as but two rods wide. This is some evidence of a contemporary nature as to how the fact appeared to one who was the city surveyor, and engaged in making a survey of a farm near the locus in quo, and at a point where the width of the road would probably be the same. This may be, perhaps, regarded as slight and unsatisfactory evidence as to the actual width of the road, and we may admit it would be if it were applied to matters of recent occurrence. We must continually bear in mind that we are inquiring as to matters which happened more than a century ago, and we must be content to rest upon such slight evidence as survives those times.

By chapter 61, Laws 1787, the common council of New York were declared commissioners of highways, and, as such, they were authorized to widen or alter, to not exceeding four rods wide, roads or highways laid out in that city or county, and they were authorized, in widening or altering a highway, to take the necessary land, and to provide payment therefor, but no compensation was to be made to any one who had encroached on any such highway. The plaintiff's counsel says there is no evidence that any compensation was paid the Cosines for land taken for widening the Bloomingdale road under this act, and that there never was any such widening. His idea is that the road had always been four rods in width, and that the act of 1751 simply permitted the inhabitants to keep two instead of four rods in repair. As has been said, we think he erroneously limits the force of the act of 1751, and that, under that act, we may regard the road, in the absence of any evidence to the contrary, as reduced to two rods in width. And it is true that it does not appear at what time any widening was effected of this Bloomingdale road prior to 1820. At that date it does appear that there were maps made by officials of the city in which the road is laid down at this point as of the width of four rods. We think there

is no evidence which compels a finding that such alteration had been made prior to 1809, when the deed to the Harsens was executed. There are certain resolutions of the common council of New York which were put in evidence. In 1793 there was passed a resolution providing for the opening of this road to "its proper and legal width of four rods." Counsel for plaintiff, however, himself admits that this resolution seems to have been allowed to sleep. In 1799 another resolution was adopted, appointing a committee to see that the abutting owners (without naming them or describing their lands) moved their fences back. The resolution is stated to have been taken upon "a petition for the opening of the Bloomingdale road to its proper width of four rods." These resolutions do not show a widening of the road at that time, nor do they prove that in point of fact there had never been any other width than that of four rods, and that anything less than that width had been accomplished by encroachment. At most, it is proof of a claim advanced on the part of the city that the Bloomingdale road had a width of four rods. The act of 1787 gave the city the right to widen or alter roads in the county of New York to a width of four rods, and to take the necessary land, and to pay for it. There are no proceedings shown to have been taken under that act for the purpose of widening the road in question. If we may presume the road was laid out of the width of two rods under the act of 1751, then the burden is on the plaintiff to show some change in its width, so that in 1809 it was four instead of two rods wide. This burden is not sustained by him. The case contains no evidence of any further legislative or municipal action in any way affecting this part of the road until 1847, when certain proceedings were instituted in regard to Broadway. Thus, as late as in 1799, it would appear that the road was not in fact and actually opened and worked to the width of four rods. The mere resolutions of the common council do not prove the fact that proceedings had been taken to acquire the title to lands which might be necessary for the purpose of widening a road. And if such proof had been given we do not think it can be assumed, in the absence of evidence, that the committee appointed by the common council to see that the abutting owners moved their fences back performed that duty or exercised that power. There is a distinction between presuming as to the action of a public officer, appointed by virtue of the provisions of a statute by which it is made his official duty, and he is directed to himself perform a certain act, and a presumption as to the result of a presumed action of a committee of a common council in carrying out the terms of a resolution empowering them to see that private persons do certain acts. The presumption that he has done his duty, which properly attaches to a public officer in such circumstances, cannot and ought not to be carried to the extent of presuming (without any evidence whatever) that

the committee proceeded to attend to the business intrusted to it by the common council, and that the abutting owners, pursuant to the presumed action of the committee, actually removed their fences which had, up to that time, encroached upon the public highway. We cannot, in such case, presume action of which there is not the slightest evidence.

We come, then, to the proposition that there is an utter lack of evidence that this road was, in 1809, more than two rods wide in fact. If, however, the legal width may have been four rods,—if the road was only used, worked, and repaired to the width of two rods, and the other two rods, so far as visible boundaries are concerned, were a portion of the abutting land,—we think a description of the land, as bounded by the east side of the road, should be construed to mean the visible road as in actual use, and not the ideal road of a width of four instead of two rods. Counsel for plaintiff says that the defendant admitted at the general term that between the death of the elder Cosine, in 1765, and the execution of the deed to the Harsens, in 1809, the road had been widened from two to four rods. It would seem the concession was made, in the course of an argument, to prove that the division of the farm, in 1809, was made with reference to its condition at the time of the death of the owner, in 1765. The defendant makes the same statement here. We do not put our decision on that ground. We are more inclined to the view that in 1809 there is no evidence or finding that the road was then over two rods in width, and the deed to the Harsens included the locus in quo, because it lay east of the two rods forming the road. Upon the facts the plaintiff failed to make out a title to the premises, and the judgment for the defendant should, therefore, be affirmed, with costs. All concur.

(134 Ind. 638)

#### GIMBEL v. GREEN.

(Supreme Court of Indiana. May 23, 1893.)

##### JUDGMENT ON APPEAL—MODIFICATION.

A petition to modify a judgment of the appellate court, by striking out so much thereof as relates to the cross errors, on the ground that the cross errors were not assigned properly, and within the time allowed therefor, cannot be considered; it being the duty of petitioner to make his objection to the manner and form of such assignments previous to the decision of the action.

Petition to modify judgment.

For former report, see 33 N. E. Rep. 964.

OLDS, J. The judgment in this cause was reversed on cross errors. The appellant files a motion to modify the judgment by striking out so much thereof as relates to the cross errors. It is based on the contention that the cross errors were not assigned properly, and within the time allowed for assigning cross errors. This objection comes too late to be considered. The assignment of cross errors is in proper form in the record. The case was briefed by both parties, and

no objection was made to considering the question presented by the cross assignment of errors, and the case was taken up in its order and decided, and it is now too late to object to the consideration of the question thus presented, or to the manner or time of the assignment. It is the duty of counsel to give cases attention before they are decided. The question presented by the cross assignment of errors was discussed by counsel for appellee in his brief, and he asked for a reversal of the judgment in his favor, and no objection made previous to the decision in the case as to the manner or time of their assignment. The petition to modify the judgment is overruled.

(134 Ind. 380)

**CHICAGO, ST. L. & P. R. CO. v. SPILKER.**  
(Supreme Court of Indiana. May 17, 1893.)  
**RAILROAD COMPANIES — LIABILITY FOR NEGLIGENCE — UNUSUAL RATE OF SPEED — PLEADING.**

A complaint, in an action to recover for personal injuries, alleged that at the time of the accident defendant's train was running across a street in a city at a dangerous, reckless, and unusual rate of speed of 50 miles an hour, where a great many persons were passing and crossing. *Held*, that the negligence charged was running the train over a street, where many people were passing and crossing, at a dangerous speed, and that such complaint did not base its right of action on the theory that defendant was not in the habit of running its trains at such a rate of speed.

On petition for rehearing.

For former report, see 33 N. E. Rep. 280.

**HOWARD, J.** The appellant asks for a rehearing in this case, still insisting that the evidence given by the witnesses Reuben A. Riley, Jerome Black, and Dr. Kelsey was improperly admitted. The questions presented have already been fully considered by the court, except, perhaps, the additional reason, now more fully brought forward by appellant, why the testimony of the witness Riley should not have been received, that it was not good under the theory of the complaint. The complaint charges that at the time of the accident the train was running across a street in the city of Greenfield, at a "dangerous, reckless, and unusual rate of speed of fifty miles an hour over and across said street, where a great many persons were passing and crossing." And appellant contends that the complaint thus "presents the cause of action upon the theory that the appellant was not in the habit of so running her trains, but that the rate of speed charged at the time of the accident was unusual." We are of opinion that this is not a correct interpretation of the theory of the complaint. The negligence charged on this point is the running of the train over a street of a city, where many people were passing and crossing, at a dangerous, reckless, and unusual rate of speed of 50 miles per hour; that is, in effect, that 50 miles an hour, across a much-frequented street of a city, is a dangerous, reckless, and unusual rate of speed. It is, indeed, a matter of common knowledge that such a rate of

speed of trains in cities is extremely unusual, and always reckless and dangerous. We think that counsel for appellant have misapprehended the force of the word "unusual" as used in the complaint. We have found nothing in the able brief filed by appellant that would change the opinion already rendered. Indeed, the verdict is amply supported, without considering any of the evidence objected to. The petition for a rehearing is accordingly overruled.

(134 Ind. 361)

**FIRST NAT. BANK OF INDIANAPOLIS,**  
**No. 2,556, v. HENDRICKS.**

(Supreme Court of Indiana. May 19, 1893.)

**JUDGMENT LIEN — EXTINGUISHMENT — SALE UNDER SUPERIOR LIEN.**

A bank holding a tax lien which was superior to all other liens on a certain lot, and a judgment which was superior to plaintiff's mortgage on the lot, and also a lien on other real estate, had the lot first sold to satisfy its tax lien, and then the other real estate to satisfy its judgment, after which it attempted to have the lot again sold to satisfy an unpaid balance still due on the judgment. The decree under which this was done provided that the lot should be sold, and the proceeds applied first to payment of the tax lien, and then to plaintiff's mortgage. The decree also allowed the bank to levy on the lot for the satisfaction of its judgment after having levied on the other real estate. *Held*, that the sale of the lot under the superior tax lien extinguished all other liens, including that of the judgment, and gave the purchaser a clear title. 33 N. E. Rep. 110, affirmed.

On rehearing.

For former report, see 33 N. E. Rep. 110.

**HOWARD, J.** In a very able and elaborate petition and brief for rehearing, counsel for appellant endeavor to shield their client from the consequences of the fatal defect in the decree of the superior court. It is admitted that the court found the lien of the bank judgment to be superior to the lien of appellee's mortgage, and it is contended that the court might therefore have decreed that lot 3 should be sold subject to the judgment, or, at the least, might have decreed that the proceeds of the sale should be applied to the payment of the liens in the order of their priority, and reference is made to the order requiring that the Shelby county lands should be first sold before levying on lot 3 under the bank judgment, as showing the intention of the court that the sale of lot 3 under the decree should be made subject to the lien of the judgment. But we are not here concerned with what the court could have done, nor even with what the court intended to do, but only with what the court actually did. Counsel go so far as to say that, in the adjustment of the equities of the case, the bank's lien for taxes was made subordinate to its judgment lien. An examination of the record will not bear out this contention. The taxes due the bank were found by the court to be \$2,799.84, which sum the court expressly declared to be the "first and senior lien on said lots from one to seven, \* \* \* and that, of said



sum; the amount of lien on each lot is as follows: \* \* \* On lot three, \$526.49. \* \* \* And said liens are hereby enforced, and said lots ordered to be sold to pay the same."

As counsel say, the findings and decree of the superior court were exceedingly elaborate, full, and complete, even to excess, covering 64 pages of the record; and it would seem that the court took ample time and space to say what it intended to say. Finally, after ordering that all the land sold under the decree "be sold by the sheriff of said county of Marion, Ind., as upon execution, said sale to be without any relief from valuation or appraisal laws," the court next proceeds to decree the separate sale of the several tracts, ordering the proceeds applied in each case to the payment of liens as therein severally stated. The decree for the sale of lot 3 is in the following words: "And said sheriff shall next sell said lot number three, (3.) but, of the proceeds of said sale, he shall first pay and satisfy the amount of the prior lien thereon in favor of the plaintiff, on account of taxes and street improvements and assessments paid by plaintiff, as herein found and adjudged; and the residue, or so much thereof as may be necessary, the said sheriff shall apply upon the said judgment rendered herein in favor of Thomas A. Hendricks against the defendant, Deless Root." If, as counsel insist, there was a sufficient pleading to protect the bank's judgment, it is very clear that no such pleading carried the finding of the court as to the superiority of the judgment lien into the decree or order of sale; for as a matter of fact, as shown above, in the words of that order of sale, no judgment on such finding was carried into the order of sale. We have to look to what was done by the court, not to what might have been done. It is vain now to say that the court might do what is usual in such decrees,—have ordered that the proceeds of sale be applied to the payment of the liens in the order of their seniority, or might have ordered the sale made subject to the lien of the bank's judgment. The sufficient answer to this is that the court did not do so. Counsel now admit that "the rights of all parties interested in lot 17 were fixed and established by the decree providing for its sale in the different parcels into which it had been subdivided, and the application of the proceeds of such sale." To that we agree, and all parties must abide by the result as made in the order of the court, and carried out by the sheriff. As to the actual equities of this result, we think they are as nearly harmonized as possible. Granting that the lot was worth \$5,000, it stood to appellee, after paying the bank's tax lien of \$526.49, as netting \$4,473.51. Appellee's judgment was found to be \$7,158.82. On this was applied the surplus of the purchase price paid for the lot, \$473.51, leaving yet due appellee \$2,201.80. After appellant sold the Shelby county lands, there remained due on her judgment \$2,580.68. The net losses of appellant and appellee are therefore very nearly equal; so, whether we look to

the wording of the decree and order of sale and the proceedings that followed, or whether we confine our attention to the equitable results that followed, there seems no reason to change the opinion of the court already rendered.

The petition for a rehearing is overruled.

(125 Ind. 245)

#### HAWLEY et al. v. ZIGERLI et al.<sup>1</sup>

(Supreme Court of Indiana. May 16, 1893.)

PLEADING—SUFFICIENCY OF ANSWER—DEMURRER—INSTRUCTIONS—REVIEW ON APPEAL—CONFLICTING EVIDENCE—DEED—COLOR OF TITLE.

1. A demurrer to an answer alleging that it does not state facts sufficient to constitute a cause of action is bad, answers being required to state only causes of defense.

2. An objection to an instruction will not be noticed unless all the instructions are brought up on the record; the rule being that they must be considered as an entirety, and if, when so considered, they state the law correctly, there is no error.

3. The appellate court will not disturb a verdict because of conflicting evidence.

4. Though a deed executed under a power of attorney is defective, because of the weakness of the power of attorney, or insufficiency of description of the land conveyed, the grantee, at least, has color of title.

Appeal from circuit court, Huntington county; Lyman Walker, Judge.

Action by Wesley W. Hawley and others against Mary Zigerli and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

J. B. Kenner, B. M. Cobb, and U. S. Lesh, for appellants. Milligan, Whitlock & Cook, for appellees.

HACKNEY, J. In an action to quiet title, and for possession by the appellants, the appellees succeeded.

The first assignment of error is in the overruling of a demurrer to the 3d, 4th, 5th, and 6th paragraphs of the appellees' answer. The demurrer is not in the form directed by the statute, and recognized by any decision of this court. The cause of demurrer stated is that "neither of said paragraphs states facts sufficient to constitute a cause of action." Answers are not required to state causes of action, but are sufficient when they state causes of defense. That which is a sufficient cause of defense to an action may be materially deficient when stated as a cause of action or cross action. While the statement of the cause of demurrer was probably the result of inadvertence, we are not at liberty to hold it sufficient. The sufficiency of the answers is not, therefore, before us.

The second assignment of error is upon the overruling of the motion of appellants for a new trial. The first cause for a new trial discussed by counsel is the action of the court in modifying instruction numbered 4 of those asked by appellants. No other instruction is in the record. The rule is thoroughly established that instructions must be considered as an entirety, and when so considered, if they state the law of the case correctly, there is no error. *Gallaher v. State*, 101 Ind.

<sup>1</sup>Rehearing denied.

411; *Reinhold v. State*, 130 Ind. 467, 30 N. E. Rep. 306. Here the appellants have made it impossible for us to consider the instructions as an entirety, by omitting them from the record. The tract, the title to which is in dispute, is described in the complaint as commencing on the north bank of Little river, and the east line of south Jefferson street, in the city of Huntington, and running thence north 82 feet, to the south line of the lot known as "lot 268," in the original plat of said city; thence, along said line, east 100 feet; thence south, and parallel with said street, to said river bank; and thence westward, along said river bank, to the place of beginning. In three paragraphs of answer the appellees claim the ownership and right of possession in part of said tract, describing such parts by different methods, and disclaiming as to all of such tract not so described and claimed. The fifth paragraph of answer pleads the 15-years limitation, and the sixth paragraph pleads the 20-years limitation. To the answers of the statutes of limitation the appellants replied specially that, in the year 1830, the then owner of said tract dedicated the same, with other lands, to the public as a burial ground, and for no other use; that, in the year 1834, John F. Tipton purchased the lands upon a portion of which said burial ground was located; that the public continued to use and occupy for burial purposes said tract until in the year 1883, when it was wholly abandoned for such purposes, and reverted to the heirs of said Tipton, who conveyed to the appellants. It was further alleged that any possession of the appellees was wrongful and tortious, in that it was against the municipal corporation of the city of Huntington and the public. The cause was submitted to a jury, resulting in a general verdict in favor of the appellees, and the return of special interrogatories and answers thereto. By the special interrogatories and the answers thereto we learn that the jury found that the particular tract in controversy, as against the appellees, was never dedicated or used for burial purposes, nor was it ever accepted by the public as such, nor did it ever become, nor was it abandoned as, such. The operation of the statute of limitations as against the public, and other questions discussed, are determined by findings specially that no interest was ever acquired by the public. The second cause stated in the motion for a new trial is that such findings are not sustained by the evidence.

The evidence for the appellants shows that on the 12th day of October, 1830, Murry and Helvey purchased from the Wabash & Erie Canal Commissioners, and secured a certificate of purchase for, 88 55-100 acres of land, including the tract in controversy; that on the 4th day of May, 1833, they assigned said certificate to said Tipton, who, on the 18th day of December, 1834, procured a patent for said lands. However, as appears from the appellees' evidence, said Murry and Helvey, before they transferred said certificate, and on the 29th day of May, 1832,

laid off, platted, certified, and recorded in the proper recorder's office, a plat of the town of Huntington. By that plat a strip of ground, bordered on the south by Little river, on the east by Guilford street, on the north by State street, and on the west by a line 66 feet east of Warren street, was laid out and designated as the "Burying Ground." October 20, 1835, the tract in dispute was transferred, with other lands, to Morse and Beardsley, by a deed executed by Elias Murry, as attorney in fact for said Tipton. Thereafter, and at a time not well defined in the record, burials were made on another tract on the north side of Little river, and a few rods west of the tract designated on said plat as the "Burying Ground." No authority for such use appears from the record. This tract adjoins on the east the tract in dispute, and the principal point of difference between the parties is as to whether the tract is and has been a part of said second burial ground. However, the question, while involving surveys, plats, location of highways, and other transactions, properly turns upon the existence of fences about said second burial ground as defining its boundaries. Treating the location of graves upon this tract as a trespass, or as a mistake for the tract platted and dedicated, or by the acquiescence of the parties, the right may not be so enlarged as to extend it beyond the limits of the tract inclosed, maintained, and used for the purposes of burial. This point of difference is a question of fact, and the jury heard the evidence, which was conflicting, and, by the general verdict, found in favor of the appellees. We cannot weigh that conflicting evidence to determine whether the jury decided correctly.

Objection is made here to the rulings of the circuit court in admitting in evidence the power of attorney of Tipton to Murry; the plat of the town of Huntington by Murry and Helvey; the deed by Murry, as attorney in fact for Tipton; the complaint, answer, proceedings, and commissioners' deed in an action by Milligan against Woods for specific performance; a deed from Morse to Milligan; a deed from Milligan to Slusser; Slusser's plat of the ground in dispute; Slusser's deeds to the appellees and their grantors; and other testimony of like character. The manifest object in the introduction of all of this testimony was to show that the appellees held by color of title. The objection that the evidence did not show title, because the power of attorney did not sufficiently describe the tract in dispute or the deed under that power, because of the weakness of the power of attorney; that Woods and Morse were not shown to have title when, under the proceeding to enforce specific performance, Wood's conveyance was made, and when Morse executed his deed; and like objections,—are of no avail, because said title papers are sufficient to give color of title. *Bell v. Longworth*, 6 Ind. 273; *Vancleave v. Milliken*, 13 Ind. 105; *Doe v. Hearick*, 14 Ind. 242; *Bauman v. Grubbs*, 26 Ind. 419; *Brenner v. Quick*, 88 Ind. 552. The statute of limitations applies to defective

titles and imperfect sales, and, if it did not, there would be no purpose in the statute. *Hatfield v. Jackson*, 50 Ind. 507; *Brown v. Maher*, 63 Ind. 14; *Ray v. Detchon*, 79 Ind. 56; *Bank v. Corey*, 94 Ind. 457; *Roots v. Beck*, 109 Ind. 472, 9 N. E. Rep. 698; *Sedwick v. Ritter*, 128 Ind. 209, 27 N. E. Rep. 610. Slusser purchased on the 14th day of January, 1861, and platted the ground in dispute; and thereafter, in March, 1863, and in August, 1867, sold under his plat the lots now in dispute. If we do not go back of Slusser's purchase, we find abundant time to preclude the appellants under the 20-years limitation, this action having been instituted on the 5th day of April, 1887. We do not understand the appellants as contending that the statute of limitations would not bar their action, unless it may be held that their rights were postponed by the interposition of some right in the public to the lots in dispute. As we have seen, the public held no right by dedication, possession, or user, as found by the jury, upon testimony of a conflicting character. Many questions are included within the discussion of counsel, but all are in line with the conclusion we have reached upon the questions particularly stated. We find no error in the record for which the judgment should be reversed, and it is therefore in all things affirmed.

(134 Ind. 453)

## McALLISTER v. HENDERSON.

(Supreme Court of Indiana. May 16, 1893.)

INJUNCTION—RESTRAINING DESTRUCTION OF DITCH—SUFFICIENCY OF ANSWER—QUIETING TITLE—NEW TRIAL AS OF RIGHT.

1. In a suit by one adjoining landowner to restrain another from obstructing a ditch, the answer alleged that the owners of the adjoining farms, by agreement, constructed a tile ditch to drain the water which would naturally flow into it from the farms; that plaintiff, without defendant's knowledge, lowered the ditch on his land, and made lateral drains, and thereby caused water to flow into the ditch which did not naturally belong there; that thereby defendant's land was flooded, and in order to stop the flow defendant dug up a part of the ditch. *Held*, that the court properly overruled a demurrer to the answer, since it showed that plaintiff did not come into equity with clean hands. *Coffey, C. J.*, dissenting.

2. Where plaintiff alleges that he has an easement in land, and that defendant is denying the right and attempting to destroy it, and that the denial and attempt is casting a cloud on his title to the easement, and prays for an injunction, and that his title be quieted, the defeated party may claim a new trial, which may be had as of right in actions to quiet title.

Appeal from circuit court, Montgomery county; E. C. Snyder, Judge.

Action by Marshall J. McAllister against Andrew J. Henderson to restrain defendant from destroying a ditch, and to quiet plaintiff's title to an easement to flow water through defendant's land. Judgment for defendant, and plaintiff appeals. Reversed.

Thos. F. Davidson and Jere West, for appellant. Craue & Anderson, for appellee.

OLDS, J. This is an action by the appellant against the appellee to enjoin the obstruction of a certain tile ditch, commencing at a pond on the land of the appellant, and terminating on the land of the appellee, which had been constructed, by agreement of the parties owning the land at the time of its construction, for the purpose of draining their land, and subsequent grantees purchased with knowledge of the drain. The complaint alleges the facts showing that the parties were adjacent landowners, and that, for the purpose of draining certain of their land through and along the natural outlet for the water to flow, it was mutually agreed between them that they should construct a tile drain, each constructing that portion which was located on his own land respectively, commencing at the pond upon the land of the appellant, and extending to and upon the land of the appellee, and then terminating in an open drain, where it had an outlet, and that they did so construct the said drain at a large expense to each of them; that appellee had without right dug up and taken out the tile to the distance of a few rods of the ditch on his own land, and near to appellant's land, and filling it in with earth, thereby obstructing the ditch, and stopping the flow of water, causing the water to back up and overflow appellant's land and render the land, otherwise good for cultivation, entirely worthless for such purposes. It is further formally alleged that the appellant has an easement in the land of the appellee through which the ditch passes, which consists in the right to flow water through said drain, which appellee denies, and casts a cloud upon appellant's title thereto. Prayer for quieting the title to his easement, for a mandatory injunction requiring the appellee to restore the ditch to its original condition, and that he be enjoined from further interference therewith. No question is presented as to the sufficiency of the complaint. To the complaint the appellee answered in two paragraphs—First, in denial; and, second, as follows: "For a second and further paragraph of answer herelu, defendant says that he admits that in the year 1877, one Atwell Mount, the then owner of the lands now owned by defendant, constructed a tile drain of six-inch tile from the south line of his said land to the point near to the barn as alleged in the complaint, and he avers that said tile drain so constructed was sufficient to carry off of defendant's land all surface water which naturally flowed upon said land and made said land susceptible of cultivation. That afterwards, in the following year, plaintiff's grantor, Jesse McAllister, constructed a tile drain on his land from the pond mentioned in the complaint to the south end of said Atwell Mount's drain, and joined and connected the same thereto, making a continuous drain from said pond to said point near to said barn. That after the construction of said drain by said Jesse McAllister, the tile drain on defendant's land was sufficient to and did carry all the surface water that it had theretofore carried, and in addition thereto the water discharged by

said McAllister's drain, but said water taxed said drain to its utmost capacity. That afterwards, to wit, in the year 1887, plaintiff's grantor, Jesse McAllister, without the knowledge or consent of the defendant or his grantor, took up his part of said drain between said pond and the drain on defendant's said land, and lowered the same about two feet, so as to more effectually drain said pond and his said land, and constructed on his said land about two hundred rods of lateral drain draining into his said drain and into said pond, as a sort of catch basin, a large amount of water that did not naturally or before that time flow into said pond and into said drain. That the drain on defendant's land was not sufficient to carry off the large amount of water thus thrown into it by the lowering of said drain on plaintiff's land, and the construction of said lateral drains, and, by reason of said water being thus cast into his said drain, the same was rendered useless to him and to his said land, and his said land was overflowed, and a large part thereof rendered unfit for cultivation. That in order to reclaim his said land, and enable his said drain to carry the surface water from said land as it was originally intended to do, and as it had done prior to the acts of the plaintiff and his grantor in lowering their said ditch and constructing said lateral drains and throwing additional water into defendant's said ditch, defendant took up a rod and a half of his said tile and filled the ditch in as alleged in the complaint. That before defendant took up said tile and filled in said ditch, he notified plaintiff and plaintiff's grantor that the lowering of said drain and the construction of said lateral drains and the consequent pouring into his drain of the additional water rendered his drain useless to him, and rendered his lands wet and unfit for cultivation, and asked plaintiff to relieve him and his said lands of this burden, but plaintiff refused to do so. Wherefore defendant asks judgment for costs." To the second paragraph of answer the appellant filed a demurrer, which was overruled, and exceptions reserved, and this ruling is assigned as error. By this ruling the question is presented as to whether the appellant is entitled to the relief sought under the facts as shown by this answer. It shows a state of facts, more briefly stated, as follows: The owners of the land, by agreement, constructed a tile drain from a pond on the land owned by the appellant, extending onto and having an outlet on the land owned by the appellee, to drain the water from the lands of the two parties which naturally flowed into and through the drain so constructed. The ditch as constructed was sufficient to and did carry off the water naturally flowing into and through the ditch, and rendering the land so intended to be drained by said ditch suitable for cultivation, and performed the purpose and accomplished the object for which it was constructed, for the period of two years, yet in so doing it taxed the drain to its full capacity. Contrary to the arrangement and object and purpose for which the ditch was so constructed, the

appellant or his grantee, the then owner of the land now owned by the appellant, upon which the pond was situated, lowered the ditch upon his land two feet, and constructed lateral drains turning into the drain and into the pond, and thence into the drain, a large quantity of other water which did not naturally, or previous to the lowering of the ditch, and the construction of the lateral drains, flow into or through said ditch, thus overtaxing the tile ditch, storing the water in the catch basin or pond at its head, and feeding it from above the appellee's land, so as to render it useless for the purpose for which it was constructed, in so far as the benefit to the appellee and his lands are concerned, and rendering his land so drained by it unfit for cultivation. The appellant having mixed or intermingled and caused to flow together on his own lands, and from thence into the drain, water which he had no legal right to turn into and have flow through said drain with those which had the right to flow through said drain, causing a surplus of water, overtaxing the drain, and rendering it useless for the purpose of draining appellee's land, the appellee, having no means of stopping the flow of the surplus, which the appellant had no right to cast upon his land through said ditch, without shutting it all off, took up a portion of the ditch, and stopped the flow altogether. The appellee, no doubt, had a legal remedy for this breach of duty on the part of the appellant, but not desiring to resort to it, and adopting the summary remedy which he did, is the appellant in a position to enforce in a court of equity his right to the use of the drain, when it appears that to do so and to open the drain at all will cast upon the appellee water which has no right to flow through said drain, or into or upon or across the lands of the appellee? The facts pleaded in the answer show that the appellant has without right caused the waters which would lawfully flow through the drain and the water having no right to flow through it to intermingle and mix at the head of the tile drain, causing a surplus, affecting injuriously the lands and the rights of the appellee; and to open the drain the waters from the various sources must necessarily flow through the drain together, and are inseparable; and the pond affords a reservoir at the head of the tiledrain, supplying the drain to its full capacity for a longer time than necessary to carry off the water which of right flows through it, and destroys its usefulness to appellee's land. It occurs to us that the ruling of the lower court was right,—that the appellant comes into a court of equity with stained hands; that he comes not only to enforce a right, but to enforce likewise a wrong, and to profit by his wrongful act; that he asks a court of equity to compel the appellee to open up the drain and refrain from interference with it, when to do so will permit the water, which by his act he has wrongfully caused to flow into the drain at its head, to flow through the drain into and upon appellee's land. This is contrary to all principles of equity. It is one of the very first principles of equity

that he who asks equity must do equity; that a party coming into a court of equity must come in with clean hands, free from wrong himself in relation to the matter in which he asks equitable relief. Appellant has voluntarily put himself in a position where he cannot have the relief to which he is entitled, except he profit by his own wrong, and this being the case a court of equity will not aid him. *Harrison v. Haas*, 25 Ind. 281; *Jones v. Ewing*, 107 Ind. 313, 6 N. E. Rep. 819. The appellant was entitled only to such rights as the original construction of the drain in accordance with the arrangement or agreement in relation thereto gave to him, and this right he might have enforced had he remained in a position to have done so,—had he not voluntarily put himself in a position where the enforcement of such right would necessarily give him the benefit of the wrong he committed, and allow the water he wrongfully turned into the pond and drain to have flowed through it. *Outhank v. Railroad Co.*, 71 N. Y. 194; *Bannon v. Angier*, 2 Allen, 128; *Jennison v. Walker*, 11 Gray, 423; *Wynkoop v. Burger*, 12 Johns. 222. The conclusion reached in this case is not in conflict with the decision in *Ferguson v. Spencer*, 127 Ind. 66, 25 N. E. Rep. 1035, holding that a license of this character is irrevocable; our decision in this case being based upon the theory that appellant had voluntarily put himself in a position where he could not be granted the equitable relief asked without profiting by his own wrong, as in the decision fully shown.

There is a further question presented by the record. The complaint alleges specifically that the appellant has an easement in the land consisting of the right to flow water through said drain, and that appellee is denying said right, and is attempting to destroy said drain, which denial and attempt are wrongful, and cast a cloud upon appellant's title to such easement, and the prayer asks to have such title quieted. It has been held by this court that an action will lie to quiet the title to an easement. *Sanxay v. Hunger*, 42 Ind. 44; *Davidson v. Nicholson*, 59 Ind. 411. It has further been held that the right to a new trial as of right exists in actions to quiet title. *Bisell v. Tucker*, 121 Ind. 249, 23 N. E. Rep. 81; *Hammann v. Mink*, 99 Ind. 279; *Shuman v. Gavin*, 15 Ind. 93; *College v. Wilkinson*, 89 Ind. 23; *Hunter v. Chrisman*, 70 Ind. 439; *Earle v. Peterson*, 67 Ind. 503; *Zimmerman v. Marchland*, 23 Ind. 474; *Shucraft v. Davidson*, 19 Ind. 98. The appellant moved the court for new trial as of right without cause, and filed an undertaking for costs as required by the statute, and the court granted a new trial, making the proper order. Afterwards the appellee filed a motion to vacate the order granting the new trial, which motion was sustained, and the order granting a new trial was vacated and set aside. To this latter ruling and action of the court the appellant excepted, and this ruling is presented for review by this court. It is stated by counsel for appellee that this ruling was made on the authority of *Hall v. Hedrick*, 125 Ind. 326, 25 N. E. Rep. 350, which they regard as sustaining

the action of the court in vacating. The order was vacated soon after the decision in that case was rendered. If the action of the court was based upon the decision in that case, it is evident that, the action being taken before the decision was reported, the trial court must have acted upon an erroneous abstract of the opinion. A careful examination of the opinion will disclose the fact that it does not sustain the action of the court in holding that the appellant was not entitled to a new trial. The case of *Hall v. Hedrick*, supra, was simply an action to enjoin the obstruction of a right of way over and across the land of another. The complaint in that case did not seek to quiet the parties' title in the easement, while in this case that specific relief is prayed for. If all the relief the appellant sought in this case was an injunction, he would not be entitled to a new trial as of right without cause; but he does more; he asks to have his title quieted, and to enjoin any obstruction of or interference with his rights by the appellee. The court erred in vacating the order granting a new trial, and for this error the judgment must be reversed. Judgment reversed, with instructions to the circuit court to set aside the order vacating the order granting the appellant a new trial, and to grant him a new trial as originally ordered, and for further proceedings in accordance with this opinion.

COFFEY, C. J. I dissent from so much of this opinion as holds that the court did not err in overruling a demurrer to the answer of the appellee.

(124 Ind. 483)

McKEEN et al. v. PORTER et al.

(Supreme Court of Indiana. May 10, 1893.)

HIGHWAYS—BY USER—EVIDENCE—DEDICATION—INSTRUCTIONS—ASSIGNMENTS OF ERROR—PLEADING—AMENDMENT.

1. It is not an abuse of discretion, in a proceeding for the ascertainment of a highway, which has been used as such without record, to allow an amendment changing the description so as to shift somewhat the location of the way, although there has already been one trial, and the petitioners have once before amended their petition in the matter of description.

2. The fact that assignments of error in a cause originally appealed to the circuit court of a county, but afterwards changed to the circuit court of another county, from which an appeal is taken to the supreme court, fail to specifically allege in which court the errors were committed, does not render the assignments insufficient.

3. On an application to establish a highway under Rev. St. 1881, § 5035, on the ground of user, it is competent to prove facts tending to show dedication, as well as user.

4. Although evidence of dedication may be shown in such case as corroborative of user,—the question in issue,—it is not proper to bring the question of dedication before the jury, and instruct as to what constitutes; the application not being based on the theory of dedication.

5. Instructions on which are noted "Given" or "Refused," exceptions of the parties, date, and signature of the judge, and which are contained in the bill of exceptions, are in the record.

Appeal from circuit court, Fulton county; George Burson, Special Judge.

Suit by Oscar R. Porter and others against William R. McKeen and the Terre Haute & Logansport Railroad Company. Judgment for plaintiffs. Defendants appeal. Reversed.

H. Corbin, S. Parker, and R. B. Oglesbee, for appellants.

McLaren & Martindale, for appellees.

The assignments of error present no question for consideration. Elliott, App. Proc. § 306, and note 2; Smith v. Smith, 106 Ind. 43, 5 N. E. Rep. 411; Rev. St. 1881, § 655.

OLDS, J. The appellees filed their petition under section 5035, Rev. St. 1881, for the purpose of having a certain alleged highway ascertained, described, and entered of record. The highway sought to be established is situate in Marshall county, Ind. The petition was filed with the board of commissioners of said Marshall county, and asked the board to proceed to have the public highway in said petition described, which has been used as a public highway for more than 20 years last past, but which has not been recorded, ascertained, described, and recorded; describing the highway; alleging that lands of certain named persons would be affected, and that notice had been given. An appeal was taken to the Marshall circuit court, where one trial was had. The venue was then changed to the Fulton circuit court, where a trial was had, resulting in favor of the appellees, and establishing a highway, and from the judgment rendered in the Fulton circuit court this appeal is prosecuted. Some preliminary and minor questions are suggested, but not discussed, and we deem it unnecessary to consider them. The questions discussed are such only as arise on the ruling of the court in overruling the motion for new trial.

The first question discussed relates to the ruling of the court in permitting the appellees to amend their complaint, during the trial of the cause in the Fulton circuit court, by changing the description of the road, changing it so as to locate the highway further to the east, placing it all on one side of the section line, instead of a part on either side, and making it 40 feet wide, instead of 30 feet wide, as originally described; and it is contended that this was an abuse of the discretion of the court in the matter of allowing amendments to pleadings, in view of the fact that there had been one trial previous to the amendment, and appellees had once before amended their petition in the matter of description, while it was pending in the Marshall circuit court. While allowing the amendment at so late a date in such a protracted litigation is holding to a very liberal rule in the matter of amendments, yet all the parties were in court; the change made was only to shift the location of the highway a portion of the width of it to the east. We do not see how it could have operated injuriously to the rights of the appellants,

and, under the liberal rule of practice in this state sanctioned by the decisions of this court, it was not an abuse of discretion to allow the amendment to be made. See Burns v. Simmons, 101 Ind. 557, 1 N. E. Rep. 72; Metty v. Marsh, 124 Ind. 18, 23 N. E. Rep. 702.

It is proper that we should state that the appellees contend that there is no proper assignment of error to present any question in this case, for the reason that the record shows that the cause was originally appealed to the Marshall circuit court, and the venue afterwards changed to the Fulton circuit court, from which last-named court the appeal is prosecuted, and the assignment of error does not specifically allege in which court the alleged errors were committed, and cite some authorities in support of this position. The authorities cited are not in point in this case. They are to the effect that when a cause has been transferred from one court to another, and an appeal prosecuted, and errors assigned, naming in the assignment of error the court which it is alleged committed the error, if the ruling was made by the other court in which the cause was pending no question is presented; as in this case, if it was alleged in the assignment of error that the Fulton circuit court erred in a ruling which that court did not make, but which was made by the Marshall circuit court, no question would be presented. There is some reason for this rule, for, by specifically naming the court that it is alleged committed the errors, it would limit the right to challenge any ruling of the other court; but, even in that case, the rule is somewhat technical, for the record would have to show if such a ruling was made, and in which court it was made, and the mistake would be apparent. While we do not desire to interfere with the rule as established, (Elliott, App. Proc. § 306; Smith v. Smith, 106 Ind. 43, 5 N. E. Rep. 411,) yet we do not desire to extend it. In this case the appeal is prosecuted from the Fulton circuit court, and the assignment of error alleges that the court erred in certain rulings. If the assignment of error be limited to the rulings made by one court, it is limited to the rulings made by the court from which the appeal is prosecuted; and it was in that court that the trial was had, and the judgment rendered against the appellants, and in which the motion for new trial was made and overruled, on which ruling the alleged errors are predicated. The better practice, no doubt, is to specifically name the court which it is alleged erred in its ruling, naming the court which made the ruling alleged to be erroneous; but we think a general assignment, as in this case, is sufficient, as the record itself must show the rulings, and by which court they were made.

The next question discussed relates to the introduction of evidence arising on motion to strike out a portion of the deposition of one Reuben F. Shirley, being certain questions and answers which it is contended tended to prove, and were propounded and answered for the purpose of

some of them to prove, that the highway sought to be established had been laid out in the first instance, and others, that it had been opened up, fenced, and dedicated by the owner of the land as a public highway; it being contended that section 5035, *supra*, recognizes two classes of highways, one which has been laid out, but not sufficiently described, and another such as has been used for 20 years, but not recorded, and that the petition in this case limited the investigation in this case to the question as to whether the highway had been used for 20 years, by the averments in the petition placing the grounds for the proceedings on the ground of user alone, and it was immaterial how the road came into existence, whether by an attempt to lay it out, or by dedication, and hence no evidence can be introduced tending to prove that the road was laid out or was dedicated by the owner of the land; that the inquiry is limited exclusively to the question of user. The section of the statute, 5035, *supra*, is somewhat peculiarly worded, but it is immaterial in this connection whether or not it will bear the construction placed upon it by counsel for appellants. Even with such a construction, we do not think there was any error in the admission of the evidence complained of. Under the averments of the petition that it had become a public highway by 20 years' continuous user as such, it would be competent to prove the facts in relation to the opening up of the highway, whether it was fenced as a highway by the owners of the land, or whether some proceedings were had followed by its being opened up and worked by the supervisor. The case proceeds upon the theory that there is no record of valid proceedings by which the highway was established. It is a proceeding to establish a nonrecorded highway, and have it ascertained, described, and recorded. The testimony objected to does not show or tend to establish any proceedings before the board of commissioners establishing the highway, except it may be one question asked by counsel for appellants on cross-examination, and counsel cannot make available error by propounding improper questions and eliciting improper evidence, or complain if, after he has done so, the court will not strike it out. The extent of the testimony objected to is that it tends to prove that the owner of the land opened the road up for the use of the public, and may tend to show that he dedicated it to public use, and then followed by evidence as to its user, and there was no error in its admission. It would be a very technical rule, in a case where, on a certain day, the owner of land opened up a highway across his land, fenced it out to the public, for the use of the public, and from that date forward it was used and repaired as a public highway, which would hold, on an application, such as this, to establish the road on the grounds that it had been used for 20 years, that the petitioners might prove the user back to the day it was opened, but that they could not show that on that day the road was opened up and fenced as a public highway by the owner of the land.

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Such fact is strongly in corroboration of the user of the highway, explanatory of its use, and tends to fix a date when such user commenced, and is, we think, clearly legitimate to be shown. True, the highway may be ascertained, described, and recorded by proof of user alone, but that does not make the other testimony incompetent.

A more serious question arises on the instructions given and refused in the case. Objection is made by counsel for appellees that the instructions are not properly in the record, so as to be considered by the court; but in this counsel are in error. The instructions are in the record, and on the margin of each it is noted "Given" or "Refused," according to the fact, and excepted to at the time by plaintiff or defendant, as the fact was, and dated and signed by the judge. In addition to this, they are brought into the record by bill of exceptions, showing the exceptions to such of the instructions which were excepted to by the appellants. As we have shown, the appellees alleged in their petition and sought to have the highway ascertained, described, and recorded on the sole ground that it had become a public highway by reason of 20 years' user as such. Issues were joined by a denial to the petition. Under the issues joined on this petition, it was immaterial whether there had been any dedication or not, or any attempt to lay it out. It would become a highway, and appellees would have just as great a right to the relief asked, in case the use of the highway had been without the consent or over the objection of the adjoining landowners, as if it had been dedicated by them, if it had been continuously used as such for the 20 years. While testimony tending to prove that it had been opened up and dedicated at a certain time a certain width would be proper to show the time when the user commenced, and be corroborative of the fact that it was treated as a public highway, and used as such to that width, yet the legal right to recover under the petition in this case, under the statute, must rest on the 20 years' user. *Strong v. Makeever*, 102 Ind. 578, 1 N. E. Rep. 502, and 4 N. E. Rep. 11; *Ice Co. v. Lay*, 103 Ind. 48, 2 N. E. Rep. 222.

There were instructions given to the jury in this case which were clearly calculated to mislead the jury, bringing before the jury too prominently the question of dedication, and from which they might have inferred that, if the highway had been once dedicated, the landowner dedicating the same to the public, and those claiming under him, would be estopped from defending or objecting to having the highway described and recorded. The court, at the request of the appellees, gave the following instruction: "No. 1. The court instructs you that a dedication is the setting apart of the land for the public use; that a dedication must be accepted by the public within a reasonable time. Dedication may be either express or implied. An express dedication is where the owner by some act or manifestation of his purpose to dedicate the land to the public use. An implied dedication is where the owner by



act or course of conduct by which his intention to dedicate may be implied, and it arises by operation of law from the acts of the owner. It may exist without express grant, without any writing, without any form of words, oral or written. The law considers it in the nature of an estoppel in pais, and holds it when once dedicated, either expressly or impliedly, and accepted, to be irrevocable." We need not approve or disapprove this instruction as an abstract proposition of law, and hence do neither. See Elliott, Roads & S. p. 85. This instruction had no application to the issues in this case. If, under the issues in this case, the appellees were entitled to have had the relief asked in case they established a dedication by the landowners, and an acceptance by the public, then an instruction of the character of this, correctly stating the law, would have been proper; but, under the issues in this case, it was immaterial whether or not the road was dedicated and accepted. The proceedings were not based on the theory of dedication, and there could not be any recovery on such grounds, though proof of dedication, or tending to show dedication, might be proper, as corroborative on the question of user.

The first instruction given by the court on its own motion contains a description of the alleged road, differing in some respects from the description in the petition, but, at the close, states the issue presented correctly; but in the third instruction the court again brings prominently before the jury the question of dedication, and instructs the jury as to what will constitute a dedication. The appellants asked the court to give numerous instructions, which were refused. In view of the fact that the evidence as to the dedication was admitted, instruction 13 requested should have been given. It states, in effect, that the jury has been permitted to hear the evidence as to acts and declarations of Shirley, who, it is claimed, at one time owned the land over which the alleged highway passes, tending to show that he set his fences so as to leave this land out for the use of persons who desired to travel over it, and the public road authorities did some work upon the land to make and keep the way in repair; that such evidence was competent, as tending to show that the land became a highway, its continuous and uninterrupted use by the general public, without objection, for a period of 20 years or more, but should be considered only in relation to the question at issue, as to whether it became a public highway as the result of such use; that in a proper case such evidence would be proper, as tending to establish a dedication, but that is not the issue in this case, but the issue is as to whether or not the road became a public highway by continuous use for over 20 years. The instruction correctly stated the law and the issues, and should have been given. Especially this instruction should have been given, in view of the fact that the other instruction to which we have referred in relation to dedication was given. The verdict finds that the road was dedicated, and was ac-

cepted. It is, we think, clearly apparent that this case was placed before the jury in such a way and upon the theory that the appellees had the right to recover in case there had been a dedication, and such was not the issue joined in the case, and the case was tried upon the wrong theory. The court erred in giving the first instruction requested by the appellees, and in refusing to give the thirteenth instruction requested by the appellants, and for these errors the judgment must be reversed. The other questions presented may not arise on a retrial of the cause; hence we do not consider them. Judgment reversed, with instructions to the court below to grant a new trial, and to proceed in accordance with this opinion.

(124 Ind. 503)

**MORARITY v. CALLOWAY et al.**

(Supreme Court of Indiana. May 17, 1893.)

**RES JUDICATA.**

A decree in an action against plaintiff setting aside a deed of land by defendant's grantor to him, and quieting her title thereto, is a bar to subsequent action by him to have declared and enforced a lien on such land for taxes paid out by him, and for improvements made thereon.

Appeal from circuit court, Tipton county; W. R. Fertig, Special Judge.

Action by Daniel Morarity against Benjamin F. Calloway and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Beauchamp & Mount and Gifford & Flippen, for appellant. Waugh & Kemp and Goodykoots & Ballard, for appellees.

**COFFEY, C. J.** This was an action by the appellant against the appellees to have a lien declared and enforced against the land described in the complaint for certain sums of money paid by him for taxes, and for improvements made on the land by way of ditches. Upon the issues formed on the several pleadings in the cause, the court found for the appellees.

It is assigned as error that the court erred in denying the appellant a new trial. The only matter discussed by counsel relates to the question as to whether the appellant is estopped from asserting the lien which he sets up in his complaint. It appears from the evidence in the cause that the land described in the complaint was conveyed by the appellees King and King to the appellant, on the 3d day of June, 1879. King and King, at the time of the conveyance, were husband and wife, and held the land by entireties. At that date Phoebe King, the wife, was a minor, under the age of 21 years. She became 21 years of age on the 4th day of April, 1881, and at once repudiated the conveyance made by her and her husband, and served upon the appellant a written notice of her election to avoid the deed on account of her minority at the date of its execution. She subsequently brought suit in the Clinton circuit court to set aside the deed, and quiet her title to the land, in which action she was successful. After quieting her title, she and her husband conveyed the land

to the appellee Calloway. During the time the appellant held the land under the deed from King and King, he purchased the same at a sale for delinquent taxes. He also performed labor in the construction of a public ditch during that period, for which the land had been assessed. These are the matters for which he seeks to recover in this action. It is contended by the appellees that appellant is estopped by the decree quieting title from now asserting any lien on the land existing prior to the date of such decree; while the appellant contends that, as the primary object of that suit was to avoid the deed executed by Phoebe King while a minor, no such estoppel exists. We are of the opinion that the decree quieting title as against any claim to the land described in the complaint held by the appellant at the time such decree was rendered estops him from now asserting such claim. Of course the appellees were never personally liable on the claims set up in the complaint, and the only means by which the appellant could enforce them was by a decree declaring them a lien upon the land. If they were valid liens, they should have been set up by way of cross complaint in the action to quiet title, and saved from the operation of the decree. *Green v. Glynn*, 71 Ind. 336; *Hawkins v. Taylor*, 128 Ind. 431, 27 N. E. Rep. 1117. To permit the appellant to assert these supposed liens now would be to hold that the title of the appellees to the land described in the complaint was not quieted, notwithstanding a general decree of a court of competent jurisdiction to the effect that such title is quieted as against all claims of the appellant. In our opinion, the court did not err in overruling the motion of the appellant for a new trial.

Judgment affirmed.

(134 Ind. 463)

CINCINNATI, H. & I. RY. CO. v. MADDEN.

(Supreme Court of Indiana. May 17, 1893.)

MASTER AND SERVANT—NEGLIGENCE OF MASTER—PLEADING—RISKS OF EMPLOYMENT—REVIEW ON APPEAL—CONFLICTING EVIDENCE—APPEAL—ASSIGNMENT OF ERROR.

1. In an action for personal injuries against a railroad company, the complaint alleged that plaintiff, an employe, at the command of another employe, his superior, was unloading rails from a train; that the train was in the hands of a reckless and incompetent engineer, to defendant's knowledge; that plaintiff was ignorant of his character; that while at work the engineer negligently and without warning caused the train to back suddenly, throwing plaintiff under the car, and causing the injuries complained of. *Held* to state a cause of action.

2. Such complaint further alleged that plaintiff at the time of the injury was employed as trackman; that he was ordered by a coemploye to assist in unloading rails from a train,—work which was out of the line of his duty, and much more hazardous than that which it was his duty to perform; that while thus engaged he received the injuries complained of. *Held* to state a further cause of action.

3. A verdict will not be disturbed on appeal because of conflicting evidence, where the evidence tending to support it, when considered alone, is sufficient to justify the jury in finding it.

4. Though it appeared that there was snow

and ice on the cars from which the rails were to be unloaded, the danger of the work in unloading them cannot be said to be so apparent as to charge plaintiff with contributory negligence in obeying orders to unload them.

5. An assignment of error on motion for a new trial embracing several instructions can be sustained only by showing that the instructions are all bad.

Appeal from circuit court, Henry county; E. H. Bundy, Judge.

Action by Patrick Madden against the Cincinnati, Hamilton & Indianapolis Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

R. D. Marshall and Beer L. Smith, for appellant. W. A. Cullen and U. D. Cole, for appellee.

MCCABE, J. This was an action by the appellee against the appellant for a personal injury. The complaint was in three paragraphs, a demurrer to each of which was sustained as to the second, and overruled as to the first and third paragraphs. Answer by general denial, trial by jury, verdict for appellee, on which judgment was rendered over a motion for a new trial. The errors assigned here, and not waived by failure to argue them in appellant's brief, are overruling the demurrer to first and third paragraphs of the complaint and overruling the motion for a new trial. The material allegations of the first paragraph of the complaint are as follows: "That the plaintiff entered the service of said defendant as a track hand in 1868, and continued in said service over seventeen years, to the 27th day of December, 1886. That throughout said period he served as section boss of section number eleven, and his duty, with the assistance of a gang of men who were under his control, consisted in caring for the track generally, cutting weeds, tamping ballast, watching for and removing impediments from the track, walking the track, putting in new ties, removing broken or worn rails, and any other labor required in the care and preservation of the track. Such were the duties for which he was hired, and which he agreed to perform. That at the same time said defendant was managing, running, and operating locomotive engines and cars of said defendant over and upon the railroad track of said defendant. That plaintiff had nothing whatever to do with the management, running, and operating said locomotive engines of said defendant, nor had he any right, power, or authority to give any orders or directions in reference to the running, managing, or operating of the locomotive engines, but that he was hired to and he engaged to perform only the ordinary duties of a section boss or employe in charge and control of the track or section number eleven of defendant's road. That on the 27th day of December, 1886, the defendant, by one H. Pierce, then acting in the capacity of supervisor of the division from Hamilton, Ohio, to Indianapolis, Ind., of defendant's railroad, a servant of the defendant, and having full control and charge of said railroad in its care and repairs, with full control of all hands and men employed upon and in the care

and repairs of the road, with power of discharge and employment, and having on said 27th day of December, 1886, full charge and control of a construction train running upon the road of defendant for the purpose of distributing steel rails upon the line thereof, the object being to lay the track anew with steel rails, directed and required and compelled the plaintiff to assist in unloading steel rails from the construction train aforesaid, such employment being then and there wholly different from and outside of the service he was employed to perform and much more hazardous than the work he had engaged and promised to do. That the engineer in charge of the engine hauling said train on said day, James Montgomery, was a careless, inexperienced, reckless, incompetent, and untrustworthy engineer, and was known to be such by defendant when he was hired as an engineer by defendant, and long before plaintiff received his injuries said Montgomery was known to defendant to be an incompetent, reckless, careless, and untrustworthy engineer, and, further, he might have been known to defendant to be such an engineer by the exercise of ordinary care and attention in the operation of the railroad, said Montgomery having shown his incompetency, carelessness, recklessness, and inexperience on many occasions prior to said day. That defendant did not exercise ordinary care and prudence in the employment of said engineer, and retained him in her service after she had notice of his said incompetency, and long after she might have known of such incompetency by ordinary care and attention, and prior to plaintiff's injury. That plaintiff did not know, and had not the means to know, prior to said 27th day of December, 1886, of such incompetency. That the weather was very cold, and the season of the year entirely unfitted for the work of distributing steel rails. That the steel rails and car on which they were loaded were all covered with ice and snow, which added greatly to the hazard, peril, and hardship of the duty to be performed. That while so engaged, and wholly without fault or carelessness or negligence on his part, and while standing at the forward end of the car on which the steel rails were loaded, and while engaged in the act of turning the rails over, so that they could be taken hold of with tongs, suddenly, and without any warning by whistle or bell or voice, the train was jerked violently forward by the engineer, James Montgomery. That plaintiff was thrown off his balance, but managed to throw one foot across on the side board of the tender in such a way as to catch, when suddenly, and without warning of whistle or bell or voice, the engine was checked back by said Montgomery, and the plaintiff was again thrown off his balance, and fell down under the train with both legs on the rail between the wheels of the forward truck. That he instantly, with all his power, endeavored to pull his legs from under the car, but before he could succeed said engineer again jerked the train forward, and the wheel passed over plaintiff's left leg between the knee and foot, crushing and mangleing the limb in such a

manner that amputation was necessary, and amputation of his left leg below the knee was necessarily performed by the surgeons in charge. That all of said acts of said engineer in the management of said engine were careless, reckless, unskillful, and wholly incompetent. That said injury was inflicted on him wholly without fault or negligence on his part. That plaintiff was caused to suffer great pain, and rendered a cripple for life, helpless, and unable to earn a support for himself and family." The third paragraph is substantially the same, as appellant's counsel concede. There are two respects in which the sufficiency of the complaint may be considered, —one relating to appellant's negligence in employing an incompetent engineer, with knowledge thereof, and retaining him after notice of his negligence and incompetency, through which the alleged injury was brought about; and the other, the wrongful direction of appellant, through one of its employees clothed with authority so to do, by which appellee was compelled to undertake the discharge of duties other and different and more dangerous than those he had agreed to perform, through which the injury was brought about. These are elements of separate and distinct causes of action, though no question is made as to the propriety of uniting them in a single paragraph. The appellant's counsel in their brief have confined their attack on the complaint to the last point above mentioned, namely, the act of ordering appellee into a more dangerous service than that he had agreed to perform. But if the paragraphs are each good and sufficient to withstand a demurrer in regard to the alleged negligence in employing and retaining the engineer in service, with knowledge of his incompetency, then we need not inquire into the other question. The case of *Railway Co. v. Stupak*, 123 Ind. 210, 23 N. E. Rep. 246, was very much like this, and the complaint there in regard to the negligence of the railway company in the employment of the engineer was almost exactly like this, and at page 222, 123 Ind., and page 250, 23 N. E. Rep., this court said: "It is true appellee and Pool, the engineer, were fellow servants, and that ordinarily the master is not liable to his servant for an injury occasioned by the negligence of a fellow servant. But it is equally well settled that the master is bound to employ none but careful servants knowingly, and that where he negligently employs a careless or negligent servant, or negligently keeps in his employment a negligent or careless servant, after notice of such carelessness or negligence, he is liable to one of his servants injured by the negligence or carelessness of such servant;" citing in support thereof *Car Co. v. Parker*, 100 Ind. 181; *Bogard v. Louisville, etc., Ry. Co.*, Id. 491; *Robertson v. Railroad Co.*, 78 Ind. 77; *Capper v. Railroad Co.*, 103 Ind. 305, 2 N. E. Rep. 749; *Boyce v. Fitzpatrick*, 80 Ind. 526; *Coal Co. v. Cain*, 98 Ind. 282; *Manufacturing Co. v. Millican*, 87 Ind. 87; *Railway Co. v. Col-larn*, 73 Ind. 261; *Railway Co. v. Johnson*, 102 Ind. 352, 26 N. E. Rep. 200; *Pennsylvania Co. v. Roney*, 89 Ind. 453. It is alleged that the engineer Montgomery was

a careless, inexperienced, reckless, incompetent, and untrustworthy engineer, and was known to be such by defendant when he was hired as an engineer by defendant prior to plaintiff's injury, and that appellee was ignorant of that fact. This statement of facts brings the case within the well-recognized exception to the general rule that the master is not liable for injuries to one of his servants resulting from the negligence of a fellow servant engaged with him in the same department of the master's service or business. See, also, *Railway Co. v. Stupak*, 108 Ind. 1, 3 N. E. Rep. 630; *Railway Co. v. Dailey*, 110 Ind. 75, 10 N. E. Rep. 631; *Spencer v. Railway Co.*, 130 Ind. 181, 29 N. E. Rep. 915; *Rogers v. Leyden*, 127 Ind. 50, 26 N. E. Rep. 210. In *Railway Co. v. Harney*, 28 Ind. 28, the complaint, like the present, contained both elements of a cause of action, and though no question was made as to such union in a single paragraph, this court held the complaint good on both grounds. This court in that case said: "But in this case it is alleged that the son was at the time not engaged in the service he was hired to perform, nor indeed in a service which he or his father had consented that he should engage in; but on the contrary, that he was 'compelled' by the fellow servant to labor at a business much more perilous, and was injured while so engaged. There was then no opportunity to adjust the compensation with a view to the risk. There was no consent to perform the service on any terms. It was a compulsory service, and under such circumstances neither justice nor policy requires that the master shall be acquitted of responsibility. Then, again, a master ought to be bound to all the world to employ none but competent and trustworthy servants, so far as reasonable care in their selection can accomplish that end, and if he fails in this, knowing the incompetency or carelessness of those whom he takes into his service, he ought to answer to his other servants for the consequences which may result to them. The master has no right, either moral or legal, to impose upon them knowingly a needless peril." So, then, for both reasons, the complaint was sufficient. The acts charged against the engineer in the case at bar constituted negligence within the rule laid down in *Railway Co. v. Collarn*, 73 Ind. 261. We therefore hold that on both grounds the first and third paragraphs of the complaint each stated a good cause of action, and that the court did not err in overruling the demurrer thereto.

One of the grounds of the motion for a new trial is that the evidence does not support the verdict. It is claimed on behalf of the appellant that the charge that the engineer was a negligent and incompetent servant, and that appellant had knowledge of that fact before appellee's injury was received, is refuted by the great weight of the testimony. It may be that what appears here as the preponderance of the evidence on that question is against the charge; and yet, according to the well-established rule, it does not follow that the judgment must be reversed for that reason. The jury and the trial court are the best judges of the weight of the

evidence where there is a conflict in it, because they have vastly better opportunities and means of weighing and estimating the weight of conflicting evidence than this court has. The judge of the trial court has just as good an opportunity, and as efficient means of weighing the testimony as the jury has, and, though the jury are the exclusive judges of the weight of the evidence, that only lasts until their verdict is returned and a motion for a new trial is filed, in which is assigned as a reason therefor that the verdict is not supported by sufficient evidence. Then the trial judge becomes the judge of the weight of the evidence, and if in his opinion the preponderance of the evidence is against the verdict so strongly that he should have felt compelled to have found the other way, the law makes it his duty to grant the motion for a new trial. While it is sometimes strongly asserted that trial judges, for want of courage, shrink from this plain duty, yet the legal presumption is that the trial judge has conscientiously, faithfully, and courageously discharged his whole duty, and that presumption continues on an appeal until the contrary is made to appear by the record affirmatively in this court. Hence the propriety of the rule in this court that affirms the verdict if the evidence that tends to support it, considered alone, is sufficient to justify the jury in finding it. This court cannot know but that the jury had good and sufficient reasons for discrediting the evidence that conflicted with their finding, and, even if it were possible to suppose that the jury had made a mistake in weighing the evidence, the trial judge, we are bound to presume, has calmly and impartially reviewed it, after having heard it all, with the same means of observing the manner and appearance of the witnesses, and all other circumstances of the trial likely to aid in correctly weighing the evidence, and, by his action in overruling the motion for a new trial, says in effect to us that he thinks the weight of the evidence justifies the verdict of the jury. In this case there was evidence tending to support the verdict, and from which the jury might fairly have drawn the inference that the charge against the engineer of unskillful and negligent conduct was true, and that the appellant knew of that fact long before the appellee's injury occurred. But even if the evidence had failed to show that appellant knew of the unskillfulness and negligent habits of the engineer, through whose misconduct appellee received the injury complained of, yet the other ground of appellee's complaint is sustained without any material conflict in the evidence. He was employed and had served appellant over 17 years as a section boss, the duties of which required him to keep the track in repair with a gang of men under his charge. He was ordered by the supervisor of the road, clothed with authority over appellee and his section men, to hire and discharge, to help unload steel rails then being distributed along the road, with a view of relaying the track with such steel rails. This was entirely a different service from that he had contracted

and agreed to perform, and was much more hazardous and dangerous than the duties he had hired and agreed to perform. He neither objected nor consented to perform the more hazardous service, but simply obeyed the order of his master's vice principal; in other words, he obeyed his master, and commenced to discharge the more dangerous duties. In the discharge of those new duties, through the unskillful and negligent conduct of the engineer in charge of the engine hauling the train, he was thrown therefrom onto the ditch, and his leg crushed by the wheel of the car running over it, so that it had to be amputated, and this without any fault or negligence on appellee's part, unless his obedience to the order of his master was negligence. See *Wood, Mast. & S.* § 439. It has often been decided by this court that the risks and dangers ordinarily incident to the service which the servant has agreed by his contract with his master that he will perform are assumed by the servant, and in contemplation of law the servant has agreed to run those risks in consideration of which the rate of wages has been adjusted in the contract of hiring. *Railway Co. v. Harney*, supra; *Rogers v. Leyden*, 127 Ind. 50, 26 N. E. Rep. 210; *Railway Co. v. Adams*, 105 Ind. 151, 5 N. E. Rep. 187; *Railroad Co. v. Orr*, 84 Ind. 50. But where the master has ordered him to perform service other than that embraced in the contract of hiring, a very different rule prevails. In that case there is no implied agreement, as there is in the other, that the servant will take on himself the risks incident to that service. *Railway Co. v. Harney*, supra; *Hill v. Gust*, 55 Ind. 45. In *Railway Co. v. Adams*, supra, this court said: "As we have said, when, by the order of the master, the servant is carried beyond his employment, he is carried away from his implied undertaking to assume the risks incident to the employment. Hence it is that when a servant is thus, by orders of the master, put at work outside of his employment, and is injured by reason of defective machinery, railroad track, etc., without his fault, the master is liable, regardless of the care he may have exercised to keep the machinery, railroad track, etc., in safe condition. When a servant is thus ordered to work at a particular place, or with particular machinery, etc., outside of his employment, the master impliedly assures him, not only that he has exercised reasonable care to have the place, machinery, etc., in a safe condition, and fit for the business for which they are used." And we may add, in harmony with the principles thus announced, that the master, under such circumstances, impliedly assures the servant that he has also exercised reasonable care in the selection of the servants with whom such servant is to labor in the new service into which he is ordered by his master. It is insisted that, by obeying the order of his master and going into the new service, he thereby assumes the increased risks and perils of the new service. That would be in direct conflict with the three cases last above cited. The case last quoted from cites with approval *Railway*

*Co. v. Bayfield*, 37 Mich. 205, where Cooley, J., speaking for the supreme court of Michigan, said: "The fact that Williams was under no obligation to obey the order of Smith is not, in our opinion, sufficient to sustain the first proposition. When one person engages in the employment of another, he undertakes to obey all lawful orders, and he subjects himself, for any failure to do so, to the double liability of being expelled from the employment and of being required to pay damages. It is true the master has no right to direct him to do anything not contemplated in the employment, but when one thus contracts to submit to the orders of another, there must be some presumption that the orders he receives are lawful, the giving of the orders being of itself an assumption that they are lawful, and the servant who refused to obey would take upon himself the burden of showing a lawful reason for the refusal. This of itself is sufficient reason for excusing the servant who declines the responsibility in any case in which doubts can possibly exist; he should assume that the order is given in good faith, and in the belief that it is rightful; and if in his judgment it is unwarranted, it is not for the master to insist that the servant was in the wrong in not refusing obedience. Respect for the master, as well as a consideration for his own interest, may very properly induce him to waive his own judgment for that of his superior, and instead of engaging in disputes, and being perhaps ejected from his employment, to leave questions of doubt for future settlement." *Lalor v. Railroad Co.*, 52 Ill. 401, cited by this court with approval in the *Adams Case*, is directly in point, and supports the principle announced by the supreme court of Michigan just quoted. So, also, does *Hill v. Gust*, supra; *Mann v. Print Works*, 11 R. I. 152; *Railroad Co. v. Fort*, 17 Wall. 558. To obey the master's order in this case was not contributory negligence; therefore, unless the danger and peril to life and limb in the new service into which appellee was ordered was so glaring that "no prudent man would have entered into it, even where, like the servant, he was not entirely free to choose." *Stephens v. Railroad Co.*, (Mo. Sup.) 9 S. W. Rep. 589; 2 *Thomp. Neg. p.* 975, § 5. Mere knowledge that the new service was dangerous and even more dangerous than the old is not sufficient to charge the servant with contributory negligence, or an implied agreement to assume the risks thereof. *Rogers v. Leyden*, supra; *Railway Co. v. Trowbridge*, 126 Ind. 391, 26 N. E. Rep. 64; *Murphy v. City of Indianapolis*, 83 Ind. 76. It is objected that most of the cases holding the master liable for injuries sustained by his servant on account of the increased dangers of the new service into which he has ordered him have been cases where the servant was a minor, and of tender years and lack of discretion. It is true the minority of the servant, especially where he is so young as to be greatly wanting in experience and discretion, so that it would require a more glaring danger to charge him with contributory negligence in obeying the orders of his master, is a stronger circum-

stance from which an implied agreement on his part would arise to assume the new risks; otherwise the principle is the same whether the servant be an adult or an infant. The dangers of the new employment into which appellant was ordered did not consist alone or mainly of the snow and ice on the cars and steel rails to be unloaded, which he could see and know, but it consisted in handling and unloading them from the cars as well, and the action of the engineer in moving the train and starting and stopping it frequently. Such a danger was not, in our opinion, so glaring that no prudent man would have obeyed the order to perform the same. Nor do we think that there was anything in the circumstances disclosed in the evidence from which it can fairly be implied that appellee agreed to assume the dangers incident to the new service. However, both questions were questions of fact for the determination of the jury, and we see no reason to believe that the jury did not decide both questions in accordance with all the evidence.

The only other ground of the motion for new trial urged in argument is that the court erred in giving instruction No. 7. The motion reads thus: "Error in giving charges numbered one, two, three, four, five, six, seven, and eight." The correctness of the other seven instructions is not questioned here, and we see no objection to them. It has been held by this court that such an assignment of error in a motion for a new trial can only be sustained by showing that the instructions are all bad. *Railway Co. v. McCartney*, 121 Ind. 385, 23 N. E. Rep. 258; *Pennsylvania Co. v. Sears*, 34 N. E. Rep. 15, (at this term.) We find no error in the record. The judgment is affirmed.

(134 Ind. 447)

WALLIS et al. v. LUHRING et al.

(Supreme Court of Indiana. May 18, 1893.)

WILLS—TESTAMENTARY CAPACITY—UNDUE INFLUENCE—EVIDENCE—INSTRUCTIONS.

1. On an issue as to the testamentary capacity of decedent, the court properly refused an instruction that unsoundness of mind in law means the same thing as insanity, and instead gave the statutory definition of unsoundness of mind, and instructed the jury as to the various degrees of mental disease, and as to what degree of mental infirmity would disqualify a person from making a will.

2. Where the issue is as to the testamentary capacity of decedent, an instruction that, "when unsoundness of mind of a permanent nature has been established, the presumption is that that state of unsoundness exists or continues until the contrary is shown," is not open to the objection that it assumes that, if the evidence shows unsoundness of mind at all before the execution of the will, that unsoundness was of a permanent nature.

3. Evidence, in an action to contest the validity of a will, that a deceased devisee admitted that testatrix was not of sound mind is admissible, though his administrator is not a party; his widow and sole heir being a party, and no other party being prejudiced by the admission.

4. And so, also, was the declaration of the devisee, before the making of the will, that testatrix had "got to make a will," and he

was "going to have all the property, or raise hell."

5. In an action to contest the validity of a will, the court having fully instructed as to the various forms and characteristics of unsoundness of mind, there was no impropriety in refusing to instruct the jury as to illusions and hallucinations as features of insanity.

Appeal from circuit court, Gibson county; O. M. Welborn, Judge.

Action by Amanda Luhring and others against Melissa Wallis and others to contest the will of Catherine Wallis. From a judgment for plaintiffs, defendants appeal. Affirmed.

J. E. McCullough, J. H. Miller, and H. A. Yeager, for appellants. Buskirk & Brady and D. B. Kumler, for appellees.

HOWARD, J. This was an action brought by appellees to contest the will of Catherine Wallis on the grounds of unsoundness of mind and undue influence. There was a general denial, and the issue was submitted to a jury, who returned a special verdict, finding for appellees. A motion for a new trial was overruled, which ruling is assigned as error.

The questions discussed by counsel relate principally to instructions given, refused, or modified, and to the admission of certain evidence. The testimony as to unsoundness of mind was all by nonexpert witnesses. It was conflicting, but there was evidence to sustain the verdict. A number of witnesses introduced by appellees, after having testified, on direct examination, that the testatrix was of unsound mind, testified on cross-examination that she was not insane or crazy. Dr. Ballard, the only physician who testified, after stating many facts relating to his attendance upon the testatrix as her family physician, said: "In my opinion, she was not fully sound in mind or body for several years before she died." On cross-examination he said: "I am not testifying as an expert, and I do not say that she was insane. I do not think Mrs. Wallis was insane or crazy. I am not here as an expert. I do not know what term the medical books use. I suppose there is a difference between insanity and unsoundness of mind. If a person is not of perfectly sound mind, then he must be of unsound mind, and yet he is neither insane nor crazy. That is my opinion. Mrs. Wallis was not insane, but she was not perfectly sound." Other witnesses, after relating facts on which they based their opinions, made the same distinction between unsoundness of mind and insanity. Nancy Smith, a daughter, one of the appellees, said, "Her mind was unsound," and afterwards added, "I did not regard mother as crazy or insane." Hester A. Pritchett gave similar testimony stating many facts and circumstances in her mother's life during her last years on which she based her testimony, showing absent-mindedness, forgetfulness, want of knowledge of her children at times, and unaccountable actions of various kinds. Amanda Luhring testified, also, to various facts upon which she based her opinion, and said: "In my opinion, my mother had not been of sound mind for five years.

The first change I noticed was about 1½ years after father died. She talked sensible; only occasionally would drop off to some other subject. My mother was not crazy or insane. I mean by an insane person a person who is wild." As bearing on this and other like evidence, appellants requested the court to instruct the jury that unsoundness of mind in law means the same thing as insanity. This instruction the court refused, but of its own motion gave, instead, the statutory definition of the words "a person of unsound mind," and otherwise very fully instructed the jury as to various degrees of mental disease, and as to what condition and degree of mental infirmity would disqualify a person from making a valid will. We think this was correct. It was the course followed by the trial court in the case of *McCaumon v. Cunningham*, 108 Ind. 545, 9 N. E. Rep. 455, to which appellants refer. The form of the instruction requested by appellants was objectionable, and calculated to mislead and confuse the jury. The witnesses, and probably the jury also, entertained the popular notion that craziness or insanity implies a wild and uncontrollable form of mental derangement, while unsoundness of mind describes a milder and more placid form of the disease. The court very properly avoided confusing the minds of the jury on this point, and instead detailed very fully the various forms of disease all included under the term "unsoundness of mind." The instructions on this point, while full and complete, were at the same time such as were intelligible to the jury, and suitable to the character of the evidence detailed before them. Names are not of so much consequence as things, and it was more important that the jury should understand the character and degree of mental infirmity which would incapacitate a person from making a will than to know whether the disease should be called "insanity," "unsoundness of mind," "imbecility," or by some other name. The instructions given fully covered all that was requested on this point.

Appellants object to the following paragraph in an instruction given by the court: "The law presumes that every person is of sound mind until the contrary is proven; yet, when unsoundness of mind of a permanent nature has been established, the presumption is that that state of unsoundness exists or continues until the contrary is shown." Appellants think that the court here assumes "that, if the evidence shows unsoundness of mind at all before the execution of the will, that unsoundness was of a permanent nature." Appellants are mistaken. The court makes no assumption. That is left to the jury; but, if the jury find that such unsoundness has been established, they are instructed that the presumption of the law is that such unsoundness continues until removed by proof. This is correct.

Appellants claim that certain evidence given by the witness William Blancet was improperly admitted. This witness testified, over appellants' objection, that Robert Wallis, a son of testatrix, and to

whom she had devised the bulk of her property, had admitted to him in conversation that he thought his mother was not of sound mind, and was incompetent to make a will. The objection made to this evidence is that, Robert Wallis being one of the devisees of the will, and being dead, and his administrator not being a party to the action, it was immaterial whether he had such conversation or not; that the statements of one devisee or legatee made out of court are not competent to be proven as admissions to impeach or sustain the will. It is true that Robert Wallis is dead, and his administrator was not a party; but it fully appears that the appellant Melissa Wallis is his widow and his sole heir at law. The jury found that the sole heirs of the testatrix were her children, the appellees, and the said widow of her deceased son, Robert. All those who had any interest in the estate of the testatrix were parties to this suit. If Robert were living and made a party, his declarations against his interest would have been competent. They are equally competent against his sole heir, made a party in his stead, and representing all his interest. This is not like a case where the admission of such declarations would injuriously affect the interests of other persons interested on his side under the will. If there were other defendants whose interests would be prejudiced by the admissions of one of the defendants, or of one whose privy was a defendant, then the case of *Hayes v. Burkam*, 67 Ind. 359, and others relied upon by appellants, might be in point. In the case before us the admissions of Robert Wallis are substantially admissions of the appellant, his sole heir, and injuriously affect no one else. A similar objection was made to testimony given by the witness George Green, to the effect that Robert Wallis, some time before the date of the will, had said: "Mother's got to make a will some of these days. She is not going to live very long, and I am going to have all the property, or raise hell." What has been said as to the admission of testimony of conversation of Robert with William Blancet applies also here. This evidence tended to show undue influence on the part of Robert,—a main issue in the case. 1 Greenl. Ev. § 108; 1 Tayl. Ev. (7th Ed.) § 588; Whart. Ev. §§ 262, 263. The evidence was competent to go to the jury for what it was worth. Objection was made to the admission of evidence by Henry Lühring, the husband of one of the appellees. The contention is somewhat obscure, and wholly untenable. Because Robert Wallis is dead, and because the setting aside of his mother's will would diminish his estate, it is insisted that the testimony is prohibited by sections 498, 499, and 501, Rev. St. 1881. In *Lamb v. Lamb*, 105 Ind. 456, 5 N. E. Rep. 171, this question was fully considered, and it was held that the statutes referred to do not prohibit parties from testifying in such a case as this, and on such a subject as the mental capacity of a testator, and also that heirs are not prohibited from testifying, in a suit to set aside a will, as to the mental capacity of the testator, even though the executor were a party.



See, also, *Staser v. Hogen*, 120 Ind. 209, 214; 21 N. E. Rep. 911, and 22 N. E. Rep. 990; and *Burkhart v. Gladish*, 123 Ind. 345, 24 N. E. Rep. 118. It may also be noted that, by the amendments of 1888 to these sections, (Elliott, Supp. § 19,) the statutes are broadened, and the discretion of the court enlarged, as to the admission of such evidence. We do not think there was any abuse of discretion in this case.

Appellants complain that the court should not have refused to instruct the jury as to illusions and hallucinations as features of insanity. The court of its own motion, and on request of appellants and appellees, having very fully instructed the jury as to the various forms and characteristics of unsoundness of mind, and having applied such instructions to the case before the court and to the evidence, we think there was no impropriety in refusing to extend these instructions, even though the instructions asked might be correct as abstract statements of law. The subject was already fully covered.

Appellants finally ask us to review the evidence, insisting that it is not sufficient to sustain the verdict upon the issue of undue influence, and even contending that there was no evidence of that character. Appellants are certainly mistaken in this contention. We have looked through the evidence carefully, and find much which the jury might reasonably hold to be sufficient on both the issue of unsoundness of mind and of undue influence. It is true that there was much evidence in conflict with this, but it was for the jury to weigh the evidence, and to decide the issues.

The judgment is affirmed.

(128 Ind. 414)

NEW YORK, C. & ST. L. R. CO. v. PERIGEUY.<sup>1</sup>

(Supreme Court of Indiana. May 19, 1893.)

MASTER AND SERVANT — INJURY TO EMPLOYEE — PROXIMATE CAUSE — CONCURRING NEGLIGENCE.

1. In an action against a railroad company for personal injuries, it appeared that an engineer in charge of locomotive No. 172 was ordered to side track at a station at night, and wait until locomotive No. 167, in charge of plaintiff, had passed; that on reaching the station, and waiting a few minutes, No. 172 started ahead, and, on seeing No. 167 coming, stopped; that the headlight of No. 172 was defective, and could not be used, but that hand lights which were for use in case of emergency, and which would throw a light for five miles, were on board, but were not used; that plaintiff did not see No. 172 in time to stop his engine, and ran into it, and was injured. *Held*, that the negligence of the engineer in charge of No. 172 was the proximate cause of the accident, and not the failure of the company to provide a proper headlight.

2. Though the assumption of the negligence of a fellow servant does not include his negligence when it concurs with the negligence of the master in producing the injury, defendant was not liable, since his negligence was not a concurring immediate cause of the injury, and he was ignorant of the engineer's incompetency.

Appeal from circuit court, Wells county; J. S. Dailey, Judge.

Action by Julian Perigeuy against the New York, Chicago & St. Louis Railroad

Company for personal injuries. Judgment for plaintiff, and defendant appeals. Reversed.

Bell & Morris, for appellant. L. M. Ninde, for appellee.

HACKNEY, J. The appellee sued for damages for injuries sustained in a collision of two engines upon the appellant's railway. He secured a verdict for \$12,000, the jury returning, with the general verdict, answers to special interrogatories propounded by each party. The complaint alleged that the appellee and one Wilson were, respectively, fireman and engineer for appellant, and in charge of engine No. 167, drawing a caboose west out of Ft. Wayne, with instructions to run at the rate of 40 miles per hour to Argos, where they should meet and pass train No. 41, drawn by engine No. 172, in charge of Ferris, as engineer; that said Ferris was east bound from Chicago, with orders to run to Argos, and lay up for No. 167; that the headlight of No. 172 was entirely useless, by reason of certain defects, and that said Ferris was a reckless, dangerous, and unskilled engineer, both of which facts were well known to the appellant,—the said defect for six weeks, and the character of the engineer from the time of his employment,—and which facts were unknown to the appellee. There are allegations as to the failure of the appellant to maintain a registry of the arrival and departure of trains at Argos, but appellee's counsel, in their brief, expressly deny any independent cause of negligence by reason of such failure, and we doubt the sufficiency of such allegations to have constituted a cause, proximate or remote, for the injury. It is further alleged that Ferris ran No. 172 with his train to Argos, where he remained for some time, and being informed by some one, and believing it true, that No. 167 had passed Argos, he pursued his journey; that it was night, and said headlight furnished no light; that, when he had gone from Argos about two miles, he saw No. 167 approaching, and stopped his train; that, because of the absence of said headlight, the appellee and the engineer on No. 167 could not see No. 172 in time to stop their engine and avoid a collision; and that, in the collision which followed, appellee's injuries were sustained.

The record contains numerous questions which have been presented by counsel for the parties with marked ability, but the primal point of contention arises upon the existence or nonexistence of the established negligence of the appellant as the proximate cause of the injury. The established negligence of the appellant is in requiring its engineer Ferris to operate engine No. 172 with a defective headlight. This fact is found specially by the jury with other facts, some of which are as follows: Said Ferris had special orders to stop at Argos, and remain until No. 167 passed. He did stop at Argos, but, in violation of his special order, pressed on in his journey with the defective engine. After leaving Argos two and three quar-

<sup>1</sup> Rehearing denied, 87 N. E. 976.

ters miles, and having observed the approach of No. 167, he stopped his engine when one and a quarter miles distant from No. 167. There were upon the front of No. 172 two green lights, burning brightly, and on board were hand lamps, to be placed in the headlight when it failed for any reason, which, when placed in the headlight, could be seen for the distance of five miles, but on this occasion were not so placed. From Argos eastward the track was straight and free from obstruction, with a decline in the grade, for four miles. That No. 167 came on at the rate of 30 miles an hour. Her engineer and fireman having looked, but failing to observe No. 172, the crash came. There are findings as to how far the green lights could be seen, and there are questions as to whether the findings in that respect are supported by the evidence, but they go only to the question of contributory negligence, and are unnecessary to our decision. It is also found that Ferris was not a competent and careful engineer, but it is further found that of this fact the company had no knowledge prior to the collision, and it is found by the jury, as further stated in the answers to special interrogatories, that "such defective headlight" was "the proximate cause of said collision and the plaintiff's injury." Without stopping to analyze this finding, and to decide whether it is one within the province of the jury to make, we find that the conclusion stated is not supported by any evidence.

It is urged by the appellant, and conceded by the appellee, that Ferris and the appellee were fellow servants, and if, therefore, the injury was the result of the negligence of Ferris, the appellee should not recover. The appellant concedes its own negligence, in the use of the defective headlight, but insists that this defect was not the proximate cause of the injury; while the appellee insists that this was the proximate cause, and, if not the immediate cause, it was concurrent in cause with the negligence of Ferris, and that, therefore, the company may not excuse its participancy in the wrong by asserting that it had a joint wrongdoer. Was the act of the appellant the proximate cause of appellee's injury? In Wharton on Negligence (section 73) is this quotation from Lord Bacon: "It were infinite for the law to consider the causes of causes and their impulsions one of another. Therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking for any further degree." Judge Cooley, in *Lewis v. Railway Co.*, 54 Mich. 55, 19 N. W. Rep. 744, says: "As between the causes which precede the proximate cause, the law cannot select one, rather than any other, as that to which the final consequence shall be attributed, and it stops at the proximate cause, because to go back of it would be to enter upon an investigation which would be both endless and useless." It is too well settled to multiply citations of authority to the point that it is the immediate, and not the remote, cause of injury that creates the liability; but, as there is no rule by which every case can be tested and

known, to determine distinctly its class in the order of causation, we find the difficulty in distinguishing between the immediate and the mediate, or the remote, cause of the injury. Cases may illustrate, but definitions are not sufficiently explicit for practical application. In this case the act of the appellant was in directing an engineer to side track at a way station an engine known by it to be defectively lighted, and to there detain such engine until appellee's engine had passed. The use of the engine at the particular time and under the particular circumstances is inseparable from its condition in determining the negligence of the appellant. As we have said, it was found by the jury, and is conceded by the appellant, that it was negligence to place the defectively lighted engine upon the main track, in the darkness of the night, without the use of the hand lamps; but it must be remembered that to have so placed it was in violation of the orders of the appellant. So placing the engine was the immediate cause of the collision. That was the negligence of Ferris. The absence of light accounts for the appellee's inability to avoid the collision; not the absence of a particular light—the headlight—any more than the absence of the hand lamp in the headlight, which was found sufficient to be seen five miles distant. The absence of the hand lamp was due to the carelessness only of Ferris, and not to the appellant. It is true, as appellee argues, that if the headlight had not been defective, but had been in good order, and burning brightly, the collision would not have happened. It is equally true that, if No. 172 had not been on the trip, the collision would not have occurred. Judge Ray, in his recent work, "Negligence of Imposed Duties to Passengers," says: "Where the concurring cause is the independent wrongful act of a responsible person, such act arrests causation, being regarded as the proximate cause of the injury; the original negligence being considered merely as its remote cause. As in the law it is the proximate, and not the remote, cause which is regarded, he who is guilty of the original negligence is not chargeable, but redress must be sought from him who directly caused the injury." Again, he states that "in civil cases a defendant is not responsible for results, except such as are natural, proximate, and direct. If such consequences are caused by the acts of others, so operating on his act as to produce the injurious consequences, then he is not liable." These statements of the rule are fortified by many authorities, as may be seen by reference to that work, (pages 669, 670.) In *Railroad Co. v. Kellogg*, 94 U. S. 469, Mr. Justice Strong states the rule in this manner: "The question always is, was there an unbroken connection between the wrongful act and the injury,—a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? \* \* \* It is generally held that, in order to warrant a finding of negligence, or an act not

amounting to a wanton wrong is the proximate cause of the injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." He states further: "We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not where there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause. But when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must therefore always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury." The rules quoted are so fully recognized in the cases in this state as to require no further comment. *Alexander v. Town of New Castle*, 115 Ind. 51, 17 N. E. Rep. 200; *Railroad Co. v. Buck*, 98 Ind. 347; *Billman v. Railroad Co.*, 76 Ind. 166, and the cases collected in these decisions.

In determining whether, in this case, there was an intervening, responsible cause for the injury, between the omitted duty of the appellant and the injury to the appellee, we reach the conclusion that appellant's wrong was or was not the proximate cause of the injury. In *Scheffer v. Railroad Co.*, 105 U.S. 249, it was held that the death by suicide of one from a disordered mind, occasioned by an injury sustained in a collision of railway trains, was not the proximate result of the negligence causing the collision. His added act of self-destruction was a new and independent cause. In *Carter v. Towne*, 98 Mass. 567, a druggist sold, carelessly, two pounds of gunpowder to a minor of eight years, which powder the child exploded, and was thereby injured. It appeared that, when purchased, the powder was taken home by the child, and kept in the house for a week, when the boy's mother gave it to him, and permitted him to explode it. It was there held that, though the druggist was negligent in selling the powder to a child of such tender years, yet the negligence of the mother interposed between the sale and the injury, and cut off the line of causation from the druggist's negligence. One discharged from service before the end of his term, because of the slanderous utterances of another against him, cannot recover from the slanderer for the loss of employment. Though the remote and indirect cause of his loss, the master's act was the proximate cause of it. *Vicars v. Wilcocks*, 8 East, 1. In selling diseased sheep to a butcher, a farmer fraudulently represented them as sound, and, by reason of their unsound and diseased condition, the butcher lost the trade of his customers, and sought damages for such loss from the farmer. It was held that the fraud was but the remote cause of the loss, and the independent intermediate act of the customers the proximate cause. *Crain v. Petrie*, 6 Hill, (N. Y.) 522.

Because of a defect in a highway, a traveler went into an adjoining field, where he received injuries. In a suit for the injuries as the result of the defect in the highway, it was held that such defect was the remote, and not the proximate, cause. *Tisdale v. Norton*, 8 Metc. (Mass.) 388. In *Anthony v. Slaid*, 11 Metc. (Mass.) 290, the plaintiff, obligated by contract to support in sickness and in health the paupers of a town, brought suit against one who had beaten one of such paupers, whereby additional service and increased expense was occasioned to the plaintiff. It was held that no recovery could be had. Of the same class of cases are *Silver v. Frazier*, 3 Allen, 382; *Bosch v. Railway Co.*, 44 Iowa, 402; *Association v. Dubuque*, 30 Iowa, 176; and *Lewis v. Railroad Co.*, supra. In the last case are cited, by Judge Cooley, *Daniels v. Ballantine*, 23 Ohio St. 532, and *McClary v. Railroad Co.*, 3 Neb. 44, with this statement: "In each of these cases the negligence of the defendant left the property of the plaintiff where, by the act of God,—in the one case by flood, and in the other a tornado,—it was lost or injured, and in each the act of God, and not the negligence, was held to be the proximate cause of the injury." Our own case of *Alexander v. Town of New Castle*, supra, held that leaving negligently an unprotected excavation near a public walk, and into which a prisoner in custody hurled the officer, furnished no cause of action against the town. The negligence of the town made the act possible, but the act of the prisoner was the immediate cause of the injury sustained. So, in the case before us, the negligence of the appellant made it possible for Ferris to set the dangerous obstruction upon the railway, but it was his act in placing it there, in violation of expressed instructions, that caused the injury. It was not negligence for the appellant to have left its engine standing in its yards, in a proper place, for repairs, nor was it negligence to have left it upon a siding at Argos, until No. 167 had arrived and passed. So standing it was harmless. That it would have been moved out upon the main track in the face of an approaching train, in violation of the direct orders of the company, could not have been reasonably anticipated by the appellant. No reasonable prudence and foresight could have determined upon such a result without a knowledge of the recklessness and ignorance of the engineer,—a fact here found to have been unknown. Suppose this suit were against Ferris for the damages resulting to appellant's engines, or by the appellee for his injuries; could he assert with reason that his negligence was not the proximate cause of the collision? Suppose the conduct of Ferris, in promoting the collision, to have been wanton or willful; could it be said that the prior negligence of the company was the proximate cause of the collision? We believe not. The movement of the train under the management of Ferris was the independent wrongful act of a responsible person. Such act of Ferris was not induced by the act of the appellant, nor did the act of Ferris so operate on the act of the appellant as to cause appellant's

act to produce the injury. If it had so operated, according to the authority we have cited, responsibility would not attach to the appellant's act. The absence of the headlight was not the cause of the injury. Such absence was but an incident to the appellee's failure to avert the collision. We cannot escape the conclusion that the wrongful act of Ferris was the immediate cause of the injury.

Regarding the appellee and the engineer Ferris as fellow servants, as it is agreed we must, can we hold the appellant responsible for the wrongful act of Ferris? The appellee contends, as we have shown, that the assumption of the negligence of a fellow servant does not include his negligence where it concurs with the negligence of the master in producing injury. We are advised of the rule so asserted, and do not desire to infringe upon that rule, as we have held in *Rogers v. Leyden*, 127 Ind. 50, 26 N. E. Rep. 210. The only question we entertain is as to the application of the rule. Where the defect in the machinery, or the want of skill of a fellow servant, or the unsafety of the place where occupied, are within the knowledge of the master, are not known to the servant, and are the immediate cause, or one of the concurring immediate causes, of the injury, there is not, and ought not to be, any doubt of the application of the rule that the master may not hide his liability behind the concurring act of his employe. In addition to the cases cited in *Rogers v. Leyden*, supra, we cite the authorities of the appellee: 2 *Thomp. Neg.* 981; *Cayser v. Taylor*, 10 *Gray*, 274; *Whart. Neg.* §§ 3, 789; 1 *Shear. & R. Neg.* §§ 25-28; *Hawkesworth v. Thompson*, 98 *Mass.* 77; *Phelps v. Walt*, 30 *N. Y.* 78; *Pfau v. Williamson*, 63 *Ill.* 16.

We have found that the act of the appellant was not a proximate cause of the injury; that the act of Ferris was the immediate cause of the injury; and it follows that the two acts were not concurrent in causing the injury. We doubt if a case can be found where an act of the master, though negligent, but not causing injury, or concurring as a cause of injury, is coupled with a wrongful act of a servant, and made the basis of recovery for such injury. The case of *Panmler v. Railroad Co.*, 34 *N. J. Law*, 151, cited by appellant, and in *Rogers v. Leyden*, supra, as the principal authority, presented this distinction from the case before us: There was a latent defect in the roadbed, of which the company and the plaintiff's fellow servants had knowledge. The company owed to the servant the duty of disclosing that knowledge, and in this duty failed when the fellow servant drove the engine upon the latent danger, and caused plaintiff's injury. The defect was the immediate cause of injury. We have in our own state many cases holding a liability where the master knows of the lack of skill of a fellow servant, and the plaintiff has no such knowledge, and from which lack of skill injury results. There, however, the lack of skill is the direct cause of injury. If the rule were otherwise, the duty to employ suitable servants and machinery would be defeated. If the rule contended for by appellee should prevail,

the master would become an insurer of the safety of his servant against the negligence of a fellow servant, however gross, if the negligence of the master, however slight, and however remote from the cause of injury, could be discovered to have offered an opportunity for the negligence of such fellow servant. We conclude that the answers to interrogatories are in irreconcilable conflict with the general verdict, and that the motion of the appellant for judgment non obstante verdicto should have been sustained. The judgment of the lower court is reversed, with directions to sustain said motion.

(7 Ind. App. 34)

#### DEBS v. DALTON et al.

(Appellate Court of Indiana. May 27, 1893.)

GARNISHMENT—DUTIES OF GARNISHEE—JUDGMENT BY DEFAULT—WHAT CONSTITUTES ENTRY—VALIDITY—REMEDIES—MOTION FOR NEW TRIAL—SERVICE OF PROCESS—ACTIONS AGAINST FOREIGN CORPORATION—VENUE.

1. In the absence of jurisdiction in garnishment, both of the subject-matter and the person of the principal debtor, a judgment against the garnishee, and payment thereof, will afford him no protection.

2. Under Rev. St. 1881, § 316, service of summons on the agent of a foreign corporation is sufficient, where there is no chief officer in the county.

3. Under Rev. St. 1881, § 309, which provides that actions against corporations having an office or agency in any county for the transaction of business, if such action grows out of, or is connected with, the business of such office, may be brought in the county where the office or agency is located, attachment against a foreign corporation will lie in any county where such corporation has an agency connected with its business.

4. A mere recital of the service of summons in an entry of judgment by default is not sufficient, but the summons itself must be set out.

5. Jurisdiction of the court over the subject-matter of an action is not waived by failure to demur or answer, but may be raised by motion in arrest of judgment in the trial court, or by assignment of error on appeal.

6. Where, after a garnishee in attachment is defaulted, judgment against him is deferred until certain testimony is taken, the judgment is nevertheless one by default.

7. Where, in attachment, judgment is taken by default, both against the principal debtor and a garnishee, their remedy is by motion to set aside the default, or in arrest of judgment, and not by motion for a new trial.

On rehearing.

For former report, see 32 *N. E. Rep.* 570.

REINHARD, J. This action was instituted by the appellee, Mary Dalton, against the Brotherhood of Locomotive Firemen of North America as principal defendant, on a judgment obtained by said appellee against said corporation. The appellant, Debs, by proper proceedings in attachment, was made a garnishee defendant in the action. Judgment was taken by default, both against the principal and the garnishee defendants, but at a subsequent term of the court, and before formal judgment was entered against the appellant, he and other garnishees were summoned to appear as

witnesses, and were examined with reference to the question of money in the hands of said appellant belonging to said corporation. It was found and adjudged that appellant had in his hands, belonging to said corporation, funds sufficient to pay the judgment against the principal defendant, and he was ordered to pay the same on said judgment. No motion to set aside the default was made by said appellant, but he did make a motion for a new trial, which was overruled. The appellant appealed the cause to the supreme court, where the judgment was affirmed, and a rehearing was granted. Upon the taking effect of the act increasing the jurisdiction of the appellate court, (Acts 1893, p. 29,) the cause was transferred to this court.

It is insisted that the record fails to show that the court below had jurisdiction of the principal defendant. It is doubtless the rule that a garnishee defendant must see that the court has jurisdiction both of the subject-matter and the person of the principal debtor, and, in the absence of such jurisdiction, the judgment against him, and the payment thereof, will afford him no protection. *Emery v. Royal*, 117 Ind. 299, 20 N. E. Rep. 150; *Newman v. Manning*, 89 Ind. 422; *Mathoney v. Earl*, 75 Ind. 531; *Andrews v. Powell*, 27 Ind. 303. The judgment entry recites that the principal defendant, "which is a foreign corporation, was duly and legally notified of this action by \* \* \* summons being duly and legally served upon Albert Chambers more than ten days before the first day of the present term of this court; said day being the day upon which said defendant was by said summons required to appear and answer to this action, and the said Chambers being, at the time said summons was served upon him, then and there the agent of said defendant, \* \* \* and then and there doing business for it and in its name, no president, or presiding or other officer, treasurer, secretary, or clerk of said Brotherhood of Locomotive Firemen of North America, being found in said county of Clark." It is provided by statute that process against a corporation, domestic or foreign, may be served on the president, presiding officer, mayor, chairman of the board of trustees, or other chief officer, or, if its chief officer is not found in the county, then upon its cashier, treasurer, secretary, clerk, general or special agent, etc. Rev. St. 1881, § 316. It would seem that, so far as the recital of the judgment record shows, the service was valid under the section cited. *Telegraph Co. v. Lindley*, 62 Ind. 371.

It is further contended, however, that the record affirmatively shows a want of jurisdiction, as the action was not brought in the proper county. The affidavit in attachment discloses that the principal defendant is a foreign corporation. In another section of the statute it is provided that actions against corporations which have an office or agency in any county for the transaction of business, if such action had grown out of, or was connected with, the business of such office, may be brought in the county

where the office or agency is located, as though the principal resided therein. Rev. St. 1881, § 309. It is argued that the evidence discloses that the action grew out of, and was connected with, the business of mutual life insurance, and, as it does not appear that the agency in which such business was transacted is located in the county of Clark, a want of jurisdiction is shown. In view of the conclusion we have reached, it will not be necessary for us to decide this question.

It is the further contention of appellant's counsel that, if this is a judgment by default, a mere recital of the service in the entry of judgment is not sufficient, but that the summons itself must be set out in the record. In this position the appellant seems to be sustained by the authorities. *Elliott, App. Proc.* §§ 193, 716; *Woods v. Brown*, 93 Ind. 164; *Fee v. State*, 74 Ind. 66; *Miles v. Buchanan*, 86 Ind. 490; *Cochnowar v. Cochnowar*, 27 Ind. 253. Jurisdiction of the court over the subject-matter or person is not waived by failing to demur or answer, but the question may be raised by motion in arrest in the court below, or by assignment of error on appeal. 1 *Work, Pr. & Pl.* § 459.

Two errors have been assigned by the appellant in this court, viz.: (1) The overruling of the motion for a new trial; (2) that the court had no jurisdiction of the subject-matter of the action. There is no assignment that the court had no jurisdiction of the person of the principal defendant or of the appellant. That there was jurisdiction of the subject-matter we think must be clear. The action was for the recovery of money on a personal judgment previously rendered, and the circuit court has jurisdiction in all such cases. If we concede the proposition that the action should have been brought in the county where the agency was located, it still does not follow that it was a "local" action, in the strict sense of the word, such as an action in ejectment, or for the foreclosure of a mortgage on real estate. In such actions as those last mentioned, it is doubtless true that the court in the county of the situs is the only one which has jurisdiction of the subject-matter. The present action was a personal one, and would lie in any one of several counties where the defendant had an agency connected with such business. As we have seen, there is no assignment of error calling in question the jurisdiction of the trial court of the person of the principal debtor. The question sought to be raised concerns the jurisdiction of the person, and not of the subject-matter. It is the assignment of error that gives jurisdiction to this court. Without it, no question whatever can be considered. The specifications must be such as to cover the exact questions sought to be reviewed, and the errors not well assigned will be disregarded. *Elliott, App. Proc.* §§ 303, 306, 325, 402. Had there been an assignment that the court had no jurisdiction of the person of the appellant or of the defendant corporation, quite a different question might be presented.

But counsel further contend that the

judgment against appellant was not one by default. In this view we cannot concur. The mere fact that, after the garnishee was defaulted, the judgment of the court against him was deferred until after his testimony and that of others was taken, cannot change the nature of the proceedings. It is a common practice to hear testimony as to the amount due, etc., after default is taken. In fact, the default does not admit that any amount is due, and, to establish that, it is not improper to examine the garnishee as well as other witnesses. The default admitted the appellant's indebtedness to the corporation, but not the amount of the same. Nor can the fact that no judgment was rendered against other garnishees have any controlling force. If, upon examination, the court found that such other garnishees owed the corporation nothing, or had under their control no moneys or property belonging to it, we see nothing wrong in the action of the court in not finding against them, also. The judgment having been taken by default, both against the appellant and the corporation, a motion for a new trial was not in order. The defendants could have moved to set aside the default or in arrest of judgment, but we know of no practice that would sanction the consideration of a motion for a new trial upon default. The court could therefore have committed no error in overruling this motion. All the questions sought to be raised by appellant's counsel are embraced in the two assignments of error above named. For the reasons already stated, these cannot be considered.

Judgment affirmed.

(8 Ind. App. 214)

#### CITY OF LAFAYETTE v. ASHBY.<sup>1</sup>

(Appellate Court of Indiana. May 23, 1893.)

DEFECTIVE STREETS—LIABILITY OF CITY—NOTION—PLEADING—EVIDENCE—INSTRUCTIONS.

1. In an action against a city for personal injuries caused by plaintiff catching his foot on a guy wire attached to an electric light post and a tree, which had given way the day of the accident, causing the wire to lie a few inches above the sidewalk, a complaint alleging the negligent attachment of the wire several months before to an insecure tree, with the knowledge of defendant, and that defendant, with knowledge of the facts, negligently permitted the wire to remain, states a good cause of action.

2. Though the evidence showed that the city did not have knowledge of the condition of the tree at the time the wire was fastened to it, as alleged in the complaint, still this would not justify a reversal of a judgment for plaintiff if the evidence showed that the city had knowledge of it for such reasonable time as would enable it to remove or safely secure the wire.

3. It appearing that a member of the city council knew that the tree had been burned partly away several years before, and more than two months before the accident knew that the wire was attached to the tree, it cannot be said there was an entire absence of evidence of notice or knowledge on the part of the city. Reinhard, J., dissenting.

4. Where the evidence is so unsatisfactory on the vital points in a case as to render it extremely doubtful whether the verdict was right,

the giving of instructions not pertinent to the issues, and the refusal of proper instructions, will be considered harmful error.

Appeal from circuit court, Clinton county; S. H. Doyal, Judge.

Action by William Ashby against the city of Lafayette. Judgment for plaintiff. Defendant appeals. Reversed.

John F. McHugh, for appellant. Coffroth & Coffroth, for appellee.

DAVIS, J. This was an action to recover damages on account of personal injuries. The complaint was in two paragraphs, and separate demurrers to each paragraph were overruled. The answer was a general denial. As the result of a trial before a jury judgment was rendered against appellant for \$2,000. The errors assigned bring in review the rulings on the demurrer to each paragraph of the complaint, and also the overruling of appellant's motion for a new trial. We will consider them in the order in which they are presented.

It is alleged, in substance, in the first paragraph of the complaint, that the Brush Electric Lighting Company in January, 1888, erected at the corner of certain streets in the city of Lafayette, as a part of its plant for lighting the streets of said city with electricity, a pole about 10 inches in diameter and 20 feet in height, at the top of which it caused to be attached its electric lighting wires, and that for the purpose of keeping said pole in position said Brush Company, "with the knowledge of said defendant," caused a guy wire to be attached to the top of said pole, and stretched the same a distance of 300 feet over, above, and beyond the street, and there "carelessly and negligently caused said guy wire, with the knowledge of said defendant, to be fastened and attached to an insecure and dead tree," and that said company carelessly and negligently continued to suffer and permit said wire to be stretched over said street, and to remain fastened to said insecure, decayed, and dead tree, and that said appellant might have known said facts by the exercise of reasonable diligence. It is alleged that afterwards on Friday, October 19, 1888, said decayed and dead tree, from its own weight and the strain of said guy wire, fell over and upon the ground, and thereby greatly loosened said guy wire, "which was suffered to remain stretched across said street during said day, attached to said pole and fallen tree, at a distance of about eight inches above the sidewalk, and "that on the evening of said 19th day of October, 1888, at about the hour of six o'clock, the plaintiff, while passing over and along the sidewalk of said Fourteenth street, without knowledge of said fallen wire, and in the exercise of care, and without any fault or negligence on his part, was caught by said wire, and thrown violently forward upon the sidewalk and into the gutter," and was injured "through the fault and negligence of the defendant aforesaid," etc. The second paragraph is substantially the same as the first paragraph, except it charges that the Brush Company did the acts complained of, without objec-

<sup>1</sup> Rehearing denied, 35 N. E. 518.

tion upon the part of the city, and that appellant, with full knowledge of all the facts, "suffered and permitted said wire to remain suspended over and across said Fourteenth street, well knowing that the wire was attached to said insecure tree, and was liable to fall and unlawfully obstruct said street;" and, further, "that early in the day of Friday, October 19, 1888, said insecure, decayed, and dead tree, from its own weight and the strain of said guy wire, fell over and upon the ground in the direction of said pole, and thereby greatly loosening said guy wire, and said guy wire during said day was, by the defendant, carelessly and negligently suffered to remain stretched upon and across said Fourteenth street;" and that appellant had negligently permitted said street at said point to become and remain out of repair, and in a dangerous and unsafe condition, in this, that there was a hole in the gutter, etc.

It will be noticed it is charged in the first paragraph that the guy wire was carelessly and negligently, with the knowledge of appellant, so fastened and attached to said insecure, decayed, and dead tree, in January, and that said company carelessly and negligently continued to suffer and permit said wire to be stretched over and across said street, and to remain fastened and attached to said insecure, decayed, and dead tree, until the ensuing October, when the accident occurred, and that the appellant might have known of such continuation of said wire by said company by the exercise of reasonable diligence. And that in the second paragraph it is charged that the wire was so negligently attached to the insecure tree with the knowledge of appellant, and that the alleged negligent continuation thereof was with such knowledge on part of appellant. We have examined the authorities cited by counsel for the respective parties, and we call attention thereto. "It is the duty of municipal corporations to keep all of their streets in a reasonably safe condition for travel, so as not to endanger the persons and property of those lawfully using them, and they are liable for negligently suffering them to become unsafe." *City of Aurora v. Bitner*, 100 Ind. 396. This duty extends upwards indefinitely for the purposes of the preservation, safe use, and enjoyment of the street. *Grove v. City of Ft. Wayne*, 45 Ind. 429. "When a defective and unsafe condition of a street or sidewalk in a city is caused by the act or omission of a third person, and the city, after due notice of the defect, fails to have it remedied within a reasonable time, it is as much responsible for the injury caused thereby as if the defect had had its origin in the acts of the city itself, through its officers in charge of the streets, or otherwise." *City of Huntington v. Breen*, 77 Ind. 29. The italics in the quotations throughout this opinion are our own. It has been held that "the indirect and inferential averments, that the highway, within the corporate limits of the city, and where the wagon ran into the ditch, was carelessly and negligently permitted to be out of repair, and that the city had knowledge that it was so out of repair, fairly and plainly imply that the

city had notice of the bad condition of the street when the plaintiff and his daughter were injured;" but in that case the sufficiency of the complaint was not challenged by demurrer in the court below, and in conclusion of the above sentence the court said, "after verdict we will infer that the notice was in time to have enabled the city to repair the street if it had desired to do so." *City of Madison v. Baker*, 108 Ind. 41, 2 N. E. Rep. 236. See, also, *City of Michigan City v. Ballance*, 123 Ind. 834, 24 N. E. Rep. 117; *City of Logansport v. Justice*, 74 Ind. 378; *City of Indianapolis v. Murphy*, 91 Ind. 382. In another case, Judge Elliott says: "Where the obstruction which causes the injury is not placed in the street by the city itself, *there must be actual notice*, or the obstruction must have remained in the street such a length of time as to make it the duty of the corporate authorities to take notice of its existence." *City of Warsaw v. Dunlap*, 112 Ind. 576, 11 N. E. Rep. 623, 14 N. E. Rep. 568; *Dooley v. Town of Sullivan*, 112 Ind. 451, 14 N. E. Rep. 566. It is also settled that a general averment of negligence is sufficient to withstand a demurrer. *City of Anderson v. East*, 117 Ind. 126, 19 N. E. Rep. 726.

It will be noticed it is not alleged in either paragraph that the obstruction was placed or remained in the street under such circumstances and for such length of time as to make it the duty of the corporate authorities to take notice of its existence, but the charge is that appellant had notice, when the wire was stretched across the street, that it was fastened to a decayed and unsafe tree outside of and beyond the street, and that by the exercise of reasonable diligence appellant might have known of the continuance of such unsafe attachment thereafter up to the time of the accident. It should be borne in mind that in this instance the work was not undertaken by the city, nor was it apparently dangerous in itself. It was proper to permit the streets to be used by the Brush Company for the purpose of lighting the city with electricity. Aside from the alleged actual notice on part of appellant that the wire when erected was attached to said unsafe tree, nothing is shown which would indicate that the wire was or would likely become an obstruction. The distinction which exists between a work undertaken by a municipal corporation itself and work undertaken by another should be kept in view. Whatever our views of the question under consideration might have been as an original proposition, we are constrained, under the decisions of the supreme court, to hold each paragraph of the complaint sufficient. The demurrer concedes the truth of the averments relative to notice on the part of appellant of the alleged negligence of the company in the erection of the wire across the street in the unsafe condition described in the complaint, and as the result of which negligence the injury occurred. With actual notice or knowledge of such negligence and carelessness of the company in fastening the wire to an insecure and decayed tree in the unsafe manner described, it was the duty of appellant, under the authorities cited, to have given



the subject proper attention, and to have exercised at least reasonable diligence in having the wire removed or safely secured, and suffering the continuation thereof for nine months in the negligent and unsafe manner described renders the appellant liable under the circumstances stated in the complaint.

There is evidence tending to show that on the afternoon of Friday, October 19, 1888, there was a wind and rain storm, during which the tree in question was blown down, and that as appellee was returning to his home, perhaps an hour thereafter, he fell over the wire and was injured. The testimony as to whether appellee fell or was injured is, it is true, conflicting. In fact, all the witnesses who saw the appellee on that occasion, except himself, say that he did not trip or fall, but that when he reached the wire, he discovered it was there, and that the appellee, with the assistance of his neighbors, then and there cut and removed it. That the heavy wind blew the tree down does not seem to have been controverted, and that the wire was removed on the evening of the 19th appears to be conceded. In this connection we pause to remark that appellee concedes he said nothing to either his family or any one else on that evening concerning his fall or injury. The evidence is, however, in several respects contradictory; and where there is any evidence in the record favorable to appellee he is entitled to the benefit thereof, on this appeal, without reference to any conflict, and regardless of the weight of such evidence.

There is no allegation in the complaint that appellant suffered or permitted the wire to remain down or across the sidewalk an unreasonable length of time. In fact, there is no claim, either in the complaint or evidence, that appellant had any knowledge the wire was down prior to its removal. Neither is it alleged that the defect in the street mentioned in the second paragraph was a proximate or contributing cause of appellee's injury. The theory of the appellee, on which the cause was tried in the court below, seems to have been, except as indicated in instructions, that said Brush Company, with knowledge of appellant, negligently and carelessly attached the guy wire to a dead and insecure tree, and that therefore appellant was responsible for such negligence of said company, and should respond in damages for the injuries sustained by appellee in falling over the wire when down across the sidewalk on that evening. Dr. Washburne, who was the family physician of appellee, and who treated him professionally, both before and after the alleged injury, testified, as a witness on the trial in behalf of appellee, that he was and for 10 years had been a member of the city council of Lafayette, and that the guy wire was fastened to a hickory tree in the commons. He states that he saw the tree while it was lying on the ground a day or two after the accident. He also testified that the tree was 10 inches in diameter, and that it was green in both branches and body, "down to within just above the ground a piece," and that the tree

bore hickory nuts the year before. We quote the greater part of his testimony as follows: "Were you present when the Brush Electric Lighting Company fastened its guy wire to this tree, running it from the pole to the tree? I was not. Do you know how long had this guy wire been run from this pole to this tree in question? I don't know. You may state, so far as you have any knowledge of its existence there, how long it had been before this 20th of Oct., 1888. I have no knowledge of the length of time; I don't know anything at all about it. You practice medicine a good deal all over that part of the city, don't you? I am over that part of the city quite often; yes, sir. And in passing along, you had noticed the wire running from the pole to this tree, had you? I had observed the wire; yes, sir. How long, now, before the time this accident is alleged to have occurred, had it been since you observed it? I couldn't say. State whether or not it was for considerable time, or only a short time. I couldn't say the period of time, but it was before this accident or the tree blew down. Well, was it several years or several months, or what was it? I remember seeing this wire attached to the tree, and that is all I can say. As regards the period of time prior to the time the tree blew down, I don't know. It was some time before, was it? Some time before that; how long I wouldn't undertake to say. Can you state whether it was two or three months before? Yes, it was two months before; how much longer I don't know." He also testified that a fire had been built on one side of the tree several years before by his son, and that one-half of it had been burnt off, but whether he noticed this fact prior to the accident is not clear; and that inside the tree was dead and decayed, and the outside was apparently green, at the time of the accident. Other witnesses testified that fires had been built at and around said tree several times after the wire was fastened thereto, and prior to the time it blew down. As to when and under what circumstances Dr. Washburne observed the condition of the tree prior to the alleged accident does not appear, except as indicated in his testimony, to which reference has been made. It appears, however, that he had seen the tree, and knew a fire had been built there several years before, and that one side of the tree was burned; that the tree bore hickory nuts the year before, and that "the body of the tree was green, (and the branches were green,) with the exception of down close to the ground;" and that he knew the guy wire was fastened thereto; but it is not shown, except inferentially, that he knew at any time prior to the accident that the tree was insecure or decayed, except the burn near the ground. In fact, we have referred to the sole and only evidence to which our attention has been called, or which we have observed, tending to show any knowledge on the part of appellant in relation to the fastening of the guy wire to the tree, or of its continuance, prior to the 19th of October, 1888, and there is no evidence whatever in the record tending to prove the city had any knowledge at any

time of the condition of the tree, except the testimony of Dr. Washburne. It is insisted "that appellee has wholly failed to show that there is a particle of evidence to sustain the very essential fact that the city knew, *at the time the guy wire was attached to the tree*, that the tree was dead, decayed, and rotten. This is the basis of both paragraphs of the complaint." It is conceded there is a variance between the allegations and the proof, in this, that the evidence fails to show that appellant had such knowledge "at the very time it was so fastened." It is insisted, however, by counsel for appellee that under all the surrounding circumstances disclosed by the evidence appellant had constructive knowledge of the alleged negligence of the company and unsafe condition of the wire a sufficient length of time to have remedied the defect, as to the street, before the happening of appellee's injuries. In this view we cannot concur. The tree was on the commons, which belonged to private parties, and was some distance from the street. There was nothing in the appearance of the wire to indicate that it was in any manner unsafe. In the absence of actual knowledge or notice as to the condition of the tree, it does not appear that anything could be observed from the street indicating that it was rotten or unsafe. The variance referred to, however, will not justify a reversal of the judgment of the trial court, if, as insisted by counsel for appellee, the evidence fairly tends to prove such actual knowledge on the part of appellant as to the alleged negligence of the company and the unsafe condition of the wire for such period prior to the accident as would have given appellant a reasonable time in which to have taken the necessary steps to remove or safely secure the wire. *Steinke v. Bentley*, (Ind. App.) 34 N. E. Rep. 97, decided at this term. The evidence relative to such notice or knowledge on the part of appellant, and also in reference to other material points in the case, is not satisfactory, but there was evidence tending to show that Dr. Washburne knew the tree had been burned, at least partly away, several years prior to the time in question, and that one end of the guy wire was fastened to the tree at least two months prior to the accident. In view of all the facts and circumstances which appear in the record, we cannot say there was an entire failure of proof on this proposition or as to the alleged injury. There was no evidence in support of the allegation in relation to the hole in the gutter, or that the tree fell from its own weight and the strain of said guy wire.

Complaint is made of the third instruction given by the court at request of appellee, in substance, to the effect that, if the city knew the sidewalk was obstructed a reasonable time before the happening of the injury, the city was liable for the injury occasioned by such obstruction. There was no evidence whatever tending to show that appellant, prior to the alleged injury, had any knowledge of the fact that the wire was down or across the sidewalk. The instruction was not applicable to either the issues or the evi-

dence. The same objection is urged to the fourth instruction, but it is insisted by counsel for appellee that "if they were not relevant, as counsel contend, the giving of them is no cause for reversal, for the reason that it clearly appears that no harm could have resulted to appellant therefrom." When the evidence clearly justifies the verdict, and it appears to the appellate court that the merits of the cause have been fairly tried and determined in the court below, the giving of irrelevant and erroneous instructions, where it is clear that such instructions have done no injury, constitutes harmless error, for which the judgment of the trial court will not be reversed. Section 658, Rev. St. 1881; *Felkner v. Scarlet*, 29 Ind. 154; *Garrigan v. Dickey*, 1 Ind. App. 421, 27 N. E. Rep. 713. Absolute accuracy and perfection cannot be obtained ordinarily in all the stages of an important trial. It is therefore not enough to reverse a judgment that the court below committed some error in the course of a cause. Errors which have no effect on the verdict occur in the proceedings and trial of almost every cause before a jury. Appellate courts are not created to either reverse or affirm judgments, but are organized and maintained as a part of the judicial system, the administration of which is intended and calculated to secure to parties involved in litigation their substantial rights, freely and without purchase, completely and without denial, speedily and without delay; but where error is shown to have occurred in the trial court, which it appears was probably prejudicial to appellant, it is the duty of the appellate court to reverse the judgment. Practically more or less delay in judicial proceedings is unavoidable, and moreover correct results cannot always be secured. Notwithstanding painstaking investigation and careful consideration unimportant errors will occasionally be deemed prejudicial, and now and then hurtful rulings may be considered harmless. There is not so much uncertainty in the general principles of the law or the rules of practice, but the difficulty in the practical enforcement of these principles and rules in and by an appellate court oftentimes is in determining what errors in the trial court were probably influential on the result. So it is in this case. For instance, in the fourth instruction referred to, without any reference to whether the obstruction had remained in the street under such circumstances and for such length of time as to make it the duty of the city to take notice of the existence thereof, the jury were told that appellant was liable if the city, "by the use of ordinary and reasonable diligence, might have known of such obstruction a reasonable time before the occurrence of said alleged injury." Whatever may be said concerning the instruction, it certainly was not pertinent to any issue in the case. Whether the instruction had any effect on the result prejudicial to appellant, the court cannot say. We can only theorize, speculate, and indulge in presumptions and probabilities in relation thereto. The rule is that instructions of the court must be applicable to the issues.

Myers v. Moore, 3 Ind. App. 226, 229, 28 N. E. Rep. 724.

Counsel for appellant insists that the court erred in refusing to give to the jury instructions Nos. 6, 7, and 10 asked by defendant. The substance of the tenth instruction was that the jury, in determining the weight and credibility of the appellee's testimony in relation to whether he tripped and fell over the wire as claimed by him, had the right to take into consideration his conduct immediately following the alleged accident, together with the other evidence in the case. It is contended by counsel for appellee that the use of the word "duty" in the instruction, in this connection, namely, "It is your duty to look into his conduct," etc., renders the instruction improper. *Unruh v. State*, 105 Ind. 117, 4 N. E. Rep. 453. Under the facts and circumstances disclosed by the evidence in this case, the reasoning in the case last above cited is not applicable, and does not sustain the objection urged to the instruction in question. *Robertson v. Monroe*, (Ind. App.) 33 N. E. Rep. 1002, (decided at this term,) and authorities there cited. In our opinion the instruction was a proper one to have been given to the jury. It correctly states the law applicable to the evidence on that branch of the case. It does not necessarily follow, however, that the refusal to give such correct and pertinent instruction constitutes reversible error.

The 5th, 6th, and 7th instructions asked by appellant are as follows: (5) "If you find from the evidence that the tree to which said guy wire was attached was rendered insecure by reason of its having been set fire to some time after the guy wire had been attached to it, then I instruct you that the plaintiff cannot recover unless the defendant had knowledge or notice of such insecurity of said tree, or unless such insecurity had existed for such a length of time before the alleged accident that the city authorities, under the circumstances disclosed in the evidence, by the exercise of reasonable care, should have known of its existence." (6) "If you find from the evidence that the tree to which the guy wire is alleged to have been attached was rendered insecure by reason of fires having been made against it after the time said tree was observed by the witness Washburne, and that prior thereto said tree was a reasonably secure tree to which to attach a guy wire for the purposes alleged in the complaint, then I instruct you that a knowledge on the part of the witness Washburne of the prior condition of said tree would not alone amount to a knowledge or a notice on the part of the defendant of the insecurity of said tree at the time of the alleged accident." (7) "In determining the question whether the defendant should have had notice of the insecurity of said tree to which said guy wire was attached, prior to the alleged accident, you should take into consideration, with the other evidence in the case, the distance of said tree from a public street, the character, location, and visibility of the defect or burn, if any, which rendered said tree insecure, and the likelihood of its having been ob-

served by any of the city authorities prior to the alleged accident." In the language of Niblack, C. J., "as applicable to the facts of this case, we see no objection" to the sixth instruction. *Wiseman v. Wiseman*, 89 Ind. 479, 483. The fifth instruction, which was given, does not embrace all of the material and pertinent parts of the sixth instruction, which was refused. In view of the fact that there were no circumstances, aside from the knowledge of Dr. Washburne, in regard to the condition of the tree, tending to show that appellant might have known of the insecure condition of the wire prior to the accident, the fifth instruction, to say the least of it, stated the law, under the issues and the evidence, on the proposition contained in the conclusion thereof, fully as favorably as appellee was entitled thereto. If in fact the tree was rendered unsafe by reason of the burning thereof after the time Dr. Washburne observed it, the sixth instruction should have been given in connection with the other instructions. The seventh instruction was also refused. The general statement of an abstract legal rule, although accurately stated, cannot in all cases be properly embodied in an instruction. A party, however, has a right to have specific instructions applying to the facts of the particular case as developed by the evidence. *Unruh v. State*, supra; *Hipes v. State*, 73 Ind. 39; *Elliott's App. Proc.* § 706. The theory of each paragraph of the complaint was that the wire was originally negligently attached by said Brush Company to the decayed and insecure tree, with the knowledge of appellant, but the instructions given by the court at the request of appellee were in substance and to the effect that, without any knowledge on the part of appellant either in relation to the original insecure attachment, or to the continuation thereof in an unsafe condition, the appellant was liable, "if, by the exercise of ordinary or reasonable diligence," the city might have known of such negligence on the part of the company several months before the happening of the accident in question. It is true, as contended by counsel for appellant, that a complaint must proceed on a single, definite, and distinct theory, (*Bank v. Root*, 107 Ind. 224, 8 N. E. Rep. 105,) and that the instructions must be applicable thereto, (*Myers v. Moore*, supra.) These rules should be construed and applied in the spirit which underlies the Code. Sections 391-393, Rev. St. 1881. But conceding without deciding that the instructions so given by the court, at request of appellee, to the jury relative to constructive notice on the part of the appellant of the alleged negligence of said company, correctly state the law applicable to the case, then theseventh instruction asked by appellant, under the circumstances of this case, should have been given. It is not necessary to decide whether if appellee's instructions of which complaint is made had not been given, or if appellant's instructions which were refused had been given along with them, or whether, if all of the instructions in question had been refused, there would have been, in any such event,

reversible error in the record. It is sufficient to say that, in the view we have taken of the case, any one of the errors which we have heretofore mentioned, standing alone, may have been harmless, but, when the entire case as presented by the record is examined and considered as a whole, we cannot say it appears "to the court that the merits have been fairly tried and determined in the court below," or that the errors referred to do "not affect the substantial rights" of appellant. Sections 398, 658, Rev. St. 1891; Elliott's App. Proc. §§ 599, 632. This case does not come within the rule that, where the record affirmatively shows that the verdict is right upon the evidence, the judgment will not be reversed because the court erred in the instructions given to the jury, or for error in refusing to give instructions. *Woods v. Board of Com'rs*, 128 Ind. 289, 292, 27 N. E. Rep. 611. An appellate court, in the light of the observation and experience of nisi prius courts, and of the members of the profession who have had an extensive and long-continued practice in the trial of causes before juries, may and ordinarily will assume that the giving of merely irrelevant or slightly inaccurate instructions do not have any controlling influence on the result, and therefore the presumption in such cases is that a just conclusion was reached in the trial court, (and this rule may apply in some cases where the instructions are more radically erroneous, and also where correct and pertinent instructions are refused;) but where the evidence is so unsatisfactory on the vital points in the case as to render it extremely doubtful, in the mind of the court, whether the verdict was right, while it is true the court will not weigh the evidence, it will, when there is such error in the record as is shown to exist in this case, proceed on the theory that the errors were harmful. In this case the record discloses, in the opinion of the court, under the facts and circumstances to which we have called attention, such prejudicial error in the giving and refusing of instructions, on account of which, for the reasons indicated, the judgment of the court below is reversed, with instructions to grant a new trial.

REINHARD, J. I concur in the result, but think the judgment ought to be reversed on the evidence also. In my judgment there is no evidence tending to show any knowledge of the unsafe condition of the tree. It is not shown at what particular time Dr. Washburne discovered that the tree had been scorched, nor does it appear that he knew the extent to which it had been injured. It was the duty of the appellee to prove knowledge of the defective condition in the city.

(7 Ind. App. 248)

PITTSBURGH, C., C. & ST. L. RY. CO. v. LIGHTCAP.

(Appellate Court of Indiana. May 24, 1893.)

CARRIERS—LIMITED TRAINS.

A person who buys a ticket from a railroad company is entitled to offer the same as

fare only on a train which is scheduled to stop, for the purposes of receiving and discharging passengers, at the place mentioned in the ticket as his destination; and the fact that at such place there is a railroad crossing at which all trains are required to stop does not change this rule.

Appeal from circuit court, Pulaski county; George Burson, Judge.

Action by Henry Lightcap against the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company to recover damages for refusal to receive plaintiff's ticket. A demurrer to the complaint was overruled, and judgment was rendered for plaintiff, and defendant appeals. Reversed.

N. O. Ross, for appellant. Spangler & Spangler and H. R. Robbins, for appellee.

REINHARD, J. Lightcap sued the railroad company for damages. He alleges in his complaint that the appellant, on the 14th day of July, 1891, owned and operated a railroad, and was a common carrier of passengers for hire, between North Judson, in Stark county, Ind., and Logansport, in the same state. That on said day the appellee purchased a ticket from the appellant entitling him to ride from North Judson to Logansport, and from there back to North Judson, and that he paid therefor the sum of \$2.20, which was the regular price for first-class fare. That, in pursuance of the contract, the appellant carried the appellee to Logansport, and returned to him his "return coupon," entitling appellee to ride from Logansport back to North Judson. That on the following day, and within the life of the ticket, the appellee got on board of one of appellant's passenger coaches going from Logansport, to and through North Judson, which is a regular station on appellant's road and the crossing of two other railroads, and, according to law the appellant is bound to stop all her trains at North Judson, and did stop said train at said station, and permitted appellee and three other passengers to alight therefrom at said station on said day; and while riding in appellant's passenger coach, and in care of appellant's servants, the conductor on said train demanded from appellee his fare, whereupon the latter tendered the conductor said coupon ticket, which he refused to take or accept, and demanded of appellee \$2.30 in money. Appellee protested against this demand, but, to avoid expulsion from the car by said conductor, he was compelled to and did give the latter the said sum claimed by him. That said conductor threatened to and would have put appellee off the train had he not given him said amount. Appellee was greatly mortified and humiliated by being thus compelled to part with his money in the presence of the passengers of said coach, and endured great mental suffering in consequence of said treatment, as well as the loss of his money, to his damage in the sum of \$5,000. The overruling of a demurrer to this complaint constitutes the first error relied upon for a reversal of the judgment.

It will be noticed that in the complaint there is an entire absence of any averments that the train upon which appellee

had taken passage to North Judson was scheduled to stop at the station or depot at that point for the purpose of receiving and discharging passengers. Nor is there any allegation that it was the appellant's custom to stop said train, or that the other railroads mentioned crossed appellant's road at or near the company's station at North Judson. There is an averment that appellant was required by law to stop at North Judson, and did stop there; but at what point, and whether or not the said stopping place was near said company's station there, is not stated; and, so far as the complaint informs us to the contrary, it may be quite true that the appellant's station and stopping place at North Judson of the train in question were separate and distinct places, and any distance apart the one from the other. It is true there is an averment that in this instance the train stopped "at said station," and permitted the appellee and three other passengers to alight, but whether such stop was in consequence of the payment of fare by the appellee, or in consequence of the railroad crossings, or for the purpose of allowing passengers to leave the train, does not appear. Doubtless a railroad company not only has the right, but it is its duty, to operate its trains in accordance with established rules and regulations, and upon these it is not bound to infringe in order to accommodate a single passenger. On the other hand, it is the duty of one about to become a passenger to use reasonable diligence in acquainting himself with the rules and regulations of the company respecting the time when, the place where, and the circumstances under which a train upon which he desires to travel may go or stop, according to the company's rules and regulations; and if, by neglecting to do so, he makes a mistake, he can have no remedy if he be carried past his destination or ejected before getting there. *Railway Co. v. Nuzum*, 50 Ind. 141; *Railway Co. v. Applewhite*, 52 Ind. 540; *Railroad Co. v. Hatton*, 60 Ind. 12; *Railroad Co. v. Bills*, 104 Ind. 13, 3 N. E. Rep. 611; *Id.*, 118 Ind. 221, 20 N. E. Rep. 775.

If, under the company's regulations, the train upon which appellee had taken passage was not required to stop at North Judson, the appellee had no right under his contract to travel upon that train by reason of the ticket he held. The mere fact that the train was compelled to stop, and did stop, on account of the railroad crossing at North Judson, did not give the appellee any right under his contract to go upon such train, which, for aught that is pleaded, may have been a limited one between Logansport and some point beyond North Judson. When he entered the appellant's coach with no ticket other than the one he had, he became a trespasser, and could lawfully remain upon the train only by paying his fare to the first regular stopping station, unless the conductor consented to carry him to North Judson on his return coupon. If he refused to pay such fare, the conductor would have had the right to stop the train at once, and compel him to leave it, or he could have done what it seems he

did do,—collect fare from him to the first station at which the train was scheduled to halt. Had the conductor chosen to carry him past North Judson, and to the next stopping point, the appellee would have been without redress for being carried beyond his point of destination. The conductor, it would seem, chose to exercise his right of collecting fare to the next station where the train was scheduled to stop. If, when the train reached North Judson, and stopped on account of the crossing, the appellee and others availed themselves of the opportunity to alight, the company cannot be deemed to have waived its right to carry passengers on said train only between Logansport and some point beyond North Judson. Neither under its contract nor by virtue of its general duty as a carrier did appellant violate its obligations to the appellee. It never agreed to carry him to North Judson upon this train, and it was under no legal duty to do so. If appellee chose to remain on the train as a passenger to some point beyond North Judson, taking his chances for getting off at North Judson, that was for him alone to determine. But the mere fact that the train was obliged to halt, and did so, at the railroad crossing, and by reason of the same, which is the utmost that can be made out of the averments, gave the appellee no rights as a passenger to that point by virtue of his return ticket, in the absence of any agreement to take him there; for his ticket would have been valid only on some train that was scheduled to stop at North Judson, and that this was such a train is not averred. The \$2.20 collected may have been for fare to the next regular stopping point, and this, we think, the conductor had a right to exact of the appellee. If the latter availed himself of the opportunity to leave the train when it stopped at the crossing, notwithstanding the fact that he had paid his way to the next stopping station, he cannot now be heard to complain. Other errors relied upon need not now be considered. Judgment reversed, with instructions to sustain the demurrer to the complaint.

ROSS, J., took no part in the decision of this case.

(7 Ind. App. 70)

EVANS et al., County Commissioners, v. WEST.<sup>1</sup>

(Appellate Court of Indiana. May 24, 1893.)

APPELLATE COURT—JURISDICTION.

The appellate court has not jurisdiction to entertain an appeal from a judgment of the circuit court made in a proceeding to lay out a road.

Appeal from circuit court, Boone county.

Proceedings were commenced by petition to Thomas B. Evans and others, county commissioners, to establish a gravel road. Samuel West appeared as remonstrator before commissioners, and moved to dismiss proceedings, and the motion was denied. The remonstrator appealed to the circuit court, which rendered judgment holding the proceedings

<sup>1</sup> Transferred to Supreme Court. See 38 N. E. 65.

void, and the county commissioners appeal. Appeal transferred to supreme court.

T. W. Lockhart and O. P. Muhan, for appellants.

**PER CURIAM.** A petition was filed before the board of commissioners of Boone county by appellants to establish a gravel road, under section 5091 et seq., Rev. St. 1881. The board appointed viewers and an engineer to lay out the road, and report upon its utility, which was done according to the order. The viewers having reported the road of public utility, the board ordered the same established, and appointed an engineer to have the improvement made, and also appointed a committee to apportion the expenses of the improvement, the same having theretofore been estimated and assessed. In pursuance of this order, the committee acted, and subsequently reported such apportionment, and, in the session at which such report was made, the appellee appeared as remonstrator, and moved to dismiss the entire proceedings, which motion was overruled, and the remonstrator appealed to the circuit court, and such proceedings were afterwards had that, upon issues joined, the court made a special finding, and held the entire proceedings void, and rendered judgment in favor of the appellee, from which this appeal was taken to the supreme court. The cause was transferred to this court by the clerk, under the belief, we suppose, that this was a proceeding to enforce a statutory lien for the assessments, of which class of cases this court has jurisdiction. Acts 1893, p. 356. This is not a proceeding to enforce a lien, however, but to establish a gravel road under the statute. No jurisdiction has been conferred upon the appellate court in appeals from such proceedings, and the jurisdiction is therefore reserved in the supreme court. Ordered transferred.

(7 Ind. App. 696)

### OHIO & M. RY. CO. v. LEVY.

(Appellate Court of Indiana. May 25, 1893.)

#### NEGLIGENCE—EVIDENCE—DECLARATIONS.

In an action against a railroad company for damages arising from personal injuries to plaintiff's wife, caused by falling into an excavation adjoining defendant's track, it is error to admit the declarations and admissions of the general solicitor of defendant respecting the question of notice, in the absence of evidence that he was invested with authority concerning the use and occupation of the street in which the excavation was made. *Railway Co. v. Levy*, (Ind. Sup.) 82 N. E. Rep. 815, followed.

Appeal from circuit court, Jefferson county; W. T. Friedly, Judge.

Action by Reuben Levy against the Ohio & Mississippi Railway Company. Judgment for plaintiff. Defendant appeals. Reversed.

McMullen, Johnston & McMullen and Edward Barton, for appellant. Korbly & Ford and A. G. Smith, for appellee.

**DAVIS, J.** The appellee was the plaintiff below. He brought this action to recover damages sustained by him on ac-

count of injuries his wife received in consequence of falling into a ditch which it is alleged the appellant negligently maintained adjoining the railroad track in Madison street, in the city of North Vernon. The appellee recovered judgment in the court below, from which appellant prosecutes this appeal. The wife of appellee has also prosecuted an action to recover the damages sustained by her in the same accident. *Railway Co. v. Levy*, (Ind. Sup., Nov. term, 1892,) 82 N. E. Rep. 815.

On the trial of his case, and also on the trial of the case cited, appellee, over appellant's objection, was permitted to prove by Mr. Cope, formerly mayor of North Vernon, a conversation between himself, during his term of office, and Mr. Beecher, the general solicitor of the road, concerning the ditch in question, in which said attorney stated, in substance, that the company would fix the ditch, which promise was not kept. The declarations and admissions of Mr. Beecher, so proven, tended to establish the fact that appellant was responsible for the alleged negligence, and that the company would remedy the defect. Counsel for appellee insist that under the circumstances the declaration and admission of the general solicitor were competent. Further, it is urged that the dangerous condition of the ditch, the responsibility of appellant therefor, and all the facts and circumstances constituting the alleged negligence of appellant, were fully proven by other evidence on the trial, and therefore, it is earnestly urged, if the testimony was improperly admitted, such error was harmless. The argument of learned counsel is cogent, and, whatever our conclusion might otherwise have been, the identical question now under consideration was decided adversely to appellee in the case cited. The two cases, so far as the question here involved is concerned, are in all respects the same. The record in the wife's case was offered in evidence by appellee on the trial of this case, but was excluded. The record so offered is not in the transcript in this case. Counsel, however, concede, in their briefs, that the two causes of action arise out of the same transaction, and that the question now under consideration grows out of the same conversation. A thorough examination of the records leads the writer to the conclusion that the admission of the evidence in question, when considered in the light of all the other circumstances, if erroneous, was not prejudicial to appellant. Counsel for appellee say in their brief, "The plaintiff, Reuben Levy, had no cause of action to recover the expenses to which he was put, in endeavoring to cure his wife of the injuries she received, unless she had a cause of action for the same injuries. Her cause of action depended on her freedom from contributory negligence, and the defendant's negligence. Her recovery of a judgment established both of these propositions. The defendant had its day in court on both of them. The same evidence to establish them was competent here that was competent there." With this statement we concur, as applied to the ques-

tion under discussion. If this conclusion is correct, then, in the state of the record before us, whatever ruling was prejudicial on the trial of the action instituted by the wife would be likewise prejudicial on the trial of the action by the husband. The statute provides that "the appellate court shall be governed in all things by the law as declared by the supreme court of this state, and it shall not, directly, indirectly, or by implication, reverse or modify any decision of the supreme court of this state." Acts 1893, p. 29. There is no basis for discrimination, so far as this question is concerned, between the case instituted by Theresa Levy and the one instituted by Reuben Levy. The cases, in this respect, cannot be distinguished. Whether a recovery by a wife for the injuries sustained by her on account of the negligence of the defendant is conclusive against the defendant, on the question of such negligence, in an action by the husband to recover for the expenses incurred by him for necessary surgical and medical treatment for her on account of such injuries, we need not consider or decide, for the reason the question is not properly presented by the record. On the authority of the opinion of the supreme court in the Theresa Levy Case, the judgment of the court below is reversed, with instructions to grant a new trial.

GAVIN, C. J., did not participate in the decision of this case.

(7 Ind. App. 64)

DAGGY, Township Trustee, v. BALL et al.  
(Appellate Court of Indiana. May 25, 1893.)

DRAINAGE—REPAIRS—ACTION TO ENFORCE PENALTY—PLEADINGS—LIEN—AMENDMENT OF STATUTE AFTER PENALTY INCURRED.

1. Elliott, Supp. § 1207, requires every landowner, in September and October of each year, to clean out and repair the ditches allotted to his land. Section 1208 requires the township trustee, as soon after the 1st day of November of each year as is practicable, to examine the ditches in his township, and provides that, if he finds any landowner in default, such trustee shall at once cause the ditch to be repaired, and that he may enforce the expense thereof against the land. *Held* that, as it is the absolute duty of the landowner to annually clean out and repair the ditches allotted to his land, in an action by the trustee to recover the expense of making such repairs the complaint need not allege that defendant's "allotment of the ditch for repairs was out of repair or needed cleaning," though section 1208 provides that, "when it may be shown to the satisfaction of the trustee that there is no necessity for an annual cleaning, he shall not enforce the penalties for nonperformance."

2. Such statute creates a lien on the land, enforceable by action, for the expenses of the trustee in cleaning out and repairing a ditch allotted to it on the owner's failure to do so.

3. Under Rev. St. 1881, § 248, providing that the "repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide," Acts 1891, p. 47, amending Elliott, Supp. §§ 1207, 1208, which provides for keeping ditches in repair, and attaches a penalty for a

violation thereof, does not affect the right of action to recover a penalty for such violation which accrued before the amendment.

Appeal from circuit court, White county; A. W. Reynolds, Judge.

Action by George W. Daggy, township trustee, against Jennie T. Ball and others.

From an order sustaining a motion in arrest of a judgment for plaintiff, he appeals. Reversed.

T. F. Palmer and Hartman & Hamelle, for appellant. Sellers & Uhl, for appellees.

GAVIN, C. J. The appellant brought suit to enforce against the land described in his complaint a lien for the expense of repairing and cleaning out that portion of a public ditch allotted to it under the law of 1889. After a trial and finding for the appellant, the court sustained appellees' motion in arrest of judgment. From this ruling the appellant appeals, thus bringing before us for determination the sufficiency of the complaint.

The complaint is quite lengthy, and we will not set it out in this opinion, but will take up and consider the various objections presented to the complaint by appellees. It is contended by appellees that the complaint was bad, because "it is nowhere charged that appellees' allotment of the ditch for repairs was out of repair, or needed cleaning." The complaint shows the allotment regularly made, the proper notice thereof given, and their final confirmation. It also shows that appellant, "after the 1st day of November, 1890, examined said John F. Price ditch, and found that the defendant had failed to clean out and repair the portions of such ditch allotted to said lands, whereupon he caused such portions to be cleaned out and repaired at a cost which is the fair cash value of the work," etc. Also "that said lands are and have been, long before said allotments were so made, in the name of said Jennie T. Ball, and that all the defendants claim some interest in said land, the exact nature of which is unknown to plaintiff, and they are made parties hereto, to answer to their interest," etc. By section 6 of the act of 1889 (being section 1207, Elliott, Supp.) it is made the duty of the landowner "to clean out and repair the portion of said work so allotted to such tract of land, \* \* \* between the first days of September and November, of each and every year thereafter." By section 7 of the act of 1889 (Elliott, Supp. § 1208) it is made the duty of the township trustee, "as soon after the first day of November of each year as is practicable, to examine the ditches in his township, and, if he find that any such owner, corporate road, or railroad has failed to clean and repair the portion of said ditch or drain allotted to the lands of such owner, or to such corporate road or railroad, such trustee shall at once cause such portion to be cleaned out and repaired at the cost of such owner, or such corporate road or railroad, and may certify such expense to the auditor of the county, who shall place the same, together with the fees of such trustee, on the duplicate as an assessment upon



the land of such owner, or upon the right of way property and franchises of such corporate road or railroad, and the same shall be a lien thereon, and collected as other taxes are collected, and, when collected, shall be paid over to such trustee; or such trustee may recover such expense and his fees before any justice of the peace of the township where such owner resides, or through which such road or railroad runs, or he may bring suit in the circuit or superior court of the county to collect such expense and fees, and enforce and foreclose the lien upon such land." It will be observed that these sections do not confer upon the trustee any discretionary power to examine the drains, and ascertain and determine whether they really need cleaning out, in order to enable them to subserve their purpose; nor do these sections require the owner to clean out if really needed to make the ditches work right. On the contrary, by these sections the law imposes upon the owner the absolute duty of cleaning out and repairing annually. Recognizing that, in the course of nature, by the action of the running water, and by frosts and falling rains and other natural causes, there must necessarily be within a year more or less disturbance of the ditch from its original condition, the law determines the frequency with which these cleanings shall be made. The complaint follows the requirements of the statute in this respect, and no more can be demanded. It is true that in section 1203, Elliott, Supp., there is a proviso "that when it may be shown to the satisfaction of the trustee that there is no necessity for an annual cleaning, he shall not enforce the penalties for nonperformance, but in no case shall the work be delayed more than two years." This proviso, however, constitutes matter of defense merely. Primarily, it is the duty of the trustee to see that the ditch is cleaned annually. If any different order was made by him, it devolves upon the defendant to plead and prove it, and this has not been done. *State v. Maddox*, 74 Ind. 105; *Hewitt v. State*, 121 Ind. 245; 23 N. E. Rep. 88; *Teel v. Fonda*, 4 Johns. 304, Bliss, Code Pl. § 202.

It is also suggested that, under this statute, no lien for these expenses is created which can be enforced by action. We are not favorably impressed with this view of the law. "In the construction of statutes the prime object is to ascertain and carry out the purpose of the legislature in their enactment." *City of Evansville v. Summers*, 108 Ind. 192, 9 N. E. Rep. 81. "It is a settled principle that in construing a statute the intention of the legislature must govern." *Taylor v. Board*, 67 Ind. 853. There is no room to doubt that the legislature by this statute did intend to create a lien upon the land for these expenses, enforceable by suit in the circuit or superior courts.

It is also urged that the lien was lost by reason of the amendment of the act of 1889 in 1891. In 1891, (see Acts 1891, p. 47,) and during the pendency of this action, the legislature amended sections 6 and 7 of the act of 1889, they being sec-

tions 1207 and 1208 of Elliott's Supplement. Counsels' position is that by the amendment of the statute the amended sections are repealed, and rights acquired thereunder lost, unless they had been established by judgment, or were saved by the express provisions of the amended law, and this would appear to have been the view of the learned judge who determined the cause in the court below. In coming to this conclusion we think the provisions of section 248, Rev. St. 1881, must have been overlooked. This section reads as follows: "Whenever an act is repealed which repealed a former act, such act shall not thereby be revived, unless it shall be so expressly provided. And the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide; and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability." Counsel urge that this statute only applies to and saves personal liabilities, and not liabilities against lands. No authority has been cited in support of this limitation upon the language of the statute, and we are unable to see any good reason why the court should ingraft it thereon. Upon every principle of equity there exists a much stronger reason for continuing a liability in such a case as this, where reimbursement is sought for money expended on the land, than where a simple penalty or strict legal liability is sought to be enforced. In *Dearborn v. Patton*, 3 Or. 420, it was held that the lien of a judgment was a "liability incurred" within the purview of a saving statute. We are of opinion that the liability of this land for the repayment of the expenses sought to be recovered in this action was continued by section 248. With this view of the law it is unnecessary for us to determine whether or not the amendments really operated as a repeal of the old sections, or were, so far as concerned the enforcement of liens, a continuation of the old sections, as was the case in *Mayne v. Board*, 123 Ind. 132, 24 N. E. Rep. 80. Neither need we decide whether the right to the lien had become vested, so as to be unaffected by a repeal of the law under which it arose. *Goodbub v. Estate of Hornung*, 127 Ind. 181, 26 N. E. Rep. 770; *Bate v. Sheets*, 64 Ind. 209.

The last objection urged to the complaint is that it does not affirmatively show the defendants, or any of them, to be the owners of the land. If there be any defect in this respect, it is immaterial. The decree will be binding upon those who are parties, and upon those only. If the true owner is not a party, he will not be bound, but those who are parties will be bound by the judgment. The proceeding will not be, as to them, a nullity. *Curtis v. Gooding*, 99 Ind. 45; *Hanna v. Scott*, 84 Ind. 71; *Waltz v. Borroway*, 25 Ind. 380. We are forced to the conclusion that the court erred in sustaining the motion in arrest. Judgment reversed.

(7 Ind. App. 44)

**STATE v. MURPHY.**

(Appellate Court of Indiana. May 26, 1893.)

**TRESPASS—SUFFICIENCY OF INDICTMENT—DESCRIPTION OF LANDS.**

An indictment for trespass under Rev. St. 1881, § 1941, need not specifically describe the lands in question. *State v. Smith*, (Ind. App.) 34 N. E. Rep. 127, followed.

Appeal from circuit court, Boone county; Stephen Neal, Judge.

John Murphy was indicted for trespass under Rev. St. 1881, § 1941. The indictment was quashed, and the state appeals. Reversed.

P. H. Dutch, for the State. S. R. Artman, for appellee.

LOTZ, J. The appellee was indicted for a violation of section 1941, Rev. St. 1881. The first count charged that the defendant, being about to enter unlawfully upon the inclosed land of George Stephenson, and being forbidden so to do by the owner, did thereafter unlawfully enter upon the same. The second count charges that the defendant, being upon the land of George Stephenson, and being notified by the owner to depart therefrom, unlawfully neglected and refused so to do. The court below sustained a motion to quash. The only point made against the indictment is that it fails to describe the lands specifically. This is unnecessary in such an indictment. *State v. Smith*, 34 N. E. Rep. 127, (decided this term.) Judgment reversed, with instruction to overrule the motion to quash.

(50 Ohio St. 297)

**SHUGARS, Village Clerk, v. WILLIAMS et al.**

(Supreme Court of Ohio. May 9, 1893.)

**VILLAGES AND HAMLETS—ANNEXING TERRITORY—PROCEDURE.**

Chapters 2, 5, div. 2, tit. 12, Rev. St., relating to the general subject of the creation of villages and hamlets, and the annexation of territory to those already created, are to be treated, for purposes of construction, as one act. The course of procedure at the hearing before the county commissioners, directed by section 1557, is applicable to each branch of the subject. The authority there given to permit amendment to the petition applies to a petition for annexation of territory under subdivision 2, c. 5, and it is not necessary to the exercise of such discretion by the commissioners that an ordinance should previously have been passed, authorizing the agents of the corporation to apply for such amendment.

(Syllabus by the Court.)

Error to circuit court, Lucas county.

Petition by one Williams and others against one Shugars, clerk of the village of Maumee, to restrain proceedings for the annexation of territory to the village. A judgment dismissing the petition was reversed at circuit court, and defendant brings error. Reversed.

The other facts fully appear in the following statement by SPEAR, J.:

On the 7th day of December, 1887, the council of the village of Maumee, Lucas county, duly passed an ordinance to

provide for the annexation of certain territory to the village, and therein directed and empowered A. W. Eckert and Albert Allus to make proper application to the commissioners of Lucas county, and to prosecute all necessary proceedings to effect annexation of said territory. On the 4th day of January, 1888, the agents named filed with the board of commissioners a petition in behalf of the village, setting forth the ordinance, a description of the territory sought to be annexed, with a plat, and praying an order of annexation. Notice of the time and place of hearing was duly given, and the meeting of the board for this purpose was adjourned from time to time. On the 8th day of May, by leave of the board, the agents, in the name of the village, presented an amendment to the petition and map, changing some of the lines, and leaving out a portion of the territory described in the original petition, but not adding any additional territory, which was taken under advisement, and the further hearing adjourned until June 5th. On the last-named day the hearing was again adjourned until June 12th. On that day the board again met, and a resolution was passed, reciting, among other things, that the application, as amended, contained a correct description of the territory sought to be annexed, granting the prayer, and ordering the annexation of the territory therein described. No ordinance had been passed by the council authorizing the amendment. A certified transcript of the journal of the board, together with the original and amended petitions, and the plat attached to the same, was thereafter filed, by order of the board, with the plaintiff in error, the clerk of the village of Maumee. Within 60 days thereafter the defendants in error, owners of property lying within the territory ordered to be annexed, filed a petition in the court of common pleas praying for an order restraining the clerk from reporting the proceedings to the village council. The common pleas refused the prayer, and dismissed the petition. This judgment was reversed by the circuit court, and the case is here on a petition in error, asking a reversal of the judgment of the last-named court.

A. W. Eckert, for plaintiff in error. Osborn & Smith, for defendants in error.

SPEAR, J., (after stating the facts.) The question presented by the record is as to the legality of the order of the board of commissioners giving leave to amend the petition, in the absence of an ordinance authorizing such change, and ordering the annexation of the territory as described in the amended petition. It was the judgment of the circuit court that the action of the board in that behalf was unauthorized.

The proceeding is purely statutory, and the question is, therefore, to be determined by a consideration of all the statutes bearing upon the subject. In arriving at a conclusion, the test to be observed is the intent of the lawmakers, as expressed by the law. Chapter 2, div. 2,

tit. 12, Rev. St., relates to the creation of villages and hamlets; chapter 5 of the same division relates to the annexation of territory to any city or village; subdivision 1 treats of annexation on application of inhabitants residing on adjacent territory; and subdivision 2 treats of annexation on application of the corporation itself. The general subject-matter of all is the formation of municipalities and changes in territory.

Looking to subdivision 2, we find that, when the inhabitants generally desire to enlarge the corporate limits by annexation, the first step is for the council to pass a proper ordinance, and constitute one or more persons to act for the municipality in prosecuting the proceedings necessary to effect the annexation. This is done by the filing with the board of county commissioners of a petition setting forth the ordinance, and giving a description and a map. That done, "like proceedings shall be had, in all respects so far as applicable, as are required under the provisions of subdivision 1." (section 1602.) No other method of procedure is pointed out in subdivision 2, so that we necessarily turn to subdivision 1. There we find (section 1590) that, when the petition is presented, "the same proceedings shall be had, in all respects, so far as applicable, and the same duties in respect thereto shall be performed by the commissioners and other officers, as are required in the case of an application to be organized into a village under provisions of this division." So that, for further method of procedure before the board, we recur to chapter 2, prescribing the duties of the commissioners in case of an application for the organization of a village; and provision is there made for the hearing, as follows: "Sec. 1557. The hearing shall be public, and may be adjourned from time to time, and from place to place, according to the discretion of the commissioners, and any person interested may appear, in person or by attorney, and contest the granting of the prayer of the petition, and any affidavits presented in support of or against the prayer of the petition shall be considered by the commissioners, and the petition may be amended by leave; but if any amendment is permitted, whereby territory not embraced is added, the commissioners shall appoint another time for the hearing, of which notice shall be given as specified in the last preceding section." This section clearly gives the commissioners, in a proper case, authority to grant leave to amend; and, as stated before, it is the only provision directing procedure before the commissioners in either chapter 2 or chapter 5. If it cannot be held to apply to a case like the present, then the legislation seems like a jumble, and the apparent purpose of the legislature is defeated. If such result can be reasonably avoided, it is the duty of the court to give such construction to the whole statute as will avoid it.

This court is of opinion that this may be done, and that the provisions of section 1557 should be held to apply. If they do apply, in substance and spirit, then the commissioners had authority to al-

low an amendment to the petition without the formality of action by the village council directing such amendment, for the statute nowhere requires such an ordinance. The purpose of such ordinance would be only to show that the action of the agents was directed by the principal. But may not subsequent ratification be as effectual as previous authority? If so, and if the statute furnishes a method by which this result may be reached, is not the end accomplished? Apparently such provision is made, in substance. Recurring, again, to section 1590, we find that "the final transcript of the commissioners, and the accompanying map or plat and petition, shall be deposited with the clerk of the city or village to which such annexation is proposed to be made, who shall file the same in his office." By sections following, provision is made requiring the clerk, after the expiration of 60 days from the date of the filing, to lay the transcript, with map, plat, and petition, before the council, and thereupon the council, by resolution or ordinance, shall accept or reject the application for annexation. If the application is rejected, the proceedings stop. If accepted, the clerk must make two certified copies, containing the petition, maps, transcript of the proceedings of the commissioners, and of resolutions or ordinances, one of which he must forthwith deliver to the recorder of the county, who must make a record of the same in a proper book, and the other forward to the secretary of state. When the resolution or ordinance accepting the annexation has been adopted, the territory is to be deemed a part of the village, and the inhabitants residing therein are to have all the rights and privileges of the inhabitants within the original limits. Provision is also made for delay, in case injunction proceedings are commenced within the 60 days mentioned, and for proper action by the officers in the event that the injunction is either finally sustained, or is dissolved. It is manifest that one of the purposes of this legislation is to provide for the addition of territory by the joint action of the village council and the county commissioners; and it would seem that, giving effect to all these sections, a scheme has been mapped out which, though not altogether coherent in its parts, will nevertheless practically reach the end intended.

Objection is made that the commissioners did not, after the amendment, act respecting the same territory as that which the ordinance described, and hence their action was void for want of jurisdiction. But is not this rather technical? The amended petition does describe territory described in the ordinance, though not all of it, and does not include any not described in the ordinance. In other words, the effect of the action of the commissioners was to grant to the petitioners a part of their prayer; not all of it. In the practical administration of justice, mere technical objections have to give way to substance.

It is further objected that the agents could not have had authority to make the amendment to the petition, because

the council could not, as to a matter of this kind, delegate its authority. If by this is meant that it could not delegate authority to make a change which would bind the municipality as a finality, the claim may be conceded. But we have already seen that the scheme contemplated further action by the council, and, it is submitted, this fact destroys the force of the objection.

It is the judgment of this court that, giving a reasonable construction to the statute, the action of the commissioners was authorized, and that in holding otherwise the circuit court erred.

Judgment reversed.

(60 Ohio St. 208)

**ZIEVERINK et al. v. KEMPER.**

(Supreme Court of Ohio. April 25, 1893.)

**CANCELING DEEDS—PLEADINGS—LIMITATION OF ACTIONS—WHEN ACTION "COMMENCED"—CORPORATIONS—APPOINTMENT OF RECEIVER—POWERS OF RECEIVER—LIABILITY OF STOCKHOLDERS—EVIDENCE.**

1. When it appears from plaintiff's petition, in an action for relief on the ground of fraud, that the cause of action accrued more than four years before the action was commenced, a general averment in the petition that the fraud was not discovered by plaintiff until a time within four years before the action was brought is sufficient to bring the case within the saving clause of the statute of limitations for such actions, without specifically setting out when the discovery was made, or how it was made, or why it was not made sooner.

2. An action is deemed commenced at the date of the summons which is served on the defendant, and, although a demurrer is sustained to the petition, and leave given to amend, the action remains "commenced," and the averment as to the discovery of the fraud within four years before the action was brought may be supplied in a subsequent amendment to the petition.

3. In an action to enforce payment of the statutory liability of stockholders in an Ohio corporation, a receiver may be appointed by the court to collect and distribute the fund, and such receiver may, by authority of the court appointing him, prosecute actions in his own name as such receiver to enforce payment of judgments rendered for such statutory liability.

4. When a judgment in a former action exists against a party to another action in the same court, and upon the trial of such other action reference is made to such former judgment, admissions are made as evidence on the trial by counsel on both sides that such judgment shows certain facts, and witnesses testify as to facts said to be shown by such judgment, all without objection by either side, it is not error for the court hearing the case to regard such judgment as in evidence, although not formally offered or read by either party. *Bevington v. State*, 2 Ohio St. 160, followed and approved.

Minshall, J., dissenting.

(Syllabus by the Court.)

Error to superior court of Cincinnati.

Action by Willis M. Kemper, receiver, against John Henry Zieverink and others, to cancel conveyances of real estate, and for other relief. Plaintiff had judgment, and defendants bring error. Affirmed.

The other facts fully appear in the following statement by BURKET, J.:

John Henry Zieverink, one of the plaintiffs in error, was a stockholder and officer

in the Western Furniture Company, at Cincinnati, for some time before the 6th day of June, 1878, and had full knowledge of its financial condition, and the fact that said company was insolvent; and on the 6th day of June, 1878, said company made an assignment of all its assets for the benefit of its creditors. The assets of said company were insufficient to pay its debts, and on the 18th day of January, 1880, an action was brought in the superior court of Cincinnati, known as "Case No. 35,313" in said court, by Oscar F. Moore against the Western Furniture Company and its stockholders, to enforce the statutory liability of the stockholders of said company. Such proceedings were afterwards had in said action that on the 26th day of October, 1882, judgment was rendered against said John H. Zieverink in said superior court on account of his statutory liability for the sum of \$2,000, and execution was issued on said judgment, and said execution remained unsatisfied for want of property upon which to levy to make any part of said execution. On October 26, 1882, Willis M. Kemper was duly appointed receiver by said court in said case No. 35,313, and authorized to collect said judgment, and other judgments for the benefit of the creditors of said company. And on January 21, 1887, said Willis M. Kemper, as such receiver, commenced an action in the superior court of Cincinnati against John H. Zieverink, Mary Zieverink, his wife, William F. Wieman, Casimir Bauman, and John B. Lucas, and in his said petition set out the foregoing facts, and averred that on the 27th day of May, 1878, just prior to the assignment so made by said company, said John H. Zieverink and Mary Zieverink, his wife, conveyed the property in the petition described, being 20 feet front on the west side of Pleasant street in the city of Cincinnati, to said William Wieman without consideration, and for the purpose and with the intent to defraud his creditors, and to conceal his property from his creditors; and that on the same day said William F. Wieman conveyed said property to said Mary Zieverink without consideration, and that said Mary Zieverink received the same with such fraudulent intent. That afterwards, on the 9th day of October, 1879, said John H. Zieverink and Mary Zieverink, his wife, conveyed the said property to Casimir Bauman. That thereafter, on the 29th day of December, 1883, said Bauman transferred said property to said John B. Lucas, and on the 15th day of April, 1885, said John B. Lucas conveyed said property to said Mary Zieverink, and that there was no consideration in fact for any of the above conveyances set forth; but that said plaintiff did not learn of said lack of consideration and the fraudulent intent on the part of said grantors and grantees until within four years before filing his said petition. The prayer of the petition is that said conveyance of real estate may be declared void and set aside, and that said real estate may be subjected to the payment of said judgment, and for all further and proper relief.

On the 24th day of February, 1887, an answer was filed by said Zieverink and

wife, in effect a general denial, with a plea of the statute of limitations; and the case was tried in the superior court of Cincinnati, judgment rendered in favor of the plaintiff, petition in error filed in the general term of said superior court, and said judgment reversed, and cause remanded to special term for further proceedings, and with leave to said plaintiff to amend his petition. And on the 31st day of March, 1888, said plaintiff filed an amendment to his petition, in which he avers that he reiterates all the allegations of his petition, and, in addition thereto, says "that Oscar F. Moore, A. Veneman & Co., Frederick Dell, H. N. Bird, A. Walterbos, and E. D. Albra & Co. are all creditors of the said company; and that none of said creditors had any knowledge of the lack of consideration for the conveyance set out in plaintiff's petition, nor of the fraudulent intent therein set forth, until a time within four years prior to the filing of said petition. To this petition, as amended, Zieverink and wife demurred. The demurrer was overruled, and exceptions taken. Thereupon an answer was filed on the 25th day of May, 1888, in which the statute of limitations is again pleaded, and a general denial interposed, together with the fact that said deeds were all of record, and notice to the world. And they further aver that at least one-third in amount of said creditors, after the recovery of said judgment, released their said judgments against said Zieverink, and that the judgment, to that extent, was satisfied; and pray that an account be stated of the amount of said releases, and that a pro tanto satisfaction be entered of the judgment against said Zieverink. No reply was filed to this answer. That case was again tried at special term on the 21st of November, 1888, and judgment rendered for plaintiff, setting aside and vacating said deeds, ordering that said property in the petition described be subjected to the payment—First, of the costs; second, of plaintiff's claim, and other debts of the said John H. Zieverink thereafter to be determined; and further ordering that, if said costs be not paid within 20 days from the date of the decree, said property be sold by the sheriff of said county as upon execution, and that he make due return of his proceedings to the court for further order in the premises; to all of which exceptions were taken. A bill of exceptions was allowed, pretending to set out all the testimony, and in said bill of exceptions are found copies of the various deeds alleged in the petition to have been executed, conveying said property to said different parties.

J. R. Von Seggern and J. J. Glidden, for plaintiffs in error. Avery & Holmes, for defendant in error.

BURKET, J., (after stating the facts.) The first claim made by plaintiffs in error is that the court erred in overruling the demurrers to the amendment to the petition, for the reason that said amendment contains the averment that said creditors had no knowledge of the lack of consideration for the conveyance set out in plaintiff's petition, nor of the fraudulent

intent therein set forth, until a time within four years prior to the filing of said petition; and it is claimed that this is not a sufficient averment to avoid the statute of limitations; that the amendment to the petition should have contained a statement of the time at which the discovery of the fraud was made, and how it was discovered. This is a matter of pleading under our Code and must be determined by the rules of pleading under the Code of Civil Procedure, and not by the rules of equity pleading as administered by the courts of chancery in England and this country. Hence the Indiana cases cited by counsel, as well as the cases in equity in the federal courts, are not applicable to the question here presented.

The complainant in equity was permitted to state in his bill as well the facts constituting the cause of his action as the evidence of those facts, and the circumstances tending to establish them. But these rules of pleading were expressly abolished by our Code; and, as if to emphasize the matter, the Code provides that the forms of pleading, and the rules by which their sufficiency shall be determined, are those prescribed by this Code.

Whatever may have been necessary when the chancellor refused to give relief against wrongs of long standing, unless the plaintiff disclosed in his bill due diligence not only in ascertaining his rights, but also in discovering the fraud of his adversary, and when, therefore, the conduct of the plaintiff was as important as that of the defendant in determining plaintiff's right to relief, we think no such rule of pleading obtains under our Code of Civil Procedure.

The statute fixes the limitation, and it is not left, as formerly, to the discretion of the chancellor. It is not a question of diligence or conduct in the discovery of the fraud, but a question of time as to the discovery of the same; that is, not as to the specific day of discovery, but as to whether the fraud was discovered within four years before the action was brought.

The ultimate facts should be averred in a petition under the Code, and not the circumstances and evidence from which such facts might be inferred. The ultimate fact in this class of cases is that the fraud set out in the petition was not discovered until within four years before the action was brought. As the petition shows that the cause of action accrued more than four years before the action was brought, it is necessary for the plaintiff, in order to bring himself within the saving exception of the statute, to plead the facts which bring him within the exception, viz. that he did not discover the fraud until within a period of four years before the action was brought. We think the case of *Combs v. Watson*, 32 Ohio St. 228, states the true rule, and that all that is necessary in such case is to state that the fraud was not discovered until within four years before the action was brought, and that it is not necessary, as against a demurrer, to state the exact date at which the fraud was discovered, nor

what acts of diligence plaintiff used to discover the fraud, nor what acts of concealment the defendant practiced to prevent a discovery of the fraud. The conclusion here arrived at is sustained by the decisions of other states having codes similar to ours. *Sublette v. Tinney*, 9 Cal. 423; *Boyd v. Blankman*, 29 Cal. 20, 44; *Carpentier v. City of Oakland*, 30 Cal. 444, *Railway Co. v. McCormick*, 20 Kan. 107; *Ryan v. Railway Co.*, 21 Kan. 365. It is said by this court in *Combs v. Watson*, 32 Ohio St., on page 235, that "the saving clause of the statute in question is a substantial embodiment of the rule applied by courts of equity in suits for relief on the ground of fraud;" and counsel for plaintiff in error contended that, having adopted substantially the rule in equity, we have also adopted with it the rule of equity as to the pleadings in such case. The answer to this is that the same statute which adopted this rule in equity as to the discovery of the fraud also prescribed the rules of pleading, and expressly abolished the rule of equity pleading, and provided that the rules by which the sufficiency of a pleading should be determined were the rules prescribed by the Code." The case of *Douglas v. Corry*, 46 Ohio St. 354, 21 N. E. Rep. 440, is cited and relied upon by plaintiffs in error, but it is sufficient to say that the section of the statute here in question was not involved in that case, and received no construction, either in the syllabi or in the opinion of the court. It is urged that the four years within which the fraud was discovered must be the four years next before filing the amended petition. An action is deemed commenced as to each defendant at the date of the summons which is served on him; and, although a demurrer be sustained to the petition, and leave given by the court to file an amended petition, which is done, yet the action remains "commenced" so as to stop the running of the statute of limitations; and an averment in such amended petition that the plaintiff or other party in interest did not discover the fraud until within four years prior to the filing of the original petition has the same force and effect as if contained in such original petition.

Complaint is also made by counsel for plaintiffs in error that the averments of the petition, even if regarded as sufficient, are not sustained by any evidence; and it is said that the deeds complained of were all of record, and should have enabled plaintiffs, with fair diligence, to have discovered the fraud many years before this action was begun. But an inspection of the deeds shows that each deed recites not only full and ample consideration, but also recites the fact that said consideration has been paid by the grantee, and received to the full satisfaction of the grantor. There is, therefore, nothing on the face of the deeds to excite suspicion, unless it be that the second deed was to the wife of Mr. Zieverink. But even the sting of that suspicion is taken out of the case by the further fact that when the first action was brought against Mr. Zieverink on January 13, 1880, and when the first judgment was

rendered against him on October 22, 1882, the title to the lot had been conveyed away by Mr. Zieverink and his wife to Casimir Bauman, and stood in his name all that time, and until April 15, 1885, when he conveyed it to John B. Lucas. It further appears that the deed to Mr. Bauman was, in effect, a mortgage to secure \$1,000, and that the deed to that extent was valid, and inquiry would not likely have resulted in the discovery of any fraud. The deeds are admitted to be without consideration, except the \$1,000, and that was paid back by Mr. Zieverink, and the only defense relied upon to defeat the action in the court below was the statute of limitations. We have examined the evidence, and, while it is a little meager as to the exact time of the discovery of this fraud by the different parties in interest, there is no evidence whatever that any of them discovered the fraud more than four years before the action was brought, and there is some evidence that as to all of them the fraud was discovered within four years before the action was commenced. We cannot say therefore that there is total failure of proof to sustain the judgment.

But it is further urged that the petition avers that the receiver was appointed to collect the judgment against Zieverink for the benefit of creditors, and that he duly qualified as such receiver; that this is denied by the answer, and that the only proof on this point is the admission by counsel on the trial that Willis M. Kemper was appointed receiver in case No. 35,313, superior court, October 26, 1882, and the further admission by counsel that a judgment in case No. 35,313 was rendered October 28, 1882, against J. H. Zieverink, on his stockholder's liability, for \$2,000. From these admissions by counsel it appears that the receiver was appointed by the court the same day that the judgment of \$2,000 was rendered against Mr. Zieverink; and in the ordinary course of proceedings the appointment of the receiver and the rendition of the judgment would be in the same journal, and in the same entry on the journal. Hence, admitting the judgment and the appointment of the receiver was admitting all that appeared in the record of that case, and was, in effect, bringing the record before the court as testimony. But still it is insisted that, as the record of the judgment is not carried into the record of this case, this court cannot know what its contents are. The answer to this is that the record before us shows that the record of the judgment in case No. 35,313 was a part of the records of the court trying this case below; that said judgment was referred to by counsel for both parties; that admissions were made on the trial as to matters shown by said judgment; that witnesses testified to matters in said judgment,—all without objection by either party. In such case the trial court is authorized to regard the judgment as part of the evidence in the case, although not formally offered or read by either party. *Bevington v. State*, 2 Ohio St. 160. In the case just cited the court say, on page 163: "When an instrument in writing is produced by a party on a trial as evidence, and witnesses exam-

ined in relation to it without objection to its admissibility from the other side, it is not error for the court to regard it as in evidence, although not formally offered and read by the party producing it." Again, as the judgment in case No. 35,313 was referred to, and admissions made by counsel of both sides with reference thereto, so as to authorize the court to regard it as in evidence, it ought to have been incorporated into the bill of exceptions, and, as it is not found there, the record is not complete, and the fourth syllabus in *Armleder v. Lieberman*, 33 Ohio St. 77, is applicable. With the judgment in case No. 35,313 in as evidence in the trial of this case in the court below, and said judgment not appearing in the bill of exceptions in this case, it will be presumed, on error, that there is sufficient evidence contained in said judgment to warrant the finding and judgment of the court below in this case.

But it is urged finally by attorneys for plaintiffs in error that, as this is a statutory action for the recovery of the statutory liability from a stockholder in an Ohio corporation, there is no law in Ohio authorizing the appointment of a receiver in such case; that the appointment of the receiver was therefore void; and that the receiver could not maintain this action, even though appointed for that purpose, and ordered to do so by the court. The appointment of the receiver, and the order to bring this action, having been made in an action in which said John H. Zieverink and Mary Zieverink were parties, they cannot now be heard to complain, as they acquiesced in the judgment, and took no steps to reverse or modify the same by proceedings in error or by appeal. High, Rec. p. 35, § 37. We think there is abundant authority in the statutes for the appointment of a receiver in an action to collect the statutory liability of stockholders, and that such is the usual and better practice. But the judgment against the several stockholders should be rendered in the original action brought by a creditor or stockholder as provided in section 3260, Rev. St. Such an action is equitable in its nature, and the statutory liability of the stockholders is a trust fund inuring to the equal benefit of all the creditors of the corporation, and this fund is made up from different amounts of money, to be collected from many different stockholders, and to be distributed among many creditors, and no one creditor is more interested in the collection than another. As no preference can be obtained by diligence no one would be specially interested in prosecuting suits for the equal benefit of himself and others; and in such cases it is the usage of equity to appoint a receiver to collect and distribute the fund under the order of the court for the equal benefit of all the creditors. The fact that the right of action is given by statute makes it none the less an equitable action, and, being an equitable action in its nature, requiring the service of a receiver, it is one of those in which receivers have heretofore been appointed by the usages of equity, as provided in section 5587, Rev. St. This case also comes within the letter, as

well as spirit, of the third subdivision of said section 5587, which provides that a receiver may be appointed "after judgment to carry the judgment into effect." The judgment being made a charge on the real estate in question, the court properly ordered it sold, in case the judgment and costs should not be paid by a day named.

The judgment provides that if the costs be not paid in 20 days the property be sold as upon execution by the sheriff, and that he make due return of his proceedings to the court for further order in the premises. When that return shall be made, or when the case gets into the probate court under section 6344, the rights of the plaintiffs in error as to the accounting prayed for in their answer will doubtless be protected. We fail to find any error in the record, and the judgment will therefore be affirmed.

MINSHALL, J., dissents.

(137 Ill. 621)

#### BROPHY v. HARDING et al.

(Supreme Court of Illinois. Oct. Term, 1891.)

SPECIAL ASSESSMENT—DATE—HOW DETERMINED.

Rev. St. c. 24, § 147, relating to special assessment proceedings, empowers the court, on the coming in of the commissioners' report, to "modify, alter, change, or annul any assessment, or cause the same to be recast," and to appoint other commissioners for the purpose of "making, modifying, altering, changing, or recasting such assessment." *Held*, that where the report of commissioners is made the basis of all subsequent proceedings, and the only change made by the court is a reduction of the total amount assessed, the date of such report, and not the date of the judgment of the court, is the date of the assessment.

On rehearing. Petition overruled.

For prior reports, see 24 N. E. Rep. 558, and 27 N. E. Rep. 523.

PER CURIAM. On petition for a rehearing in the foregoing case, counsel for appellant insists that the order of the county court did modify the assessment on which his tax title is based, and therefore, in conformity with our opinion, such assessment should be held "a special assessment for the year 1886." The contention heretofore has been that the date of the order confirming the assessment roll returned by the commissioners, or the date of the warrant for the collector, should fix the year in which the assessment was made, making no claim that in this case the court did "modify, alter, change, or annul" the assessment, as returned by the commissioners. It appears from the record that the county court, by its order, after stating that the objectors had withdrawn their objections, proceeded as follows: "And thereupon, it appearing to the court that the commissioners appointed to make said assessment have complied with all the requirements of the law, it is ordered and adjudged by the court that said assessment roll be, and it is hereby, confirmed, as to eighty-four per cent. of said assessment." Section 147 of the statute<sup>1</sup> under

<sup>1</sup>Rev. St. c. 24, § 147.



which the special assessment proceedings were had gives the court power, on the coming in of the commissioners' report, to "modify, alter, change, or annul any assessment, or cause the same to be recast," and may appoint other commissioners for the purpose of "making, modifying, altering, changing, or recasting such assessment." Manifestly, under this section, such proceedings may be had as to entirely annul the action of the first commissioners, and make the assessment the act of the court or newly-appointed commissioners; and we hold, in such case, the date of the judgment of the court, or report of such new commissioners, would determine the year in which the assessment should be treated as having been made, the question being when was it made, not when was it confirmed. Here the report of the commissioners, made in 1885, showing what portion of the total cost of the improvement would be of benefit to the public, and what portion thereof would be of benefit to the property to be benefited, and their assessment of the same between the town and such property, and also their assessment of the amount found by them to be of benefit to the property, upon the several lots, etc., in the proportion in which they would be severally benefited by the improvement, was confirmed, the only change made being a reduction of the entire amount assessed. The report of the commissioners remained the basis of all subsequent proceedings, and its date is the date of the assessment.

(127 Ill. 189)

**WEST v. PEOPLE.**

(Supreme Court of Illinois. March 30, 1891.)

Concurring opinion.

For majority opinion, see 27 N. E. Rep. 34.

MAGRUDER, J. I concur in the conclusion reached by this opinion. It has seemed to me to be doubtful whether the charge made in the indictment is sustained by the evidence. The indictment charges that the false certificates of stock were issued "with intent to defraud \* \* \* the Chicago Times Company," whereas there is much of the evidence which tends to show that the stock was issued for the purpose of raising money to aid and help the Times Company, and prevent its failure.

(139 Ill. 433)

**KELLETT v. SHEPARD et al.**

(Supreme Court of Illinois. March 4, 1892.)

DOWER—TITLE OF HUSBAND—REVERSION.

A widow is not entitled to dower in a husband's reversion, where the husband has died before termination of the life estate.

On rehearing.

For former report, see 28 N. E. Rep. 751.

MAGRUDER, C. J. Upon application for a rehearing, our attention has been called to the case of *Strawn v. Strawn*, 50 Ill. 33, which holds that, where the owner

of the reversion dies before the termination of the life estate, his widow is not entitled to dower. Upon the authority of this case it follows that the widow of Charles P. Stillman took no dower in the half of his reversionary estate which did not go to her as his heir. The opinion, as amended, so holds.

(145 Ill. 414)

**BELFORD v. BEATTY et al.<sup>1</sup>**

(Supreme Court of Illinois. May 9, 1893.)

REVIEW ON APPEAL—WAIVER—CONSTRUCTION OF NOTE.

1. Waiving a jury, and submitting a cause on the short-cause calendar to trial by the court without objection, is a waiver of the objection that the case was improperly placed on such calendar, even though the party on a previous day moved to strike the case from the short-cause calendar, and excepted to the denial of his motion. *Jensen v. Fricke*, 24 N. E. Rep. 515, 133 Ill. 171, followed.

2. Whether a note was executed without consideration is a question of fact, on which the judgment of the Illinois appellate court is conclusive.

3. The words "Int. @ 6 % p. a." in a note signify that the note is to draw interest from date at the rate of 6 per cent. per annum.

Appeal from appellate court, first district.

Action by A. J. Beatty & Sons against Alexander Belford on a note. Judgment for plaintiffs. Defendant appeals. Affirmed.

Newman & Northrup, for appellant. Ullman & Hacker, for appellees.

CRAIG, J. This was an action brought by A. J. Beatty, R. J. Beatty, and George Beatty, who claim to be copartners under the firm name of A. J. Beatty & Sons, against Alexander Belford, to recover the sum of \$3,212.41 upon two promissory notes made by Alexander Belford on the 27th day of November, 1891. The first note, due in 15 days, was for the sum of \$1,376; the second note, due in 21 days, for the sum of \$1,836.41. Both notes were payable to the order of A. J. Beatty & Sons. To the declaration the defendant pleaded the general issue; also, a want of consideration. The parties by agreement waived a jury, and the cause was tried before the court, resulting in a judgment for the plaintiffs for the amount of the notes, principal and interest. The defendants appealed to the appellate court, where the judgment of the circuit court was affirmed.

It appears from the record that the cause was placed on the short-cause calendar, and the defendant entered a motion to strike the cause from that calendar. The court overruled the motion, and the decision is relied upon as error. Upon looking into the record it will be found that the cause was placed in the short-cause calendar on January 20, 1892, and called for trial February 1, 1892. On this last date the defendant entered a motion to strike the cause from the short-cause calendar. The court held the motion under advise-

<sup>1</sup> Reported by Louis Boiset, Jr., Esq., of the Chicago bar.

ment until February 9, 1892, when it was overruled, and the defendant excepted to the decision of the court. Nothing further was done until February 15th when the cause was called, the parties being present. A jury, by agreement, was waived, and the cause proceeded to trial without objection from any quarter. When the defendant appeared on the day the cause was finally tried, and waived a jury, and submitted to a trial without interposing any objection, we are of the opinion that he waived any irregularity, if any occurred, in placing the cause on the short-cause calendar. A similar question arose upon a similar state of facts in *Jenson v. Fricke*, 133 Ill. 171, 24 N. E. Rep. 515, and we there held that the objection was waived. It was there said: "The court had jurisdiction of the persons and subject-matter, and the defendants, having voluntarily appeared on the day set for trial of the cause, waived a jury, and submitted to trial without objection, cannot now be heard to complain. The record shows that no objection was interposed upon the call of the case upon the short-cause calendar. They had the right to waive the objection, and, by waiving a jury and submitting the cause to the judge for trial, did so. *Cleaver v. Webster*, 73 Ill. 607. Having waived the objection when they might have insisted upon it, they were in no position to urge it upon motion for a new trial," or, we may add, upon appeal. See, also, *Anderson v. McCormick*, 129 Ill. 308, 21 N. E. Rep. 803. It was not enough that defendant excepted to the ruling of the court on February 9th, refusing to strike the cause from the short-cause calendar; but if he still desired to rely upon the objection, when the cause was called for trial six days later, it was his duty then to object to a trial, and serve an exception to the ruling of the court. This he failed to do, but waived a jury, and voluntarily went to trial.

It is next urged that the two notes were executed without consideration. That was a question of fact, upon which the judgment of the appellate court affirming the judgment of the circuit court is conclusive. It is also said that the declaration counted on notes payable to A. J. Beatty & Sons, and the notes read in evidence were payable to A. J. Beatty & Son. The supposed variance, if any exists, was disposed of by an amended record filed in the cause, in which it appears that the notes were in fact payable to A. J. Beatty & Sons.

The note in suit, first due, read as follows: "1,836.41. Chicago, November 27, 1891. 21 days after date I promise to pay to the order of A. J. Beatty & Sons eight hundred and thirty-six and 40-100 dollars, payable at my office. Value received. Int. @ 6% p. a." The other note, as respects interest, read the same. The court allowed interest from the date of the notes, and it is claimed, from the reading of the notes, interest could not be recovered. "Int.," inserted after the words "Value received," is beyond question an abbreviation of the word "interest," and should receive the same construction as if the entire word "interest" had been written out.

The letter "@," when used in a note as it was here, is known and recognized among commercial people and business men as standing for the word "at." So, also, "6%" is a per cent. mark, and, when used as here, has a recognized meaning, and is known to stand for "six per cent." The letters "p. a.," standing isolated and alone, might perhaps have but little significance, but, when used in the connection they were used here, their meaning cannot be misapprehended, and were intended to be read as "per annum." We think the construction placed on the abbreviations by the court was correct, and judgment for interest was fully authorized by the language of the notes. The judgment of the appellate court will be affirmed.

(159 Mass. 168)

### HALE v. CHENEY.

(Supreme Judicial Court of Massachusetts. Middlesex. June 2, 1893.)

INJURY TO EMPLOYEE — NEGLIGENCE OF MASTER — DANGEROUS MACHINERY.

In an action for personal injuries it appeared that in defendant's shop, where plaintiff was working, there was a horizontal shaft, a foot from the floor, to one end of which an iron collar was fastened by a set screw to prevent longitudinal vibration. The screw, which projected half an inch from the collar, caught plaintiff's clothes as he was passing, and threw him down. It was not denied that such shaft, near the floor, was a common and proper method of distributing power, and that such a collar, with a projecting screw, was in ordinary use, and was preferable to any known device for preventing longitudinal vibration, though a collar could be secured to a shaft without a projecting screw. *Held*, that defendant was not guilty of negligence.

Exceptions from superior court, Middlesex county.

Action by Preston W. Hale against Frank P. Cheney for personal injuries. The court below having refused to rule that plaintiff failed to exercise due care, and that defendant was not guilty of negligence, the latter excepted. Exceptions sustained.

C. S. Lilley, for plaintiff. N. D. Pratt and E. B. Quinn, for defendant.

**LATHROP, J.** This is an action at common law, in which the plaintiff seeks to recover for personal injuries sustained by him while in the defendant's employ. The case comes before us on the defendant's exceptions to the refusal of the judge who presided in the court below to rule that the plaintiff had failed to show that he was in the exercise of due care when injured, or that the defendant's machinery was unsuitably placed, defective, and dangerous. The defendant was a manufacturer of boxes. He occupied a room 78 feet long and 38 feet wide, in which were about 15 machines. Power was furnished from an engine in an adjoining room, connected with an overhead shaft. There was also a horizontal shaft, 12 feet long, a foot above the floor, resting on bearings at each end. Power was communicated to this shaft by a belt from the upper shaft. To prevent longitudinal vibration of the low-

er shaft, an iron collar was fastened to one end of it by a set screw, the end of which projected half an inch outside the collar. The evidence was uncontradicted that such shafts near the floor were common and proper methods of distributing power to the machinery, and that collars with projecting screw heads or nuts, similar in all respects to those used by the defendant, were in ordinary and common use, and were preferable to any other known device for preventing longitudinal vibration. It further appeared that a collar could be secured to a shaft without a projecting screw or nut. At the end of the shaft was an upright post, two inches by four inches, extending from the bearing in which that end of the shaft rested to the ceiling of the room. The set screw was within three inches of the post. The object of the post was to hold the bearing in place, and to protect any one from getting onto the pulley, belt, and shaft. The plaintiff, at the time of the accident, was a boy nearly 16 years old, and appeared to be, as the exceptions recite, of ordinary intelligence. He had attended a commercial college, "and was a bright, intelligent boy." There was evidence that "he was not a very careful boy around machinery;" that "he would get too near the machines, and would not, apparently, know where he was." The plaintiff had been in the defendant's employ three months, doing odd jobs about the shop. He had worked on a machine at different times, equal in all to three or four days. On the day of the accident he was working on a machine, the nearest part of which was five feet and four inches from the end of the shaft where the collar was. On the other side of the shaft, and about the same distance from it, was another machine, at which one Bernier was at work. While at work the plaintiff had occasion to pass from his machine to hand some work to Bernier. At least, we must assume that the jury would have been warranted in finding this from the evidence. The plaintiff might have reached Bernier's machine by going around the shaft. Instead of doing so, he went, as he testified, "the shortest way, regardless of the machinery, and went right up to the revolving shaft." His trousers were caught by the set screw, and he was thrown down and injured. He testified that when he was caught he was not looking down at the shaft, but over it, and straight at Bernier, who had just taken the work from his hand. He further testified that he did not know that the set screw was there. The evidence was conflicting on the question whether this screw was visible when the shaft was revolving. Without passing on the question whether there was sufficient evidence of due care on the part of the plaintiff to warrant the submission of this question to the jury, we fail to see any evidence that there was a breach of any duty on the part of the defendant, which he owed to the plaintiff.

Upon the evidence, the defendant did not owe to the plaintiff the duty of boxing the shaft. *Sullivan v. Manufacturing Co.*, 113 Mass. 396; *Rock v. Indian Orchard Mills*, 142 Mass. 523, 8 N. E. Rep. 401; *Foley v.*

*Machine Works*, 149 Mass. 294, 21 N. E. Rep. 304; *Tinkham v. Sawyer*, 153 Mass. 485, 27 N. E. Rep. 6. It cannot be successfully contended that the shaft placed near the floor, with the set screw projecting, was defective or unsuitable for the purpose. The evidence was uncontradicted that such a device was in ordinary and common use, and preferable to any other. The fact that the collar could be secured to the shaft without a projecting screw or nut was not evidence from which the jury would be warranted in finding that the defendant was not justified in using the device which he had in his shop. *Goodnow v. Emery Mills*, 146 Mass. 261, 15 N. E. Rep. 576; *Carey v. Railroad*, 157 Mass. —, 33 N. E. Rep. 512. Exceptions sustained.

(159 Mass. 271)

LEIGHTON et al. v. MORRILL et al.

(Supreme Judicial Court of Massachusetts.

Essex. June 8, 1893.)

INSOLVENCY—PREFERENCES—MORTGAGE ON GOODS.

An insolvent exhibited to a creditor a false schedule of his debts, and made a statement of his assets, according to which he was solvent, and asked for a loan of \$6,000 on a mortgage on his goods, telling the creditor he needed \$1,500 at once, and that he was to use the money to pay his debts and continue business. The money was paid to the insolvent, and for it he executed a bill of sale. Afterwards he executed a mortgage on the greater part of his goods for \$6,000, and the creditor redelivered the goods covered by the bill of sale for \$1,500, paid the insolvent \$3,500 in cash, and gave him the remainder in goods. The insolvent went on with his business for a month, and then absconded. *Held*, that the mortgage was valid, and not made to give the creditor a preference in fraud of the insolvent law.

Appeal from superior court, Essex county.

Action by one Leighton and others, as assignees in insolvency, against one Morrill and others, to set aside a mortgage to defendants by the insolvent as a fraud on the insolvent law. From a decree for defendants, plaintiffs appeal. Affirmed.

J. H. Siak and Ira B. Keith, for appellants. John Lowell and A. F. Means, for appellees.

HOLMES, J. This is a bill brought by the assignees in insolvency of one Humphrey to set aside a mortgage for \$6,000 to the defendants as a fraud on the insolvent law. The master found that the mortgage was made with a view to give the defendants a preference, mainly in respect of \$1,500 parcel of the \$6,000 secured, and also with a view to prevent the property from coming to the assignees, and that it was void. The single justice found for the defendants. The case comes before us on the evidence, and is wholly a question of fact. For that reason we shall not discuss it at length, but shall state the conclusion to which we have been led by reading the evidence.

There is no doubt that the defendants actually paid over the \$6,000, or that the mortgage was executed without haste or secrecy, and with the knowledge and ap-

proval of at least the two principal creditors, parties not friendly to, or co-operating with, the defendants. The master declines to find that the fact that the insolvent's property was insufficient to pay his debts was known to the defendants, and the evidence is that they were informed by the insolvent that the amount advanced would enable him to pay his debts and go on. For more than a month afterwards the debtor did go on with his business, and then, upon the defendant's discovery that the conditions of the mortgage had been broken, and that probably a fraud had been practiced upon them, he absconded. There is no evidence, beyond the fact of his absconding and the state of his assets, that he kept any property from his assignees. The indications are that he carried nothing away with him, and that he spent all that he got in paying debts, and in the regular course of his business, although we do not assume this to be beyond controversy. In view of the whole evidence, and especially of the undisputed facts, and of the master's declining to find that the insufficiency of the insolvent's property to pay his debts was known to the defendants, it seems to us that his finding that the mortgage was made in fraud of the insolvent law must have been based upon a proposition of law which is not disclosed in his report, but which is to be gathered from the report of the evidence and of his rulings upon it. That proposition we understand to have been in effect, although not precisely so stated in words, that, if the mortgage was given on Humphrey's whole stock in trade at his only place of business, this fact not merely warrants a finding, but, as matter of law, raises a *prima facie* presumption that the mortgage was not given in the usual course of business, and that the defendants had reasonable cause to believe that a fraud on the insolvent law was intended. We mention this because, if the master's principal finding is explained by his supposing himself bound by a somewhat stricter rule of law than we should lay down, we should feel a greater freedom than we should otherwise feel in adopting a conclusion which seems to us more consistent with the subsidiary findings and the evidence than the one to which he felt himself forced to come.

The proposition which we have stated narrows too much the function of the master as a judge of fact. Presumptions of fact generally are questions of fact. They are merely the major premises of those inferences which juries are at liberty to draw, in the light of their experience as men of the world, from the facts directly proved. *Com. v. Briant*, 142 Mass. 463, 464, 8 N. E. Rep. 338; *Doyle v. Railroad Co.*, 145 Mass. 380-388, 14 N. E. Rep. 461. The question whether a mortgage was not made in usual and ordinary course of business of the debtor, within the meaning of Pub. St. c. 157, § 98, is a question of fact. *Alden v. Marsh*, 97 Mass. 160, 163; *Buttum v. Jones*, 144 Mass. 29, 10 N. E. Rep. 471; *Peabody v. Knapp*, 153 Mass. 242, 20 N. E. Rep. 696; *Killam v. Peirce*, 153 Mass. 502, 27 N. E. Rep. 520.

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Whether, if it was not so made, the inference shall be drawn that the mortgagees had reasonable cause to believe that a fraud on the insolvent law was intended is another question of fact. *Bridges v. Miles*, 152 Mass. 249, 253, 25 N. E. Rep. 461.

In view of what we have said, we regard the validity of the mortgage as set at large for our consideration. In our opinion the evidence is insufficient to do more than to suggest a suspicion that the insolvent kept, or intended to keep, his assets from the hands of an assignee. We do not believe that he had such an intention in his mind. If he did, all the evidence shows that it was not shared by the defendants, nor do we see how we can say that they had reasonable cause to believe in the existence of an intention which, even after the event, we do not believe to have existed. Humphrey exhibited to the defendants a schedule of his debts,—false, but believed by them to be true,—and made a statement of his assets, according to which he was solvent. The defendants were informed and believed that there were large assets not embraced in the mortgage. To them the mortgage appeared as a perfectly natural step. A loan upon mortgage, made to a debtor in embarrassed circumstances for the purpose of enabling him to pay his debts and go on, is not necessarily a fraud on the insolvent law. *Bush v. Boutelle*, 156 Mass. 167, 171, 30 N. E. Rep. 607; *Clark v. Sawyer*, 151 Mass. 64, 23 N. E. Rep. 726. The defendants examined Humphrey's books, and satisfied themselves that he was doing a profitable business. Unless it be assumed, as matter of law, that the mortgage was not in the usual course of business, and that, therefore, also as matter of law the defendants had reasonable cause to believe that a fraud on the insolvent law was intended, we see no such ground for doubting the validity of the instrument.

There is no suggestion that the defendants intended to aid in giving a preference to any creditor other than themselves. The only question remaining, and the one most pressed, is whether they intended to prefer themselves. The details of the transaction, mainly as found by the master, are these: About the middle of January the insolvent applied to the defendants for a loan of \$6,000 upon a mortgage of his stock of goods. He told them that he needed \$1,500 at once. This sum was paid to him on January 26, 1889, and for it he executed a bill of parcels, afterwards exchanged for a bill of sale, of his fixtures and certain watches, etc. One of the defendants put his hand on the articles, saying that he took possession of them, and told the insolvent that he left them with him as the defendants' agent or bailee.

After the defendants had examined Humphrey's stock, and a full schedule had been made out, a mortgage of the greater part of his goods was made on February 25, 1889, for \$6,000. The defendants redelivered the goods covered by the bill of sale for \$1,500 of this amount, paid \$3,500 in cash, and agreed to give him the remaining \$1,000 in goods which he purchased from them in the line of his trade,

which goods he received. It seems to us impossible to discover any intent to give a preference in this transaction. Such an intent is disproved by the fact that neither party doubted that the bill of sale given for the \$1,500, whether a sale or a mortgage, was valid.

The master's report says that the mortgage was given "with a view to secure to them the payment of the said \$1,500, and of \$119 for a watch sold to him by said firm before said mortgage was given, and \$162, the amount of a protested note of Humphrey held by said firm, and thereby give them a preference." In view of the undisputed testimony, the two small items hardly would have been mentioned had it not been for the large one. The note was taken up by the defendants with Humphrey's approval some time in February, while the negotiations for the mortgage were going on.

We see no sufficient ground for changing the decree appealed from in respect of costs. The defendants are not concerned with the fact that the plaintiffs are trustees. In this proceeding the parties are strangers. *Hill v. Magan*, 2 Moll. 460; *Perry, Trusts*, (4th Ed.) § 891. Moreover, as the decree on the merits is affirmed, we should be slow to disturb the discretion of the single justice on appeal. *The Maggie J. Smith*, 123 U. S. 349, 356, 8 Sup. Ct. Rep. 159. Decree affirmed.

(159 Mass. 60)

#### ATLANTIC WORKS v. TUG GLIDE.

(Supreme Judicial Court of Massachusetts.  
Suffolk. May 16, 1893.)

#### JURISDICTION OF STATE COURT—ENFORCING LIEN ON VESSEL.

The courts of a state have jurisdiction to enforce, by a proceeding in rem, liens given by its laws for labor and materials furnished in constructing or repairing domestic vessels, notwithstanding *Rev. St. U. S. § 563*, subd. 8, and section 711, subd. 3, giving the United States district courts exclusive jurisdiction of "all civil causes of admiralty and maritime jurisdiction, saving to suitors the right of a common-law remedy in all cases where the common law is competent to give it." 33 N. E. Rep. 163, affirmed.

Exceptions from superior court, Suffolk county; Daniel W. Bond, Judge.

Petition of the Atlantic Works against Jonathan Chase and others, owners of the tug *Glide*, to enforce a lien on the tug for labor and materials furnished in repairing it, under *Pub. St. c. 192, §§ 14, 15*. Decision for petitioner, and defendant excepts. Exceptions overruled.

The tug *Glide* was a vessel owned in Boston, and engaged in towing vessels in and out of the harbor of Boston to the neighboring ports. The lien claimed under the statute was for labor and materials furnished in repairing the vessel by the petitioners at her home port. At the trial of the case in the superior court the respondents asked the court to rule as follows: That, inasmuch as this was an action in rem against the tug *Glide*, the superior court had no jurisdiction, the statute being contrary to the constitution of the United States, inasmuch as, under

the constitution of the United States, full admiralty jurisdiction was given to the United States courts; but the court ruled that the superior court had jurisdiction, to which ruling the respondents duly excepted. The court found for the petitioner, and directed a sale of the said tug *Glide* under the provisions of the statutes. For report on former appeal, see 33 N. E. Rep. 163.

Millett & Foster, for plaintiff. Carver & Blodgett, for defendant.

HOLMES, J. This exception is disposed of by our former judgment in the same cause. The latter decision by the supreme court of the United States in *The J. E. Rumbell*, 13 Sup. Ct. Rep. 498, contains some expressions contrary to our conclusion, but, as the point adjudicated is consistent with it, we feel compelled to adhere to our opinion.

Exceptions overruled.

(159 Mass. 240)

#### GAY v. ESSEX ELECTRIC ST. RY. CO.

(Supreme Judicial Court of Massachusetts.  
Essex. May, 1893.)

#### DEATH BY WRONGFUL ACT—PLEADING.

In an action against a street railroad under *St. 1886, c. 140*, rendering every railroad company liable for death caused by the gross negligence and carelessness of its servants while engaged in its business, the declaration should allege facts showing such negligence, and an averment that plaintiff's intestate lost his life by reason of the gross negligence of defendant's servants in the operation of its street railroad is insufficient.

Appeal from superior court, Essex county.

Action by Granville Gay, administrator of Albert G. Gay, against the Essex Electric Street Railway Company, for the death of plaintiff's intestate. Defendant's demurrer to the amended declaration was sustained, and plaintiff appeals. Affirmed.

The declaration is as follows: "The plaintiff says that he is the duly-appointed administrator of Albert G. Gay, late of said Salem, deceased, and that he brings this action under section 212 of chapter 112 of the Public Statutes of this commonwealth, for the use of the father and mother of said Albert G., (he having left no children and no widow,) as the next of kin of said Albert G. The plaintiff further says that on October 15th, 1890, his intestate lost his life by reason of the negligence and carelessness of the defendant in the operation of its street railway, and of the unfitness and gross negligence and carelessness of its servants and agents, while engaged in its business. And the plaintiff further says that, at the time his intestate suffered the injury by which he lost his life as aforesaid, said intestate was in the exercise of due care and diligence, and was not an employe of said street railway; that said life was lost because of the negligence of the defendant, its agents and servants, in negligently handling and controlling one of its street cars, and in negligently leaving in an

open and exposed place, to wit, on Balcom street, a public highway in Salem, in said county, one of its street cars, which car was negligently left in an unsafe, dangerous, and unguarded position and condition, whereby said intestate, who was a child of tender years, lost his life, as aforesaid, through the negligent acts of other persons, whose names are to the plaintiff unknown, in the negligently using and misusing the brakes and appliances for stopping said car, and for moving the brake beam thereof."

The declaration was subsequently amended as follows: "The plaintiff moves to amend his declaration by adding the following: The plaintiff further says that his intestate was a child seven years old, a traveler on said highway at the time of said injury, and rightfully upon said car. The plaintiff further says that he, with other children, was enticed and allured there by the opportunity for play afforded, and by the enticement and invitation of the defendant, its agents and servants; and further says that some of said children, or some of the agents and servants of the defendant, to the plaintiff unknown, were negligently using and misusing said brakes, and said children were doing said acts, and were permitted and given permission, occasion, and opportunity to do said acts, by the consent, and with the knowledge, inducement, and invitation, of the defendant, its agents and servants; that the defendant was using said street as a repair shop, and said car was there without right, and contrary to the city ordinances of Salem; that it was the duty of the defendant to keep said car and said brakes securely locked and fastened, and in a safe and guarded position and condition, so that children could not go upon said car, and could not use or play with said brakes,—all of which negligence and acts of negligence heretofore alleged as existing prior to said injury the defendant well knew before said injury occurred, as well as that said car and brakes were an enticing, attractive, and inviting object to children, and that children then were, and long prior thereto had been, accustomed to play in, upon, and about said car, and with said brakes. And the plaintiff further says that all said acts and negligences which preceded or contributed to said injury the defendant should have anticipated would happen, and should have prevented, and these were duties which it owed the plaintiff and his intestate."

C. G. Fall, for appellant. F. L. Evans, for appellee.

MORTON, J. The only difference between this and the preceding case is that that is a suit at common law, and this is brought under St. 1886, c. 140. Except so far as it contains averments rendered necessary by the fact that it is brought under that statute, the essential allegations contained in the declaration, as amended, in this case, are the same as these contained in the amended declaration in the preceding case. It is necessary to consider, therefore, only the allegations

which are peculiar to this case. Those are that the plaintiff's "intestate lost his life by reason of the negligence and carelessness of the defendant in the operation of its street railway, and of the unfitness and gross negligence and carelessness of its servants and agents while engaged in its business." In this case we must, as in the preceding case, take the declaration as a whole; and, looking at it in that way, there is nothing tending to show unfitness or gross negligence and carelessness on the part of the servants or agents of the defendant. *Com. v. Boston & M. R. Co.*, 183 Mass. 583; *Peaslee v. Railroad Co.*, 152 Mass. 155, 25 N. E. Rep. 71. If there is anything tending to show negligence or carelessness on the part of the defendant itself, (which we do not intimate,) then the conduct of the plaintiff's intestate must be regarded as a contributing cause, and the plaintiff cannot recover. *Gay v. Railway Co.*, (Mass.) 84 N. E. Rep. 186. Judgment affirmed.

(159 Mass. 233)

### McGUINNESS v. BUTLER.

(Supreme Judicial Court of Massachusetts.  
Suffolk. May 22, 1893.)

#### CONTRIBUTORY NEGLIGENCE—OF CHILDREN— WRONGDOING.

1. A child who, while committing a wrongful act, is injured by the negligence of another, cannot recover by showing that he was in the exercise of such care as might reasonably have been expected of him, since an infant cannot shift, any more than an adult, the consequences of his own wrongdoing on another.

2. A child who, in play with other boys, interferes with marble slabs resting on private property, and participates in throwing the stones over on himself, cannot recover for his injuries, though defendant may have been guilty of negligence in leaving the slabs where he did, and though the child's conduct was such as might reasonably have been expected of him.

Exception from superior court, Suffolk county; Charles P. Thompson, Judge.

Action of tort, for personal injuries, by Bernard McGuinness against Philip H. Butler. There was a verdict in defendant's favor, and plaintiff's exceptions to the rulings of the court were allowed. Exceptions overruled.

The defendant was a marble cutter, and occupied, in his business, the street floor of a building on Beverly street. In the front of the building there were supporting columns five or six feet apart, and six or seven inches thick, extending from the ground up to the second story. The front side of those columns was just up to the street line. The front wall of the first story of the building ran along the rear of these columns from four to six inches from the street line, forming recesses between the columns about the depth of the columns, which recesses were outside of the highway, and were a part of the premises occupied by the defendant. An ordinance of the city provided: "No person shall place or permit to remain in a street any coal, firewood, or other merchandise, for more than ten minutes." The foregoing facts were not in dispute. There was evi-

dence tending to show that sometime prior to Sunday, November 24, 1889, there had been placed by defendant's servants, with his knowledge, against the front part of his building, two marble slabs,—one against the other; the bottom of one of the slabs resting outside of the line of the private property about four inches, and within the limits of Beverly street, a public highway in said Boston, and that part of it was used as a sidewalk, the tops of the slabs resting against the building in one of said recesses, and wholly within private property. That the slabs were about 4 feet high, 5 feet long, and, on the average, each,  $1\frac{1}{2}$  to 2 inches in thickness. That they were resting in the same place all day Sunday up to 4 P. M., when the accident happened. That Beverly street was mainly occupied by mechanical business establishments, which were all closed up on Sunday. That plaintiff, being then a boy of 8 years and 10 months of age, left his home on South Margin street, west of Beverly street, in company with a boy named Carroll, of the age of 9 years, to go to Sunday school, east of Beverly street, crossing Beverly street. That they left Sunday school, came back towards Beverly street, playing at childish games, such as "tag," "leads," etc., well known games of children. That for a few minutes prior to the accident they had been playing the game of "leads," which is played as follows: The leader (who in this case was the Carroll boy) touched the plaintiff, and then ran, touching such other objects, and performing such feats, as he chose; and the plaintiff was to run after him, duplicating all his doings, and try to overtake and catch him. That in playing this game they had run across Beverly street several times. That Carroll finally ran across said street to the slabs, and began kicking and pulling at the outside marble slab. That the plaintiff, in playing the game, followed the Carroll boy to the opposite side of the street, and stopped there for a moment. That the plaintiff then followed the Carroll boy across the street to the marble slabs, and stood in front of them, and close to Carroll, while the latter was kicking and pulling them; and while plaintiff was there on the sidewalk he met with his injury, under circumstances of the character of which there was a conflict of testimony and inferences; the plaintiff's direct testimony tending to show that the Carroll boy, in a playful disposition, pulled the outer slab over from the top, to balance it, and, losing the balance, threw it, unintentionally, upon the leg of the plaintiff, who was a bare spectator upon the sidewalk, looking on with childish curiosity, and encouraging the boy Carroll by no act or word, and not being in any wise a joint participant, while, on cross-examination of the plaintiff and the boy Carroll, their testimony, in portions, tended to show, on the contrary, that the two boys were playing the game of leads, in which the leader is to do something, and the follower is to imitate him; that the boy Carroll ran across the street, and proceeded, in carrying out the joint game, to pull at the marble; and that either the Carroll boy had done the

thing, and the plaintiff was imitating him, and pulled the marble upon himself, or that the Carroll boy was pulling at the marble as a part of the joint game, and that the plaintiff was standing upon the sidewalk, prepared to imitate the boy Carroll when he had done his part, and the slab fell, and injured the plaintiff. The plaintiff asked the court to give the following instructions to the jury: "The fact that the plaintiff himself may have interfered with the slabs, and did thereby, partially or wholly, bring the injury upon himself, does not help the defendant, if the plaintiff's act was what the defendant's conduct naturally attracted and invited, and such interference, and the boy's conduct, was what might reasonably be expected of a boy of his tender years." The court declined to give such instruction, but instructed the jury as follows: "Now, you have heard the question discussed with regard to the action of the Carroll boy, and as to these boys. It is claimed on the part of the defendant that you ought to deduce from the evidence, taking it reasonably, that this McGuinness boy was participating in what the other boy was doing; that he was so acting that he may be said fairly to be participating in the transaction. It is not enough for a person to stand by and witness a transaction, to make the party responsible for the transaction. To illustrate it, if you see a man assaulting another, and stand off, take no part in it,—merely look at them,—that is not, in law, a participation in the assault. You cannot be held responsible for an assault by merely witnessing it. Something more than bare observation is necessary to make participation. But if you encourage, if you do any act in furtherance of it, then you are held to be guilty, although you may not strike a blow, and although you may not be sufficiently near to strike a blow. But you must be near enough to participate in it, and that may be by words of encouragement, or acts to incite, or by any act which shows that you are actually favoring the assault. The principle may be important in this case. So, if the boy was looking, whether between the slabs or not, that would not be a participation. If he had the curiosity to look in and see, that would not be participation. It would be participation if he asked him to take it off, and let him look in. You can see the difference. The bare looking would not be participation, while the asking to lift it away, or helping to do it, or, if he did not help, but asked it to be done, or did that which was an inducement or encouragement for the other to do it, then he may be said to have participated in it, although he may not have taken hold of it with his own hands. So that, in order to find participation in the transaction, you will have to find that the party was doing something beyond standing and observing. If he stood and looked at it, as I said before, that would not be participation. So that you have the testimony in relation to that matter, and you are to say whether or not he was participating in this himself, or, in other words, was pulling over the stone upon himself,—was



giving encouragement to the doing of the act in such a way as, under the rules which I have given you, would make him a participant in it; and, if he was participating in throwing over the stone upon himself, he cannot recover. You will take all the evidence, and determine as to that. With reference to whether or not the plaintiff was exercising ordinary care, it is wholly, as I said before, a question of fact for you to determine upon the whole testimony. If you find that the evidence fails to satisfy you of that, why then it is not necessary for you to go further. If you are satisfied that he was in the exercise of ordinary care, then, was the defendant guilty of negligence? Upon that point you are, of course, to take the testimony." Appropriate instructions on the question of due care of a child were given, and not excepted to.

E. Greenhood, for plaintiff. Ranney & Clark, for defendant.

MORTON, J. In order that a child may recover against one through whose negligence he claims to have been injured it is not always sufficient for him to show that he himself was in the exercise of such care as might reasonably have been expected of him. His conduct, notwithstanding that fact, may have been that of a wrongdoer, and may have contributed to the injury of which he complains. When it clearly appears that such was the case he cannot avoid the effect of his conduct by showing that he was doing only what a child might have been expected to do. An infant cannot shift, any more than an adult, the consequences of his own wrongdoing or negligence upon another. Whether he was negligent or a wrongdoer, very often, is a difficult question to determine; and it is hard to say, in all cases, where the line should be drawn between negligence or wrongdoing and such care as, considering his age and experience, reasonably should be expected of him. But about the general principle there can, we think, be no question. Thus, if a child trespass on the premises of the defendant, and is injured by something that he does while trespassing, he cannot recover, unless the injury was wantonly inflicted by, or was due to the recklessly careless conduct of, the defendant. *Gay v. Railway Co.*, (Mass.) 34 N. E. Rep. 258; *Daniels v. Railroad Co.*, 154 Mass. 349, 28 N. E. Rep. 283; *McEachern v. Railroad Co.*, 150 Mass. 515, 23 N. E. Rep. 231. So, if a child voluntarily participates in the wrongful acts of others, and is thereby injured, he cannot recover, though there may have been negligence on the part of the defendant which contributed to the injury. *Lane v. Atlantic Works*, 111 Mass. 136; *Id.*, 107 Mass. 104. Again, if a boy is injured while playing with a machine on which he has been set to work, with proper instructions, he cannot recover, because such conduct constitutes contributory negligence on his part. *Rock v. Indian Orchard Mills*, 142 Mass. 522, 8 N. E. Rep. 401. See, also, *McAlpin v. Powell*, 70 N. Y. 126. There is no suggestion in any of these cases that the plaintiff was entitled to recover if he was acting, when he

received the injury complained of, as children of his age, intelligence, and experience would naturally be supposed to have acted under the same or similar circumstances. The principle for which the plaintiff contends would require us to hold that in no case would trespassing or intermeddling by a child, or participation by him in the act resulting in injury to him, be a bar, as matter of law, to his recovery, provided it appeared that the defendant was negligent, and that the child was only doing what he might naturally have been expected to do. We do not think that such is the law. We have assumed, for the purposes of this case, without deciding it, that the defendant was negligent in leaving the marble slabs where he did. The plaintiff concedes that there was evidence tending to show that there was, on the part of the plaintiff, interference with them, growing out of the play in which he was engaged with the other boys. The court instructed the jury that if the plaintiff participated in throwing the stone over upon himself he could not recover. The jury must have found that the plaintiff did assist in doing the thing which caused the injury to himself. We think the ruling was right. Exceptions overruled.

(159 Mass. 221)

#### DALTON v. WEST END ST. RY. CO.

(Supreme Judicial Court of Massachusetts.  
Suffolk. May 20, 1893.)

##### COMPROMISE OF SUIT BY ATTORNEY.

A compromise of a pending suit by an attorney, in violation of express instructions from his client, is not binding on the client; and when the parties can be placed in statu quo, and application is seasonably made, the court has power to vacate any judgment founded on such compromise, and to order it and the compromise stricken from the files.

Exceptions from superior court, Suffolk county; John W. Hammond, Judge.

Petition by Anna D. Dalton to vacate a judgment, entered pursuant to an agreement between counsel, in an action brought by her against the West End Street-Railway Company for personal injuries. The court granted the prayer of the petition, and defendant excepts. Exceptions overruled.

The original action was an action of tort to recover damages for personal injuries, in which the ad damnum was placed at \$3,000, wherein said Anna D. Dalton was the plaintiff and the West End Street-Railway Company the defendant. The action was brought by Edward J. Jenkins, Esq., an attorney at law and member of the bar. The writ, dated March 7, 1892, issued out of the superior court, and was returnable in this county. Said writ was duly entered in said superior court on the first Monday of April, 1892, together with the declaration setting forth the cause of action; and said Jenkins appeared as counsel of record therein for said Dalton, and William B. Sprout, Esq., appeared as counsel of record for said defendant. Said Jenkins afterwards, to wit, on the following 13th day of July, made with the defendant a settlement of said action for the sum of

\$750, which was paid by the defendant to said Jenkins. Thereupon said Jenkins, representing the plaintiff, and said Sprout, representing the defendant, signed an agreement and judgment satisfied, as follows: "The above case being settled, it is agreed that judgment may be entered therein for the plaintiff for \$750, without costs, and that entry may be made of judgment satisfied;" and said agreement was duly filed July 18, 1892. At the hearing on said petition, evidence was introduced by the petitioner showing that the said petitioner employed said Jenkins as her attorney at law in said action; and evidence was further admitted, against the respondent's objections, that said Jenkins was not authorized by said Dalton to make said settlement, but was told by said Dalton not to compromise for that sum, to wit, \$750, but that said Dalton in no way informed the respondent concerning any authority of said Jenkins. There was no evidence tending to show that the compromise and settlement were not made in good faith on the part of the respondent. No evidence was introduced as to whether the said settlement was a reasonable settlement. The court ruled as a matter of law that the said Jenkins, as an attorney at law for the plaintiff, had, under the circumstances, no authority to make said settlement of the case, and, having so ruled, ordered judgment in the original suit to be vacated, and the action to be brought forward for trial, upon the petitioner paying to the respondent, or into this court for the use of the respondent, said sum of \$750, with interest and costs of the respondent in the petition, which sums are now in the hands of the clerk of said court, in pursuance of said order.

D. F. Kimball, for plaintiff. W. B. Sprout, for defendant.

FIEL, D. C. J. The only questions which have been argued relate to the authority of an attorney at law to make a compromise of a suit, to enter into an agreement for judgment, to file it in the cause, and to receive satisfaction of the judgment. The exceptions recite, in effect, that the attorney for the plaintiff was not authorized to make the settlement which was made, but was told by his client not to make it. In *Railroad Co. v. Martin*, (March, 1893,) 33 N. E. Rep. 578, we declined to enforce specifically an agreement of compromise of a suit made by the attorneys, because it appeared that the attorney of the plaintiff, in making the agreement, had acted under a mistake of fact as to his authority. The reasons are stronger against enforcing such an agreement when, in making it, one of the attorneys has violated his instructions. In that case we declined to express an opinion whether, in this commonwealth, an attorney at law, by virtue of his employment, has authority to agree to a compromise of his client's suit out of court, but we said that the weight of authority in this country was that he had not any such authority. In that case the court also said: "If such a compromise is entered of record in the suit, and relates to the disposition to be made of the suit,

it may be that, unless the court for good cause shown consents to the withdrawal of the agreement, it binds the parties to the suit; and that, if it has been made without authority, or improperly made, the attorney is answerable in damages to his client." In the present case the agreement was made a matter of record in the suit, and judgment was entered accordingly, and the judgment was satisfied. But even when such agreements are entered of record in the suit, courts have the power to grant relief against them, if made without the authority of the clients. They may refuse to enforce them, or treat them as void. See *Township v. Keller*, 100 Pa. St. 105; *Whipple v. Whitman*, 13 R. I. 512; *Granger v. Batchelder*, 54 Vt. 248; *Holt v. Jesse*, 3 Ch. Div. 177; *Swinfen v. Swinfen*, 2 De Gex & J. 381; *Holker v. Parker*, 7 Cranch, 436. In practice the assumed authority of attorneys of record to agree upon the amount of judgment to be entered, or to other disposition of the suit, must be recognized by the court, and, when entered of record, such agreements are binding upon the parties, unless the court, for good cause shown, permits them to be withdrawn, or vacates any order founded upon them. But when the court is informed that they have been made against the express prohibition of the client, and the parties can be put in statu quo, we are of opinion that the court has the power to vacate any judgment founded upon them, and to order such agreements off the files, if the application is seasonably made. It is not contended in the present case that the application to vacate the judgment was not seasonably made, or that the court had not the power at that time to vacate the judgment. We see no error in the exceptions.

Exceptions overruled.

(159 Mass. 210)

#### THOMPSON v. DICKINSON et al.

(Supreme Judicial Court of Massachusetts.  
Middlesex. May 20, 1893.)

EXCEPTIONS—ALLOWANCE—ATTORNEYS—LIABILITY TO CLIENT—DEFAULT.

1. The nonappearance of a party at the time and place fixed for hearing concerning the allowance of his exceptions to the rulings of the court during the trial is no ground for disallowing such exceptions, but it is the duty of the presiding justice to examine the exceptions prepared by such party, whether he appears or not, and "to allow them if conformable to the truth," as required by Pub. St. c. 153, § 8.

2. An attorney has a right to withdraw from a case if his client consents, and the client cannot thereafter sue him for a wrongful and unjustifiable withdrawal.

3. A defendant, who first employs attorneys after he is in default, cannot maintain an action against the attorneys for negligence in failing to plead a special statute of limitations, where the order striking off the default by its terms requires defendant to answer to the truth of the charges contained in the declaration.

4. Under St. 1885, c. 334, § 10, which authorizes the supreme judicial and superior courts, "in their discretion, and upon such terms, if any, as they may think fit," to strike out a default at any time before judgment, such

courts may prescribe the kind of a defense which a defendant may be permitted to make as a term or condition of striking off a default.

Exceptions from superior court, Middlesex county; Henry K. Braley, Judge.

Action by Augustin Thompson against Marquis F. Dickinson, George F. Richardson, Hollis R. Bailey, and John L. Hunt, attorneys at law, for negligence in failing to plead the statute of limitations in an action brought against plaintiff by Mira Beals, and for wrongfully withdrawing from said action. The court ruled that plaintiff could not recover, and plaintiff excepted. He failed to appear at the time and place fixed for hearing concerning the allowance of his exceptions, and the same were disallowed. At the request of the parties, the commissioner appointed to hear the exceptions reported the whole evidence in the case, and submitted the questions of law to the court, with the finding that the bill of exceptions tendered did conform to the truth, unless some one or more of the thirty-one omissions specified by him were material, and should have been included therein. Exceptions overruled.

E. W. Cate, for petitioner. S. J. Elder, for defendant M. F. Dickinson. G. F. Richardson, for defendant H. R. Bailey. D. O. Allen, for defendant J. L. Hunt.

FIELD, C. J. The plaintiff in this suit duly filed his exceptions. The presiding justice appointed "June 18, 1892, 8 o'clock A. M., at the court house, East Cambridge," as the time and place for hearing the parties concerning the allowance of the exceptions, and an indorsement on the exceptions states that, "said Thompson not appearing to prosecute and settle said exceptions, and the defendants did appear, the said exceptions are disallowed." The commissioner to whom the plaintiff's petition to prove his exceptions was referred has found that the presiding justice "did not pass upon the truth of said exceptions, or any of them," and that he erred "in disallowing the exceptions solely on the ground of the non-appearance of the petitioner," etc. A party may undoubtedly abandon his exceptions after he has filed them, but such abandonment ought not to be inferred merely from his failure to appear at only one hearing appointed for settling them. The procedure is regulated by Pub. St. c. 153, § 8. The statute provides that the adverse party "shall have an opportunity to be heard concerning the allowance of the exceptions," but there is no similar provision concerning the party who excepts. In practice both parties usually attend, that each may be heard upon any amendment or modification of the exceptions that may be suggested by the other or by the court. But the excepting party has a right to stand upon his exceptions as he has framed them. It then becomes the duty of the presiding justice to examine them, and, if they are "found conformable to the truth," to allow them, whether the excepting party appears or not. The commissioner has found that the "exceptions tendered did conform to the truth, unless some one or more of the thirty-one omissions specified

above were material, and should have been included therein." We have examined these omissions, which are shown by the commissioner's report, and none of them seems to us to be essential to the proper understanding of the exceptions. We therefore consider the exceptions as proved. See *Morse v. Woodworth*, 155 Mass. 233, 27 N. E. Rep. 1010.

The first exception is to the exclusion of evidence that, before the action of *Beals v. Thompson* was brought, the financial standing and reputation of the plaintiff in the present suit was good, and that, after judgment was rendered in that action, his financial standing and reputation were impaired. This exception plainly relates to damages, and it becomes immaterial if the plaintiff failed to prove a cause of action. The plaintiff's remaining contentions are: First, that the action of *Beals v. Thompson* was an action for libel, and that the cause of action was within Pub. St. c. 197, § 3, and that, if this statute of limitations had been pleaded, it would have been a defense, and that the present defendants, as his attorneys in that action, were negligent in not pleading this statute, or in asking leave of the court to plead it; and, secondly, that the defendants wrongfully withdrew their appearances, and refused to continue to act as his attorneys in that action. It was admitted that since the judgment in the action of *Beals v. Thompson* the plaintiff in the present action has been adjudged an insolvent debtor, and that assignees of his estate have been duly chosen, and that he has not obtained leave of his assignees to prosecute this action, nor have said assignees intervened in it. On these admitted facts the defendants contended that the plaintiff had no right to bring and prosecute this action, and the plaintiff contended that the cause of action did not pass to the assignees, and that this defense was not open to the defendants under their answers. The presiding justice ruled that under the order of the court made in the suit of *Beals v. Thompson*, taking off the default, the defendant therein was limited in his defenses to those stated in the order; "and that said order by its terms excluded the right of the defendant to plead the statute of limitations; and that the plaintiff had shown no negligence on the part of the defendants in connection with said case of *Beals v. Thompson*; and that as a matter of law, upon the undisputed evidence in this case, the plaintiff had not made out his case, and was not entitled to go to the jury." Of the four defendants Hunt did not withdraw his appearance in the action of *Beals v. Thompson*, but continued to act as the attorney of the defendant therein until final judgment. The exceptions recite that the plaintiff "offered in evidence a duly-authenticated copy of the record in the case of *Mira Beals* against him." This record shows that in October, 1888, Mr. Richardson, and on October 9, 1888, Mr. Dickinson and Mr. Bailey, withdrew their appearances as attorneys for the defendant. The plaintiff also introduced in evidence the answers of these defendants to the interrogatories filed by him. Mr. Richardson

answered: "I notified Thompson about October 1, 1888, that I could not act further in his case, and could not try it; and subsequently withdrew my appearance about October 9th. I did not act after October 1st. Said Thompson assented to my withdrawal. I obtained no leave from the court." Mr. Dickinson and Mr. Bailey answered that they withdrew from the case October 9, 1888; that they notified Mr. Thompson that they had withdrawn; and that they understood him to consent to their withdrawal. In *Powers v. Manning*, 154 Mass. 370, 28 N. E. Rep. 290, it was held that an attorney at law, for reasonable cause, and upon reasonable notice, may withdraw from a suit. So far as appears, the only evidence which the plaintiff offered that these defendants wrongfully withdrew from the defense of the suit was that they did in fact withdraw after notice to him, and that he consented to it, or that they understood that he consented to it. The plaintiff did not testify in the case, and there was no contradiction to the evidence of the defendants put in by the plaintiff that the plaintiff consented to their withdrawal, or that they understood that he consented. This evidence is not sufficient to sustain the burden, which is on the plaintiff, to prove that they withdrew wrongfully or without justification. The withdrawal was no wrong to him if he consented to it.

Whether the defendants should have pleaded or attempted to plead the special statute of limitations relates to all the defendants. The writ in *Beals v. Thompson* was dated December 29, 1887, and was returnable on the first Monday of February, 1888, and was duly entered on the return day, and the defendant was defaulted for want of an appearance on February 17, 1888. The defendant Hunt appeared for the defendant in *Beals v. Thompson* on March 26, 1888, after this default was entered, and filed a motion to have the default taken off. This motion was first allowed, and afterwards the order striking off the default was vacated, and the motion was dismissed. After this, to wit, on May 17, 1888, the other defendants appeared for the defendant in *Beals v. Thompson*, and on May 18th filed a motion to have the default taken off, and for leave to file a demurrer and an answer, and they filed affidavits giving their reasons for the application. It appears that Mr. Hunt was first retained as an attorney in March, 1888, and the remaining defendants about May 15 or 16, 1888. All the defendants in the present suit were first retained after the defendant in *Beals v. Thompson* had been defaulted. On September 20, 1888, a hearing was had on the motion filed May 18, 1888, and on September 26, 1888, the following order was passed: "Default taken off, and the defendant to have leave to file an answer alleging any facts upon which he expects to rely to sustain a defense to the action on the ground of the truth of the charges contained in the letters mentioned in the declaration, or the defense that the said letters were privileged communications, and not to have liberty to deny the sending of said letters, and not to have leave

to file a demurrer, and that the cause retain its place on the trial list for the October session for trial upon the merits." Mr. Hunt, on the 10th of October, presented an answer to the court, and asked leave to file it, but leave was refused, because it appeared that it "is not within the terms of the order of this court heretofore passed;" and on October 15th an answer was filed by him which was within the terms of the order. It thus appears that none of the defendants except Hunt were attorneys in the case at the time the answer was actually filed. We think, however, that their contention is true that the order means that the defendant in that suit should have leave to file an answer which should be confined to allegations of fact tending to sustain a defense on the ground that the charges contained in the letters mentioned in the declaration were true, or that the letters were privileged communications, and that the order did not permit an answer of the special statute of limitations applicable to actions of libel. The record discloses that it was with some difficulty that leave was obtained to file an answer at all, and that the court was vigilant to see that the answer to be filed did not transcend the terms of the order. St. 1885, c. 384, § 10, authorizes the supreme judicial and superior courts, "in their discretion, and upon such terms, if any, as they may think fit," to strike out a default at any time before judgment. We have no doubt that this authorizes a court to prescribe the kind of defense which a defendant may be permitted to make as a term or condition of striking off a default. We are of opinion that the present defendants were precluded by the order of the court from setting up that the suit of *Beals v. Thompson* was an action of libel, and was not commenced within two years after the cause of action accrued, as required by Pub. St. c. 197, § 3. It is unnecessary to consider the further contention of the defendants that the suit of *Beals v. Thompson* was not an action of tort in the nature of an action for a libel, but was an action of tort in the nature of an action per quod consortium amittit, which could be brought at any time within six years after the cause of action had accrued. If the defendant in *Beals v. Thompson* had been permitted to file and argue a demurrer, perhaps this court at some time would have been called upon to pass upon the form of the action. This question was not directly involved in the exceptions argued in this court, although it was assumed that it was an action of libel with an allegation of the loss of the society of the husband as constituting special damages. *Beals v. Thompson*, 149 Mass. 405, 21 N. E. Rep. 959. If the defendants had considered the nature of the action, they might well have been in some doubt whether it was within Pub. St. c. 197, § 3, but at the time when they entered on the defense we think that such a defense was not opened to them. We have not considered whether the plaintiff could prosecute the action without the assent of his assignees in insolvency, or whether the defendants could be sued jointly.

Exceptions overruled.

(159 Mass. 249)

## CREESY et al. v. WILLIS et al.

(Supreme Judicial Court of Massachusetts.  
Norfolk. May 22, 1893.)PURCHASE OF MORTGAGED PROPERTY—ASSUMPTION  
OF MORTGAGE—CONSTRUCTION OF WILL.

1. A promise, in a deed of mortgaged land, that the purchaser will pay the mortgage debt, cannot be enforced by the mortgagee by action in his own name, or in the name of the grantor without the latter's consent.

2. An understanding between the purchaser and the mortgagee that the mortgage would not be foreclosed until the mortgagee desired payment does not render the purchaser personally liable to the mortgagee for the mortgage debt, nor can resort be had to her personal estate after her death for that purpose.

3. The rule which requires incumbrances on real estate of a testator to be paid from the personal estate, where no other intent is expressed in the will, is confined to incumbrances created by the testator, and does not extend to a case where testator purchased the estate subject to a mortgage, though he may have covenanted with the vendor to pay the debt.

4. Testatrix devised her homestead, which she had purchased subject to a mortgage, to her husband, "outright," and she also gave him a life estate in all her other property, with remainder to her brother and sister. *Held*, that the will disclosed no intent on the part of testatrix that the mortgage debt should be paid out of her personal estate, and that, therefore, the executors would be instructed not to pay it.

Case reserved from supreme judicial court, Norfolk county; John Lathrop, Judge.

Petition by Frank L. Creesy and others, executors of the will of Lois A. Willis, for the construction of the will. Robert B. Willis and others; next of kin and heirs at law, were subpoenaed as defendants; and at the request of the parties the case was reserved for the consideration of the full court.

C. F. Kittredge, for petitioners. S. L. Whipple and W. R. Bigelow, for defendant R. B. Willis.

LATHROP, J. This is a petition in equity by the executors of the will of Lois A. Willis, asking the instructions of this court as to the construction of the will of their testatrix. From the report of the single justice who heard the case, the following facts appear: The only clause of the will material to the questions before us is the following: "I give and bequeath to my husband, Robert Burton Willis, my household furniture, barn and house and land, No. 93 Francis St., Brookline, where we now live, outright, and the income of all my real and personal estate as long as he lives. After his death it is to be equally divided among my brothers and sister," (naming them.) This will was made on June 20, 1892. Mrs. Willis died on July 2, 1892, and her will has been duly admitted to probate. The estate No. 93 Francis street, Brookline, was purchased by Mrs. Willis of one Smyth, on April 10, 1888. The consideration named in the deed, which was the true consideration, was \$11,750. The deed described the estate as subject to a mortgage, which was excepted from, and taken out of, the covenants of the deed, by the following words: "Except a mort-

gage now therson of \$5,700, which the grantee is to pay, viz. \$5,700, and save me harmless therefrom, being a part of the consideration of this deed." There were, in fact, two mortgages given by Smyth,—one for \$700, and one for \$5,000, the mortgagee in each being the Brookline Savings Bank. The mortgage for \$700 was paid by Mrs. Willis in her lifetime. The mortgage for \$5,000 became due on July 1, 1888, and about this time Mrs. Willis called at the savings bank, and said that she had some money coming in soon, with which she would pay the mortgage, and asked that the mortgage might remain. No formal agreement for its extension was made by the mortgagee, but it was understood between the mortgagee and Mrs. Willis that it might "remain" until the mortgagee desired its payment. Mrs. Willis continued to pay interest on this mortgage while she lived, but the mortgage has not been paid.

1. It is well settled in this commonwealth that a promise made by a purchaser of an equity of redemption, by accepting a deed poll from his grantor, to pay the mortgage debt, is not a promise which can be enforced by the mortgagee by an action at law in his own name, or in the name of the grantor without his consent. *Prentice v. Brimhall*, 123 Mass. 291; *Coffin v. Adams*, 181 Mass. 133. It is contended in behalf of the husband of Mrs. Willis that what took place between Mrs. Willis and the mortgagee about July 1, 1888, is sufficient to constitute a contract between her and the mortgagee, so as to make her personal estate liable for the mortgage debt. We do not think that the facts reported amount to more than this: That Mrs. Willis desired that the mortgage should not be foreclosed; that no formal agreement as to even this was made; that there was only an understanding that the mortgage might "remain"—that is, that it would not be foreclosed—until the mortgagee desired payment. On the findings we cannot say that there was an agreement, assented to by both parties, that she should be personally liable to the mortgagee.

2. The rule which requires incumbrances upon real estate to be paid from personal estate, where no other intent is expressed in the will, is confined to incumbrances created by the testator, and does not extend to cases where the testator purchased the estate subject to a mortgage. *Hewes v. Dehon*, 3 Gray, 205; *Andrews v. Bishop*, 5 Allen, 490. The same is true where there is a covenant with the vendor to pay the debt. *Tweddell v. Tweddell*, 2 Brown, Ch. 101, 152; *Billinghurst v. Walker*, Id. 604; *Butler v. Butler*, 5 Ves. 535; *Cumberland v. Codrington*, 3 Johns. Ch. 229, (in which case the authorities are fully discussed by Chancellor Kent;) *McLenahan v. McLenahan*, 18 N. J. Eq. 101; *Mount v. Van Ness*, 33 N. J. Eq. 262.

3. We find nothing in the will which shows an intent on the part of Mrs. Willis that the mortgage debt should be paid out of the personal estate. The word "outright" seems to us to be used in

antithesis to the following clause, by which the husband takes a life estate in the income of the other real and personal estate. The result is that the petitioners are instructed that they ought not to pay the mortgage debt. Decree accordingly.

(159 Mass. 252)

In re BATES et al.

(Supreme Judicial Court of Massachusetts.  
Suffolk. May 23, 1893.)

WILLS—CONSTRUCTION—DISTRIBUTEES—"REPRESENTATIVE."

1. A clause of a will provided that at the death of testator's last remaining child the estate should be closed, and the property distributed. A subsequent clause, which appeared to have been added at a later date, provided that his estate should be divided, as provided in his will, when all but one child was dead, but that certain securities should be kept, from which the annuity to such child should be paid, and, when he died, the fund from such securities should be divided as provided in the original will. *Held* that, in so far as the two clauses were inconsistent, the latter would govern, and the partial distribution should be made on the death of the last child but one.

2. The will provided that the distribution should be among testator's grandchildren and the representatives of any deceased grandchild, with a single exception. A codicil excluded another unless the property exceeded a certain amount which testator had given her. *Held*, that a grandchild for whom he made special provision would, in the absence of anything indicating a different intention share in the distribution.

3. Under the provision that the distribution should be to his grandchildren and the representatives of any deceased grandchild, the term "representatives" means those distributees of a deceased grandchild living at the time fixed for distribution.

4. The provision of the will for distribution does not require the distribution to be postponed to await any possible birth of children to the living son.

Case reserved from supreme judicial court, Suffolk county.

Petition of William M. Bates and others, trustees under a will, for instructions.

D. A. Dorr, for William M. Bates and others. W. I. Badger, for H. H. Newell and others. B. B. Jones and E. B. George, for E. B. Cartwright and others. J. Fox, for persons not in being. Gaston & Snow, for Susan H. Folger. R. D. Weston-Smith, for C. L. Cartwright. C. B. Southard, for F. C. Cartwright. R. Foster, guardian ad litem, for Anne M. Cartwright. M. O. Adams and F. R. Jones, for Anne C. and G. B. Sheldon. H. V. Cunningham, for Emma Sheldon and others.

FIELD, C. J. It was said at the argument that the will and codicils were written by the testator. On examining them it seems probable that the will, as originally written, ended with the clause appointing Barry, Ruggles, and Bates executors and trustees. The clause immediately preceding this is as follows: "At the death of my last remaining child, including my son-in-law, Leonard R. Sheldon, I order my estate to be closed, and the amount left to be equally divided among my grandchildren and the repre-

sentative of any deceased grandchild, excepting George B. Cartwright, Junr., and Ellen M. Jones, the wife of Henry L. Jones. The part of Ellen M. Jones I give in trust to her brother Edmund G. W. Cartwright for her use, free from the claims of said Jones or of his creditors, and, at her death, what may remain I wish to have equally divided among her sisters." The annuities given in the preceding clauses of the will were to his two sons, to his one daughter, to his son-in-law, and to his two sisters, each for the life of the annuitant; to his grandson John W. Cartwright an annuity of \$1,200 "until my estate is settled;" and to his niece Ann G. Bates \$500 a year for 10 years. All these annuitants except his son Edward S. Cartwright have died, and we are not called upon to consider what the construction of the will would be if any other of the persons who were given annuities expressly for life was still living. It is not improbable that the testator believed that his two sisters would die before the death of his "last remaining child." It is probable that after having completed his will, as he supposed, he afterwards made an addition to it, and either copied the will with the additional clauses, or, if the will had not been executed, wrote the additional clauses at the end of it. The will as it now appears contains no in testimony clause, and the last clause but one is as follows: "I hereby authorize a majority of my executors or trustees to pay to any one, or more than one, of my grandchildren, or the widows of my grandsons, that may be needy, any portion of surplus income from my estate, after all my legacies have been provided for, not exceeding one hundred dollars monthly to each. Any allowance made to my granddaughter Ellen Maria Jones, the wife of Henry L. Jones, is to be placed in the hands of her brother Edmund G. W. Cartwright for her use. And I desire that my estate may be divided as provided in my will, when all but one of my children are dead; and I order my trustees to keep in their hands thirty thousand dollars of Mad River railroad bonds, and five hundred shares of Sandusky, Dayton and Cincinnati preferred railroad stock, the income of which to be used, as far as needed, to pay the annuity due to such child; and, when the last child dies, this fund is to be divided and paid over as was provided in my original will to my grandchildren as specified therein." In the will, as it now appears, the testator gave annuities to several persons, one of which—to Ellen M. Cartwright—was to continue "during the life of James Weld's widow, and during the life of his sister Mrs. Cobb." The other annuities were given in the following terms: "I give annuities to the following persons, viz.: To Edward Wallace Cartwright, four hundred dollars; to Ann Eliza Richardson, six hundred dollars; to Sarah W. Galucia, six hundred dollars; to Ellen M. Jones, four hundred dollars; to Susan C. Folger, four hundred dollars; to James Weld Cartwright, twelve hundred dollars, and, in case he leaves a widow, one-half—say six hundred dollars—is to be paid to her." Some of these annuities were changed in amount by the codicils,

but they still remain annuities, given generally, without any express designation of the term for which they are to be paid. The only annuitants now living are Edward S. Cartwright, the son of the testator, and Edward Wallace Cartwright, his grandson, Ann Eliza Richardson, his granddaughter, Sarah W. Galucia, his granddaughter, Susan C. Folger, whose real name is alleged to be Susan H. Folger, his granddaughter, and James W. Cartwright, his grandson. If the two clauses of the will with reference to the time for the distribution of the estate were inconsistent with each other, the case is peculiarly one for the application of the rule that the latter clause should govern. The latter clause plainly refers to the former as a part of the original will, and shows an intention to modify the former clause so far as the two clauses differ from each other. It may be said, however, that the former clause relates to the time when the estate shall be "closed," while the latter relates to a partial distribution before that time, and that thus they are not wholly repugnant to each other, but one is an amendment of the other. It is plain, on the face of the will, that the latter clause expresses the final intention of the testator, and that this intention was that the estate generally should be divided when all but one of his children were dead, but that certain specific property should continue to be held by the trustees, the income of which should be used in paying the annuity to the child who remained alive.

That specific property was \$30,000 of Mad River Railroad bonds, and 500 shares of Sandusky, Dayton & Cincinnati preferred railroad stock. The bill alleges that it "has been heretofore necessary to change" these securities, but it is not stated what changes have been made. The question is reserved, "what, if any, instructions the court will give the trustees as to the amount and character of the funds to be retained by them to pay the annuitant Edward S. Cartwright." This must be settled by a single justice. The general rule is that an amount should be retained, equivalent to the value of the securities named in the will, when they have been converted into other property, or that the securities received in place of them, if they can be specifically traced, should be retained. We are not informed whether by this rule the amount to be retained would be more or less than would reasonably be required to pay the annuity to Edward S. Cartwright during his life, and a single justice can determine whether, on the facts appearing before him, there should be any modification of this general rule. When the last child but one of the testator died, the time came for the distribution of the estate, except the portion which was to be retained by the trustees for paying the annuity to the last surviving child. This portion cannot be divided until Edward S. Cartwright dies.

As to the remainder of the estate the provision is "that my estate may be divided as provided in my will, when all but one of my children are dead," etc. This refers to the preceding clause. The amount left

is "to be equally divided among my grandchildren and the representative of any deceased grandchild, excepting George B. Cartwright, Junr.," etc. This means that the amount is to be equally divided between the grandchildren living at the time of the death of the last but one of the testator's children, and the representatives of the grandchildren who have deceased before that time. Frederick C. Sheldon, a grandchild, has deceased, and the question reserved is whether his representatives are to share in the amount to be distributed, or whether the bequest of \$30,000 to him was in full of his share in the estate. We infer from the statements contained in the bill that the annuity given to Frederick C. Sheldon during his minority, and the bequest of \$30,000 to him when he attained the age of 21 years, have both been paid. There is nothing in the terms of this bequest of \$30,000 to indicate that it was all which he was to receive. The testator expressly excluded his grandson George B. Cartwright, Jr., to whom he gave a legacy of \$4,000, from receiving anything more when the estate was to be divided among his grandchildren and their representatives. By the first codicil he excluded Annie Maria Richardson, a granddaughter, from sharing in the ultimate distribution of his estate unless the share exceeded \$9,000, the value of an estate which he had purchased for her in his lifetime, and then she was to receive only the excess. He provided that the share of Ellen M. Jones, his granddaughter, should be put in trust, but there is nothing in the will or codicils indicating that he intended that Frederick C. Sheldon should stand any differently from the other grandchildren in the division to be ultimately made of the estate. Separate provisions of a will, in favor of the same legatee, are to be considered commutative, unless a contrary intention is apparent from the terms of the will. The nature of the evidence offered to show that the testator did intend the contrary is not set out in the report. Such evidence generally is incompetent, and it does not appear that this was not. We think that the representatives of Frederick C. Sheldon are entitled to share in the division. See *Wainwright v. Tuckerman*, 120 Mass. 232.

The most difficult question relates to the disposition of the shares of those grandchildren who died before the death of the last child but one. Some of them left a widow and children, and some died testate, and some intestate. What is meant by the words "the representative of any deceased grandchild," found in the clause of the will relating to the division of the property? It is perhaps not very important to determine whether the grandchildren living at the testator's death took vested interests as of his death, which opened and let in afterborn grandchildren, but which were divested if they died before the time for distribution arrived, or whether the interests of the grandchildren were contingent upon their being alive at the time fixed for distribution, with a gift to their representatives if they died before that time, because in either case the grandchildren could assign their inter-



ests subject to the contingency. If "the representative of any deceased grandchild" means the executor or administrator of their estates, then the share appropriated to each deceased grandchild would be a part of his estate, as if his interest had absolutely vested in his lifetime. There is no doubt, if the word "representative" be held to mean executor or administrator, that under our laws they would not take for their own benefit, but for the benefit of the estate. The principal cases, English and American, on this subject, are collected in 2 Jarm. Wills, (6th Ed. by Bigelow,) \*957-\*967. The decisions are somewhat conflicting, but we think that in the present case the word "representative" must mean either the executor or administrator of a deceased grandchild, or the distributees of the estate of a deceased grandchild, under our statutes of distribution. It becomes necessary to determine which of these meanings was intended, because one of the deceased grandchildren left a will, and, besides, there may be claims of creditors upon their estates. The word, as printed in the papers before us, is "representative," and not "representatives;" but we do not attach much importance to that. We think that the intention was that the representatives of any deceased grandchild should take instead of such deceased grandchild, and should take to their own use. On the whole, we incline to the opinion that the distributees of each deceased grandchild, under our statutes of distribution, are the persons intended. See *Briggs v. Upton*, L. R. 7 Ch. App. 376; *Bridge v. Abbot*, 3 Brown Ch. 227; *Cotton v. Cotton*, 2 Beav. 67; *Smith v. Palmer*, 7 Hare, 225; *Walter v. Makin*, 6 Sim. 148; *King v. Cleveland*, 28 Beav. 166, on appeal, 4 De Gex & J. 477; *Gibbons v. Fairlamb*, 26 Pa. St. 217; *Brokaw v. Hudson's Ex'rs*, 27 N. J. Eq. 135; *Bronson v. Phelps' Estate*, 58 Vt. 612, 5 Atl. Rep. 552; *Baines v. Ottey*, 1 Mylne & K. 465; *Pallin v. Hills*, Id. 470; *Davies v. Davies*, 55 Conn. 319, 11 Atl. Rep. 500; *Rivett v. Bourquin*, 58 Mich. 10, 18 N. W. Rep. 537; *Thompson v. Young*, 25 Md. 450. Ellen M. Jones died before the time came for division, and thus the right of possession never vested, either in her or her trustee. If the right of property once vested in her, it was divested by her death. In the event which has happened, there is no more difficulty in sustaining the bequest to her sisters than in sustaining the bequest to the distributees of other deceased grandchildren. These distributees all take directly under the will. Her share should be equally divided among her sisters living at the time fixed for distribution. It does not appear that any grandchildren of the testator died before his death, and the question does not arise whether the distributees of such grandchildren are to be included in the distribution.

It was argued that Edward S. Cartwright, the living son of the testator, may yet have children; but, if that is possible, there is no provision in the will which requires the partial distribution to be postponed to await the birth of such grandchildren of the testator. Whether such grandchildren would share in the final

distribution of the fund which the trustees are to hold for the purpose of paying the annuity to Edward S. Cartwright during his life is a question not now before us. The questions reserved must be answered according to this opinion. So ordered.

(159 Mass. 266)

# MURPHY v. AMERICAN RUBBER CO.

(Supreme Judicial Court of Massachusetts. Suffolk. June 2, 1893.)

MASTER AND SERVANT—NEGLIGENCE—ASSUMPTION OF RISK — NEGLIGENCE OF FELLOW SERVANT—EVIDENCE.

1. In an action by an employee for personal injuries, the negligence alleged was that a certain shaft of the machinery was not covered; that the passageway was not properly lighted; and that a certain waterpipe leaked, making the floor slippery. Defendant employed a man whose sole duty it was to keep the pipes tight. Plaintiff had been working for defendant, in the room in which he was injured, about three weeks, and, in an adjoining room, about a year. There was no evidence that the passageway was not properly lighted, and it appeared that, if the floor was "slushy," it was caused by oil from the machinery, and that plaintiff had charge of oiling it. *Held*, that plaintiff could not recover.

2. In such case there was no absolute duty on defendant to box the machinery, or to point out its dangerous character, or to instruct him that it was not boxed, since such facts were obvious, and he was obliged to take notice of them.

3. If it was the normal condition of the floor to be wet and slippery, plaintiff assumed the risk caused thereby; and if it was not the normal condition, but became wet through the neglect of the man employed to look after the pipes, such condition was the fault of plaintiff's fellow servant, for which defendant is not liable.

Exceptions from superior court, Suffolk county.

Action by John J. Murphy against the American Rubber Company for personal injuries caused by defendant's negligence while plaintiff was in its employ. There was a verdict directed by the court in favor of defendant, and plaintiff excepted. Exceptions overruled.

Frank L. Washburn and George Oak, for plaintiff. John Lowell, Jr., and S. H. Smith, for defendant.

LATHROP, J. This is an action of tort, at common law, for personal injuries sustained by the plaintiff while in the defendant's employ. The room in which he worked was a large one, and in it were many machines for grinding rags in the process of making rubber. These machines were in rows extending the length of the room. Between the rows were passageways several feet wide, and at intervals of every two machines were cross passageways about three feet wide. Each row of machines was operated by a long shaft extending the length of the row. There was also a water pipe which extended the length of each row, and supplied the steam and water which were necessary to the grinding process. In the manufacture of rubber it is necessary to run steam through this pipe, and then, quickly, to run cold water through it.

This causes a sudden expansion and contraction of the pipe, and is apt to make it drip a little at the joints. The only way of remedying this is to tighten the joints with a wrench, and the defendant employed a man whose sole duty it was to look after the pipes, and keep them as tight as possible. The plaintiff, while passing along one of the passageways, slipped on the floor, and caught his foot between a coupling on the shaft and the floor. The only acts of negligence on the part of the defendant, which are alleged, are that the shaft was not covered; that the passageway was not properly lighted; and that the water pipe was negligently maintained in a leaky condition, so that water leaked therefrom, and made the floor slippery. The plaintiff testified that the water in the passageway made it slippery, and that after he got hurt he noticed that the passageway was slushy and slippery.

1. The plaintiff had been in the defendant's employ for a year, working in the room adjoining the one in which he was injured. He then went to work in the latter room, and had been at work there for at least three weeks before the injury. There is no absolute duty on the part of an employer to box his machinery. *Sullivan v. Manufacturing Co.*, 113 Mass. 396; *Rock v. Mills*, 142 Mass. 523, 8 N. E. Rep. 401; *Foley v. Machine Works*, 149 Mass. 294, 21 N. E. Rep. 304; *Tinkham v. Sawyer*, 153 Mass. 485, 27 N. E. Rep. 6. And, under the circumstances of the case, there was no duty on the part of the employer to instruct the plaintiff that the coupling on the shaft was not boxed. The fact was obvious, and it must be assumed that he could see the condition of things. When the dangerous character of the machinery is in plain sight, a workman, ordinarily, must take notice, and no duty rests on the employer to point this out. See cases last cited.

2. The plaintiff put in no evidence to show that the passageway was not properly lighted, and the uncontradicted evidence is that the room was very light.

3. If it was the normal condition of the floor to be wet and slippery, this was a risk of the employment which the plaintiff assumed. *Carey v. Railroad*, (Mass.) 33 N. E. Rep. 512, and cases cited. See, also, *Tinkham v. Sawyer*, 153 Mass. 485, 27 N. E. Rep. 6. If such was not the normal condition of the floor, but the slipperiness was caused by the neglect of the man employed to look after the pipes, this was the fault of a fellow servant, and the plaintiff cannot recover. *Moody v. Manufacturing Co.*, 34 N. E. Rep. 185, and cases cited.

4. There is no allegation in the declaration that the defendant was negligent in allowing the floor to be "slushy," but we need not rest the case on this ground, as it appears that, if such was the condition of the floor, it was caused by oil from the machinery, and that the plaintiff had charge of the oiling of the machinery in that room.

We see no ground on which the plaintiff can maintain his action. Exceptions overruled.

(159 Mass. 269)

## GEER v. HORTON et al.

(Supreme Judicial Court of Massachusetts. Suffolk. May 26, 1893.)

## CREDITORS' BILL—WHEN MAINTAINED.

1. St. 1888, c. 429, § 15, provides that "the money or other benefit, charity, relief, or aid to be paid, provided, or rendered by any corporation authorized to do business under this act, shall not be liable to attachment by trustee or other process, and shall not be seized, taken, appropriated, or applied by any legal or equitable process, nor by operation of law, to pay any debt or liability of a certificate holder or any beneficiary named therein." *Held*, that a bill in equity, by a creditor of a certificate holder, to reach the proceeds of the certificates, would not lie.

2. Nor can such bill be maintained under the general rules of equity jurisdiction where it is not founded on a judgment.

Appeal from superior court, Suffolk county.

Bill by David H. Geer against William Horton and others to reach the proceeds of a certificate in the United States Reserve Fund Association held by Horton. Bill dismissed, and plaintiff appeals. Affirmed.

E. H. Savery, for appellant. C. J. Noyes, for appellee Horton.

ALLEN, J. Without discussing the question whether in other respects the plaintiff's bill is sufficient, we come at once to consider the effect of St. 1888, c. 429, § 15, which is as follows: "The money or other benefit, charity, relief, or aid to be paid, provided, or rendered by any corporation authorized to do business under this act, shall not be liable to attachment by trustee or other process, and shall not be seized, taken, appropriated, or applied by any legal or equitable process, nor by operation of law, to pay any debt or liability of a certificate holder or any beneficiary named therein." It is assumed on both sides, in the absence of any averment to that effect, that the Benefit Fund Association was organized under that statute, and the plaintiff, as a creditor of the defendant Horton, seeks to reach and apply a sum supposed to be due from that association to Horton. The right which the plaintiff seeks to reach and apply came into existence subject to the statutory provision that it should not be liable to be taken for debt. There never was a moment when this right had the ordinary incident of property in respect to liability for debt. Even as between individuals, a fund may be created for the benefit of a person which cannot be reached by his creditors. *Bank v. Adams*, 180 Mass. 431. A fortiori the legislature may enact that a fund which is to come into existence in the future shall be thus exempt.

There is another ground of objection to the plaintiff's bill, which is equally decisive. The bill is not founded upon a judgment, and it cannot be maintained under the general equity jurisdiction of the court to enforce payment out of property which cannot be taken on execution, (*Carver v. Peck*, 131 Mass. 291; *Pettibone v. Railroad Co.*, 148 Mass. 411, 417, 418, 19 N. E. Rep. 337;) but it must rest wholly upon the

special statutory provision authorizing creditors to bring bills to reach and apply property, (Pub. St. c. 151, § 2, cl. 11; St. 1884, c. 285.) This remedy, so given, stands no higher, as regards the nature of the right which is given to a creditor, than the remedy by attachment of property on mesne process or by trustee process. *Maxwell v. Cochran*, 136 Mass. 73. Like them, it is no essential right which enters into and forms part of the obligation of a contract, but it is merely a matter of procedure, wholly dependent on the statute, and subject to repeal at any time. See *Bigelow v. Pritchard*, 21 Pick. 169, 174; *Sprague v. Wheatland*, 3 Metc. (Mass.) 416; *Grant v. Lyman*, 4 Metc. (Mass.) 470, 475; *Kilborn v. Lyman*, 6 Metc. (Mass.) 299, 304; *Jewett v. Phillips*, 5 Allen, 150, 152; *Ward v. Proctor*, 7 Metc. (Mass.) 318; *Stetson v. Hayden*, 8 Metc. (Mass.) 29; *Shelton v. Codman*, 3 Cush. 318, 321; *Saunders v. Robinson*, 144 Mass. 306, 10 N. E. Rep. 815. The effect of St. 1888, c. 429, § 15, is to cut off any right which might otherwise exist to maintain this bill. The numerous cases cited by the plaintiff in relation to exceptions of property or interests from ultimate liability after judgment has been obtained, have no application to this question, and we do not enter upon the inquiry how far property owned by a debtor at the time of incurring a debt may be so exempted. Decree affirmed.

(159 Mass. 280)

**BRYSON v. HOLBROOK.**

(Supreme Judicial Court of Massachusetts.  
Suffolk. June 8, 1893.)

**WILLS—LAPSED LEGACY.**

Where a testator wills personal property to a legatee, "and heirs and assigns," the words "heirs and assigns" are words of limitation, and, on the legatee's death before that of testator, the legacy lapses. *Wood v. Seaver*, (Mass.) 83 N. E. Rep. 587, followed.

Appeal from superior court, Suffolk county.

Action by one Bryson against one Holbrook, as executor, for a legacy. There was a judgment for defendant, and plaintiff appeals. Affirmed.

F. Brewster, for appellant. A. P. Loring, for appellee.

**FIELD, C. J.** This is an action for a legacy, by one of the children of Mrs. William M. Walker. Mrs. Walker is one of the legatees named in will of William Reed Holbrook. She died on March 31, 1881, leaving the plaintiff as one of her heirs. William Reed Holbrook died on February 12, 1886. Mrs. Walker was not a relative of Mr. Holbrook. The legacy to Mrs. Walker is in these words: "I give and bequeath to Mrs. William M. Walker, widow of the late William M. Walker, of Cincinnati, the sum of one thousand dollars, unto her and heirs and assigns, etc. Mr. Ambrose M. Bryson, of Cincinnati, can be informed of this bequest to Mrs. Walker, of Cincinnati." The contention of the counsel of the plaintiff is that this clause should be construed as a gift to Mrs. Walker if she

should be alive at the time of the testator's death, but, if she should not be alive at that time, then as a gift to her heirs. But we see nothing in the will whereby the words "heirs and assigns" can be construed otherwise than as words of limitation. We are unable to distinguish this case from *Wood v. Seaver*, (Worcester, 1893,) 83 N. E. Rep. 587. Judgment affirmed.

(159 Mass. 262)

**DARROW v. DARROW.**

(Supreme Judicial Court of Massachusetts.  
Suffolk. June 2, 1893.)

**SUPERIOR COURT—JURISDICTION—ACTION PENDING—WHAT CONSTITUTES—DIVORCE—DECREE NISI—WHEN MADE ABSOLUTE.**

1. St. 1887, c. 332, § 1, gives the superior court exclusive original jurisdiction of all causes of divorce. Section 5 provides that the act "shall not affect any case pending in the supreme judicial court" when the act takes effect. *Held*, that a case which had been dismissed from the docket simply to relieve the same was "pending," within the meaning of section 5.

2. Under St. 1867, c. 222, § 2, which provides for publication of the entry of a decree nisi in an action for divorce, together with the terms of the decree, the burden is on a party petitioning to have the decree made absolute to show such publication, and, on his failure to do so, his petition will be dismissed.

3. The decision of a single justice on a question of fact in divorce proceedings will not be reviewed in the supreme court, either on appeal or on report.

4. St. 1870, c. 404, which abolishes divorces from bed and board and provides for a decree nisi in case of desertion, to be made absolute upon proof of the parties living apart for five consecutive years, and which gives the court power to make the decree absolute after the parties have lived apart for three consecutive years, does not affect libels brought under Gen. St. c. 107, § 7, which provides that "a divorce from the bond of matrimony may be decreed in favor of either party, where one party has deserted the other for five years consecutively."

5. Pub. St. c. 146, § 3, provides that where a divorce from bed and board or a decree nisi has been decreed, and the parties have lived separately for three consecutive years next after the decree, a divorce from the bonds of matrimony may be decreed upon the petition of the party in whose favor the previous decree was granted. *Held*, that a husband who had lived apart from his wife for 20 years next after a decree nisi in his favor could petition the court to have the decree made absolute.

Report from supreme judicial court, Suffolk county.

Petition by John O. Darrow against Lucretia A. A. Darrow to make absolute a decree of divorce in his favor. The case was heard before a single justice, who reported the same to the court. Remitted for further hearing.

C. W. Janes, for libellant.

**LATHROP, J.** This is a petition filed on April 15, 1892, to make absolute a decree of divorce granted by this court to the petitioner on October 5, 1871, for the cause of desertion on the part of the respondent. A hearing was had before a single justice, who has reported the case for our consideration.

1. Nothing appears of record in the case, after the granting of the decree nisi, until at the April term, 1877, when the following entry was made, by direction of the presiding justice, in this and other pending libels for divorce, in which nothing appeared to have been done for some time: "Ordered that said libel be dismissed from the docket." The object of this order was not to dismiss such cases absolutely, but to relieve the docket, and to dispense with the necessity of calling them whenever the docket was called, leaving parties, if for any reason further action was required, to move that the entry be stricken off, and the case brought forward. Such a motion was made when this case was heard. The justice granted the motion, leaving the question of his power to do so for our consideration. The only question raised on this part of the report, we understand, is whether the case can be said to be "pending" in this court, within the meaning of St. 1887, c. 332, which, by section 1, gives the superior court exclusive original jurisdiction of all causes of divorce, and, by section 5, provides that "this act shall not affect any case pending in the supreme judicial court at the time when it takes effect." On this point we have no doubt that the case was pending in this court when the statute of 1887 took effect, and that this court alone had jurisdiction to deal with it. See *Peaslee v. Peaslee*, 147 Mass. 171, 17 N. E. Rep. 506.

2. Gen. St. c. 107, provided for two kinds of divorce for the cause of desertion. Section 7 provided that "a divorce from the bond of matrimony may be decreed in favor of either party when one party has deserted the other for five years consecutively." Section 9 allowed a divorce from bed and board for "utter desertion." Section 10 provided that "when a divorce from bed and board has been decreed for any cause mentioned in the preceding section, and the parties have lived separately for five consecutive years next after the decree, a divorce from the bonds of matrimony may be decreed upon the petition of the party in whose favor the decree was granted." St. 1867, c. 222, provided, in section 1, that "decrees for divorce from the bonds of matrimony may, in the first instance, be decrees nisi, to become absolute after the expiration of such time, not being less than six months from the entry thereof, as the court shall, by general or special orders, direct." It further provided that "at the expiration of the time assigned, on motion of the party in whose favor the decree was rendered, which motion may be entertained by any judge in term time or vacation, the decree shall be made absolute, if the party moving shall have complied with the orders of the court, and no sufficient cause to the contrary shall appear." Section 2 provided for publication of the fact of the entry of the decree, together with its terms, to be published in one or more newspapers, the form of the notice, the time of publication, and the mode of proof of the publication, to be fixed by the court. The decree in this case ordered publication in the *Boston Daily Times*, once a week, for six successive weeks. The report states that no file of

this newspaper was known to be in existence; that there was no affidavit or other evidence of publication on file; that there was no evidence that the order had or had not been published, except that it did not appear that there was a copy of the order on file, as would naturally have been the case had a copy been furnished for publication, and except the testimony of the petitioner that after the decree, though there was nothing to show when, he went to the clerk or some one in his office for a certificate of divorce, for which a dollar was demanded, which he refused to pay, and came away without the certificate. The judge states that he was unable to find whether the notice had or had not been given. Under St. 1867 the burden was on the petitioner to satisfy the justice of the fact of publication. This he has failed to do, and unless he is, by subsequent statutes, entitled to a decree absolute, his petition must be dismissed. The decision of a single justice on a question of fact in a cause of divorce cannot be revised by this court, either on appeal or on report. *Sparhawk v. Sparhawk*, 120 Mass. 380; *Stuart v. Stuart*, 123 Mass. 370; *Morrison v. Morrison*, 136 Mass. 310.

3. The remaining question on this branch of the case is whether the petitioner is entitled to a decree, notwithstanding his failure to show a compliance with St. 1887. He contends that he is entitled to relief under St. 1870, c. 404. Although his libel was brought after this act took effect, it was not brought under the act, as it might have been. This act does not affect libels brought, as the petitioner's was, under Gen. St. c. 107, § 7, nor decrees under St. 1867. It does away with divorces from bed and board, expressly repeals sections 9 and 10, c. 107, Gen. St., and provides for a decree nisi in case of desertion, to be made absolute upon proof of the parties living apart for five consecutive years after the decree. It also gives the court power to make the decree absolute after the parties have lived apart for three consecutive years. We, however, see no reason to doubt that the petitioner is entitled to relief under Pub. St. c. 146, § 3, which is in substance the same as St. 1875, c. 226. The language is as follows: "When a divorce from bed and board, under laws heretofore in force, or a decree nisi, has been decreed, and the parties have lived separately for three consecutive years next after the decree, a divorce from the bonds of matrimony may be decreed upon the petition of the party in whose favor the previous decree was granted." Though the decree was not from bed and board, yet there was a decree nisi, and it is found as a fact that the parties have lived apart since 1871.

4. It is found that the petitioner, after the decree nisi, went to Chicago, "and married there again, some six or seven years after that, supposing that he had obtained an absolute divorce. After living with the second wife a year or so in Chicago, they came to Boston, where he and she continued to live till her death, about a year and a half ago, and where he still lives." This case was reported before the case of *Pratt v. Pratt*, 157 Mass. —, 32 N. E. Rep. 747, was decided, and the

attention of the justice who heard it was not directed to the questions of fact pointed out in that case. We are of opinion, therefore, that the case should be remitted to a single justice for a further hearing. The petitioner should also be allowed to show, if he is able to do so, that publication was made, or what his reasons were, if any, for supposing that he had obtained an absolute divorce. If he merely supposed that the decree nisi was an absolute divorce, this would be a mistake of law, and he would not be entitled to relief. If, however, the justice is satisfied that the petitioner acted under a mistake of fact, that negligence is not imputable to him, and that he has not been guilty of any moral fault, then he is entitled to a decree absolute, notwithstanding the second marriage and cohabitation thereunder. *Pratt v. Pratt*, *ubi supra*.

Case to stand for further hearing.

(159 Mass. 224)

BARNARD et al. v. STONE.

ABBOTT v. SAME.

(Supreme Judicial Court of Massachusetts.  
Middlesex. May 20, 1893.)

TRUSTEE AND CESTUI QUE TRUST—AGREEMENTS  
BETWEEN—CONSTRUCTION OF WILL.

1. A conveyance by a residuary legatee, to the trustee appointed by the will, of the property bequeathed to her, in consideration of his agreement to support her during life, to provide for a proper burial, and to erect a suitable monument over her grave, while open to suspicion as an agreement between trustee and cestui que trust, is valid when it appears that she was of sound mind when she executed the conveyance, and that it was not procured by the fraud or undue influence of the trustee.

2. A will devised the residue of testator's property to his wife, authorizing her to take possession "at any time that she wish," and appointing a trustee to manage the same, who was directed to pay her any sum of money, or give her any property, that she might request. On the widow's death the unexpended property was devised to testator's son. *Held*, that it was the trustee's duty to deliver to the wife any or all of the property at any time she wished for it, and that she could terminate the trust at any time, and obtain possession of all the property, and hold it as her own absolutely.

3. A conveyance by the widow to the trustee of all her interest in the residue, in consideration of his promise to support her during life, to provide a proper burial, and to erect a suitable monument over her grave, is an exercise of the power to take possession of the property, conferred by the will on the widow, and the trustee's title is valid as against the son, to whom the will directed payment of the unexpended property on the widow's death.

Case reserved from supreme judicial court, Middlesex county; Charles Allen, Judge.

On final account by Charles B. Stone, as executor and trustee of the will of Levi Barnard, deceased. From decrees of the probate judge allowing such accounts, Charles P. Barnard, George C. Abbott, and others appeal. The case was heard by a justice of the supreme judicial court, and reserved to the full bench. Decree of probate court affirmed.

The residuary clause of the will of Levi Barnard is as follows:

"To my beloved wife, Charlotte Barnard, all of the residue of my property, real, personal, or mixed, at any time that she wish; and until she shall wish to use the same, to relieve her from the care and trouble of taking care of the same, I direct that the trustee hereafter named to pay her any sum of money, or give her any of said property that there is remaining. At her decease, after paying all her debts and funeral charges, and erecting suitable gravestones or monuments, all of said property then unexpended to my said son, Charles P. Barnard. I hereby appoint and constitute Charles B. Stone, of said Acton, executor of this, my last will, and trustee of the legacies therein contained, and request that he be exempt from giving surety or sureties on his bonds; and, for the purpose of carrying out the provisions of this will, I hereby authorize my said executor to sell any real estate that I may die seized, and empower him to sign any papers that will vest a good and sufficient title to the purchaser or purchasers thereof."

F. C. Nash, for appellants. S. J. Elder and A. A. Wyman, for appellee.

FIELD, C. J. The question in these cases is whether, under the third article of the will of Levi Barnard, Charlotte Barnard, his widow, took an absolute title to the residue of his property, or a life interest with an absolute power of disposal of the whole of it, or a life interest with the right to receive only such portions of the principal and income as should be reasonably necessary for her use. She conveyed to Mr. Stone, the executor and trustee, all of this residue, in consideration of his agreement to support her during her life, to provide for her a proper burial, and to erect a suitable monument over her grave. Such an agreement between a trustee and his cestui que trust is open to grave suspicions, but the jury, on issues submitted to them, and under instructions not objected to, have found that she was of sound mind when she executed the conveyance, and that it was not procured by the fraud or undue influence of Mr. Stone, and also that she, being of sound mind, assented to the allowance of his first account, and that this assent was not procured by the fraud or undue influence of Mr. Stone. We assume that if the trustee had been directed by the will to pay over to her only such sums as were reasonably necessary for her comfortable support, and if the amount in his hands, remaining unexpended on her decease, was to be paid to the testators' son, Charles P. Barnard, the conveyance would be in violation of the trust, and that the trustee must account for all the property not expended for her support. The terms of the bequest, however, show that the testator did not intend to limit her to such sums as either the trustee or herself deemed necessary for her comfortable support. She was to have it all at any time when she wished; and a trustee was appointed to relieve her from the trouble of taking care of it until she wished to use

it, and then he was to pay to her any sum of money, or give to her any of the property, remaining in his hands. We think that this means that it was the duty of the trustee to deliver to her any or all of the property at any time when she wished for it, and that she could terminate the trust at any time, and obtain possession of all the property, and hold it as her own absolute property. We do not see why the transaction between her and Mr. Stone was not, in legal effect, equivalent to a request of him, as trustee, for a conveyance to her of all the property, and then to a reconveyance of it to him personally, as the consideration of his agreement to support her during her life. If there is no other objection to such a transaction, we cannot say that it was beyond the power given her to deal with the property. It is immaterial in this case whether all the property was absolutely hers, whether she asked for it or not, or whether she had only the absolute power to make it all hers by asking for it, because it must be taken that if she had such a power she has exercised it by her conveyance. See *Joslin v. Rhoades*, 150 Mass. 301, 23 N. E. Rep. 42; *Chase v. Ladd*, 153 Mass. 126, 26 N. E. Rep. 429; *Kent v. Morrison*, 153 Mass. 137, 26 N. E. Rep. 427; *Foster v. Smith*, (Mass.) 31 N. E. Rep. 291. The decrees of the probate court must be affirmed. So ordered.

(138 N. Y. 494)

SYLVESTER et al. v. CROHAN et al.

(Court of Appeals of New York: June 13, 1893.)

NEGOTIABLE INSTRUMENTS—DEMAND AND PROTEST  
—LACHES.

Laws 1887, c. 289, § 1, provides that each Saturday afternoon is a holiday, and that demand of acceptance or payment of commercial paper not paid before noon of that day may be made, and notice of protest given, on the next succeeding secular day. Held that, where a sight draft received in New York on Friday was presented to the drawee Saturday forenoon, and at his request was again presented on Monday, when it was protested for nonpayment, and notice mailed to the drawers, the payees were not guilty of laches, and the drawers were liable on the draft. 18 N. Y. Supp. 546, affirmed.

Appeal from supreme court, general term, first department.

Action by Horace C. Sylvester, Alexander P. Bell, and David H. Standish against John F. Crohan and William H. Dooner, Jr., on a sight draft drawn by defendants to the order of plaintiffs, payment of which was refused by the drawee. From a judgment of the general term (18 N. Y. Supp. 546) affirming a judgment for plaintiffs, defendants appeal. Affirmed.

Arthur Furber, for appellants. John B. Green, for respondents.

O'BRIEN, J. On Wednesday, July 29, 1891, the defendants, residing and doing business at Savannah, Ga., for the purpose of paying their promissory note held by the plaintiffs, residing and doing business in the city of New York, which was to

fall due two days later, drew and mailed to the plaintiffs a sight draft for \$1,268.72, payable to the plaintiffs' order, upon one Becker, a banker in New York. The plaintiffs received this draft through the mail on Friday, July 31st, at 11 o'clock in the forenoon, and, without presenting it to the drawee, indorsed and deposited it to their credit immediately in their own bank, and returned the note to the defendants. On Saturday, August 1st, a messenger of the bank in which the draft had been deposited presented it to the payee for payment between 10 and half-past 10 o'clock in the forenoon of that day, and was directed to leave notice, and present it again on Monday. It was again presented on Monday, August 3d, and payment demanded and refused, and on that day it was protested for nonpayment, and notice of protest mailed to the defendants. The plaintiffs took back the draft from the bank where it was deposited, and still hold the same. When the draft was drawn and received by the plaintiffs, and when presented, on Saturday, and during all of that day, the defendants had funds, not otherwise drawn, on deposit with the drawee, sufficient to pay the draft in full, and other checks or drafts drawn upon him by other parties were paid and honored on that day. On Monday, August 3d, the drawee made a general assignment for the benefit of his creditors, and became insolvent. The plaintiffs' place of business, and that of the bank in which they deposited the draft upon receipt of the same, and that of the drawee, were all on Broadway, in the city of New York. The plaintiffs brought this action against the drawers of the draft, and have recovered.

The defense, in substance, is that the amount of the draft was lost to the defendants in consequence of the neglect and failure of the plaintiffs to present the same to the drawee for payment in due time. The draft, though made in another state, by parties residing there, was payable here, where the drawee resided, and the legal questions involved are to be determined by the law of this state. *Bank v. Lacombe*, 34 N. Y. 367. The plaintiffs, the payees of the draft, were bound only to use reasonable diligence in presenting it, in order to charge the drawers, and presentation to the drawee within 24 hours, or the next day, was in time, under the circumstances of this case. *Burkhalter v. Bank*, 42 N. Y. 588; *Railroad Co. v. Collins*, 57 N. Y. 641; *First Nat. Bank v. Fourth Nat. Bank*, 77 N. Y. 320. The duty which the plaintiffs owed the defendants with respect to the presentation of the draft is not the same as the duty which the bank in which the draft was deposited owed to the depositors. *St. Nicholas Bank v. State Nat. Bank*, 128 N. Y. 26, 27 N. E. Rep. 849. Irrespective of the statute, which will presently be referred to, the case stands thus: The plaintiffs presented the draft for payment in due time after they had received it by mail. It was not paid, and therefore, in the absence of some agreement, express or implied, to wait or present it again, the paper was dishonored, and could

have been protested, and notice thereof given within a reasonable time thereafter, or on the next secular day. *Bank v. Vail*, 21 N. Y. 485. The draft was protested on Monday, and notice thereof mailed to the defendants. Aside from the statute, this would seem to be, under the law formerly governing such cases, a sufficient presentation, demand, and notice. The finding is that the draft was presented for payment on Saturday, and therefore there was a demand of payment, because the presentation of a check or draft at the bank upon which it is drawn for payment, when it is due, is a demand. The drawee did not pay, and therefore there was a refusal to pay, though the person who presented it was told to leave notice, and present it again on Monday.

But the rights, duties, and obligations of parties to commercial paper of this character are somewhat modified by the recent statute on that subject. Laws 1887, c. 289, § 1. It is there provided that every Saturday, from 12 o'clock at noon until 12 o'clock at midnight, shall be a public holiday for all purposes in regard to the presentation for payment, demand, and notice of protest of commercial paper. As to the other holidays named in the statute, it is provided that such paper as would otherwise be payable or presentable on any of these days shall be deemed to be payable or presentable on the secular or business day next succeeding such holiday, but in the case of Saturday, a half holiday, it shall be presentable for acceptance or payment at or before 12 o'clock noon of that day. Therefore the draft in question was properly presented up to noon of Saturday. But the following proviso, the meaning of which is not very clear, was added, and seems to apply to the facts of this case: "Provided, however, for the purpose of protesting, or otherwise holding liable any party to, any bill of exchange, check, or promissory note, and which shall not have been paid before twelve o'clock at noon on any Saturday, a demand of acceptance or payment thereof may be made, and notice of protest or dishonor thereof may be given, on the next succeeding secular or business day: and provided, further, that when any person shall receive for collection any check, bill of exchange, or promissory note due and presentable for acceptance or payment on any Saturday, such person shall not be deemed guilty of any neglect or omission of duty, nor incur any liability, in not presenting for payment or acceptance, or collecting such check, bill of exchange, or promissory note, on that day: and provided, further, that in construing this section every Saturday, unless a whole holiday as aforesaid, shall, until twelve o'clock noon, be deemed a secular or business day." The legislature, in enacting this statute, curtailed the business day within which this draft could formerly have been presented by one-half, and to that extent limited the opportunity of the holder to demand payment. The intention was to enlarge the time within which the holder of a bill or note could demand payment, and give notice of dishonor. It did not change the time

within which the paper fell due, nor when it became dishonored. If it fell due by its terms on a Saturday, the holder could present it up to noon of that day; and if he did, and payment was not made, the paper was dishonored, and protest could then be made, and notice served. But in such case the statute also permits the holder, at his discretion, in case payment is not made before noon of Saturday, to present it again on Monday, or the next secular day, and, if not then paid, protest must be made, and notice given, on that day. The holder of the bill or note due and presentable on Saturday may, if he so elects, rest upon the demand and presentment made before noon of that day, and, if he does, notice of demand and protest given on that day or the succeeding Monday, or next secular day, is good; but if he elects to make demand on Monday, and payment is not made then, he must, in order to hold the indorser or other antecedent parties entitled to notice, give the notice of dishonor on that day. A party whose duty it is to collect or present for payment a bill, note, or draft which falls due upon Saturday is not chargeable with neglect or omission of duty because of failure to present it on that day, providing he does present it on Monday, or the next secular day, and then, on that day, gives notice of dishonor, in case of nonpayment. This, we think, is what the legislature intended, and to this extent only has the statute changed the law on this subject, as it previously existed. As the paper in question was again presented on the following Monday, and notice of nonpayment given on that day, the defense was not established, and the plaintiff was entitled to recover. The judgment should therefore be affirmed. All concur.

(133 N. Y. 431)

TAUZIÈDE et al. v. JUMEL et al.

(Court of Appeals of New York. June 6, 1893.)

REVIEW ON APPEAL—DISCRETION OF COURT—VACATING STIPULATION.

1. Where an order has been made, vacating a stipulation entered into by defendant, that an appeal taken by her should be governed by the decision in another action, and the action was argued notwithstanding the stipulation, and judgment entered thereon, an appeal from the judgment alone, and not from the order, will not bring up for review the alleged error made in vacating the stipulation.

2. Assuming that defendant's appeal was to abide the decision of the general term on the appeal in such other case, and that the stipulation was not intended to apply to the ultimate decision of such appeal in the court of appeals, it was nevertheless in the power of the general term, after the court of appeals had passed on the questions in such other case, to relieve the parties from such stipulation, and order the case argued.

Appeal from supreme court, general term, first department.

Action by Jean Albert Tauziède and others against Francis Henry Jumel and others to obtain a sale of certain real estate, and for a distribution of the pro-



ceeds. From a judgment of the general term (15 N. Y. Supp. 24) affirming a judgment of the special term, defendant Frances A. Gesner appeals. Affirmed.

Thornton, Earle & Klendls, (David Thornton, of counsel,) for appellant. George C. Lay, (Edward Winslow Paige, of counsel,) for respondents.

O'BRIEN, J. The defendant Frances A. Gesner is the only party who appeals from the judgment in this case. She seeks a review here of the action of the court below in the distribution of the proceeds of certain real estate in the city of New York, in which she had an interest. The appellant was a party to the suit of *Chester v. Jumel*, 125 N. Y. 237, 26 N. E. Rep. 297, in which case the principle upon which such distribution should be made was decided, and the judgment in this case is in accordance with the decision of this court in that case. The judgment in this case has been before this court upon the appeal of the plaintiffs, and has been affirmed. *Tauziede v. Jumel*, 133 N. Y. 614, 30 N. E. Rep. 1000. This case, upon the merits, is governed by the decisions above referred to, unless the stipulation which is now to be referred to controls. It appears that the appeals from the judgment of the special term to the general term in this and the *Chester Case* were progressing side by side, when, in January, 1890, a motion was made to dismiss the appeal in this case. On that motion the court made an order that unless the appellant Gesner stipulated, within 10 days, that she would abide the event of the appeal in the *Chester Case*, to which she was a party, the appeal in this case should be, and was thereby, dismissed. The appellant complied with that order, and gave the stipulation. The appeal in the *Chester Case* was thereafter decided by the general term, and the judgment of the special term modified in such a way as to be more favorable to Mrs. Gesner. The plaintiffs and respondents then voluntarily entered a judgment modifying the judgment in this case in the same way, and in accordance with the decision, but upon an appeal to this court in the *Chester Case* the modification ordered by the general term was reversed, and the original judgment affirmed. Thereafter a motion was made to the general term by the respondents in the appeal from the judgment in this case for a reargument of the appeal in that court. This motion was opposed, but granted, and upon the hearing the judgment of the special term was affirmed, and in this way Mrs. Gesner lost the benefit of the modification by the general term in the *Chester Case*, which she claims was secured to her by the stipulation, notwithstanding the reversal of that modification in this court. The violation of the stipulation is now urged by her counsel as ground of reversal of the judgment appealed from. There are, we think, two answers to this contention:

1. The order of the general term which allowed the respondents to bring the case to argument, notwithstanding the stipulation, has not been appealed from. It was in making that order that the alleged er-

ror was committed, if at all. It does not enter into the judgment, and cannot be reviewed on appeal from it. That order, in effect, relieved the respondents from the stipulation, and vacated it, and cleared the way for the application to the case of the decision of this court in the *Chester Case*. It put the case before the court for a hearing in the same way as if the stipulation had not been made; and if that order violated any legal right, or, without power, revived an appeal which, as matter of law, had been terminated by the act of the parties themselves, it was reviewable.

2. The appeal from the judgment of the trial court gave the general term jurisdiction which was not lost by the stipulation. That simply provided that the appeal then pending should be decided in the same way as the appeal in the *Chester Case*. But the court did not lose control of the case. Assuming that this stipulation was to abide the decision of the general term in the *Chester Case*, and that it was not intended to apply to the ultimate decision of the appeal in this court, it was within the power of the general term, after this court had passed upon the questions in the *Chester Case*, to relieve the parties; or any of them, from the stipulation, and order the case to be argued, and then apply the principle of distribution decided by this court to be the correct one. At best it was but a stipulation in an action that the parties would abide the result of a future decision in another case, which, when made, was thought to be in some respects erroneous. The court had the power then, in the exercise of a sound discretion, to modify or vacate the stipulation, and upon a hearing of the appeal to apply the law as finally determined in the other case. That, in effect, was what was done in the case at bar, and, as it touched no legal rights which the party had, the judgment should be affirmed. All concur.

(138 N. Y. 398)

#### PEOPLE v. TAYLOR.

(Court of Appeals of New York. June 6, 1893.)  
APPEAL IN CAPITAL CASE—REVIEW—EVIDENCE—  
HOMICIDE—INSANITY.

1. In exercising the jurisdiction conferred on the court of appeals in criminal cases by Code Crim. Proc. § 528, it will be governed by the practice regulating the review of questions of fact on appeal to the supreme court; and in such cases, if there is a fair conflict in the evidence, or it is such that different inferences can be properly drawn from it, the determination of the jury will not be interfered with, unless it is clearly against the weight of the evidence, or appears to have been influenced by passion, prejudice, mistake, or corruption.

2. Defendant, a convict, whose conduct had been exemplary for several years, without provocation, assaulted his keeper with a hatchet. He was thereafter closely watched for several months by the prison physician, who concluded that he was suffering from melancholia, with homicidal tendencies. He was thereafter transferred to the asylum for insane criminals, detained there for a year, and then transferred back to prison as not insane. He established friendly relations with a fellow convict, but about six months later he showed great hostility to such fellow convict, under the delusion that

the latter had divulged a plan of escape claimed to have been entertained by him. During several months thereafter, defendant frequently threatened to kill this fellow convict, but afterwards effected a reconciliation with him, and, on the next day, when they were alone together, defendant killed him. Defendant displayed no emotion, and gave as his motive for the homicide a desire "to be electrocuted," because his prison life had become unendurable. His morbid condition of mind was aggravated by the effect of a pernicious habit which he believed had wrecked him both physically and morally. He refused the aid of counsel, and repeatedly stated that he did not want the trial postponed. Two physicians, after repeated examinations, pronounced him insane, while five experts for the state, also from personal examination, pronounced him sane. *Held*, that a verdict that defendant was sane was not so clearly against the evidence as to warrant the court of appeals in setting it aside.

3. The insane delusion of defendant that deceased had divulged his plan of escape to the prison authorities is no defense to the homicide, since an insane delusion with reference to the conduct or attitude of another cannot excuse the criminal act of taking his life, unless it is of such character that, if true, it would have rendered the homicide excusable or justifiable.

4. While the suicidal motive which prompted defendant to commit the murder may be considered with other circumstances in determining the issue of sanity, it is not entitled to controlling weight, since a desire for self-destruction, and the adoption of means to secure it, do not of themselves indicate a mental impairment which has advanced to the stage of irresponsibility.

5. Under Pen. Code, § 17, which provides that responsibility is to be presumed, and the burden of disproving it is on the accused, and section 22, which provides that he cannot be excused from criminal liability, as an insane person, except on proof that at the time of committing the alleged criminal act he was laboring under such defect of reason as either not to know the nature and quality of the act he was doing, or that the act was wrong, partial or incipient insanity is not sufficient, if there is still ability to form a correct perception of the legal quality of the act, and to know that it is wrong; and if, when a specific act is contemplated, the accused has the power to know whether it is wrong to do it, the law presumes that he has also the power to choose between the right and the wrong course of action, and will not permit either courts or juries to speculate as to its possible nonexistence.

6. In passing on the correctness of the verdict of the jury the court of appeals will take into consideration the report of an expert appointed after the trial, as commissioner, under Code Crim. Proc. § 658, to determine the present sanity of defendant, where it appears that defendant's condition at such inquisition is the same as at the homicide.

7. A witness who has testified as to acts and conversations of defendant may state his opinion as to whether they are rational or irrational.

**Appeal from court of oyer and terminer, Cayuga county.**

William G. Taylor was convicted of murder in the first degree, and appeals. *Affirmed*.

Frank C. Cushing, for appellant. Adalbert P. Rich, Dist. Atty., for the People.

**MAYNARD, J.** Judgment of death has been pronounced upon the defendant, William G. Taylor, a convict in the state prison at Auburn, for killing Solomon Johnson, a fellow convict, on September

20, 1892. The felonious act was executed with great deliberation, and had evidently been long premeditated. The method of its accomplishment was planned with great cunning and forethought, and every element apparently existed which the law requires to be present in order to establish this most atrocious crime. Counsel assigned by the court to defend the prisoner have discharged that most delicate and responsible duty with great diligence and fidelity, and have urged a reversal of this judgment upon the sole ground of the legal irresponsibility of the defendant for the offense of which he has been convicted. It is manifest that this defense has some basis upon which to rest, and that it has not been invented to meet the exigencies of the trial. In determining whether the verdict was against the weight of evidence, or whether justice demands that a new trial shall be had, it becomes incumbent upon us to make a careful and critical examination of the evidence, in view of the previous history and conduct of the defendant.

The defendant has been living the life of a felon since 1836, when he was sentenced to Dannemora prison upon a conviction for burglary for a term of three years, which expired in the summer of 1838, having received the usual commutation for good behavior. Very soon after his discharge, and in the same year, he was returned to the prison to serve out two sentences for burglary, aggregating about 11 years. From the time of his readmission his conduct was exemplary, with a single exception. He was obedient and tractable, and readily submitted to all of the requirements of the prison discipline, until April 28, 1890, when, without provocation or warning, he assaulted his keeper with a hatchet, and felled him to the floor. He was immediately seized, and placed in close confinement. His demeanor was such as to lead the prison physician to suspect that he might be insane. He was therefore closely watched, and examined daily, and this physician reached the conclusion that he was suffering from that form of insanity known as "melancholia." His physical symptoms indicated the correctness of the diagnosis. He had the stolid appearance, the slow muscular movements, the flabby, tremulous, and coated tongue, and the slow and weak pulse, usually observable in such cases. When questioned as to his purpose in assaulting the keeper he always told the same story,—that he had concealed the hatchet in his cell on Saturday to enable him to dig his way out, and escape, and failing in that, and knowing that his attempt would be detected, and believing that he would not outlive his sentence, he knocked the keeper down, not intending to kill him, but to secure his revolver and kill himself. He avoided the association of others, and wished to be allowed to remain in his cell, saying that he thought he would either kill himself, or some one else. If he was allowed the liberty a prisoner was usually given. On September 29, 1890, he was transferred, as an insane convict, to the asylum for insane criminals at

Auburn, and in the certificate of transfer the prison physician stated, among other things: "I believe him to be suffering from temporary melancholia, and not a safe man to keep in state prison, as he is both suicidal and homicidal. I would therefore suggest caution and watchfulness in handling him, as I think he is bent on escape at any cost." The defendant was detained in the asylum until September 20, 1891, when the entry "Not insane" was made in the "Case Book," opposite his name, and he was transferred to the prison, and put to work in the broom shop. The medical superintendent of the asylum states that during this period he was sane, and this entry was made by his direction. The assistant superintendent, in whose charge the defendant was, and who had, perhaps, better opportunities to know his mental condition, objected to this entry as not correctly describing his status, and testifies that during all the time there was a doubt in his mind as to his sanity; that, while he expressed no well-defined delusions, his facial aspect and actions were those of a man not mentally sound; and that he favored making an entry that he was recovering, which would indicate that he had been insane, and might have a recurrence of the attack, while the statement "Not insane" would be construed to mean that he had always been sane, but, yielding to the directions of his superior, he made the entry as stated. The defendant and deceased worked in the same shop, and at benches a few feet apart. The latter was a quiet, inoffensive man, and, between the two, friendly and somewhat intimate relations seem to have existed for some months. From the time of his admission, in September, 1891, until the homicide, the defendant's prison record was good. He was quiet, self-contained, diligent, industrious, and skillful in his work, and was never reprovved for any misbehavior. It appears from the testimony of several of the convicts who worked in the same shop that in the month of April he exhibited, without any apparent cause, a feeling of great hostility to the deceased. The professed occasion for it was, as he claimed, that he had been thwarted in a scheme which he had formed, of making his escape by means of a gateway which was in process of construction between the asylum and the prison grounds, and that the deceased had informed the prison authorities of his design, and thus caused its failure. It would seem that his plan of escape was not a rational one, if he ever really entertained it. It does not appear that he ever confided it to the deceased, or that the latter had informed any one in regard to it, or that any person had told the defendant that the deceased had given any such information; and we think that the weight of the evidence favors the conclusion that his feelings in this respect towards the deceased were the offspring of an insane delusion. From the defendant's manner the deceased became apprehensive of bodily harm, and he was, at his own request, transferred to a distant part of the shop, where he

would not be within reach of the defendant. During the summer the defendant frequently threatened to kill the deceased, because the latter had, as he believed, informed upon him; and there was no intercourse between them until the day before the homicide, when the defendant, upon his own motion, effected a reconciliation, and established friendly relations with the deceased, and seems to have regained his confidence. The next afternoon, when the work of the day was over, and all the other convicts had left the shop, the defendant lured him into a shed under the shop upon the pretense that he had some contraband articles to show him, and there killed him with a knife, which he had concealed upon his person, almost completely severing the head from the body. Without displaying any trace of emotion or excitement, and with his arms folded, he walked to the office of the principal keeper, and, exhibiting the knife dripping with blood, told him that if he would go down under the shop he would find a carcass there. When questioned as to the motive which prompted the deed, he said that he had to do one of three things,—either starve to death, or kill the deceased, or kill himself,—and that he did it in order "to be electrocuted," and that he did not want his execution to be delayed. The loss of commutation for good behavior, which he had incurred by his conduct at Dannemora, seemed to weigh heavily upon his mind, and he apparently despaired of his physical ability to survive the full period of his sentence, and his prison life had become so unendurable that he desired to put an end to his own existence, which, he conceived, he could not do except in one of the three ways indicated. His morbid condition of mind was aggravated by the effects of a pernicious habit, which he believed had wrecked him both physically and morally, and by his belief that there were many other prisoners in the same condition; that they would be greatly benefited by a change of prison management, and that it was necessary to kill some one to attract attention to the matter, and bring about a reform; that his first intention was to kill the warden, but, not having an opportunity, he decided to kill a fellow convict, and selected the deceased because he had been placed as a spy over him, and had informed the authorities of his plan of escape.

The trial was had on January 10, 1893, less than four months after the homicide, and it is shown that there was no change in the mental condition of the defendant during that time. He refused to aid his counsel in the preparation of his defense, or give him any specific information in regard to his previous life or his family, and repeatedly stated, in substance, to the physician who examined him, that he did not want any nonsense about the thing, and did not want his trial postponed, but wanted it quickly over, and "to be electrocuted." He was thrice examined by the assistant physician of the asylum between the time of the homicide and the trial, who unhesitatingly pronounced him in-

sane, and added that in his opinion he was a dangerous lunatic, and suffered from melancholia, with homicidal delusions. He was also examined three times by another physician, who had given some special study to the subject of insanity, who reached the same conclusion. Both of these physicians say that upon each examination he exhibited a marked tremor or independent twitching of the small fibers of the tongue, which is characteristic of lunatics. He also had the well-recognized facial expression indicating melancholia, and other physical symptoms of that form of mental disturbance, such as cold and clammy hands, and the involuntary movement of the muscles about the mouth. The prison physician at Danemora affirmed upon oath the truth of the statement contained in the transfer certificate,—that he believed him then to be insane, with suicidal and homicidal tendencies. On the part of the prosecution five medical experts were examined, and all of them were of the opinion, clearly and unequivocally, that the defendant was sane. This opinion was not based upon hypothetical questions, or an assumed state of facts, but was derived from repeated personal examinations. All the witnesses had given special study and attention to the subject of insanity. One of them was the medical superintendent of the asylum, in whose charge the defendant had been for the period of a year, who had spent a large portion of his professional life in the care and treatment of insane persons, and is now the superintendent of the state hospital for insane convicts at Matteawan. Another was the prison physician, who saw the defendant at the time of the homicide, and who, with an associate, made a careful examination of him the following day; and another witness had attended the defendant professionally shortly before the crime was committed. They all, therefore, had adequate means for the formation of a correct judgment as to his mental condition. No one of them discovered any of the physical symptoms of insanity described by the defendant's witnesses. In this state of the evidence, the issue of sanity was a proper subject for final determination by the jury, and we do not think that this court, even if it possessed the power, should disturb their verdict. But the rule is now firmly established, by repeated decisions of this court, that, in exercising the jurisdiction conferred by section 528 of the Criminal Code in capital cases, we shall be governed by the practice regulating the review of questions of fact upon appeal to the supreme court, and that in such cases, if there is a fair conflict in the evidence, or if it is such that different inferences can be properly drawn from it, the determination of the jury will not be interfered with, unless it is clearly against the weight of evidence, or appears to have been influenced by passion, prejudice, mistake, or corruption. *People v. Loppy*, 128 N. Y. 629, 28 N. E. Rep. 600; *People v. Trezza*, 125 N. Y. 740, 26 N. E. Rep. 933; *People v. Fish*, 125 N. Y. 186, 26 N. E. Rep. 319; *People v. Stone*, 117 N. Y. 480, 28 N. E. Rep. 13. If, in the judgment of this court, there

was a rational doubt of the guilt of the defendant, it would not be a sufficient ground for reversal. Under our system of criminal jurisprudence it becomes the exclusive province of the jury to determine whether the evidence pointing to the guilt of the accused is so lacking in convincing force as to leave an intelligent and discriminating mind in doubt as to the truth of the charge contained in the indictment. When the jury, by their verdict, have declared that no such condition of mental uncertainty has arisen from a contemplation of the evidence, the prisoner has had the full benefit of the rule of law which protects him from punishment unless his crime is established beyond a reasonable doubt; and the question is not open for review in this court unless the case is so weak that the verdict should be set aside because against the weight of evidence, or for other sufficient cause. The charge of the trial judge upon this point was full and explicit, and eminently fair to the defendant. The jury were told that upon the issue of the defendant's sanity, as upon every other controverted question in the case, the defendant is entitled to the benefit of every doubt which is reasonable, which can be reasonably entertained by a reasonable man; and this proposition was reiterated and emphasized, so that it must have been prominently and pervasively in the minds of the jury when they retired for their final deliberation.

Counsel relies with great confidence upon the proof of an insane delusion as to the part which the deceased had taken in preventing the execution of the defendant's plan of escape, but this delusion, if established, would not, of itself, be a sufficient answer to the present indictment. It may be that if the question of its existence were separately submitted to a jury, they might find, as we might be compelled to find, if submitted to us, that the weight of evidence seemed to indicate its existence. That fact, if conclusively established, would fall far short of a defense. An insane delusion with reference to the conduct and attitude of another cannot excuse the criminal act of taking his life, unless it is of such a character that if it had been true it would have rendered the homicide excusable, or justifiable. If the defendant had actually planned a mode of escape from prison, and had confided his scheme to the deceased, and the latter had betrayed his confidence, and informed the authorities of his purpose, and by means of such information it had been frustrated, it would have afforded the defendant no justification for his act, but would have augmented its enormity, because inspired by the unholy motive of revenge. How, then, can the false belief, standing by itself, that these things had happened, affect the criminal nature of the defendant's wrong? The existence of such a delusion, or of any delusion, might be considered, and doubtless was considered, by the jury, in this case, in determining whether the defendant was so far mentally sound as to be conscious that he was doing a prohibited act. The provision of the Revised Statutes (part 4, c. 1, tit. 7, § 2) which declared that "no act

done by a person in a state of insanity can be punished as an offense" was abrogated by the Penal Code, which provided (section 17) that responsibility is to be presumed, and the burden of disproving it is upon the accused, and (section 21) that he cannot be excused from criminal liability, as an insane person, except upon proof that at the time of committing the alleged criminal act he was laboring under such a defect of reason as either not to know the nature and quality of the act he was doing, or that the act was wrong. Partial insanity or incipient insanity is not sufficient, if there is still the ability to form a correct perception of the legal quality of the act, and to know that it is wrong. If, when a specific act is contemplated, he has the power to know whether it is wrong to do it, and right to refrain from doing it, the law presumes that he has also the power to choose between the right and the wrong course of action, and will not permit either courts or juries to speculate as to its possible nonexistence. Eminent alienists criticize the rule of the Penal Code because it excludes consideration of the question whether the accused possessed sufficient power of self-restraint to forbear the commission of an act which he clearly perceived to be criminal. They contend that it is unreasonable and unjust to punish a human being for that which he does not have the power to refrain from doing; but, if such a result may follow, which we by no means admit, it is an argument to be addressed to the body which makes the law, and not to the tribunal whose sole duty it is to construe, apply, and enforce it. The learned physicians who testified that in their judgment the defendant was insane and irresponsible candidly admitted that they did not approve of the statutory measure of responsibility, and that their opinion was not circumscribed by it, and that the defendant, when he killed the deceased, undoubtedly knew that the act was a violation of the law of the state. It must be admitted that he so understood it, for it is evident that it was planned and executed in order that he might expose himself to the extreme penalty which follows its commission. He has uniformly and consistently adhered to the declaration that his principal object was to terminate his own existence by meriting the punishment of death. The proof is thus very strong and conclusive that he correctly recognized the legal quality of his act, and truly appreciated its criminal character. Here, again, it is urged that if his real motive was to eventually compass his own death it should be accepted as evidence of a disordered mind. While this may be considered in connection with other circumstances in determining the issue of sanity, it is not entitled to controlling weight. A desire for self-destruction, and the adoption of means to secure it, do not of themselves indicate a mental impairment which has advanced to the stage of irresponsibility; otherwise, the law would not make the attempt to kill one's self a crime.

The verdict of the jury in this case is fortified by the report of a special commission

appointed pursuant to the provisions of section 658 of the Criminal Code. Before sentence was pronounced the defendant's counsel moved for the appointment of this commission to determine his present sanity, and the trial court appointed a physician of high standing and eminent in his profession as a specialist in the treatment of the insane, to make the examination. The commissioner was attended by the district attorney and the counsel for the defendant. All the evidence taken at the trial, and appearing in this record, was read to him. The hearing occupied three days, and it is evident that it was of the most searching and impartial character; and the learned commissioner reported that after having heard the evidence, and personally examined the defendant on several different occasions, and obtained his family history, he is of the opinion that the defendant was sane at the time of the examination, and is now sane. As it is quite clear from the evidence before us that the defendant's mental condition at the time of the trial was not in any material respect different from what it was at the time of the homicide, this report renders it highly improbable that any error of judgment was committed by the jury in determining the principal issue submitted to them.

We think the witness Mead was properly allowed to characterize as rational or irrational the acts and conversations of the defendant which he had detailed. The evidence was admissible, within the rule repeatedly recognized in this court. *Paine v. Aldrich*, 133 N. Y. 544, 30 N. E. Rep. 725; *People v. Conroy*, 97 N. Y. 62; *Clapp v. Fullerton*, 84 N. Y. 190. Similar questions were put to other witnesses, who had only stated in general terms the acts and conversations which they were permitted to characterize. Under a strict application of the rule, these had not been described with sufficient minuteness of detail to render an opinion as to their rational or irrational character competent; but no objection was made to the evidence, and it is to be assumed upon appeal that if objection had been made on that ground it would have been obviated, and we cannot see that the defendant was materially prejudiced by its admission.

It is insisted that the charge to the jury contained an erroneous instruction, to the effect that the defendant was responsible for his act if he had sufficient mental vigor and capacity to distinguish between right and wrong, in the abstract. We do not think the charge was fairly susceptible of such a construction. The learned trial judge instructed the jury with great clearness and precision upon the statutory rule of responsibility for crime, and directed their minds to the very point upon which the rule rests, and repeatedly charged them, in substance, that if the defendant's mind was so far impaired or deranged as to render him incapable of knowing the nature and quality of the act he was perpetrating, or that the act was wrong, he should be acquitted, and that if they had any reasonable doubt upon the subject he should be given the benefit of it. Wherever reference is made

throughout the charge to the power of discrimination between right and wrong it is evident that the particular act charged in the indictment is intended, and the jury must have so understood it. Single expressions cannot be dislocated from the context, and construed as if they were the statement of separate and independent propositions, but the entire exposition of the law upon a given point by the judge must be taken; and when the charge is so analyzed it is apparent that no error was committed, but the prisoner was accorded the benefit of every rule which has been established for his protection. The judgment of conviction must therefore be affirmed. All concur; PECKHAM and O'BRIEN, JJ., in result.

(138 N. Y. 644)

**RACE v. UNION FERRY CO. OF NEW YORK & BROOKLYN.**

(Court of Appeals of New York. June 6, 1893.)  
INJURY TO PASSENGERS—FERRIES—NEGLIGENCE—EVIDENCE.

Plaintiff, in stepping on a ferryboat from the bridge thereof, fell and was injured. She testified that she did not notice how much lower the boat was than the bridge, but that from the severity of her fall she judged it was 18 or 20 inches lower. The bridge rested on the water, and rose and fell with the tide. The evidence showed that a discrepancy between the height of the bridge and boat was inevitable,—sometimes one being higher and sometimes the other, the difference being from one to eight inches. *Held*, that the evidence did not show that defendant was guilty of culpable negligence, making it liable. 19 N. Y. Supp. 675, reversed.

Appeal from city court of Brooklyn, general term.

Action by Mary Louise Race against the Union Ferry Company of New York and Brooklyn. From a judgment of the general term (19 N. Y. Supp. 675) affirming a judgment of the trial term for plaintiff, defendant appeals. Reversed.

Joseph S. Auerbach, for appellant. Dailey, Bell & Crane, (James D. Bell, of counsel,) for respondent.

EARL, J. On the 6th day of December, 1890, between the hours of 4 and 5 o'clock P. M., the plaintiff, desiring to return to her home in New York from Brooklyn, went to the Fulton ferry, and in passing from the ferry bridge on to the ferryboat she fell down and was injured, and she brought this action to recover damages for her injuries. Her claim of negligence against the defendant is that the boat was 18 or 20 inches lower than the bridge, and that that was the occasion of her fall. She was the sole witness upon the trial to the accident. She produced no other witness who saw the accident, or heard of it at the time. She did not at the time make any complaint to any one connected with the ferry, and she produced no evidence but her own to show that the boat was lower than the bridge. The substance of her evidence to show that the boat was lower is as follows: "I fell on the boat from off the bridge. I fell on the

boat because the boat was so much lower than the bridge. That is a fact. I didn't discover that this boat was below the bridge at all until after I had fallen. I should judge from the fall that the deck of the boat must have been eighteen or twenty inches below the bridge, for the fall was a terrible fall, I can tell you. I know what you mean by the bridge descending to the ferryboat. Whether that bridge was on a level or was inclined downwards at that time I couldn't see. I couldn't tell whether it was inclined down. I couldn't see whether it was. If I could, why, I wouldn't have fell. Question. I am asking you about the bridge, not about the boat at all. You got upon top of the bridge, and when you did you were some distance from the boat. Before you commenced to go to the boat at all, after you got on the bridge, was the bridge level, or was there a decline? The Court: Did you walk down when you went on the boat, or did you walk up? The Witness: I can't tell whether it was up or down. I can't tell, because I don't remember whether it was up or down. I walked along about my business, and didn't take any notice of the bridge. \* \* \* I passed down the bridge, and I stepped from the bridge to the boat, and fell because the boat was below the bridge; and then it was that I got the fall that injured me. I didn't know anything about the boat being below the bridge until I fell, because I couldn't see. I didn't think to look. I walked right along as usual. I didn't look. I went about my business; walked right along. Q. Please answer my question. You didn't look, you say; but, if you had looked, it was sufficiently near to you to see? A. Sufficiently what? Q. The boat was sufficiently near to you, if you had looked, to see whether it was below the bridge, wasn't it? A. I didn't look to see. Q. I know. But if you had looked you could have seen, couldn't you? A. Why, I suppose I might have if the light had been sufficient, but it was very dim. Q. But you didn't look anyhow? A. No; I didn't look anyhow. Q. Now, do you know whether the light was so dim or not that you couldn't see? A. I don't know. \* \* \* Q. I think you said to Judge Daily, Mrs. Race, that it must have been 18 or 20 inches—the boat—below the bridge? A. I should judge from the fall that I received, knocking the breath out of my body, that the boat must have been 18 or 20 inches below the bridge. I have no other means of judging only from the steep fall and the jar and injuries received internally. I have no other means of forming the opinion. I don't know how far it was below the bridge. I can't say positively. I did not see how far it was below the bridge. Q. And the whole thing is simply that from the fall you had you have formed a conclusion that it must have been 18 or 20 inches below the bridge? A. From the force of the fall and the injuries I received internally, it must have been. I can't judge from anything else because I was jarred internally. I didn't see it. I couldn't see." On redirect examination: "After I fell, I did not turn and look at the bridge."

It is clear from this evidence that she could not tell how much lower the boat was than the bridge. She did not look, and she did not see the discrepancy in the height, and when she says it was 18 or 20 inches she merely gives her judgment based upon the severity of her fall; and her judgment, under the circumstances, does not rise to the dignity of evidence upon which a jury could base a verdict. Her fall was unexpected and instantaneous, and she was so severely injured according to her evidence that she could not then have formed any accurate or reliable judgment as to the distance she fell. We know from observation and experience that she might have fallen if the discrepancy had been but six inches, or even less, and have been just as badly injured. The bridge rests upon the water, so that it can rise and fall with the tides, and thus it, and the boat when brought to it, will usually be substantially at the same level. According to all the evidence on both sides, some discrepancy between the height of the bridge and the boat is inevitable,—sometimes the bridge being higher than the boat, and vice versa, the discrepancy varying from one to eight inches. The ferry company, in the management of its business, has the right to assume that passengers will take some care of themselves; and, if it conducts its business with such care and skill as will make the entrance upon its boats safe for persons of ordinary prudence, it meets the requirements of the law. The proof on the part of the defendant showed that all its ferries were managed in substantially the same way, and that, while they carried many millions of passengers yearly, no accident of this kind was ever reported or known. The plaintiff had the burden to show that the defendant was guilty of culpable negligence in permitting the boat on the occasion of this accident to be lower than the bridge, and we think, after a careful scrutiny of all the evidence, that she failed fairly to sustain that burden. The judgment should therefore be reversed, and a new trial granted, costs to abide the event. All concur.

(138 N. Y. 451)

**DUDLEY v. CONGREGATION OF THIRD ORDER OF ST. FRANCIS.**

(Court of Appeals of New York, June 6, 1893.)

**BENEVOLENT SOCIETIES — MORTGAGE OF REAL ESTATE—ACTION TO FORECLOSE.**

1. Under Laws 1854, c. 50, § 1, declaring it lawful for the supreme court, on application of any benevolent society, to make an order, in case it shall be deemed proper, allowing the society to mortgage any of its real estate, a mortgage by such society without such an order is invalid. 19 N. Y. Supp. 605, affirmed.

2. Where, in an action in equity to foreclose a mortgage, plaintiff fails to establish his mortgage, he cannot, on the same complaint, without amendment, have personal judgment for the debt.

Appeal from supreme court, general term, first department.

Action by Augustus P. Dudley against the Congregation of the Third Order of St. Francis. From a judgment of the general

term (19 N. Y. Supp. 605) modifying a decree of the special term dismissing the complaint and granting affirmative relief of defendant, plaintiff appeals. Affirmed.

Shepard & Prentiss, (Wm. H. Shepard, of counsel,) for appellant. Thomas G. Barry, (Peter B. Olney, of counsel,) for respondent.

O'BRIEN, J. It is important in the determination of the legal questions arising upon this appeal to get a clear view of the precise nature and character of the action. The complaint alleges that on or about the 21st day of July, 1888, the defendant, a domestic corporation, for the purpose of securing to the plaintiff the payment of the sum of \$2,000, with interest, executed and delivered to the plaintiff a bond in double that sum, conditioned for the payment of the debt in one year from date, with semiannual interest; that, as collateral security for such payment, the defendant also executed and delivered at the same time to the plaintiff a mortgage upon certain real estate therein described, which contained a promise or covenant for the payment of the debt at the time and in the manner stipulated in the bond; that the debt was not paid, but default made in the conditions, upon the performance of which both instruments were to become void. The prayer for judgment is that the lands be sold, and the proceeds applied upon the debt, and in case of a deficiency that the defendant be adjudged to pay the same. The answer averred that the defendant was incorporated under the act for the formation of charitable, benevolent, and other societies, being chapter 319, Laws 1848. That no order of the supreme court was ever made permitting the defendant to mortgage its real estate, as required by chapter 50 of the Laws of 1854, and the execution and delivery of the mortgage was therefore put in issue by a denial of these allegations in the complaint. For another defense it was separately stated that the bond was not the obligation of the defendant; that it was executed, together with the mortgage, by or under the direction of certain persons named, who had previously usurped and intruded into the office of directors, which places they held wrongfully, to the knowledge of the plaintiff, when the bond and mortgage were executed and delivered, and that subsequently, in an action brought by the people, they were ousted, and the rightful and lawfully elected directors reinstated; that the instruments were not sealed with the corporate seal, or executed or delivered by any corporate authority. It is stated that evidence was given in support of both defenses, but in the disposition of the case the courts below have passed upon but one of them. It was not claimed that the court had ever given its assent to the execution or delivery of the mortgage, and it is found that no such assent was given, and no application therefor ever made. There are also findings that the defendant carried on and maintained St. Elizabeth's Hospital upon the lands covered by the mortgage; that both the bond and mort-



gage were executed by and under the direction of persons who at the time were in possession of the offices of the corporation, and it was authorized by persons who, at the time, assumed to be, and were in fact, acting as the trustees and directors, though they were afterwards ousted from these places by the judgment of the court. It was held that the mortgage was void for the reason that it was made without the order of the court, and that the plaintiff was not entitled to a judgment at law upon the bond. The record, therefore, presents two questions: (1) The validity of the mortgage; (2) the right of the plaintiff to recover in this action a general judgment at law upon the debt evidenced by the bond, in the event that the mortgage is invalid.

The better opinion and the weight of judicial authority is in favor of the view that the English statutes passed in the reign of Elizabeth, restricting religious and charitable corporations from alienating their real estate, have been adopted and followed by the courts of this state in determining the powers which such corporations possess to alienate or encumber their real property. It may be true, as the learned counsel for the plaintiff contends, that these statutes, as such, were never introduced here, but the principle embodied in them became the rule of our courts and the policy of the legislature in dealing with questions of the same nature and character, and therefore a part of our municipal law. *Madison Ave. Baptist Church v. Baptist Church in Oliver St.*, 46 N. Y. 141; *De Ruyter v. St. Peter's Church*, 3 Barb. Ch. 122; *Bogardus v. Trinity Church*, 4 Paige, 178. But the question whether these statutes were or were not actually adopted here we do not regard as an important or practical one in this case. This court is firmly committed to the doctrine that section 11 of chapter 60 of the Laws of 1813 (3 Rev. St. [Banks' 8th Ed.] p. 1888, § 11,) which is substantially identical in language with that now under consideration, operates to forbid sales of the real estate of religious corporations without the assent of the court, though the statute in terms simply makes it lawful for the chancellor to make the order in case he shall deem it proper. *Madison Ave. Baptist Church v. Baptist Church in Oliver St.*, supra; *Reformed Church v. Schoolcraft*, 65 N. Y. 134, 148; *Christie v. Gage*, 71 N. Y. 189, 190; *Manning v. Society*, 27 Barb. 53; *Madison Ave. Baptist Church v. Oliver St. Baptist Church*, 73 N. Y. 82. The act of 1854 (chapter 50, § 1) applied to benevolent, charitable, scientific, or missionary societies, but as it is almost identical in terms, and as it must be presumed to have originated in the same general policy, and was intended to prevent the same abuses, it should receive the same construction, as the act of 1813, which applied to religious corporations. It cannot, we think, be doubted that the legislature intended to and did enact that compliance with that statute should be absolutely necessary to the validity of any mortgage of real estate which corporations of the class described therein should execute and deliver. It was assumed that without the statute

such corporations could not mortgage their lands at all, and the legislative intent was to permit them to do so only when the assent of the court was first obtained. Therefore the mortgage in question lacked an element indispensable to its validity, and the courts below properly denied to the plaintiff a judgment of foreclosure.

The ruling of the court refusing to allow the plaintiff to prove the loan and recover a judgment at law upon the debt remains to be considered. An action to foreclose a mortgage is a proceeding in a court of equity which is regulated by statute. Code Civil Proc. c. 14, tit. 1, art. 4, § 1626. The holder of a bond and mortgage has two remedies. He may proceed at law to recover a judgment for the debt, represented by the bond, and enforce the judgment in the usual way, or he may proceed in equity by action to foreclose the mortgage, and appropriate the land embraced in it to the payment of the debt. While an action is pending for the foreclosure of the mortgage, or of the final judgment therein, an action at law upon the bond is prohibited, without leave of the court. Section 1628. In an action to foreclose the complaint must state whether any other action has been brought to recover any part of the mortgage debt, and, if so, whether any part thereof has been collected. Section 1629. And where the plaintiff has recovered judgment upon the debt he cannot maintain an action on the mortgage unless an execution has been issued upon the judgment and returned unsatisfied in whole or in part. Section 1630. Therefore a party is not entitled, as of right, to both remedies at the same time. In an action in the nature of a proceeding in rem to foreclose a statutory lien, and where a personal judgment against some of the parties follows as incidental to the general relief, such judgment cannot be rendered where the plaintiffs fail to establish the lien. *Burroughs v. Tostevan*, 75 N. Y. 567.

In an action to foreclose a mortgage a judgment for deficiency is authorized, and may be rendered as incidental to the principal relief demanded, but it cannot be rendered in an action where the plaintiff fails to establish the mortgage. The peculiar statutory provisions applicable to actions of foreclosure above referred to indicate that it was never intended to permit the joinder in the same complaint of two separate causes of action,—one at law to recover a personal judgment on the bond for the debt, and the other in equity to procure a sale of the land covered by the mortgage, given to secure the same debt and the application of the proceeds thereon; and, if not, then the complaint in this case does not contain but a single cause of action, and that in equity, for the foreclosure of the mortgage lien. It is true that the giving of the bond is stated, but that is incidental to the main facts alleged, and only necessary, if at all, for the purpose of showing the consideration of the mortgage, and the amount of the deficiency, if any. When the plaintiff failed to establish the mortgage he failed to establish his cause of action in its whole scope and meaning, and he could not stand upon the

incidental allegations in regard to the bond. It is not necessary to inquire how far, or under what circumstances, it was within the power of the court to permit him to change the form of the action to one for the enforcement of some purely legal remedy. He applied to the court for that purpose at the trial, and the permission was refused, in the exercise of that discretion which the court undoubtedly possessed. The question that we are now concerned with is whether it was legal error in the court below to hold, after the plaintiff had failed to establish his equitable cause of action, that he was not entitled, upon the same complaint, to a personal judgment against the defendant. We think not. The case, as an action in equity, was terminated by the finding of the court that the plaintiff had no valid mortgage to foreclose, and, without the permission of the court in some form, the plaintiff was not entitled in the same action to a different remedy. *Beck v. Allison*, 56 N. Y. 368.

The established rule that when equity has obtained jurisdiction of the parties and the subject-matter of the action it may adapt the relief to the exigencies of the case, even to the extent of rendering a personal judgment, in order to prevent a failure of justice, does not apply here. That rule applies when the general basis of fact upon which equitable relief was sought has been made out, but for some reason it becomes impracticable to grant such relief, or where it would be insufficient; and not to a case like this, where it appears that there never was in fact any ground for equitable relief whatever, but the sole remedy was an action at law. When facts are made out which bring the case within the general jurisdiction of equity, the court will not allow the case to fail because the specific relief prayed for is no longer practicable, but in such a case, as a substitute for the relief demanded, will award an equivalent in damages, thus ending the controversy, instead of sending the parties to a court of law for that purpose. *Valentine v. Richardt*, 128 N. Y. 277, 27 N. E. Rep. 255; *Lynch v. Railway Co.*, 129 N. Y. 274, 29 N. E. Rep. 315; *Van Rensselaer v. Van Rensselaer*, 113 N. Y. 213, 21 N. E. Rep. 75. In this case the plaintiff has failed because he never had any ground upon which to invoke equitable jurisdiction, and in such a case the court will not attempt to try another and purely legal cause of action. The question is not one of the right to a jury trial. That mode of trial is waived by the plaintiff when he elects to bring an action for relief, both legal and equitable in its nature, in respect to the same cause of action, and by a defendant when he omits to insist upon it in the answer by taking the proper objection, which is usually done by a distinct allegation that an adequate remedy exists at law, or by demanding it, or raising the question at the proper time in cases where he is entitled to that mode of trial according to the practice in equity cases. *Cogswell v. Railroad Co.*, 105 N. Y. 319, 11 N. E. Rep. 513; *Town of Ments v. Cook*, 108 N. Y. 504, 15 N. E. Rep. 541; *Ostrander v. Weber*, 114 N. Y. 95, 21 N. E. Rep. 112;

*Truscott v. King*, 6 N. Y. 147. It is the case of an action in equity, where none but equitable relief was demanded or claimed, commenced and tried before the court as such, and a finding made that the plaintiff was not entitled to the relief sought, with facts appearing upon the trial that might entitle the plaintiff to a money judgment in an action at law, which he did not claim in his complaint, and the right to which he in no way suggested to the court until the whole theory of his action, as presented by the pleadings, failed. Whatever power the court may have to permit a party, by amendment or otherwise, to thus change the whole scope and nature of his action, it cannot be demanded as a right, and a refusal by the court, under such circumstances, to go on and try other questions upon the same pleadings, and administer other remedies, purely legal in their nature, which are properly the subject of another and different form of action, is not error. *Bradley v. Aldrich*, 40 N. Y. 504; *Wheelock v. Lee*, 74 N. Y. 500; *Hawes v. Dobbs*, 137 N. Y. 465, 33 N. E. Rep. 560.

There are no other questions in the case, and no exceptions presenting any points that could possibly aid the plaintiff or change the result. The judgment should be affirmed, with costs. All concur, except *ANDREWS, C. J.*, not voting.

(128 N. Y. 352)

#### GLEASON v. HAMILTON.

(Court of Appeals of New York. June 6, 1893.)

#### ALTERATION OF MORTGAGE—IGNORANCE OF MORTGAGEE.

The alteration of a mortgage given to secure notes, by causing it to secure other notes also, without the knowledge or procurement of the mortgagee, does not affect the validity of the mortgage, in an action to foreclose it for nonpayment of notes which it was originally given to secure. 19 N. Y. Supp. 103, affirmed.

Appeal from supreme court, general term, fourth department.

Action by Lucius Gleason against Fannie M. Hamilton to foreclose a mortgage. From a judgment of the general term (19 N. Y. Supp. 103) affirming a judgment for plaintiff, and an order denying a motion for a new trial, defendant appeals. Affirmed.

Tracy, McLennan & Ayling, (William G. Tracy, of counsel,) for appellant.

No person producing any document which has been altered in a material part can claim under it the enforcement of a right created by it, unless the alteration was made before the completion of the document, and with the consent of the party to be charged under it, or his representative in interest. *Davidson v. Cooper*, 11 Mees. & W. 778, 13 Mees. & W. 343; *Aldous v. Cornwell*, L. R. 3 Q. B. 573; *Pigot's Case*, 11 Coke, 27; *Marcy v. Dunlap*, 5 Lans. 370; *Bowser v. Cole*, 74 Tex. 222, 11 S. W. Rep. 1181; *Hollingsworth v. Holbrook*, 80 Iowa, 151, 45 N. W. Rep. 561; *Reynolds v. Witte*, 13 S. C.

5; *Fishkill Bank v. National Bank*, 80 N. Y. 162, 168; *Rice v. Wilkins*, 21 Me. 558; *Phillips v. Rounds*, 33 Me. 357.

Jenney, Brooks, Marshall & Ruger, (Louis Marshall, of counsel,) for respondent.

That an alteration by a stranger, without the procurement or connivance of either party, will not avoid an instrument, however material the alteration, has been affirmed in numerous other cases. *Piersol v. Grimes*, 30 Ind. 129; *Cochran v. Nebeker*, 48 Ind. 459; *City of Boston v. Benson*, 12 Cush. 61; *Adams v. Frye*, 3 Metc. (Mass.) 104; *Drum v. Drum*, 133 Mass. 568; *Boyd v. McConnel*, 10 Humph. 68; *Lee v. Alexander*, 9 B. Mon. 25; *Bridges v. Winters*, 42 Miss. 135; *Croft v. White*, 36 Miss. 455; *Lubbering v. Kohlbrecher*, 22 Mo. 596; *Moore v. Ivers*, 83 Mo. 29; *Bank v. Roberts*, 45 Wis. 373; *Gordon v. Robertson*, 48 Wis. 493, 4 N. W. Rep. 579; *Condict v. Flower*, 106 Ill. 105; *Pry v. Pry*, 109 Ill. 466; *Bellows v. Weeks*, 41 Vt. 590; *Williams v. Moseley*, 2 Fla. 304; *Major v. Hansen*, 2 Biss. 195; *Evans v. Williamson*, 79 N. C. 86; *U. S. v. Spalding*, 2 Mason, 478; *U. S. v. Linn*, 1 How. 110.

PECKHAM, J. II, in order to sustain this judgment, it were necessary to maintain the finding that the mortgage was reacknowledged, and thus assented to by the defendant after the alteration was made, we should be unable to do it. We think the case is wholly without evidence to sustain such finding. There is nothing to sustain it but the alleged promise of the husband of defendant that he would have it reacknowledged, and the declaration of the notary, out of court, that he had taken a reacknowledgment of the mortgage. It may be assumed that Mr. Doheny supposed it had been reacknowledged, and that he is correct when he says the notary told him that it had been. The declaration of the notary, made out of court, did not bind the defendant in any way, and was not competent evidence against her for the purpose of showing the fact of reacknowledgment. When the alteration had been proved, and it appeared to be a material one, the burden rested upon the plaintiff of showing that the alteration had been made with the consent of the defendant, and that the mortgage had been thereafter reacknowledged. *Tillou v. Insurance Co.*, 7 Barb. 564; *Acker v. Ledyard*, 8 Barb. 514. There was no proof whatever of such assent or reacknowledgment. Striking out such finding, and also the verdict of the jury upon the same proposition, there yet remains enough in the case to justify and demand our affirmance of the judgment. We ought not to reverse it, and send the case back for a new trial, when there is sufficient evidence, wholly uncontradicted and perfectly credible, to prove beyond any doubt that the plaintiff ought to recover. The plaintiff was wholly ignorant of the alteration attempted to be made in the mortgage, and so remained until after the commencement of this action. The action itself is brought to foreclose the mortgage

for nonpayment of paper which, confessedly, it was originally given to secure. The attorney who wrote in the addition to the mortgage as it originally was executed had no power, as agent of the plaintiff, to make any alteration in the instrument by which its validity should be avoided. While the high character of the attorney who directed the addition might render it entirely plain that there was no intention of making any fraudulent alteration, and while the evidence seems to pretty clearly show there was not in fact the slightest wrongful intent in directing the alteration, and that it was done for the purpose of thereafter securing the assent of the defendant to the alteration, yet no such assent was secured; and this act of the attorney for the plaintiff cannot properly, as we think, operate as if it had been an alteration made in a material part of the mortgage by the plaintiff himself, or by his attorney or agent, with his knowledge or by his authority, expressed or implied. The act of the attorney did not, and ought not to, bind the plaintiff in this case.

Many cases have arisen since the decision of *Pigot's Case*, 11 Coke, 27, where it was held that a material alteration made by a stranger to a deed, and without the privity of the obligee, did nevertheless invalidate the instrument. As late as the years 1843 and 1844 this decision was treated with respect by the English courts. *Davidson v. Cooper*, 11 Mees. & W. 778, 798, in exchequer chamber, 13 Mees. & W. 343. But there has been since that period a departure from this rule, even in England, (see *Aldous v. Cornwell*, L. R. 3 Q. B. 573, A. D. 1868,) while in our state the cases referred to in the opinion delivered in the general term in this case, and those cited in the briefs of counsel before this court, show that when an alteration is not made by a party to the instrument, and in a material matter, the alteration is of no effect, and the original validity of the instrument remains. *Casoni v. Jerome*, 58 N. Y. 315, 321; *Smith v. Kidd*, 68 N. Y. 130, 141; *Martin v. Insurance Co.*, 101 N. Y. 493, 5 N. E. Rep. 338; *Town of Solon v. Williamsburgh Sav. Bank*, 114 N. Y. 134, 21 N. E. Rep. 168. In Vermont the same rule obtains. *Bigelow v. Stilphen*, 35 Vt. 521. So, also, in other states *Robertson v. Hay*, 91 Pa. St. 242; *Hunt v. Gray*, 35 N. J. Law, 227; *Nickerson v. Swett*, 135 Mass. 514; *Brooks v. Allen*, 62 Ind. 401.

Upon this view of the character and effect of the alteration, we think it clear that the judgment ought to be affirmed, in spite of the error contained in the finding alluded to. The ground upon which we place our affirmance is wholly unaffected by the evidence or finding in regard to a reacknowledgment, or by any alleged errors in the admission or rejection of evidence. It is based upon controlling facts in the case, which are not substantially denied, and which in any event are proved by overwhelming evidence. Upon the ground that the plaintiff was not in any manner responsible for the attempt, unknown to him, to enlarge the liability of the mortgagor by the proposed altera-

tion, and because the plaintiff seeks only to enforce the mortgage as it was originally executed, we affirm the judgment appealed from. All concur, except ANDREWS, C. J., not voting.

(128 N. Y. 410)

PEOPLE v. ROSENBERG.

(Court of Appeals of New York. June 6, 1893.)

NUISANCE—RENDERING FAT—INDICTMENT—EVIDENCE.

1. Laws 1892, c. 646, declares that "it shall not be lawful for any person or persons to engage in or carry on the business of fat rendering, bone boiling, or the manufacture of fertilizers, or any business as a public nuisance," within the corporate limits of any city, or within three miles therefrom. *Held*, that it was not the intention of the legislature to prohibit the carrying on of the business of fat rendering in a city, irrespective of the manner in which it was conducted, but only the carrying on of such business "as a public nuisance," and therefore a judgment convicting defendant of carrying on such business, rendered under an indictment containing no allegation that he was conducting it as a public nuisance, was erroneous.

2. It was error to exclude evidence offered by defendant, that he was carrying on the business under the permission and inspection of the health department of the city, and also as to the manner in which the business was conducted,—whether noxious odors arose, and whether the locality was sparsely or densely populated.

Appeal from supreme court, general term, second department.

Joseph Rosenberg was convicted of unlawfully carrying on the business of fat rendering, and, from a judgment of the general term (22 N. Y. Supp. 56) affirming the judgment of conviction, he appeals. Reversed.

B. F. Tracy and A. Simis, Jr., for appellant. William T. Gilbert and John F. Clarke, for the People.

O'BRIEN, J. The defendant was convicted of a misdemeanor in the court of general sessions of the county of Kings upon an indictment charging him with a violation of chapter 646 of the Laws of 1892. As this appeal from an affirmation of the judgment of conviction by the general term raises important questions with respect both to the validity and true construction of the statute, it may be well to give it here in full:

"An act to prevent fat rendering, bone boiling, or the manufacture of fertilizers, within the corporate limits of any incorporated city of this state, or within a distance of three miles from the corporate limits thereof. The people of the state of New York, represented in senate and assembly, do enact as follows: Section 1. It shall not be lawful for any person or persons to engage in or carry on the business of fat rendering, bone boiling, or the manufacture of fertilizers, or any business as a public nuisance, within the corporate limits of any incorporated city of this state, or within a distance of three miles from the corporate limits of any incorporated city: provided, however, that nothing herein contained shall prevent the rendering of fresh-killed cattle or swine. Sec. 2. All departments of health, or the com-

missioner or commissioners thereof, in any incorporated city of this state, shall have power to enforce the provisions of this act. Sec. 3. Any person or persons offending against the provisions of this act shall, upon conviction thereof, be guilty of a misdemeanor. This act shall not apply to the counties of Fulton, Wayne, Tompkins, Chautauqua, Orange, Dutchess, Erie, Monroe, Oneida, Otsego, New York, Schoharie, Ulster, Greene, Cayuga, Cattaraugus, Niagara, Saratoga, Schenectady, Hamilton, Montgomery, and Orleans. Sec. 4. This act shall take effect immediately."

The charge in the indictment is that the defendant, on a certain day named, in a certain locality and building described, within the corporate limits of the city of Brooklyn, did "engage in carrying on the business and occupation of fat rendering,—that is to say, of rendering the fat from animal matter,—said animal matter not being then and there freshly slain cattle and swine, against the form of the statute in such case made and provided, and against the peace of the people of the state of New York, and their dignity." It is claimed that in 1886 the defendant erected a factory on his own land, and for some seven years carried on the business of "fat rendering," under the permission, in writing, and the supervision and inspection, of the health department of the city of Brooklyn; and the defendant offered to produce these facts at the trial, as well as the manner in which the business was conducted, and whether any noxious odors arise from the business, and the character of the locality where the business was carried on, whether sparsely or densely populated. The testimony was excluded by the court upon the objection of the district attorney, and the defendant's counsel excepted. The court, in substance, instructed the jury that the act was constitutional, and that, if they were satisfied that the defendant carried on the business as charged in the indictment, he was guilty of the offense. The defendant's counsel excepted to these instructions. The defendant, upon conviction, was fined \$250.

It is apparent that the judgment proceeded upon the theory that the defendant's business was absolutely prohibited by the statute, and made a crime. This is the theory upon which the indictment was framed, and that is the construction which the learned judge who presided at the trial evidently put upon the enactment, and the same is true of the decision at general term. The discussion in this court upon the question arising upon the appeal has taken a wide range. The learned counsel for the defendant has argued with much force that the act is void because in conflict with at least two distinct limitations upon the power of the legislature created by the constitution of the state. He insists that it violates section 6 of article 1, which provides that no person shall be deprived of life, liberty, or property without due process of law, and also that, as it deprives the citizens of Brooklyn, if the construction adopted below be correct, of rights and privileges

secured to the citizens of other cities, situated in counties exempt from its provisions, it is violative of section 1 of article 1, which provides that "no member of the state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers." A legislative edict that would forbid the carrying on by the citizen of a particular business is always open to serious objections, and unless it can be brought within the somewhat vague and undefined domain of the police power it is difficult to sustain such legislation, under our system of government. If the disposition of this appeal required us to examine into the power of the legislature to pass enactments of this character, it might be difficult to answer some of the positions taken by the learned counsel for the defendant. If the statute is to be construed in the same way that it was by the court below, then constitutional questions of a very grave character are undoubtedly involved. But we have reached the conclusion that it is entirely possible and proper to give to the act a construction which will obviate the necessity of passing upon questions of legislative power. It is only when a case is presented which shows clearly that a statute, when fairly and reasonably construed, is brought in conflict with some provision of the constitution, that this court is justified in pronouncing the law invalid. If the act and the constitution can be construed so as to enable both to stand, and each can be given a proper and legitimate office to perform, it is the duty of the court to adopt such construction. *People v. Angle*, 109 N. Y. 567, 17 N. E. Rep. 413; *People v. West*, 106 N. Y. 298, 12 N. E. Rep. 610.

The statute is penal in its character, and it should therefore receive a strict, rather than a liberal, construction. *Maxw. Interp. St. c. 10*; *Cheese Co. v. Murtaugh*, 50 N. Y. 314; *Hoyt v. Bonnett*, Id. 538; *Hintermister v. Bank*, 64 N. Y. 212; *Wood v. Railway Co.*, 72 N. Y. 196. The act provides that it shall not be lawful for any person to carry on the business of fat rendering, bone boiling, or the manufacture of fertilizers, or any business as a public nuisance, etc. The last four words relate to, and qualify, all the preceding acts or kinds of business made unlawful, as well as the phrase "any business," immediately preceding them; so that it was made unlawful for the defendant to carry on the business of fat rendering as a public nuisance within the corporate limits of the city of Brooklyn. There is nothing in the grammatical arrangement of the words, or in the presumed intention of the legislature, that forbids this construction. The legislature, under the police power, may certainly regulate, or even prohibit, the carrying on of any business in such manner and in such place as to become dangerous or detrimental to the health, morals, or good order of the community. But how far it can go in the direction of absolutely prohibiting such business, when it is neither alleged nor claimed that in its nature, or from the manner in which it is conducted, it injuriously affects the

community, is quite another question. That would be venturing upon doubtful ground, and we ought not to give to the statute a construction that would attribute to the legislature a purpose to prohibit the defendant from carrying on his business of fat rendering, irrespective of the manner in which he conducted it, or of its effect, injurious or otherwise, upon the community. This court will assume that the legislature intended to act within its ordinary police powers, to suppress nuisances, and to punish persons carrying on some business in such a way as to become such. It may be that upon this construction the statute was wholly unnecessary, and that the defendant was liable to indictment and punishment for carrying on the business of fat rendering in Brooklyn as a public nuisance without it. We will not now stop to consider that question. It is sufficient to say that an intention should not be attributed to the law-making power to arbitrarily interdict the conduct of any business theretofore recognized as lawful, irrespective of its effect upon health, morals, or public order, unless it has in the statute itself used language of such explicit import as to preclude any other construction. It has not used such language in this case, and therefore the defendant was not guilty of the offense, unless he carried on the business in such a way as to be a public nuisance.

The judgment is erroneous for two reasons: First, there is no allegation in the indictment that the defendant was carrying on the business of fat rendering as a public nuisance; and, secondly, even if there was, the defendant's counsel offered at the trial to give proof which was material and competent upon that question, and which was improperly excluded. The judgment should therefore be reversed, and the defendant discharged. All concur.

(128 N. Y. 345)

#### GOTTHELF v. STRANAHAN.

(Court of Appeals of New York. June 6, 1893.)

#### CONTRACT TO CONVEY LAND—CONSTRUCTION.

The date fixed for the execution of a conveyance of city lots under a contract to convey with covenants against incumbrances (February 9th) was postponed a number of times for mutual accommodations of the parties. On May 4th the vendor tendered a conveyance with covenants as of February 9th. Between February 9th and May 4th assessments were made against the lots under the charter of the city in which they were located, payable in advance of the work done. *Held*, that such assessments were not "incumbrances" within the meaning of the contract, and that the vendor was not bound to warrant the title as against such assessments. 19 N. Y. Supp. 161, modified.

Appeal from city court of Brooklyn, general term.

Action by Charles Gotthelf against James S. T. Stranahan to compel specific performance of a contract for the sale of lands. From a judgment of the general term (19 N. Y. Supp. 161) affirming a judg-

ment for plaintiff, defendant appeals. Modified.

George G. Dutcher, (Wm. C. De Witt, of counsel,) for appellant. George G. & F. Reynolds, for respondent.

ANDREWS, C. J. The original contract, made on the 7th day of January, 1891, was by its terms to be completed by a conveyance and payment of the unpaid purchase money on the 9th day of February in the same year. The vendee was to pay for the property the sum of \$22,500, as follows: \$2,000 on the execution of the contract, \$4,750 on the execution of the deed, and the balance of \$15,750 in five years, with interest, to be secured by mortgage on the land. The vendor was to convey the land by warranty deed in fee simple, free from all incumbrance. The vendee, on the execution of the contract, paid the sum of \$2,000 as provided. If the contract had been performed on the 9th day of February, 1891, according to its terms, the question now presented would not have arisen. The assessments had not then been laid, and, if the deed had been given on that day, they would have become a charge on the land subsequent to the conveyance, and the defendant would have been under no obligation, legal or equitable, to pay them. They would have attached as a charge upon the title acquired by the plaintiff. But by the mutual assent of the parties the completion of the contract was postponed from time to time, in all for a period of three months, until May 4, 1891. The first postponement, until February 16, 1891, was for the accommodation of the plaintiff; the others were for the accommodation of the defendant, to enable him to clear the land of squatters who had gone upon it without permission and erected shanties and hovels in which they lived, and between whom and the defendant, in some cases, an irregular sort of tenancy had grown up by the payment and receipt from time to time of small sums as rent. During this period of three months two assessments on the property for local improvements were laid and confirmed by the city of Brooklyn,—one on the 3d day of March, 1891, for \$901.12, for the grading and paving of Bush street; and one on the 20th day of April, 1891, for \$1,079.33, for the grading and paving of William street. This action is brought by the vendee against the vendor to compel a specific performance of the contract of sale. The defendant is ready and willing and has offered to convey the premises with covenant of warranty as of the 9th day of February, 1891, the day originally fixed for the execution of the deed. The plaintiff insists that the vendor is bound to warrant the title as against the assessments mentioned. This is the controversy in the case, and the point for determination is whether the plaintiff, upon equitable principles, is entitled to the relief he seeks, and to cast upon the defendant the burden of paying the assessments. He does not ask to be relieved from the contract. He elects to have a decree for performance upon such conditions as the court shall determine, in

case it shall be held that upon principles of law or equity he is not entitled to demand a covenant by the defendant covering the lien created by the assessments.

The premises contracted to be sold consisted of a block and part of a block of land in one of the outlying wards of Brooklyn, which, when the contract was made, was partly covered by water, and was unfenced and commons. Bush street, adjoining the southerly side of the land, was a traveled road, and had been such for many years. It was graded to some extent, but had not been paved. It was an ordinary country road. One of the assessments was for the contemplated improvement of Bush street. William street, to which the other assessment related, was mostly under water. In view of the peculiar system of local improvements prevailing in Brooklyn, one question presented is whether the assessments in question constituted incumbrances on the land in May, 1891, when the defendant offered to convey, within the true meaning of the contract of sale. The charter of Brooklyn is unique in respect to its system of local improvements. The district of assessment is to be prescribed, and the estimated cost of contemplated local improvements is required to be assessed on the district benefited, and a warrant for the collection of the assessments issued, and at least one-third of the aggregate assessment must have been collected before any contract for making the improvement is authorized to be made; and the city may, even after the assessments have been collected, decline to make a contract, or to go on with the improvement, and may discontinue the proceedings, returning the money collected on the assessments. Laws 1888, c. 588, tit. 19, §§ 1-3, inclusive. In other cities, assessments for local improvements follow the performance of the work. In Brooklyn they precede the execution, and are collectible in advance. The contemplated improvements of Bush and William streets, for which the assessments in question were laid have not yet been made. There is no explanation of the delay. When the proceedings were initiated does not appear, and, referring to the charter provisions, there can be no inference that any step whatever had been taken when the contract of sale was executed, or prior to the 9th of February, 1891, when, by the original contract, the deed was to have been given. The parties entered into a contract for the sale of unimproved land. The consideration to be paid and received was presumably based on the value of the land in its existing condition. William street had no existence except on the city map, and Bush street was an ordinary road. Whether this condition would be changed at any time, and whether William street would be raised and made dry land, and Bush street be improved and brought to the condition of an ordinary city street, could not be known by the parties to the contract. If they anticipated that at some time the city would enter upon the improvement of this section of the city, they knew that any charge which might be imposed on the property embraced in the

contract for the expense of such improvement would represent the benefit received by it from the improvement, as the theory of such assessment is that the value of the land would be enhanced by at least an equivalent amount. It is impossible to suppose that the parties contemplated when the contract was executed that incumbrances created by the force of public law for improvements initiated after the making of the contract and intermediate that date and the time fixed for the conveyance should be paid by the vendor. If the contract can have this construction, then the plaintiff is entitled to property not in the condition it was in when he contracted to purchase it, but an improved estate, improved at the expense of the vendor by the act of the city, which he could not control, initiated after the contract was made. This construction would compel the vendor to pay out of the purchase money the cost of an improvement which by so much has increased or will increase the value of the property, and the vendee would acquire property which he did not pay for.

The question as to the true meaning of the contract to convey free from all incumbrances is quite different from that which would be presented by an assessment made intermediate the date of the contract and the time fixed for the conveyance for a local improvement made before the contract was entered into. In that case the purchaser buys with the improvements made, and presumably pays a price fixed with reference to the land in its existing condition. The case of periodical taxes for the support of government, assessed and laid between the date of a contract and the time fixed for the conveyance, would constitute an incumbrance within the meaning of the covenant. The time of the imposition of such taxes is known in advance, and unless excepted from the covenant would be deemed to be covered thereby. But under the charter of Brooklyn assessments for local improvements are made in advance of the execution of the work. They represent, or are supposed to represent, benefits thereafter to be secured to the property assessed. The time when improvements will be initiated cannot be known.

The contract to convey free from incumbrances ordinarily has reference to incumbrances or liens actually existing when the contract is executed, or thereafter created, or suffered by the act or default of the vendor. While the assessments in question constituted, under the charter of Brooklyn, liens on the lands assessed from the time of their confirmation by the common council, and are, in a strict sense, incumbrances thereon, we are of opinion that they are not incumbrances within the meaning of the contract. They did not diminish the value of the subject of the contract. The plaintiff will acquire what the defendant intended to sell and what he expected to receive, and, but for the postponement of the time of the execution of the deed, the plaintiff would have taken his title before the assessments were laid. This incident ought not to impose upon the defendant a loss pro tanto of so much

of the purchase money. But even if the contract, by its true interpretation, imposes upon the defendant the legal obligation to pay the assessment, this is not decisive of the right of the plaintiff to relief by way of specific performance. This equitable remedy cannot be claimed as a matter of right. It is discretionary with the court to grant or withhold it in furtherance of justice or to prevent injustice. Where, by reason of circumstances attending the making of the contract, such as fraud, accident, mistake, or where unconscionable advantage has been taken, or where, by reason of circumstances which have intervened between the making of the contract and the bringing of the action, the enforcement of the equitable remedy would be inequitable, and produce results not within the intent or understanding of the parties when the bargain was made, and there has been no inexcusable laches or inattention by the party resisting performance, in not foreseeing and providing for contingencies which have subsequently arisen, the court may and will refuse to specifically enforce the contract, and will leave the party to his legal remedy. The cases are very numerous under this head, and no hard and fast rule can be formulated by which it can be readily determined how the discretion of the court in a given case should be exercised. But it seems to us to be very clear that to enforce the contract in this case by requiring the defendant to covenant against the assessments in question would violate the spirit of the contract, and convert the equitable power of the court into an instrument for the accomplishment of rank injustice. The case of *Willard v. Tayloe*, 8 Wall. 564, contains an able discussion of the principles governing the courts in administering relief by way of specific performance of contracts, and Mr. Justice Field, in his opinion in that case, so fully cites the authorities that a further reference to them here is unnecessary. We think the judgment of the special and general terms should be modified by excepting from the scope of the covenant in the deed to be given by the defendant the assessments in question, and that, as modified, the judgment should be affirmed, with costs to the defendant in all courts. All concur, except GRAY, J., not voting. Judgment accordingly.

(133 N. Y. 649)

BURT v. ONEIDA COMMUNITY et al.  
(Court of Appeals of New York. June 6, 1893.)

On motion for reargument. Motion denied.

For report of decision on appeal, see 38 N. E. Rep. 307.

PER CURIAM. The plaintiff moves for a reargument, and one of the grounds upon which it is sought is an alleged error in the record, consisting of a misstatement in the findings of the referee. It is admitted that a correct copy of the record has been filed with the reporter of the court. The copies handed up when the



argument was bad, and upon which the court rendered its decision, have been compared with this copy, and shown to be correct; and, if there were any faulty or defective copies printed, they were not before the court, and could not have affected its determination. All of the other points relied upon were presented upon the former argument, either orally or in the elaborate briefs filed, and none of them were overlooked in the decision rendered. The exceptions to the introduction of the records of the meetings of the administrative council and business board were fully considered. These records were produced by one of the officers of the council upon the subpoena of the plaintiff, who testified upon the examination of plaintiff's counsel that they were all the records of the meetings of the administrative council, the business board, or the family meeting, relating to the expulsion of the plaintiff, that he could find. The witness also testified that he kept the minutes of the council, and that they were correct. The plaintiff read in evidence extracts from the minutes of the business board before they were offered by the defendant. The records of both boards were read over at the family meeting, which was the ultimate and final authority, and a vote taken confirming the action of the council and of the board, as it appeared in these records, without a dissenting vote. Under such circumstances it must be apparent why it was not deemed necessary to discuss these exceptions upon the decision of the appeal. It is also very plain from the opinion that the plaintiff failed because, in the judgment of the court, he was not entitled, as matter of law, upon his own proofs, to any relief. It may be that a different view was taken here of the legal effect of some of the facts proven from that adopted by the learned referee, but, if so, it does not follow that the facts were overlooked or misapprehended. The motion must be denied, with costs. All concur.

(138 N. Y. 491)

**BARRETT v. AMERICAN TELEPHONE & TELEGRAPH CO.**

(Court of Appeals of New York. June 13, 1893.)

**CORPORATIONS—SERVICE OF PROCESS.**

Service of summons against a telegraph and telephone company, on its general superintendent, is a service on "a managing agent," within Code Civil Proc. § 431, providing that service of summons on a domestic corporation must be made by delivering a copy thereof, within the state, to the president or other head of the corporation, or a director or "managing agent." 10 N. Y. Supp. 138, affirmed.

Appeal from supreme court, general term, second department.

Action by Charles J. Barrett against the American Telephone & Telegraph Company. From a judgment of the general term (10 N. Y. Supp. 138) affirming an order denying a motion to set aside service of summons, defendant appeals.

Melville Egleston, for appellant. W. B. Yeomans, for respondent.

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GRAY, J. The defendant seeks to set aside the service of the summons in this action for having been made upon its general superintendent. It is a domestic corporation, and, under section 431 of the Code, such a service, if not made upon the president, secretary, cashier, treasurer, or a director, might be made upon its managing agent. It appeared from the affidavits read on behalf of the defendant company that the person served was the general superintendent of the work of operating the lines of the company. It was said of him that he was given that title "to distinguish him from superintendents of divisions of its lines, and from superintendents of other departments of business." That was a sufficiently broad agency or delegation of power to constitute him a managing agent of the company. The design of the statute was to secure notice of the commencement of a suit to the corporation, and it is very apparent from the description in the statute of the persons upon whom service might be made that the legislature intended to facilitate such service, and only required that the person to be served should sustain such responsible and representative relations to the corporation as would be comprehended in the term "managing agent." This language would exclude persons holding such subordinate or clerical positions as imposed no responsibility upon them; but, plainly, would include a person holding so responsible and representative an office as did the general superintendent of this company. The order should be affirmed, with costs. All concur.

(138 N. Y. 473)

**HASTINGS v. BROOKLYN LIFE INS. CO.**

(Court of Appeals of New York. June 6, 1893.)

**LIFE INSURANCE—WAIVER—AUTHORITY OF SECRETARY—EVIDENCE—NEW TRIAL.**

1. In an action on a life insurance policy the question was whether or not the insured had received a certain letter from defendant terminating a waiver of payment of a premium at maturity. Defendant's secretary testified that he folded and inclosed the letter in a sealed envelope, directed it to the insured, and put it in a basket in the office where letters for mailing were usually placed. Defendant's porter testified that it was his duty to take all letters from the basket, and mail them, and that he did so, but he had no recollection of seeing or handling this particular letter. The letter was not found among deceased's papers. *Held*, that the question as to whether or not such letter was mailed to and received by the insured was for the jury.

2. In such action it appeared that defendant's secretary had a conversation with the insured a short time before a certain premium fell due, in regard to the policy, in which he urged him to retain it, and told him he would give him time; but whether this related to a past-due premium note or to the premium soon to mature did not appear. Defendant's local agent testified that his best recollection was that the secretary told the insured that they would carry him, and give him credit for premiums due and to become due. The insured was defendant's medical examiner in his locality, and it desired to retain him as a policy holder. *Held* that, though the testimony

of the local agent was improbable, the question as to whether or not defendant's secretary waived payment of the premium soon to mature was for the jury.

3. The oral agreement of the secretary of a life insurance company, made outside the state in which its general offices are located, to waive payment of a premium at maturity, is binding on the company. 17 N. Y. Supp. 333, reversed.

4. Where the trial judge concludes that he committed an error in refusing to submit a case to the jury, and grants a new trial, his order should be sustained, unless it is clear that there was no evidence whatever to submit to the jury.

Appeal from supreme court, general term, fifth department.

Action by Allen J. Hastings against the Brooklyn Life Insurance Company on a life insurance policy. From a judgment of the general term (17 N. Y. Supp. 333) reversing an order made on a case and exceptions, granting plaintiff's motion for a new trial after verdict directed by the court in favor of defendant, plaintiff appeals. Reversed.

Cary & Rumsey, (Frank Rumsey, of counsel,) for appellant. Wm. H. Ford, (Wm. F. Cogswell, of counsel,) for respondent.

O'BRIEN, J. A recovery is sought in this action upon a policy of life insurance. At the last trial the court directed a verdict for the defendant, but subsequently, upon a case and exceptions, set the verdict aside, and granted a new trial. The general term has reversed this order, and reinstated the verdict as directed. The appeal involves simply an inquiry whether the case was one for the court or the jury.

The defendant, by its policy bearing date June 5, 1882, insured the life of Edwin A. Walter, of Kendall Creek, in the state of Pennsylvania, in the sum of \$2,500, payable, in case of death within the life of the policy, to his executors, administrators, or assigns. The insured died on October 6, 1886, and his personal representatives assigned the policy to the plaintiff. The defense is that the policy was not in force at the time of the death of the insured, by reason of his failure to pay the semiannual premium that became due December 5, 1885, and another payment which became due June 5, 1886. There is no claim that these payments were in fact ever made, but it is claimed that the defendant has waived strict performance of the contract in that respect, and that, while they are still due to the defendant, and may be deducted from any recovery on the policy, yet the circumstances and dealings between the parties were such that an omission to pay the premiums on the day when due according to the terms of the contract did not produce a forfeiture or cancellation of the policy.

In order to determine whether there was any question in the case for the jury it becomes necessary to examine the testimony, and state the facts established or conceded. A note was given for the payment due December 5, 1885, which became due March 5, 1886, but was not paid, and a new note was given in its place at 60

days. These notes contained a provision pledging the policy as security for their payment, and that, in case of nonpayment when due, the policy should become null and void. The renewal note, which became due May 4, 1886, was not paid, but the act of the defendant in extending credit to the insured for premiums falling due upon pledge of the policy established a course of dealing between the parties which it was necessary to terminate in some way before the policy could be treated as forfeited and void. On the trial the defendant produced and put in evidence a letterpress copy of a letter, signed by its secretary, bearing date May 27, 1886, addressed to the deceased at his place of residence in Pennsylvania, notifying him that his note for premium on the policy was due May 4th, and was not paid. It stated further that by reason of this nonpayment the policy lapsed, "and we are thereby obliged to cancel it on our books. If you have any desire to restore it to full force, be good enough to inform us at once." This letter, if received by the deceased, doubtless operated to terminate the course of dealing and to render the policy void, unless he responded to it in a reasonable time, and paid the arrears of premium. If it had been shown that the letter had been actually mailed to the insured, the presumption would be that he received it; but we think that the defendant did not prove the mailing of the letter so conclusively as to warrant the court in taking the question from the jury. The secretary swore that he wrote and signed the letter, and then gave it to an attendant to copy in the book, who brought it back to him in such a condition as to show that it had been in the letterpress. The secretary, as he swears, then folded and inclosed it in a sealed envelope, with a notice upon it to return unless delivered, directed it to the insured, and then put it in a basket in the office where letters for mailing were usually placed. This is all the secretary knew about the mailing of the letter, but the porter in the office testified that his business was to take the letters from the basket and mail them; that he mailed all letters found in the basket, but had no recollection of ever seeing or handling this particular letter. He knew nothing on that point except what is to be inferred from his usual custom and practice. On the other hand, it was shown that no such letter was found among the letters or papers of the deceased, who was a physician, and, aside from what the porter testified to as to mailing, there was no fact or circumstance shown that would warrant the conclusion that he had received it. It could not be held, therefore, as matter of law, that the facts herein established the mailing of the letter. While the facts and circumstances in support of that conclusion are quite persuasive, and would amply warrant the jury in finding that it had been mailed, yet the question was one within their province, and should not have been determined by the court. If, however, there is no sufficient answer to the default in the payment of the premium that fell due on the 5th of June, 1886, following the date

of the letter, the question thus far considered would not be material. On the part of the plaintiff some proof was given of a conversation between the deceased and the secretary of the defendant on or about May 5, 1886, at or near the place of residence of the insured in Pennsylvania. The witness who testified as to this conversation was the same person who was or had been the defendant's local agent in the territory where the insured lived, and who had charge of the collection of premiums there. The witness was not able to give the language used by the parties to this conversation, nor was his recollection of its substance very clear, but, after several questions were put to him by counsel and the court, he finally swore that his best recollection of the substance of the conversation was that the secretary said to the insured that they would carry him, and give him credit for premiums due and to become due thereafter. If this testimony stood alone, it might be regarded as somewhat improbable, at least, but there are some conceded facts and circumstances that might be considered, possibly, as giving it some support. There is, no doubt, a dispute as to the fact that the secretary was there and met the deceased, and had a talk with him in regard to the policy. The insured was the defendant's medical examiner in the locality, and the company or its officers were desirous of retaining him for some reason as one of its policy holders. The secretary himself admits this, and also that he urged the insured to retain his policy, and that he told him they would give him time, but whether this related to the note that had just fallen due or to the premium to fall due a month afterwards is not clear. Whether there was in fact any promise or agreement on the part of the defendant to waive prompt payment of the June premium was, we think, under all the circumstances, a question for the jury.

However improbable the testimony of a witness may appear who testifies to a fact not in itself impossible in the ordinary course of events, the credibility, force, and effect of such testimony are for the jury. If the statement of this witness in its full scope and length is to be accepted, then there was an agreement between the insured and the defendant's secretary, acting in its behalf, to the effect that credit would be given for the premiums, if the officer had the power to bind the company by such an agreement or promise. The learned general term was of the opinion that, as the secretary was at the time in another state, and not at the general office of the company, he had no power to bind it. We cannot concur in this view. The secretary is one of the general managing agents of a corporation, and when in the discharge of the duties of his office he represents the corporation itself. To waive prompt payment of a premium about to fall due is an act within the general powers of the secretary of a life insurance company. The president or other

general officer of a corporation has power, *prima facie*, to do any act which the directors could authorize or ratify. *Conover v. Insurance Co.*, 1 N. Y. 290; *Booth v. Bank*, 50 N. Y. 396; *Leslie v. Lorillard*, 110 N. Y. 519, 18 N. E. Rep. 363; *Holmes, Booth & Haydens v. Willard*, 125 N. Y. 75, 25 N. E. Rep. 1083; *Patterson v. Robinson*, 116 N. Y. 193, 22 N. E. Rep. 372; *Rathbun v. Snow*, 123 N. Y. 843, 25 N. E. Rep. 379; *Railroad Co. v. Dixon*, 114 N. Y. 80, 21 N. E. Rep. 110; *Mor. Priv. Corp.* §§ 251-253. There is no reason, and we are not referred to any controlling authority, for holding that the valid exercise of his powers depends upon the particular place where he may be at the time. The true test of his authority to bind the corporation is not whether he acts in the general office or in a distant state, but whether, at the time, he is engaged in the discharge of the general duties of his office, and in the business of the corporation. These views lead to the conclusion that the case should have been submitted to the jury. The facts were not before the general term. The only question was whether the trial judge committed an error of law in setting aside the verdict which he had directed, and granting a new trial. He was authorized to review his own action and motion for a new trial, and, if satisfied that he had committed an error in refusing to submit the case to the jury, or in any other respect, to grant a new trial. He had the advantage of seeing the witnesses and observing their general intelligence, demeanor in testifying, and apparent fairness and candor, and unless, in such a case, it is clear that there was no evidence whatever to submit to the jury, his order should be sustained. *Devlin v. Bank*, 125 N. Y. 757, 26 N. E. Rep. 744. We have already expressed our views on that question, and, indeed, the learned general term did not hold that the case was destitute of all evidence to go to the jury as to the alleged agreement between the insured and the defendant's secretary to waive the payment of the premium about to become due, but only that the secretary did not possess the power to bind the company thereby at the place where he then was. The order of the general term should be reversed, and that of the special term affirmed, with costs. All concur.

Ordered accordingly.

(128 N. Y. 608)

PALMER, Appellant, v. BOWEN, Respondent.

(Court of Appeals of New York. April 11, 1893.)

David Hays, for appellant. Thomas Raines, for respondent.

No opinion. Judgment affirmed, and judgment absolute ordered for defendant, with costs, on opinion of general term. 18 N. Y. Supp. 638. All concur, except FINCH and GRAY, JJ., absent.

(188 N. Y. 417)

HOGAN v. KAVANAUGH et al.<sup>1</sup>

(Court of Appeals of New York. June 6, 1893.)

## CONSTRUCTION OF WILL — LEGACIES — JURISDICTION.

1. The will of testator, who owned both personal and real property, provided that "instead of giving an equal share to all the children, I only will P. and H. \$500 each, if there is that for them when I and my wife get done with the property, and then, if there is anything left after paying P. and H. \$500 each, the remainder I will to G., my son." Held, that it was testator's intent to charge such legacies on the land.

2. An action in equity will not lie against a person who has purchased testator's land from the devisees, taken possession thereof, and paid off some of the debts of the estate without administration or proof of such debts, in behalf of legatees under the will, to have such land sold for the payment of their legacies, since a court of equity cannot administer on the estates of deceased persons, and since an action to enforce a sale of land to satisfy legacies charged thereon without making the administrator of decedent a party is irregular.

Appeal from supreme court, general term, fifth department.

Action by Phoebe J. Hogan, legatee under the will of Edward Howard, deceased, against Daniel Kavanaugh and others, to declare a lien charging the payment of such legacy on land of testator purchased by Kavanaugh from devisees under the will, and to have the land sold to satisfy the legacy. From a judgment of the general term (18 N. Y. Supp. 946) affirming a judgment entered on the report of a referee that the land be sold for the payment of such legacy subject to the claims of Kavanaugh for money advanced by him in behalf of the estate, and to a mortgage on such land, held by defendant Julia A. Allen, complainant appeals. Modified.

Wm. H. Henderson, for appellant. J. G. Record and W. Woodbury, for respondents.

O'BRIEN, J. The judgment in this case has virtually settled and closed up the estate of a deceased person without administration or any resort whatever to the procedure prescribed by statute for the proof of debts and payment thereof from the personal estate, or, if insufficient, the sale of the realty for that purpose. An action in equity, in which both sides are actors, has been substituted for the regular and orderly proceedings under the statutes for the settlement of the estates of deceased persons. It appears that in September, 1864, Edward Howard died, leaving a will and codicil, which, in January, 1866, were duly proved and admitted to probate. No executor was named in the will or codicil, and no administration with the will annexed or otherwise was ever applied for. The entire use and control of the property, both real and personal, was given by the will to the widow during her natural life, and legacies were given to his children, of whom the plaintiff is one. The legacy to the plaintiff was modified in some respects by the codicil, bearing date April 21, 1864, and her claim which is sought to be enforced in this ac-

<sup>1</sup>Reargument denied. See 34 N. E. Rep. 1046.

tion is there expressed in the following language of the testator: "Instead of giving an equal share to all the children, I only will Phoebe Hogan and Phila Hogan five hundred dollars each, if there is that for them when I and my wife get done with the property; but they are not to have anything until I and my wife get through with the property; and then, if there is anything left after paying Phoebe and Phila Hogan their five hundred dollars each, the remainder I will to George M. Howard, my son." Another daughter was the wife of the defendant Kavanaugh, and the codicil states that he had advanced to her \$500, but makes no bequest to her. The estate is found to have consisted of an improved farm of about 75 acres, worth about \$2,500, and about \$200 in personalty. It appears that the widow conveyed her life estate in the land, and the son, as residuary devisee, his interest, to the defendant Kavanaugh, who went into possession immediately after the testator's death, which gave him the title, subject to debts and legacies. On the 13th of January, 1872, Kavanaugh and wife mortgaged the farm to the defendant Julia Allen, to secure the sum of \$1,000, and interest thereon, which was paid to Kavanaugh, and used by him to pay a note upon which he was surety, made by the testator, and as to which there is a dispute as to whether it was in fact the debt of the testator or the son-in-law; and the testator in his will described the note as one "that he had signed with his son-in-law." The interest on the mortgage was paid by the mortgagor to January 13, 1890, but the principal remained unpaid. It is found that Kavanaugh himself paid the balance due on the note, amounting to \$300, and also the legacy of \$500 to the daughter Phila Hogan, and he was treated in this action as the equitable assignee thereof, and both he and Mrs. Allen as the equitable assignees of debts of the testator, and representatives of creditors as to the claims paid by them, or with funds furnished by them. The plaintiff's action was to procure the judgment of the court declaring her legacy to be a lien or charge upon the land, and directing a sale thereof to pay it. The referee held that it was, but he also held that the mortgage was a prior charge, as well as the claims of Kavanaugh for the money advanced by him to apply upon the notes, and interest thereon, besides his costs in this action. He directed a sale to pay these claims, with the expenses first, then the two legacies out of the surplus, if sufficient for that purpose, and, if not, then pro rata. Whether a legacy is a charge upon realty is always a question of the testator's intention, and that appears from the will in this case. There can be no doubt that the testator intended to charge these legacies to his daughters upon the land within the established rules applicable to the question as settled by adjudications. *Le Fevre v. Toole*, 84 N. Y. 95; *Hoyt v. Hoyt*, 85 N. Y. 142; *Scott v. Stebbins*, 91 N. Y. 605; *McCorn v. McCorn*, 100 N. Y. 511, 8 N. E. Rep. 480; *Morris v. Sickly*, 133 N. Y. 456, 31 N. E. Rep. 332. That part of the judgment, therefore, which declares the legacies to be a

charge upon the land is correct; nor can there be any objection to the maintenance of an action in a court of equity to procure a judgment for that purpose, though it might not be proper in all cases and under all circumstances to direct a sale of the land for their payment. The primary fund for the payment of debts and legacies is the personal estate, and the land cannot be resorted to for that purpose until the personal is exhausted in the ordinary course of administration, and under the authority of the statute. *Kingsland v. Murray*, 133 N. Y. 170, 30 N. E. Rep. 845.

The difficulty with this case is that the judgment appropriates the real estate of the decedent to the payment of debts without the statutory proceedings to ascertain who the creditors are, and the amount and validity of the debts. The defendants were made parties to this action because they were in possession of the land, and Mrs. Allen, because there was a mortgage upon it in her favor upon record. They were not made parties as creditors, or for the purpose of litigating the question whether they were creditors or not, and the amount and validity of their claims as such. The referee has found that there are no other creditors, and possibly that may be so. But this finding would not bind any one hereafter who was not a party to this action, and who made a claim against the estate through the regular channel of administration. An action of this character is not a suitable and appropriate proceeding for ascertaining who the creditors are, and the most that it could definitely or finally determine was as to the rights of the parties themselves. It could not decide whether others had claims or not. This is the case of a purchaser of the real estate of the testator from his devisees, who, having gone into possession, pays up such debts as he wishes, or perhaps can find, and then, without administration, or any proof of these debts in the regular way, uses them to protect his title and possession, as prior claims against legatees who have liens under the will. The claims of creditors of a deceased person are preferred to those of his legatees or devisees, for the only interest in the testator's property that he could transmit to them was what remained after the payment of his just debts. *Platt v. Platt*, 105 N. Y. 488, 12 N. E. Rep. 22; *Rosseau v. Bleau*, 131 N. Y. 182, 30 N. E. Rep. 52. But the right of a creditor to resort to the real estate of his deceased debtor did not exist at common law, nor was the collection of debts from the real estate ever regarded as a part of the jurisdiction of courts of equity. *MacLaury v. Hart*, 121 N. Y. 636, 24 N. E. Rep. 1013. That right was conferred by statute, and it must be asserted and proved in the manner that the statute prescribes. Here the real estate of the deceased is directed to be sold for the payment of debts by the decree of a court of equity, without regard to any of the statutory steps that must precede such sale in the ordinary course of administration. It is supposed that the facts found by the referee permit this to be done. He has found that there

are no other debts and no other personal estate; but, as there was no one made a party to the action who represented the creditors or the personal estate, the finding, as already observed, can bind no one, except, possibly, the parties to the action themselves. We will not now stop to inquire whether a party to an action of this kind, who happens to be a creditor, can in any case assert his claim to the real estate of a deceased person in a court of equity when invited there for some other purpose, or when it is sought to charge the land with some other claim. Possibly it might be done in a case where the regular process of administration had reached the stage where real estate could be sold for the payment of debts, and an executor or administrator who could represent creditors and the personal estate was a party. It is not necessary to inquire how far and under what circumstances a court of equity would have jurisdiction in such a case. It is sufficient to say that a court of equity is not the tribunal appointed by law to administer upon the estates of deceased persons, and that part of the judgment in this case which virtually provides for the sale of the real estate of the testator for the payment of debts cannot be sanctioned without encouraging irregularities, and perhaps abuses, of the gravest kind, and which in the end might seriously affect the rights of parties interested in the estates of deceased persons. There can be no hardship in requiring creditors or their assignees to proceed in the regular way to appropriate real estate to the payment of debts. The statutory procedure is plain in itself, and obscure or doubtful questions have been solved by the decisions of the courts. *O'Flynn v. Powers*, 136 N. Y. 419, 32 N. E. Rep. 1085; *In re Powers*, 124 N. Y. 361, 26 N. E. Rep. 940; *Kingsland v. Murray*, *supra*.

We have not been referred to any authority that lends any sanction to the procedure adopted in this case, and it is believed none can be found. The referee and the counsel in the case all admit in some form that it is a departure from the regular and usual method of enforcing debts and legacies. While the plaintiff's action, in so far as it seeks to have the legacy charged upon the land, may be regular, it is difficult to see how it can be enforced by a sale without the presence on the record of the administrator of the deceased. The debt of Mrs. Allen is entitled to priority over the legacies, not by virtue of the mortgage, but only so far as she can maintain the status of a creditor of the deceased, or the assignee in equity of some claim enforceable against his estate. Though it is quite apparent that the parties on both sides have misconceived their rights, it may be desirable to save as much of what has been done as possible consistent with their interests. The judgment should be modified by providing for a sale of the real estate for the payment of the legacies, subject to the rights of creditors of the deceased and of persons who equitably represent creditors, to be paid out of the fund before the legatees, but only after the debts have

been duly established in the surrogate's court, and such proceedings had as will authorize proceedings for the sale of real estate for the payment of the debts of the testator; the sale and execution of the judgment to be stayed until such proceedings are had, without costs to either party. The order, unless agreed upon by the parties, to be settled by a judge of this court. All concur.

Judgment accordingly.

(128 N. Y. 532)

**CENTER v. WEED.**

(Court of Appeals of New York. June 13, 1893.)

**SPECIFIC PERFORMANCE—CONTRACT.**

Where defendant, who holds a secret legal title to land, induces others, by false representations as to the title, to accept a deed thereof, jointly with himself, from a third person, whom the other grantees believe has an interest therein by inheritance from his grantor, such false representations will be given contractual effect, and defendant will be bound, as by a promise which equity will enforce, to make good the title to the other grantees.

Appeal from supreme court, general term, fifth department.

Action by Ella Weed Center against James I. Weed to compel defendant to convey to plaintiff an undivided one-third interest in certain real estate. From a judgment of the general term (18 N. Y. Supp. 554) affirming a judgment for plaintiff, defendant appeals. Affirmed.

John D. Teller, for appellant. Chester M. Elliott, for respondent.

**MAYNARD, J.** The substantial relief which the plaintiff has secured in this action consists of a decree adjudging that she is the equitable owner of an undivided one-third of the real property described in the complaint, of which the defendant has the legal title, and directing that he convey to her the share to which she is thus entitled. The parties are children of Charles H. Weed, who died intestate in June, 1889, seised of three parcels of real estate, and leaving, besides these parties, a widow, two daughters, and a son, surviving him. At the time of his death his widow was the owner of a house and lot upon which the family resided, and known as the "Homestead Property." The daughters were all married, and lived away from home, but in or near the same village. The other son was an invalid, and unmarried, and died in February, 1890, intestate. The defendant was then 44 years of age, and unmarried, and had not lived at home since he was 16, but had frequently visited his parents, and was at the homestead when his father died, and remained there after his death, caring for the mother and the invalid brother. Mrs. Weed seems to have had a mother's love and affection for all her children, and her relations with them all were friendly and cordial, but she was especially fond of the defendant; and it is evident that she confided in him fully, and that he had the entire control and management of her affairs after her husband's death. She died March

28, 1890, also intestate. One of the pieces of real property owned by the father, and known as the "Eight-Acre Parcel," was in the possession of Mrs. Caroline Putnam, one of the daughters, who had occupied it since 1865, and who claimed that she had gone into possession under an agreement with her father, which had been performed on her part, that if she would live upon the property, and improve it, and make her home there, he would convey it to her, and it should be her property. Subsequently the father mortgaged the premises to the plaintiff's husband, which mortgage was outstanding when he died, and shortly after his death an action was brought to foreclose it, to which all his heirs at law were made parties defendant. Mrs. Putnam interposed a defense, setting up the agreement with her father, and claiming that by virtue of it she was the rightful owner of the property, and entitled to a deed free of all incumbrances. Various attempts were made in the lifetime of the mother to settle this controversy, in which the defendant actively participated. Mrs. Putnam finally proposed that if the other heirs would convey to her their interest in the eight acres she would pay off the mortgage, and convey to them her interest as heir at law in the other pieces of real estate owned by her father. It was shown that these pieces were worth from \$5,000 to \$8,000, and it has been found that Mrs. Putnam's lot, after paying off the mortgage, was worth \$1,650. If her proposition had been accepted she would thus have received nearly a full equivalent in value for the exchange which she had made. The plaintiff alone strenuously objected to a settlement on these terms, giving as her principal reason that both Mrs. Putnam and the other sister, Mrs. Gilmore, had received from the father, in his lifetime, advancements to the amount of several thousands of dollars in excess of what she had received, and that by this arrangement she would not be placed upon an equality with the other heirs. Pending the negotiations the mother died, apparently the owner of the homestead, and of the personal property, of the value of \$600; and the plaintiff, as one of her heirs at law, was entitled to an undivided one-fourth of whatever estate she may have left. Mrs. Putnam's suit was noticed for trial the following week, and the efforts for a compromise were renewed, in which the defendant was a prominent actor. He represented to the plaintiff that she ought now to be willing to accept of the terms proposed, because, by reason of the death of Mrs. Weed, she would become entitled to a share of her property, in addition to that which she had in her father's estate, or what she would acquire by the transfer from her sister. The plaintiff was still reluctant to consent to a settlement, and still claimed that she should receive more, in order to render her portion equal to that which the other heirs would receive. Mrs. Putnam then proposed to convey to the plaintiff and defendant and Mrs. Gilmore her interest in the homestead, which they all assumed belonged to the mother when she died, in addition to the two pieces of real

estate owned by the father; and the defendant urged the plaintiff to accept of this proposition, and stated to her that if she did she would have a one-third interest in the homestead, and her share of the personal property, and that his mother had not made any will, or any disposition of her property, that he knew of. The plaintiff then consulted with her attorney, Mr. William E. Hughitt, of Auburn, and intrusted him with the further management of the business. He had a conference with the defendant at the office of his attorney, in which he stated the terms of settlement, as he understood them, to which the defendant assented.

It is manifest that both the plaintiff and her attorney suspected that, owing to the confidential relations existing between defendant and his mother, she might have made a will in his favor, or conveyed her property to him; and the attorney, before leaving Auburn, examined the records of the clerk's office to see if any conveyance from her had been recorded, and found none. Mr. Hughitt stated to the defendant that the plaintiff understood that the mother had made no will, or any conveyance of her property, so that her children would take her estate under the law, and the defendant replied he supposed that was so. Again, while the preparation of the papers was in progress, the attorney, desirous of making sure of this point, went out, and found the defendant, and said to him the only uncertainty about the adjustment of the matter, and the only hesitancy he had about advising acceptance of the proposition for settlement, arose out of the possibility of Mrs. Weed's having made a will, or conveyed the homestead property; that the plaintiff had no idea that anything of the kind had been done; and that the other sisters knew of nothing of the kind; and the defendant replied, "Well, if she has done anything of the kind, I don't know it." Mr. Hughitt then said that under those circumstances he thought it was reasonably safe for him to say so to the plaintiff, and the defendant repeated the assurance he had given. These statements were communicated to the plaintiff through her husband, who was acting for her, and who directed Mr. Hughitt "to go ahead, and finish the papers, under those circumstances." A deed was then drawn, from the defendant and plaintiff and Mrs. Gilmore, to Mrs. Putnam, of the eight-acre parcel, and a deed from Mrs. Putnam, to the three, of the two other pieces of real estate belonging to the father, and of the homestead property. Defendant was present when the latter deed was drawn, and gave Mr. Hughitt the description of the homestead for insertion in the deed, in which it is also described as the same lands and premises owned and occupied by his mother at the time of her death. The deeds were completed late in the afternoon of April 8d, and given to the plaintiff to procure their execution. They were not executed the next day, because Mrs. Putnam desired to consult with her attorney before executing her deed, and there was some change to be made with respect to the furniture and household effects; but they were executed

and delivered the next day,—April 5th. On the afternoon of the 4th the defendant went to Auburn, and left with a friend, to be placed upon record as soon as the clerk's office was opened, on the 5th, a warranty deed executed by his mother July 24, 1889, conveying to him the homestead and all her personal property, with possession to be given at the death of the grantor. It was drawn by, and acknowledged before, the defendant's attorney. It recited a consideration of one dollar, and natural love and affection, and knowledge of its existence had been withheld from the plaintiff, and the other members of the family. The plaintiff testifies, and the referee has found, that she executed the deed to Mrs. Putnam upon the faith of the assurance given by the defendant that she should have a one-third interest in the homestead, and her share of the personal property, and relying upon his representations with respect to the title. It also appears that after the mother's death, and before the execution of the deeds, the sisters went to the house, and made an inventory of the personal effects, in the presence of the defendant, and without any objection from him, or any assertion on his part of exclusive ownership of them.

Upon these facts we think the plaintiff's right to the relief which she has obtained cannot be questioned. Without considering how far the representations of the defendant might conclude him, by way of an estoppel, an analysis of the transaction will disclose the presence of all the essential elements of a contract between the parties, which has been so far performed by the plaintiff that equity will decree its specific performance by the defendant. It was, in effect, an engagement by him that if the plaintiff would convey her interest in the eight-acre parcel to Mrs. Putnam, and thus secure for him, as well as for the plaintiff and Mrs. Gilmore, a conveyance from Mrs. Putnam of her interest in the residue of his father's estate, and of the homestead property, he would assure to the plaintiff the enjoyment of an undivided third of the homestead, and an undivided fourth of the personal property. There was implied in this assurance the obligation on his part to perform every act within his power which might be necessary to make his declaration good. If the mother had not conveyed or devised the property in her lifetime this obligation would have been fully met by the conveyance from Mrs. Putnam to the plaintiff and defendant and Mrs. Gilmore, but if the defendant had become possessed of the title it could only be discharged by a conveyance from him to the plaintiff of the share which he had undertaken to secure to her. We need not presume that when the transaction occurred he intended to perpetrate a fraud upon his sister. On the contrary, it may be inferred that he acted innocently when he made the representation, knowing that he had the power to fulfill its requirements, either by suppressing the deed which he had secretly taken, or by transferring to the plaintiff the portion which she expected, and he designed she should have. If he subsequently changed his mind, and sought to with-



hold that which he promised to bestow, it neither extinguished her right to demand, nor his duty to make, full performance. Had he put his representations in writing, under seal, virtually promising the plaintiff that if she would convey to her sister he would assure her the possession of a one-third interest in the homestead, to which he had the title, can it be doubted that equity would compel a specific performance when it appeared that the plaintiff had performed on her part, and that his promise had been the inducement of her act? The equitable rights of the plaintiff are not less potential because the undertaking of the defendant was oral. It may be admitted that the plaintiff expected that she would derive her title to the homestead by means of heirship from an intestate mother, conjoined with a conveyance from her sister as one of the heirs; but she had no reason to fear that this expectation would be disappointed, unless the defendant had procured from the mother a secret conveyance of the property, and hence she took the precaution to exact from him a guaranty that no such conveyance had been made. The material and controlling thing, upon which the minds of the parties did meet, was that she should have a one-third interest in that which was her mother's property, and which she then believed belonged to her estate; and the defendant knew that she had such belief, and he cannot, by the assertion of a title in himself, derived from the mother, defeat the fulfillment of his own agreement. The case shows, and the referee has found, that the statements and representations of the defendant were made to the plaintiff to induce her to consent to an adjustment of a controversy which obstructed the settlement of his father's estate. By reason of advancements made to the other sisters, plaintiff claimed that she was entitled to a larger share than the undivided one-fourth part. The defendant, in his testimony, admits that the plaintiff made this claim, and that in the last conversation he had with her, on March 8th, before the mother's death, she refused to consent to the settlement unless he made up the sum of \$500 in addition to the share she would have as heir at law. With the merits of her claim we are not concerned. It is sufficient that she made it, apparently, in good faith; that it stood in the way of the adjustment of the father's estate; that she was unwilling to forego it until she had received something more than her equal, undivided share, as heir at law; and that she did release it in the expectation of receiving an equivalent out of her mother's estate. The case is analogous, in its important features, to that of *De Herques v. Marti*, 85 N. Y. 609. The appellant there had a deed from her mother of a house and lot, and after her death, for the purpose of effecting a distribution of the estate, she agreed not to make any claim of title under the deed, but that it might be treated as a part of the mother's estate, and distributed accordingly. The agreement was enforced against her, Chief Judge Folger saying, (page 610:) "The effect is the same,—that for the purpose of bringing

about a settlement and distribution of her mother's estate, the house at Mantanzas is a part of the estate, and is so a part of the estate as if it had never been the appellant's; and the declaration of the appellant, whether it is to be taken as speaking of a prior agreement, then recognized and restated, or as of an agreement then first made, does show forth a contract that the appellant never had ownership, or absolute and sole interest in the property,—that is to say, a contract that she will so act then and thereafter as if she never, then or in the past, had ownership therein. It is an agreement founded on a good consideration, to wit, that she shall no longer be bound by the advancement; the amicable and speedy settlement and distribution of the estate, by which she got what she preferred,—that is, personal, rather than real estate,—and by which, the advancement being annulled, she got a share in that very Mantanzas property. To be sure, no contract could make it that she never had ownership of the property; but it could make it, and it was the purpose of the parties to make it, that, though she did once have ownership, that ownership was not to come into consideration in a settlement of the mother's estate. It was to go as if it never had been, and nothing was to be based upon the fact that it once existed."

In the present case we cannot regard the representations of the defendant in any other light than as the legal equivalent of a surrender by him of his right of exclusive ownership of the homestead under his deed, in exchange for the surrender by the plaintiff of her claim to an increased allowance out of the father's estate, and for the conveyance by her to Mrs. Putnam of the eight-acre parcel. The defendant, as well as the plaintiff, was a party to the Putnam suit; was a grantee with the plaintiff in the Putnam deed; was equally interested with the other heirs in effecting an adjustment of that controversy; and has received and accepted the benefits which have flowed from the execution of the conveyance by plaintiff; and the final adjustment involved the settlement of the rights of the parties to the mother's estate, equally with that of the father's. Under such circumstances we think it cannot be controverted that if a material representation is made by one party in regard to the subject-matter of the negotiation, upon which another party relies to his prejudice, and upon which it is intended that he shall rely, such representation will be given a contractual effect, and the party making it will be bound as by a promise to make it good. *Fry, Spec. Perf.* (3d Ed.) p. 146, § 297; *Piggott v. Stratton*, 1 De Gex, F. & J. 32. The judgment was sustained in the court below by the application of the doctrine of estoppel. There are difficulties in the way of upholding it upon that ground, to the full extent to which relief has been awarded, which we do not deem necessary to consider. We think the plaintiff's right to a recovery rests upon the broader foundation of a contract obligation, which the defendant should be required to perform, and for that reason the judgment is right,

and should be affirmed. All concur; ANDREWS, C. J., and EARL, J., vote for modification, by restricting the interest to be acquired by the plaintiff to one-twelfth of the homestead property.

(137 Ill. 234)

PEOPLE ex rel. GERMAN INS. CO. OF FREEPORT v. GETZENDANER et al.

(Supreme Court of Illinois. March 5, 1891.)

INTEREST — BONDS ISSUED IN AID OF RAILROAD COMPANIES—MANDAMUS—WHEN LIES.

1. Where bonds issued by a town in aid of a railroad company provided that the town should pay the principal to such company on a date specified, with 10 per cent. interest, payable annually on a certain date, on the delivery of the coupons severally thereto annexed, interest was payable thereon both before and after maturity, though no coupons were issued for interest to accrue after the maturity of the bonds.

2. 2 Priv. Laws 1869, p. 962, provides that any town so donating its bonds shall, by its proper corporate authority, annually thereafter assess and levy a tax upon the taxable property of such town, sufficient to pay and liquidate the annual interest on such bonds and so much of the principal thereof as from time to time shall become due, and such taxes shall be levied and collected as other corporate taxes of such town. *Held* that, when bonds have been so issued, a lawful debt is created against the town, and on failure of its officers to assess and levy a tax on its taxable property to meet such debt mandamus will lie to compel the levy and collection of the requisite tax to meet such indebtedness.

3. A contention that, because the county clerk, town collector, and county collector have not refused to collect such tax, mandamus will not lie against them, is without merit, in that the duty to pay is that of the town, and not of individuals, though that duty can only be performed by individuals, and in that it is the failure of the corporate body to perform its duty in that regard for which mandamus will be awarded.

Petition by the German Insurance Company of Freeport, holder for value of bonds issued by the town of Mt. Morris in aid of the Chicago & Iowa Railroad, for a peremptory writ of mandamus to compel such town to levy and collect taxes to pay such bonds, with interest thereon. Mandamus granted.

This is an original proceeding in this court for mandamus. The petition is as follows:

"To the Honorable the Supreme Court of the State of Illinois: Your petitioner, the German Insurance Company of Freeport, a corporation existing under and by virtue of the laws of the state of Illinois, whose principal office or place of business is at the city of Freeport, in Stephenson county, in said state, now here respectfully shows to this court that on the 30th day of March, A. D. 1869, the county of Ogle, in the state of Illinois, had theretofore been, and then was, duly organized under the township laws of said state, and that the town of Mount Morris had been created, and then was, one of the towns of said county, and that on that day there went into force and effect a certain act of the general assembly of said state chartering the Chicago and Iowa Rail-

road Company, which corporation thereafterwards organized, and proceeded to construct a railroad through said town of Mount Morris; that by the twelfth section of that act a special method of holding an election was prescribed, whereby towns, villages, or cities along or near where it was proposed by said railroad company to construct its railroad might aid such company by a donation of their bonds, and should issue to said railroad company their bonds, in such denominations as said company might designate, not less than \$100, and bearing interest as should be determined at such election, not to exceed ten per cent. per annum, payable annually, which bonds were to be signed by the supervisor and countersigned by the clerk in towns organized under the township organization law; and that when bonds had been so donated, for the purpose of paying the interest and principal thereof it was further by said section enacted that any town, village, or city so donating as aforesaid should, by its corporate authority, annually thereafter assess and levy a tax upon the taxable property of such town, village, or city sufficient to pay and liquidate the annually accruing interest on such bonds, and so much of the principal thereof as from time to time should become due, which taxes were to be levied and collected in the same manner as other corporation taxes in such town, village, or city; it being provided that for the payment of the principal thereof said tax should not exceed two per cent. per annum. (See 2 Priv. Laws 1869, p. 964.) That on the 30th day of June, A. D. 1870, pursuant to petitions made, among other things, setting forth that said bonds were to be made payable within ten years from the date of their issue, and to bear interest from the date of their issue at the rate of ten per cent. per annum, payable annually, and notices given under that act, an election was held in the said town of Mount Morris, whereby a donation of the bonds of that town to the amount of \$75,000 was voted to said railroad company, and on the faith of such donation said railroad company proceeded with the construction of their railroad through that town. That about the 30th day of June, 1870, the date when the donation of said bonds was voted, said railroad company commenced the construction of its road through said town, and carried forward that work up to and until the 11th day of November, 1871, when the road was very nearly completed. Meantime the issuance of bonds to the railroad company was awaiting the completion of the road, when, on the last-named day, before the bonds so voted had been issued, certain taxpayers—one Daniel J. Pinckney, John W. Hitt, Jacob Mauma, John E. McCoy, Milton Getzendaner, and John Sprecher, owners of real and personal estate situated in that town, which property they alleged was liable, in common with other taxable property in said town, to taxation for state, county, and township purposes—exhibited their bill in chancery in the Ogle county circuit court against said railroad company, the town

of Mount Morris, Charles Newcomer, its then supervisor, and Henry H. Clevidence, its then clerk, stating the said act chartering said railroad company, the organization of the company under said act, and that by the twelfth section it was provided that on the petition of twenty legal voters of the town along or near which it was proposed to construct the railroad, \* \* \* requesting an election to be held to determine whether such town should \* \* \* make a donation to that company, the town clerk should file such petition, and twenty days before holding the election should post notices stating the object of the election, and when it should be held; and it was further expressly provided that such election should be held and conducted, and returns thereof made, as was provided by the township organization law in towns organized under said law. It was further alleged in that bill that on the 9th day of June, 1870, a petition was received by Frederick B. Brayton, then town clerk of that town, praying that an election be held to determine whether that town would make a donation of \$75,000 of its bonds in aid of that company; that said town clerk posted notices for an election to be held on the 30th day of June, 1870. It was further charged that on that day voters assembled at the place mentioned in the notices, and between nine and ten o'clock in the forenoon said assemblage or meeting was called to order by said Frederick B. Brayton, acting as town clerk of said town, and thereupon one M. T. Roher was chosen moderator of said meeting, and during the continuance of said meeting acted as such moderator. That after said Roher had been sworn to faithfully and impartially discharge the duties of his said office the polls were then and there opened, and thereupon a portion of the voters of said town then and there present deposited their ballots for such donation; \* \* \* the remainder of the voters voting \* \* \* deposited their ballots against said donation. That the polls were kept open until six o'clock in the evening of said day. That a canvass of the votes cast showed a majority of fifty-seven votes for the donation, and return thereof was accordingly made to the proper officers. That the railroad company had since complied with the conditions with which it became entitled to the donation, and that the town officers were about to issue and deliver the bonds of the town to the railroad company, but it was alleged that if the bonds were so delivered they would find their way into the hands of innocent parties, so that those complainants and the other taxpayers of said town of Mount Morris would suffer irreparable injury. That to issue those bonds would violate the constitutional rights of the complainants and the other taxpayers of said town in that behalf, and was an attempt on the part of said railroad company and said town and its officers to deprive those complainants and the other taxpayers of said town of their property. \* \* \* and an attempt on the part of said parties to take the property of the complainants and the other taxpayers of

said town, and apply the same to a pretended public use, but, in fact, to a private use, without just compensation being made to the complainant and said other taxpayers therefor. It was further alleged that the notices posted for the election were void, in that they failed to fully state the object of the election and the rate of interest the proposed bonds were to bear, and that the notices contained other conditions and provisions not authorized by the act incorporating the railroad company, and were, consequently, void. It was further charged in that bill that all the ballots cast were illegal and void, in that the voters voting had no power to determine whether the town should make any donation, or to bind or obligate the town to make the donation or to issue its bonds, and that, in truth and in fact, there were no legal and valid votes or ballots cast at said election. The relief prayed was that the issue of said bonds be perpetually enjoined, and that the assessment or collecting of any taxes upon the taxable property in said town of Mount Morris to pay said bonds, or any part thereof, be perpetually restrained.

"On the 11th day of November, 1871, when the bill was filed, the property owners and taxpayers of the town of Mount Morris were very numerous, consisting of a great number of persons. Over four months afterwards the railroad company answered separately. The town, her supervisor, and clerk joined in their answer. In both these answers it was explicitly admitted that the method by which that election was held was that the town clerk called the meeting to order. One M. T. Roher was, by the legal voters present, chosen moderator, then sworn to discharge his duties as such; that the polls were then opened, the voters cast their ballots for and against the donation, and that the polls remained open until six o'clock in the evening, and that in this manner was the donation of \$75,000 voted, and that the company had in all respects fulfilled its obligations.

"On hearing that cause on its merits, the circuit court perpetually enjoined the town and its officers from issuing, and the railroad company or its agents from receiving, the bonds in question. Thereupon those defendants took that case by appeal to the supreme court of the state of Illinois, where, on a second hearing on the merits, the judgment of the circuit court was reversed, and the bill dismissed. Henry H. Clevidence, a party defendant in that bill, had meantime been succeeded as supervisor by John W. Hitt, who was a complainant therein. And your petitioner further shows that after the opinion of this court in that case had been filed, and while proceedings on rehearing were still pending, negotiations were begun for a settlement of the claim of the railroad company for the \$75,000 bonds. Communications in writing, dated November 14, 1874, signed by property owners and taxpayers in the town, were addressed to the complainants in that suit, advising a compromise with the company, and pledging the influence of the subscribers to induce the town to as-

sume the expenses of the litigation. Two of these communications were signed, respectively, by Reuben S. Marshall and Samuel Domer. At a special town meeting, held on March 19, 1875, resolutions were passed accepting a previous proposition made by the president of the railroad company to the town supervisor to take bonds to the amount of \$50,000 in lieu of the bonds amounting to \$75,000, agreeing that the town would pay all the expenses of that suit, amounting to \$1,600, and thanking their supervisor for his efforts in making the settlement. Afterwards, at the annual town meeting held on April 6, 1875, the proceedings of the special town meeting and the resolutions there adopted were fully ratified and approved.

"Your petitioner further shows that thereupon, in pursuance of said compromise, a series of fifty bonds of said town of Mount Morris, of the denomination of \$500 each, were duly made and executed, numbered from 1 to 50, both inclusive, and were each, in substance, as follows: 'United States of America, County of Ogle, State of Illinois. \$500. Mount Morris Town Bond. Know all men by these presents that the town of Mount Morris, in the county of Ogle, and state of Illinois, is indebted to the Chicago and Iowa Railroad Company in the full and just sum of \$500, which sum of money said town agrees and promises to pay on the 1st day of May, A. D. 1885, to the said Chicago and Iowa Railroad Company, or bearer, at the Third National Bank of Chicago, Illinois, with interest at the rate of ten per cent. per annum, payable annually on the 1st day of May, upon the delivery of the coupons severally hereto annexed, for which payment of principal and interest, well and truly to be made, the faith, credit, and property of the town of Mount Morris are hereby solemnly pledged, under authority of an act of the general assembly of the state of Illinois, entitled "An act to incorporate the Chicago and Iowa Railroad Company," approved March 30, A. D. 1869, and of a vote of the people of said town. This bond is one of a series numbering from 1 to 50, inclusive, for \$500 each, which bonds so numbered, together with another series numbering from 50 to 75, inclusive, for \$1,000 each, are the only bonds issued or to be issued by said town of Mount Morris under or by virtue of said act. In witness whereof the supervisor and town clerk of the said town of Mount Morris have hereto set their hands this 3d day of May, A. D. 1875. John W. Hitt, Supervisor. H. H. Clevidence, Town Clerk.' And that, in further pursuance of said compromise, another series of twenty-five bonds of said town, of the denomination of \$1,000 each, were also duly made and executed, numbered from 51 to 75, both inclusive, and are each, in substance, as follows: 'United States of America, County of Ogle, State of Illinois. \$1,000. Mount Morris Town Bond. Know all men by these presents that the town of Mount Morris, in the county of Ogle, and state of Illinois, is indebted to the Chicago and Iowa Railroad Company in the full and

just sum of \$1,000, which sum of money said town agrees and promises to pay on the 1st day of May, A. D. 1885, to the said Chicago and Iowa Railroad Company, or bearer, at the Third National Bank of Chicago, Illinois, with interest at the rate of ten per cent. per annum, payable annually on the 1st day of May, upon the delivery of the coupons severally hereto annexed, for which payment of principal and interest, well and truly to be made, the faith, credit, and property of the town of Mount Morris are hereby solemnly pledged, under authority of an act of the general assembly of the state of Illinois entitled "An act to incorporate the Chicago and Iowa Railroad Company," approved March 30, A. D. 1869, and of a vote of the people of said town. This bond is one of a series numbering from 51 to 75, inclusive, for \$1,000 each, which bonds so numbered, together with another series numbering from 1 to 50, inclusive, for \$500 each, are the only bonds issued or to be issued by the said town of Mount Morris under or by virtue of said act. In witness whereof the supervisor and town clerk of the said town of Mount Morris have hereto set their hands this 3d day of May, A. D. 1875. Jno. W. Hitt, Supervisor. H. H. Clevidence, Town Clerk.' And your petitioner further shows that said bonds so made and executed were by said town delivered to said railroad company, and that afterwards, and long before the maturity of said bonds, your petitioner, relying on the judicial sanction which said bonds had received by this court, for a good and valuable consideration purchased of and from said railroad company, of said \$500 denomination and series, the following bonds, to wit: Nos. 1, 2, 5, 9, 12, 14, 16, 21, 22, 23, 25, 27, 29, and 30 to 47, inclusive; and that at the time of purchasing said last above described bonds, for a like good and valuable consideration, your petitioner, before maturity thereof, purchased of and from said railroad company, of said \$1,000 denomination and series, the following bonds, to wit: Nos. 57, 65, 66, and 68 to 75, inclusive. And your petitioner further shows that each of said bonds so as aforesaid belonging to your petitioner had, when so purchased, attached to it ten coupons, each one of which coupons was for the payment annually of interest at the rate of ten per cent. per annum, accruing on the bond to which it was so attached, all of which coupons had been paid, except the last three thereof on each of said bonds of your petitioner; that all of said above specified bonds were sold as aforesaid, and delivered to your petitioner, and that the same have continued to be, and now are, the property of your petitioner; that the face amount thereof, exclusive of all interest thereon, is \$26,500, and that the other issued bonds of said town not so purchased by your petitioner were disposed of, as your petitioner is informed and believes, and so states, to various other persons.

"And your petitioner further shows that after said town of Mount Morris had, by annual taxation of the property therein,

paid the annually accruing interest on said bonds for a space of about seven years, on or about the 28th day of April, A. D. 1882, one John Harmon, (together with said Samuel Domer,) one David Fager, and said Reuben S. Marshall, being owners of property, both real and personal, in said town of Mount Morris, and residents of said town, exhibited in the circuit court of said Ogle county another bill in chancery in their own behalf and in the behalf of all the other taxpayers of the town of Mount Morris against your petitioner, together with other alleged holders and owners of said bonds, both known and unknown, the county treasurer of said county of Ogle, the county clerk of said county, and the auditor of public accounts of the state of Illinois, setting forth, in substance, among other things, the making, execution, delivery, and ownership, as aforesaid, of said bonds; that the supervisor and town clerk of said town had no power, right, or authority to issue said bonds; that they were wholly void, and not binding upon said town; that the issue of said bonds had not been authorized by a vote of the people of said town prior to the adoption of article 14 of the present constitution of the state of Illinois, nor had the issue of any bonds of said town to said railroad company, or for its use, been authorized in the manner provided in the act to incorporate said railroad company; that no election had been held in said town pursuant to said act, but that said instruments were executed and issued wholly without authority of law; and praying the collection of any tax or taxes upon the property of the complainants in that bill and the other taxpayers of said town, to pay said bonds or any part thereof, or the interest thereon, be perpetually enjoined, and that the holders of said bonds be perpetually enjoined from collecting, or in any manner attempting to collect, the same, or any part thereof, or any interest thereon, and that said bonds be decreed to be null and void, and that those complainants and the other taxpayers of said town be forever released and discharged from payment thereof and from further payment of any interest thereon, and that those complainants might have such other and further and such further and different relief in the premises as should be agreeable to equity, and praying a writ of injunction to all the aforesaid ends,—which injunction was by said circuit court allowed, and served upon your petitioner and said other defendants. And by an amendment to the last-mentioned bill a further ground against the validity of said bonds was alleged, to wit, that they exceeded the constitutional limitation to which said town could become indebted, and that said bond had been voted on condition that said town should have the benefit of the act of the general assembly of the state of Illinois approved April 16, 1869, commonly called the 'Grab Law,' but that said act contravened the constitution of said state, whereby such benefit had been wholly lost to said complainants.

"And your petitioner further shows that it filed its answer to said last-mentioned

bill and amendment thereto, among others, denying, all and singular, all the allegations impeaching said bonds therein, as aforesaid alleged, and setting forth that it had purchased the hereinbefore specified bonds for a good and valuable consideration, relying, among other things, upon the judicial sanction which the said bonds had received by the then said former judgment of the supreme court of the state of Illinois upon the validity of the power to issue the same, and pleading and setting up the said first hereinbefore mentioned proceedings and decree in estoppel and bar of that said second bill. And your petitioner further shows that thereupon such proceedings were had in said circuit court of Ogle county that eventually, on a hearing of the merits thereof, said last-mentioned injunction was dissolved, and said bill dismissed, whereupon the complainants therein prosecuted their appeal to the appellate court in and for the second district of said state, whereby said injunction was continued, and wherein such proceedings were had that the decree of said circuit court in that behalf was, on the hearing on the merits, affirmed, whereupon a further appeal was by those said complainants prosecuted to the supreme court of said state, whereby said injunction was further continued in full force, and where such proceedings were had that, by the consideration and judgment of such court, said judgment of said appellate court was, on full hearing on its merits, finally affirmed, and an opinion of said court rendered therein, a copy of which opinion is herewith appended, marked 'Exhibit A,' and is made part hereof; but that said complainants thereupon filed their petition for a rehearing in said supreme court, which petition was finally denied at the March term thereof, A. D. 1888. And your petitioner further shows that it has long since cut off, sold, assigned, transferred, and delivered to third persons the unpaid coupons which were attached and belonged to its said several bonds, so that, by reason of the premises, there now remains due and unpaid but the principal sum or face amount of each and every one of its said bonds, with interest thereon from the 1st day of May, A. D. 1885, at the rate of ten per cent. per annum. And your petitioner had well hoped that upon the termination of said last-mentioned litigation said town of Mount Morris, and the proper corporate authorities thereof, would have paid the interest and principal of said bonds so belonging to your petitioner, and have levied a tax for that purpose, according to law, but now so it is that the voters of said town, well knowing the premises, at the annual town meeting of said town held on the 3d day of April, A. D. 1888, passed a resolution, and placed the same on the records of said town, to the effect that it was the sense and will of that meeting that the town of Mount Morris pay only the face of said bonds; and the board of town auditors of said town of Mount Morris, well knowing the judgments in the aforesaid respective cases have been finally rendered against said town, have combined and conspired, together with other officers

whose duty it was to act officially in raising money by taxation to pay said bonds, to enable said town to evade the payment thereof, and in furtherance of said combination and conspiracy the said board of town auditors have neglected and disregarded their duty under the law to audit said bonds so belonging to your petitioner, or any of them, or any part thereof, and to certify to the same, so that the town clerk of said town might certify the same to the county clerk of said county, and the amount necessary to pay said bonds might be levied and collected of the taxable property in said town.

"And your petitioner further shows that on the 1st day of September, A. D. 1888, said Milton E. Getzendaner was, has continued to be, and still is, the supervisor of said town of Mount Morris; Andrew Shecter was, has continued to be, and still is, the town clerk of said town; John Weller and said Samuel Fagar were, have continued to be, and now are, the justices of the peace of and resident in said town; James D. Hayes was, has continued to be, and still is, town collector of said town; Henry P. Lason was, has continued to be, and still is, county clerk of said county; and James C. Feiler was, has continued to be, and still is, county treasurer and county collector of said county of Ogle. And your petitioner further shows that on the 4th day of September, A. D. 1888, at the semi-annual meeting of the board of town auditors of the said town of Mount Morris, your petitioner presented to said board its account against said town for the principal sum of your petitioner's said bonds, and the interest thereon since the maturity of its said bonds, at the rate of ten per cent. per annum, up to that date, and also then and there, in support of its said claim, produced and exhibited its said bonds to said board, and requested and demanded of said board that it should audit and allow the same in favor of your petitioner as a claim against said town, but said board then and there neglected and refused to allow the same; and that it was the duty of said board to have made a certificate, to be signed by a majority of said board, specifying the nature of your petitioner's claim, and to whom the amount thereof was allowed, and to have caused such certificate to be delivered to the town clerk of said town, so that the aggregate amount of the claim of your petitioner could, by the proper authority of said town, be certified to the county clerk of said Ogle county, at the same time and in the same manner as other amounts required to be raised for town purposes, to be levied and collected as other town taxes. And your petitioner further avers and charges that said town has very little, if any, money on hand—less than, to wit, \$1,000—which could be used toward the payment of said bonds, or any part thereof, so belonging to your petitioner, and that it is absolutely necessary that proceedings by mandamus should be taken against said town and the county officers whose duty it is to act officially in levying and collecting taxes to pay said bonds of your petitioner, to compel them to proceed, according to law, to levy and collect

a tax to pay the said bonds of your petitioner, or else they will continue to neglect and avoid their duty in respect thereto. And your petitioner further shows that no taxes whatever have been levied or collected since the year A. D. 1882 to pay any interest on the bonds of your petitioner and that not one dollar of interest or principal has been paid on its said bonds for the last six years, but that said town and its officers and a large portion of its taxpayers have been, and now are, since the supreme court of said state has repeatedly decided in favor of the validity of said bonds, resisting and opposing the collection and payment of said bonds and interest thereon, by means of which they hope to successfully repudiate said indebtedness of said town, or a portion thereof, by means whereof your petitioner has been and is deprived of the money due it on its said bonds, and has no adequate remedy, except by mandamus proceedings, against the officers of said town of Mount Morris and of the county of Ogle, whose duty it is to levy and collect taxes upon the taxable property in said town of Mount Morris to pay said bonds; and, unless your petitioner can obtain aid and redress by this method, it will sustain a loss to a large amount, to wit, to the amount of at least \$40,000.

"Your petitioner further shows that said town of Mount Morris in territory is to the extent of a full congressional township of land, and that the property therein, real and personal, subject to taxation, was by the state equalized valuation for the year A. D. 1882 of the value of \$629,678, by the state equalized valuation for the year A. D. 1883 of the value of \$638,106, by the state equalized valuation for the year A. D. 1884 of the value of \$617,328, by the state equalized valuation for the year A. D. 1885 of the value of \$547,652, by the state equalized valuation for the year A. D. 1886 of the value of \$511,659, by the state equalized valuation for the year A. D. 1887 of the value of \$509,955, by the state equalized valuation for the year A. D. 1888 of the value of \$519,290. Your petitioner further shows that on the 1st day of May, A. D. 1885,—the maturity of its said bonds,—and on the 1st day of each May thereafter succeeding, until the thereafter annually accruing interest upon its said bonds, and the principal thereof, should have been fully paid and satisfied, your petitioner was entitled to have, upon the taxable property of said town as the same was so annually equalized, a tax collected for its benefit, not exceeding two per cent. per annum; and your petitioner here claims that by reason of the premises it is now here entitled to aggregate said several annual taxations, as the same should have been, but were not, collected and paid to it, and have all of the same levied and collected at one and the same time, to apply on said bonds of your petitioner. Your petitioner therefore now here prays that your honors may award a writ of mandamus, at the suit of the people of the state of Illinois upon the relation of your petitioner, to issue out of this court, directed to the board of town auditors of the said town of Mount Morris, the

town clerk of said town, the county clerk of the county of Ogle, the town collector of said town of Mount Morris, the supervisor of said town, and the county collector and county treasurer of said Ogle county, commanding them, and each of them, respectively, to do every act and thing devolving upon them by law as such officers for the levy, collection, and payment of a tax sufficient to pay said bonds, besides interest thereon since said 1st day of May, A. D. 1885, at the rate of ten percent. per annum; and particularly that said board of town auditors of said town of Mount Morris may be commanded forthwith to audit and allow said bonds so belonging to your petitioner as a claim against the said town of Mount Morris in favor of your petitioner, and to make, sign, and deliver to the town clerk of said town a proper certificate thereof, as required by the township organization acts in reference to claims audited and allowed against towns, specifying the nature of said claim, and to whom the amount is allowed, and to do each and every act and thing in reference to said bonds of your petitioner that the township organization law requires of them in reference to lawful claims against said town, so as to put the same as quickly as possible in process of payment by the levy and collection of a tax therefor; and also particularly commanding the town clerk of said town of Mount Morris to properly file in his office the claim of your petitioner against said town, founded on said bonds so belonging to your petitioner, when the same shall have been audited and allowed by the board of town auditors of said town, and certified to him by said board, and then immediately to certify the amount thereof, or so much thereof as may by law be annually assessed and collected upon said claim of your petitioner, together with any other charges and demands which it is his duty to certify, to the county clerk of said Ogle county, at the same time and in the same manner as other amounts required to be raised for town purposes, and commanding him to do every act and thing in reference to said bonds of your petitioner which is required of him by law in reference to other audited claims against the town, so as to enable the amount thereof to be levied with the levy made in the year 1888 for town purposes, and collected with the town taxes in said year; and also particularly commanding the clerk of said Ogle county to estimate and determine the rate per cent. upon the proper valuation of property in said town of Mount Morris in the year 1888 that will produce an amount sufficient to pay said bonds so belonging to your petitioner, and the interest thereon, and then to extend the same upon the same book upon which he extends other town taxes of said town of Mount Morris levied in the year 1888, and commanding him to include the collection thereof in his warrant to the collector of said town of Mount Morris; and also commanding said county clerk of Ogle county to do every act and thing in respect to the levy, assessment, extension, and collection of a tax to pay said bonds

of your petitioner that the law requires of him in reference to other similar claims against said town certified to him by the town clerk, according to law; and also particularly commanding the town collector of said town of Mount Morris to collect the tax extended by the county clerk of said Ogle county upon the collector's books for said town of Mount Morris, so far as he is able to do so, and, if he does not succeed in collecting the same, to make a proper return to the county collector of the amount uncollected, as in case of other taxes which he is unable to collect, and as the law requires, and to do every act and thing in respect to said tax for the payment of said bonds which the law requires of him in reference to any other tax levied to pay a claim against said town; and also particularly commanding said county treasurer and collector of the county of Ogle to collect all of said tax levied and assessed to pay said bonds which may be reported or returned to him as unpaid by the town collector of said town of Mount Morris, or, in case the same is not collected by him, and he then proceed and sell the delinquent property upon which the said tax remains unpaid, after having taken all the preliminary steps required of him by law to entitle him to sell delinquent property, and commanding him to do every act and thing in reference to such tax which the law requires of him in respect to any other unpaid tax levied to pay a town claim; and also particularly requiring the supervisor of said town of Mount Morris to pay to your petitioner, for the satisfaction of its said bonds, all money that may come into his hands from the collection of said tax levied to pay said bonds and interest thereon. That, in case it shall appear, upon the return day of the summons issued herein, that the board of town auditors of said town of Mount Morris have neglected at their semiannual meeting holden on the 4th day of September, 1888, to audit and allow and properly certify the amount due on said bonds of your petitioner to the town clerk of said town as a claim against said town, or in case it shall appear that the said town clerk has neglected or evaded properly certifying said claim to the county clerk of said Ogle county, then, in such case, your petitioner prays that, pursuant to the law in such case made and provided, it may be awarded a judgment for \$1,000 damages against the officers, or each and every of the officers, so delinquent, besides being allowed a peremptory mandamus commanding the officer or officers so delinquent to forthwith perform the duties so neglected by them. And your petitioner also prays for such other and further or different and other relief in the premises as the nature and exigencies of its case may require, and as shall to your honors seem meet."

J. A. Crain, for relator. Rector C. Hitt and Brewer & Strawn, for respondents.

SCHOLFIELD, C. J. That the bonds described in the petition were lawfully issued, and are now binding obligations of



the town, is settled by *Railroad Co. v. Pinckney*, 74 Ill. 277, and *Harmon v. Auditor*, 123 Ill. 122, 13 N. E. Rep. 161, and questions in that respect are no longer open to discussion. The only question affecting the amount due to the petitioner from the town, not settled by the decisions in those cases, relates to interest upon the bonds after due. The language of the bonds respecting interest is the town shall pay the principal "on the 1st day of May, A. D. 1885, to the said Chicago and Iowa Railroad Company, or bearer, at the Third National Bank of Chicago, Illinois, with interest at the rate of ten per cent. per annum, payable annually on the 1st day of May, upon the delivery of the coupons severally hereto annexed," and the contention on behalf of the respondents is, inasmuch as no coupons were issued for interest to accrue after the maturity of the bonds, it was not intended the bonds should bear interest after their maturity. We are committed to a contrary rule. In *Phinney v. Baldwin*, 16 Ill. 108, the question was whether a promissory note, payable 30 days after date, and bearing interest from date at the rate of 5 per cent. per month, bore that rate so long as the principal remained unpaid; and it was held that it did. This ruling was reaffirmed in *Etnyre v. McDaniel*, 28 Ill. 201, and it was followed by the supreme court of the United States in *Ohio v. Frank*, 103 U. S. 697, where the question was whether a township bond, payable at a time mentioned, with interest from date at a specified rate, bore the same rate of interest after maturity, in the absence of an express promise to that effect; and it was held that it did. *Pruyn v. City of Milwaukee*, 18 Wis. 367, is, so far as concerns this question, precisely analogous to the present case, and it was there ruled that the bonds bore the agreed rate of interest after as well as before maturity, and notwithstanding no coupons were issued for that interest. It was, among other things, said in the opinion: "It is said that the bonds in this case were made payable on a specified day, 'together with interest thereon at the rate of ten per cent. per annum, payable annually, on presentation of the annexed warrants,' and that this language manifests an intention of the parties that the rate of interest stipulated should cease on the maturity of the bonds. We confess we are unable to discover any such intention or design, express or implied, in this language. By the clause in the bond above cited the parties provided for the payment of interest annually at the rate specified on the presentation of the coupons. Quite likely the parties expected the bonds would be paid at maturity; but, if it were not so paid, we have no manner of doubt but that it was expected and intended that the bond should draw interest at ten per cent. until paid." See, also, *Tied. Com. Paper*, § 412, and causes cited in note 3; *Jones, Corp. Bonds*, § 260, and cases cited.

But it is contended on behalf of counsel for respondents that, conceding the relation is lawfully entitled to the amount claimed in its petition, yet, inasmuch as its claim has never been reduced to a judg-

ment, it is not entitled to proceed by mandamus. It is provided in the twelfth section of the act to incorporate the Chicago & Iowa Railroad Company (2 Priv. Laws 1869, p. 962) that "any town \* \* \* so \* \* \* donating its bonds shall, by its proper corporate authority, annually thereafter assess and levy a tax upon the taxable property of such town \* \* \* sufficient to pay and liquidate the annually accruing interest on such bonds, and so much of the principal thereof as from time to time shall become due, which taxes shall be levied and collected in the same manner as other corporate taxes in such town." There is, therefore, here presented a lawful debt against the town, for the payment of which it is the duty of its proper officers to assess and levy a tax upon the taxable property of the town, and the failure of those officers to perform that duty; and it is clearly settled by the weight of authority that mandamus lies in such case to compel the levy and collection of the requisite tax, and its payment to the lawful holders of the indebtedness. *Maddox v. Graham*, 2 Metc. (Ky.) 56; *Shelby Co. v. Cumberland, etc., R. Co.*, 8 Bush, 209; *Commissioners v. Aspinwall*, 24 How. 376; *Com. v. Pittsburgh*, 34 Pa. St. 436; *Com. v. Commissioners of Allegheny Co.*, 37 Pa. St. 277, 82 Pa. St. 218; *State v. Commissioners of Clinton Co.*, 6 Ohio St. 288; *Pegram v. Commissioners*, 64 N. C. 557; *Commissioners v. King*, 18 Fla. 451; *Robinson v. Supervisors*, 43 Cal. 353; *Commissioners' Court v. Rather*, 43 Ala. 433; *Commissioners v. Bailey*, 11 Kan. 631; *State v. Anderson Co.*, 8 Baxt. 249; *Flagg v. Mayor*, 38 Mo. 440; *People v. Mead*, 24 N. Y. 114. The cases cited by counsel for respondents from the Reports of the United States courts (*Jerome v. Commissioners*, 18 Fed. Rep. 873; *County of Green v. Daniel*, 102 U. S. 187; *Davenport v. County of Dodge*, 105 U. S. 237; and *Chickaming v. Carpenter*, 106 U. S. 663, 1 Sup. Ct. Rep. 620) rest upon the fact that the circuit courts of the United States are creatures of statute, and have only so much of the judicial power of the United States as the acts of congress have conferred upon them; and those acts have conferred upon them no power to issue writs of mandamus as an original proceeding, but they are empowered to issue them only when such writs are necessary to the proper exercise of their existing jurisdiction, as in the enforcement of judgments at law against municipal corporations. See *Bath Co. v. Amy*, 13 Wall. 244; *High, Extr. Rem.* § 302. In *Rogers v. People*, 68 Ill. 154, cited by counsel for the respondents, the statute prescribed a specific mode for the collection of the judgment against the school directors, which was adequate, and held to be exclusive, and so mandamus would not lie. In *Coy v. City of Lyons*, 17 Iowa, 7, also cited by counsel for respondents, the ruling is simply that, "where a debt remaining in its original form as a simple contract debt, the creditor has no legal right to a mandamus to compel the city to levy and collect a tax for its payment, unless the debt is contracted under a special law or vote authorizing such proceeding to enforce payment; but where the debt has

been reduced to judgment there is then devolving upon the city authorities a perfect legal duty and obligation to provide for its payment." There was a like ruling in this court in *People v. Clark Co.*, 50 Ill. 214, where it was sought by mandamus to compel the levy and collection of a tax for the payment of a county order drawn upon the general revenue fund, and it was held that mandamus would not lie, but that the holder of the order must first reduce it to judgment. In such cases no single general creditor has a right to any previously ascertained specific part of the general revenue, and there is, moreover, judgment and discretion to be exercised by the municipal authority with respect to the purpose and amount of general revenue which they shall annually cause to be collected by taxation upon the taxable property of the municipality; and they are therefore in no wise analogous in cases like the present, where there is a specific duty to levy and collect taxes for the payment of particular debts, in which there is neither judgment nor discretion to be exercised by the municipal authority. We have often held that to authorize a mandamus to be issued the petitioner must show a clear legal right. *People v. Forquer*, *Beecher's Breese*, 104; *People v. Chicago & A. R. Co.*, 55 Ill. 95; *People v. Glann*, 70 Ill. 232; *People v. Village of Crotty*, 93 Ill. 180; *Lavalle v. Saucy*, 96 Ill. 467; *People v. Dulaney*, Id. 503. And all of the cases cited by counsel for the respondents which we have not herein commented upon belong to this class,—the facts were not admitted, and the amount and the right involved presented an issue of fact. "It is not the province of mandamus," says High in his work on Extraordinary Remedies, (2d Ed., § 339,) "to settle the differences of opinion between municipal authorities and claimants as to the amount due for services rendered. All such cases of disputed accounts or claims against the municipality should be referred to the arbitration of a jury, or to the ordinary process of the courts, and they cannot be determined by proceedings in mandamus." See, also, *Burnet v. Auditor*, 12 Ohio, 54, and *Com. v. Commissioners of Allegheny Co.*, 16 Serg. & R. 317, cited by the author in support of his statement. But there are here no facts in dispute. The allegations of the petition are admitted by the demurrer to be true, and the only contention is in regard to a conclusion of law, as to which, in our opinion, there is no doubt, and the case is therefore clearly within the authority of *Maddox v. Graham* and other cases cited *supra*, holding that mandamus will lie.

It is further contended by counsel for the respondents that, as to the county clerk, town collector, and county collector, (treasurer,) mandamus will not lie, because it is not made to appear that those officers, or either of them, have or has, up to this time, refused to extend, collect, or take any steps required of them or either of them, by law, in reference to the matter in dispute. This loses sight of the controlling fact here,—that the duty

to pay is that of the town as a corporate body, and not of individuals, although that duty can only be discharged through the acts of individuals. The failure to pay is that of the corporate body, and it is because of that failure only, and to compel the performance of the corporate duty in that respect, that a mandamus will be awarded. Were a like duty required to be performed by a natural person instead of an artificial person, under such circumstances that mandamus would lie, no one would suppose it necessary to prosecute a separate suit to enforce the performance of each distinct step necessary in the collection and paying over of the money; and yet there can, in theory, be no difference between a natural and an artificial person in this respect. The different officers appointed by law as the agencies and instrumentalities through which corporate action shall be taken are to the corporate body but as the members of the natural person, through which he or she can alone act, are to that person; and in either case, to coerce action of the parts it is only necessary to inquire, is there a right to coerce action of the person, either natural or artificial, the person being responsible for the failure to act? It would, therefore, in the present case, doubtless have been sufficient to have filed the petition against the town, without naming individuals, to have obtained a peremptory mandamus to each of the agencies and instrumentalities through which it must act to make payment of the claim due the relator; but it was competent to make the individuals whose duty it is to act parties, as was here done. *Village of Glencoe v. People*, 78 Ill. 386; *Sheaff v. People*, 87 Ill. 189. But it is obviously, in either event, the action of a corporate body, and not the action of natural persons as such merely that is to be enforced. The question involved in this contention of counsel for the respondents is exhaustively discussed, and decided against them, in *Labette County Com'rs v. U. S.*, 112 U. S. 223, 5 Sup. Ct. Rep. 108. See, also, *Farnsworth v. Boston*, 121 Mass. 173; *Attorney General v. Boston*, 123 Mass. 463; *King v. Mayor of Tregony*, 8 Mod. 111.

The person acting as town clerk was not personally served with the summons. It is claimed, and with some show of reason, that he avoided personal service, in order to defeat the awarding of the peremptory writ. We do not think it necessary to inquire into this, and ascertain what is the fact. All of the town auditors except the town clerk were personally served. It is competent for them to proceed to act, and if, when they do so, the town clerk shall be absent, and not performing the duties of his office, it will be their duty to declare the office vacant, and to appoint a town clerk in his stead, (2 Starr & C. St. c. 139, art. 10, §§ 1, 2; *Id.* art. 13, §§ 1, 2;) and the same is true with regard to any other members of the board. The demurrer is overruled, and judgment is rendered awarding a peremptory writ, as prayed in the petition.

Mandamus awarded.

(7 Ind. App. 104)

## GISH v. GISH.

(Appellate Court of Indiana. May 26, 1893.)

RECORD ON APPEAL—QUESTIONS PRESENTED—BILL OF EXCEPTIONS—SUFFICIENCY—FILING—SUFFICIENCY OF EVIDENCE—ACTION ON NOTE—COMPLAINT—SUFFICIENCY—NEW TRIAL.

1. Where the original bill of exceptions upon a ruling denying a new trial is incorporated into the record, instructions given on the trial are not properly in the record, and no question arising thereon can be reviewed, since to bring the instructions before the appellate court the clerk must copy the original bill into the record.

2. Where a bill of exceptions is taken for the purpose of getting the evidence into the record, the original bill may be made a part of the record.

3. Where a bill of exceptions shows that it was presented to the judge within the required time, the time of filing is immaterial.

4. An omission of the word "given" in the statement, "And this was all the evidence in the above-entitled cause," is not fatal to a bill of exceptions.

5. The absence of an independent record entry showing the filing of a bill of exceptions containing the evidence is not fatal if it otherwise affirmatively appears in the transcript that the bill was duly filed.

6. The record need not show that the judge judicially determined that a bill of exceptions was correct, or that the stenographer's notes were made a part of the bill by his act.

7. The omission from a bill of exceptions of certain evidence introduced on the trial precludes the consideration on appeal of any question arising on such evidence.

8. Where a bill of exceptions purports to bring all the evidence before the appellate court, the omission of any part thereof is fatal.

9. A new trial on the ground of newly-discovered evidence will not be granted where the affidavits are conflicting, the newly-discovered evidence cumulative, and due diligence is not shown.

10. Where the complaint in an action on a note, after describing the note, alleges that "a copy is herewith filed," and immediately following is a copy of the note, marked "Exhibit," the reference to the copy of the note is sufficient.

Appeal from circuit court, Cass county; D. B. McConnell, Judge.

Action by David Gish against Elizabeth Gish on a promissory note. Judgment for plaintiff. Defendant appeals. Affirmed.

Magee & Funk, for appellant. Gould & Eldridge, for appellee.

DAVIS, J. This was an action by appellee against appellant on a promissory note. Issues were joined, and the cause was submitted to a jury for trial, and on verdict in favor of appellee judgment was rendered against appellant for \$905 on the 24th of February, 1892.

Several errors are assigned, but the only errors discussed are that "the court erred in overruling the appellant's motion for a new trial," and in overruling motion in arrest of judgment. It is a well-established rule of practice in this court that errors which are not discussed are regarded and treated as waived. *Mahoney v. Gano*, 2 Ind. App. 107, 27 N. E. Rep. 315. In a brief filed in behalf of appellee on the 30th of December, 1892, it is earnestly contended that no question is presented on the first error discussed for our consideration,

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because the evidence is not in the record. No reply has been filed to this brief. We are therefore first required to determine whether the record brings before us for decision any question in regard to the merits of the controversy. The record on the day the judgment was rendered recites, "And 180 days are allowed the defendant in which to file bill of exceptions." Afterwards, on the 9th of March, an appeal bond was filed and approved. Immediately following the bond there appears the following entry: "Be it remembered, \* \* \* the following proceedings were had," etc. Then come the instructions. The instructions are not preceded by any formula for the beginning of a bill of exceptions. In conclusion, however, there is the usual formal ending of an ordinary bill of exceptions. There is no record or independent entry or statement, except in the clerk's certificate, showing the filing of the instruction or bill of exceptions, but it is recited in the formal conclusion above referred to that the bill of exceptions was presented to the judge on the 8th of August, and that it was signed on the 22d, and the stamp of the clerk indicates that it was filed on the 23d of August, 1892. Immediately following the signature of the judge thereto, and without any preliminary entry, statement, or memorandum showing the filing thereof, there is attached to and included in the transcript a bill of exceptions containing the evidence, in which it is recited in conclusion, "the foregoing being all the evidence in the above-entitled cause." This bill, as it appears therein, was presented to the judge on the 8th of August, signed on the 22d, and, as shown by the file mark, was filed on the 23d of August, 1892. The certificate of the clerk at the conclusion of the transcript is as follows: "The State of Indiana, County of Cass—ss.: I, Charles W. Fisk, clerk of the circuit court of Cass county, Indiana, hereby certify that the foregoing is a full, true, and complete copy and transcript of all entries made and all papers filed in the above-entitled cause, as appears from the records made and papers filed in said cause, now on file in my office, together with and including the defendant's original bill of exceptions number one, filed in my office August 23d, 1892, containing and being all the instructions given in said cause, and exceptions thereto, and signature of the judge; and further including defendant's original bill of exceptions number two, containing and being the longhand manuscript and transcript of the shorthand notes of the evidence given in said cause, taken, made, and transcribed by Jesse Taber, whom I hereby certify to have been at the time of said trial, and who has ever since been, and is now, the official stenographer and reporter of said Cass circuit court. Witness my hand and the seal of said court, at my office at Logansport, Cass county, Indiana. [Seal.] C. W. Fisk, Clerk." It clearly appears in this case that neither of the bills of exceptions so filed by appellant had been copied by the clerk. The original bills are incorporated in the transcript, and brought here as part of the record. The course adopted, so far as the evidence in the long-

hand manuscript of the reporter is concerned, is the proper practice, and in this respect the evidence as taken down and transcribed by the stenographer is in bill of exceptions No. 2. In order, however, to bring bill of exceptions No. 1, containing the instruction, before this court, such bill should have been copied by the clerk. Elliott, C. J., in a recent case, says: "We adjudge the better rule to be this: When a bill of exceptions upon a ruling denying a new trial is taken for the purpose of getting the stenographer's report of the evidence, with its incidents, into the record, the original bill may be certified up to this court as part of the record. All there is of such a bill, besides the report of the evidence, is composed of formal parts and brief recitals, so that little would be left to be copied if the report of the evidence were taken out. Confusion is avoided by sending up the bill without detaching the evidence, and only a very little matter outside of the report of the evidence comes up in its original condition. It is much more consistent with principle, and much safer, to require the entire original bill to be certified, than it is to devolve upon the clerk the duty of determining what shall be left in and what taken out. The rule we here declare enables parties to get the longhand manuscript into the record without incurring the useless expense of having it copied, prevents confusion in the record, and gives fair and reasonable effect to the statute concerning official shorthand reporters. But the rule we declare does not have, and cannot be made to have, any application to any other bills of exceptions except such as are prepared for the purpose of bringing into the record the longhand manuscript of the official reporter, and its necessary incidents. All other bills of exceptions must be copied by the clerk. Nor can the rule apply to a bill of exceptions wherein other matters than the longhand report and matters legitimately connected therewith are sought to be brought into the record. In order to come within the rule stated, the bill of exceptions must be confined to the single office of exhibiting the report of the evidence and the matters directly and properly pertaining thereto." *McCoy v. Able*, 131 Ind. 417, 30 N. E. Rep. 523, and 31 N. E. Rep. 453. Under the rule above enunciated, the instructions in the case in hand are not properly in the record, and no question arising thereon can be considered or determined by us. This because the original bill was incorporated in the transcript.

The question remains whether the bill of exceptions containing the evidence is properly in the record, and, if so, whether it contains all the evidence given on the trial of the cause. It is insisted, among other things, that the bill of exceptions was not filed within the time fixed by the court. Conceding this to be true, it does appear in the body of the instrument, preceding the signature of the judge, that it was presented to the judge within that time, and as to this point such presentation was sufficient. In the case cited *supra* the court says: "As the law now stands, the time of the filing is not of controlling

importance, for the presentation of the bill to the judge, if shown in the body of the instrument, controls the question."

It is also insisted that the omission of the word "given" in the statement, "And this was all the evidence in the above-entitled cause," is fatal. We cannot concur with counsel on this proposition. The use of the word "given" is not indispensable or essential. The correct rule is thus stated by Judge Zollars: "In order that this court may pass upon the evidence, the record must affirmatively show that it contains all of the evidence given below. Any statement in the bill of exceptions that will show that fact will be sufficient." *Beatty v. O'Connor*, 106 Ind. 81, 5 N. E. Rep. 880. See section 823, Elliott, App. Proc. and authorities there cited.

It is contended by counsel for appellant that, in the absence of an independent record entry showing the filing of the bill of exceptions, the bill of exceptions containing the evidence cannot be considered as a part of the record on this appeal. The decisions in this state are not, as we view them, in all respects harmonious on the question as to what is essential to show that a bill of exceptions containing the evidence is properly a part of the transcript of the record on appeal. Judge Elliott says: "A bill of exceptions, although signed, is not a part of the record until it is filed. A record entry must be made showing its filing and the date. It has been held in many cases that the filing must be shown by an independent record entry, and that it cannot be shown by a recital in the bill." Elliott, App. Proc. § 805. When time is given beyond the term for the filing of such bill of exceptions, and the bill is afterwards filed in vacation, such independent record entry, however or wherever made, is of necessity an *ex parte* act of the clerk. Whether, in such case, the independent record entry shall be a vacation order-book entry, or simply a statement or memorandum in the transcript in substance and to the effect that the bill was filed, or whether it is essential for such formal entry or statement to precede the bill of exceptions, are questions which have not been clearly and satisfactorily settled by the authorities. *Horner v. Hoadley*, 97 Ind. 600; *Hull v. Louth*, 109 Ind. 815-835, 10 N. E. Rep. 270; *Hormann v. Hartmetz*, 125 Ind. 353, 27 N. E. Rep. 731; *Hesslan v. State*, 116 Ind. 58, 17 N. E. Rep. 614. In the case of *Armstrong v. Harshman*, 93 Ind. 216, the court said: "What purports to be a bill of exceptions containing the evidence appears in the record, but there is no statement in the body of the record showing that it was ever filed in the clerk's office in the cause;" but, inasmuch as the transcript of the clerk was dated within the time granted, it was held sufficient to show that the bill had been filed, and formed a part of the record. In the case of *Loy v. Loy*, 90 Ind. 404, the court says: "But the record wholly fails to show in any manner that this writing or bill of exceptions was filed in the court below, either within the time given, or, indeed, at any time." The court there said:

"The record must show in some manner that the bill was filed, or it cannot be considered in this court as constituting a part of the record of the cause." When time is given beyond the term in which to file bill of exceptions, it must be shown in the body of the instrument that it was duly presented to the judge within the time so fixed, in term, for the filing thereof. The time so given must, of course, be shown by an order-book entry made by the court during the term. Then it must clearly and affirmatively appear in the transcript of the record brought to the appellate court, independent of the bill of exceptions, that the bill was duly filed in the office of the clerk of the trial court. If the bill was, as shown in the body thereof, presented to the judge within the prescribed time, when it was in fact filed is not of vital importance. It is not essential that such independent entry showing the filing of the bill should be entered on the order book in vacation, but such statement or memorandum, appearing in the record on appeal, as clearly and affirmatively shows the filing of the bill in the office of the clerk, is sufficient, whether it immediately precedes the bill or is otherwise properly set out. The better practice in such cases is for the clerk to make a vacation order-book entry, showing the filing of the bill. This entry should be the same in form and substance as is made when the bill is filed in term. Whether the entry is so made or not, the clerk, when he prepares the transcript for appeal, should precede the bill of exceptions with the copy of such vacation order-book entry, if made, or, in the absence thereof, he should incorporate in the transcript a preliminary formal statement or memorandum in substance and effect that the bill of exceptions had been duly filed—giving the date—in his office. The failure of the clerk to make such entry, or to precede the bill with such formal statement, will not be fatal to the rights of the appealing party if it is otherwise clearly and affirmatively shown in the transcript that the bill was duly and properly filed in the office of the clerk of the trial court. In view of the conclusion we have reached, it is unnecessary for us to decide whether the certificate of the clerk in relation to bill of exceptions No. 2 shows with sufficient certainty that said bill was filed. It is not clearly and expressly stated in the certificate that bill of exceptions No. 2 was ever filed.

It is further contended that, because leave was granted to file bill of exceptions, the entire right to so file was exhausted when the first bill was filed. Should we hold that the first writing or instrument was in proper form to constitute a bill of exceptions, (*Wagoner v. Wilson*, 108 Ind. 210, 8 N. E. Rep. 925; section 863, Elliott, App. Proc.,) it is doubtful whether the position of counsel is correct.

It is also insisted that the record does not show that the judge judicially determined the bill was correct, and that it does not appear that the stenographer's notes were made a part of the bill by the judge's act. It is true that the settlement and granting of a bill of exceptions is a judi-

cial duty, but the mere clerical work in relation thereto may be done by any one. In the language used in the case of *McCoy v. Able*: "If the judge who tries the case sanctions and accepts the statement of the evidence, he thereby adopts it as his own judicial act, and as such it comes to this court." See, also, Elliott, App. Proc. § 798.

It is also contended by counsel for appellee that it affirmatively appears in the bill of exceptions, if in the record, that a certain note was introduced and read in evidence on the trial, which has not been incorporated or set out in the bill of exceptions. In this position counsel, as disclosed by the record, are correct. For aught that appears, the omitted evidence so introduced may have been immaterial. What effect, if any, such evidence had on the trial in the result we cannot tell. The objection to the bill of exceptions in this respect may be, and perhaps is, purely technical, but under the rule long established in this state such omission precludes the consideration of any question by this court arising on the evidence. *Railroad Co. v. Lavender*, (Ind. App.) 34 N. E. Rep. 109; *Pelgh v. Huffman*, (Ind. App.) 34 N. E. Rep. 32; *Patchell v. Jaqua*, (Ind. App.) 33 N. E. Rep. 182; *Elchel v. Bower*, 2 Ind. App. 84, 23 N. E. Rep. 192; Elliott, App. Proc. §§ 823, 824, and authorities there cited. The entire evidence is not always necessary on appeal, but when the effort is made to bring all the evidence before the court, as was attempted to be done in this case, for the purpose of reviewing the questions arising on the trial thereon, the omission of any part thereof is fatal. The reason for the rule is discussed more at length in some of the authorities cited. Such technical rules are not to be commended, except in so far as they may be necessary to secure a settled and uniform practice.

In the abundance of caution, and in order to ascertain whether a different result would have been reached had the questions discussed been properly presented by the record, we have given them some attention. The first question argued by counsel is that the verdict was not sustained by sufficient evidence, and was contrary to law. There is evidence in the record tending to support every material point in the case. The next reason presented is that a new trial should have been granted for newly-discovered evidence. The affidavits are conflicting, and, when all the facts and circumstances shown are considered together, there was no error in this ruling. In the first place, the newly-discovered evidence was cumulative. *Hamm v. Romaine*, 98 Ind. 83. In the next place, the facts in relation to diligence are not sufficient. *Hines v. Driver*, 100 Ind. 315; *Ward v. Voris*, 117 Ind. 369, 20 N. E. Rep. 261; *Pemberton v. Johnson*, 113 Ind. 538, 15 N. E. Rep. 801; *Morrison v. Carey*, 129 Ind. 277, 23 N. E. Rep. 697; *Toney v. Toney*, 73 Ind. 34; *Ex parte Walls*, 64 Ind. 461. When the instructions are all considered together as an entirety, we are not able to see any error therein prejudicial to appellant; in other words, if the instructions and evidence were in the record, we have

failed to find any reversible error arising thereon; but, in view of the fact that no question is properly presented by the record, we have not entered into a full consideration and discussion thereof in detail, as no good purpose could have been accomplished thereby. Counsel contend that there is no sufficient reference to a copy of the note as an exhibit made to the pleading, and therefore that the motion in arrest should have been sustained. The averment is, after describing the note and stating the cause of action, that "a copy is herewith filed," and immediately following the complaint is a copy of the note sued on, marked "Exhibit." This is a sufficient compliance with the statute. *Blackburn v. Crowder*, 108 Ind. 238, 9 N. E. Rep. 108. In any event, the objection was waived by the failure to demur thereto. *Lassiter v. Jackman*, 88 Ind. 118. There is no error in the record.

Judgment affirmed.

(7 Ind. App. 71)

**DAVEE et al. v. STATE ex rel. BOARD OF COM'RS OF MORGAN COUNTY.**

(Appellate Court of Indiana. May 27, 1893.)

**BILL OF EXCEPTIONS—FILING—WHAT CONSTITUTES—STATEMENT AS TO CONTAINING ALL THE EVIDENCE—MARRIED WOMAN—MORTGAGE TO SCHOOL FUND—VALIDITY—ESTOPPEL.**

1. Where the certificates of the clerk to the record and to the bill of exceptions show that the latter was delivered to him within the time allowed by the court for filing the bill, and the bill was at the time indorsed as filed by such clerk, it is properly in the record, though no entry of the filing thereof was made in the order book of the trial court.

2. Where, immediately following the evidence, it is stated in the bill of exceptions that "this was all the evidence in the case," it sufficiently appears that all the evidence "given" in the cause is contained in the bill.

3. Where a married woman borrows money of the school fund to pay her husband's debts, and gives a mortgage on her separate property, and makes oath that she is the legal owner of the property mortgaged, and that there is "no incumbrance or better claim, either in law or equity, that she knows of or believes, on or to said land," and complies with all the statutory requirements, she is estopped from denying the validity of the mortgage, though the county auditor, by whom, under the law, the loan is made, knows at the time that it is for the husband's benefit, and that part of the money is to be applied on a note of the latter on which such auditor is surety. *Gavin, C. J.*, dissenting.

Appeal from circuit court, Morgan county; *G. W. Grubbs, Judge.*

Action by the state on the relation of the board of commissioners of Morgan county against John Davee and others on the official bond of George W. Prosser as auditor of such county. From a judgment for plaintiff, defendants Davee and Norman appeal. Reversed.

*A. M. Cumming*, for appellants. *Jordan & Matthews*, for appellee.

**LOTZ, J.** The state of Indiana on the relation of the board of commissioners of Morgan county brought this action against the appellants to recover damages for the alleged breach of the official

bond of one George W. Prosser as auditor of said Morgan county. The appellants, Davee and Norman, were sureties on said bond. A demurrer was overruled to the complaint. The appellants then answered jointly in two paragraphs. The first is an answer in estoppel, and the second a general denial. Appellee replied to the first paragraph, and the cause was submitted to the court for trial, which resulted in a finding and judgment for the appellee. Several errors are assigned, but, as the controlling question in the case is presented in the one overruling the motion for a new trial, we will consider it alone.

The causes for a new trial are that the finding and judgment were not sustained by sufficient evidence, and are contrary to the law. Appellee, however, insists that the bill of exceptions containing the evidence is not properly in the record. This presents the first question for consideration. From the record it appears that the clerk of the lower court made two certificates, both dated February 16, 1891. The first one immediately precedes the bill of exceptions, in which he certifies "that the above and foregoing is a true and correct copy of the record and judgment of the court in the above-entitled cause as the same appears of record in my office." The record preceding this certificate shows that the motion for a new trial was overruled on the 27th day of December, 1890, and that 60 days from that date were given the appellants in which to file their bill of exceptions. Immediately following the first certificate is what purports to be a bill of exceptions containing the evidence. At the end of the evidence is this statement: "And this was all the evidence in the case." The bill concludes in these words: "And now, on the 13th day of February, 1891, and within the time allowed by the court, the said defendants come and tender this, their bill of exceptions, and pray that it may be signed, sealed, and made a part of the record in this case; which is done accordingly. *Geo. W. Grubbs, Judge.*" The second certificate of the clerk following this is in these words: "I, *R. C. Griffiths*, clerk of the Morgan circuit court, do hereby certify that the foregoing bill of exceptions, purporting to contain all the evidence on the trial of the above-entitled cause, is the original bill of exceptions as filed by *Nathan A. Whitaker*, shorthand reporter, in said cause. In witness whereof I have hereunto set my hand and affixed the seal of the Morgan circuit court." Indorsed upon the bill is the following: "Filed February 13th, 1891. *R. C. Griffiths, Clerk Morgan Co.*" The statute (section 629, Rev. St. 1887) requires that the bill shall be filed. "Until filed, it is no part of the record; and, unless the filing is affirmatively shown by the proper record, there is no evidence of the fact upon which the appellate tribunal can act." *Hormann v. Hartmetz*, 128 Ind. 353, 358, 27 N. E. Rep. 731. It is said in the same case that a record entry must be made, showing the filing and date thereof; and that such filing must also be shown by an in-

dependent entry, and cannot be shown by a recital in the bill itself. *Guiri v. Gillett*, 124 Ind. 501, 24 N. E. Rep. 1036; *Elliott*, App. Proc. § 806. If by the term "record entry," as used in such authorities, is meant an entry on the order book of the court below, then there is an apparent conflict between such cases and other decisions of the supreme court, for in *Armstrong v. Harshman*, 98 Ind. 216, it appears that 60 days were given in which to file the bill of exceptions, and a transcript was made out and duly certified within that period, which contained a bill, but there was no statement that the bill was ever filed in the clerk's office in the cause; yet it was held that the bill must be regarded as properly filed, and within the time given. So, also, in *Hull v. Louth*, 109 Ind. 315, (336), 10 N. E. Rep. 270, the clerk's certificate to the transcript stated that "the foregoing is a full and complete transcript of the proceedings had, papers filed, and judgment rendered in the above-entitled cause," and it further appeared that the bill was filed within the time fixed by the court. It was held that it was thus made to appear that the bill was filed. See, also, *Hesslan v. State*, 116 Ind. 58, 17 N. E. Rep. 614; *Oliver v. Pate*, 43 Ind. 132. It is clear from the last-cited cases that no entry upon the order book of the filing is contemplated. There are two kinds of filing as usually practiced in legal proceedings. Where the proceedings are required to be taken or made during the progress of a cause in term time, the papers or instruments upon which such proceedings are based must be presented to the court, and its attention called thereto. Leaving the paper or instrument with the clerk, and causing it to be placed among the files of his office, is not sufficient to constitute a filing of the paper or instrument in such matters. *Gilbert v. Hall*, 115 Ind. 549, 18 N. E. Rep. 28. In one sense, filing means to exhibit or present any instrument or paper in a legal proceeding to the court in a regular way. In another sense it means to leave a paper with an officer for action or preservation. In the latter sense a paper is filed when delivered to the proper officer, and by him received, to be kept on file. *Peterson v. Taylor*, 15 Ga. 483; *Powers v. State*, 87 Ind. 144. The method adopted by our statute with reference to the presentation and filing of bills of exception clearly contemplates that the bill must be oftentimes filed when the court is not in session, and this is done by delivering it to the clerk for action and preservation. It is true that a bill of exceptions can only be filed in vacation upon the authority of the court given for that purpose when in session, and such authority must appear by the record, and not by the bill, and that without such authority the bill is no part of the record. *Engleman v. Arnold*, 118 Ind. 81, 20 N. E. Rep. 505. The record in this case, however, affirmatively shows that the court, while in session, gave time to file the bill, and that the bill was filed within the time given. The record shows that the bill was properly filed. There is no merit in appellee's other contention

that it does not appear that the bill contains all the evidence given in the cause. The terms, "all the evidence given in the cause," and "all the evidence in the cause," import the same thing. *Gish v. Gish*, 84 N. E. Rep. 305, (decided at this term;) *Beatty v. O'Connor*, 106 Ind. 81, 5 N. E. Rep. 880.

The undisputed facts of this case are substantially as follows: In the year 1886 George W. Prosser was the acting auditor of Morgan county, and had given his bond, with Davee and Norman as his sureties, conditioned for the faithful performance of his official duties. Frank C. Lloyd and Margaret Lloyd were husband and wife, residing in said county. The said Prosser, with others, was the surety of said Frank on a promissory note in the sum of \$800, payable to one Charles Seaton. Frank was insolvent. The sureties on said note were anxious and solicitous that the note should be paid, or that they be in some manner relieved from liability. Margaret Lloyd, the wife, was the owner in her own right of a house and lot in the city of Martinsville, in said county. Prosser offered to make a loan from the school fund intrusted to said county on said lot, provided a part of the money was applied to the discharge of the note on which he was surety. Mrs. Lloyd had joined with her husband in mortgaging the same property on several other occasions to procure money to pay her husband's debts, but she refused to do so on this occasion, until her husband said to her that he would lose his shop if she did not do so. She stated in her testimony that "I said then I would help him out this time, but I would not help him any more." All the statutory requirements to procure the loan were complied with. She executed her note for the sum of \$300, and she and her husband duly executed a mortgage on her real estate to secure the loan. She made the statutory oath that she was the legal owner of the property mortgaged, and that there was "no incumbrance or better claim, either in law or equity, that she knows of or believes, on or to said land." The auditor accepted the note and mortgage, and issued a warrant payable to the said Margaret for the sum of \$300. This warrant was delivered to her husband, who caused it to be presented to the treasurer, and the money obtained thereon. Two hundred and sixty-five dollars was applied as a payment on the Seaton note, and the remainder used by the husband for his own purposes. No part of the money was received by the wife, or used for her benefit. Morgan county afterwards, and before the commencement of this action, reimbursed the school funds. By the constitution and statutes of this state the school funds, congressional and common, are set apart and devoted to the high purpose of the education of the people. Const. § 2, art. 8; section 4325, Rev. St. 1881. So careful is the fundamental law for the preservation of these funds that section 3, art. 8, provides that "the principal of the common school fund shall remain a perpetual fund, but which may be increased, but shall never be diminished; and the income thereof shall be inviolably



appropriated to the support of the common schools, and to no other purpose whatever." See, also, section 4325, *supra*. The counties to which said funds are intrusted are held liable for both principal and interest thereon. Section 6, art. 8, Const.; section 4328, Rev. St. 1881. It is made a part of the official duties of the auditor to manage and control the school funds intrusted to the county which he serves. The statutes, in carrying out the design of the constitution that such funds shall never be diminished, have thrown every safeguard around them. The funds can only be loaned upon mortgage security, and it is made the duty of the auditor to inform himself of the value of the real estate offered, and be satisfied of the validity of the title thereof; and all persons applying for a loan shall produce to the auditor title papers showing to his satisfaction a good and sufficient title in fee simple, without incumbrance. He shall also require the real estate to be appraised by three disinterested freeholders of the neighborhood. Such appraisers, after being duly sworn, shall examine and appraise the land, and sign and give to the applicant a certificate setting forth the fair cash value, without taking into consideration perishable improvements; and no loan shall exceed one-half of the appraised value. The applicant for the loan shall file with the auditor the certificate of the clerk and recorder of the county that there is no incumbrance on the land offered as security in either of said offices. And, last of all: "Such applicant shall make oath that there is no incumbrance or better claim that he knows of, and that the abstract of title presented by him is, as he believes, a true one." See sections 4370-4373, 4375, 4376, Rev. St. 1881. The statute also prescribes the form of the note and mortgage, and, after these things shall all have been done, the auditor shall draw his warrant in favor of the borrower. Section 4397.

It is true, as a general proposition, that a married woman cannot mortgage or pledge her own separate property to secure the debt of her husband or any other person; but it is equally well settled that she may, by her husband joining with her, mortgage or pledge it for her own debt, or to discharge valid claims against it, and such contracts are binding upon her. The authorities go even further than this, and lay down the rule that, although the mortgage or incumbrance be to secure the debt of another, she may estop herself by matter in pais against questioning its validity. *Taylor v. Hearn*, 131 Ind. 537, 31 N. E. Rep. 201; *Cummings v. Martin*, 128 Ind. 20, 27 N. E. Rep. 173; *Bouvey v. McNeal*, 126 Ind. 541, 26 N. E. Rep. 396; *Ward v. Insurance Co.*, 108 Ind. 301, 9 N. E. Rep. 361. Shall all the solemn acts of the married woman, as shown by the above statement, be overthrown by the fact that the auditor knew that the money was obtained for the purpose of paying the debts of her husband? As was well said in *Deming v. State*, 23 Ind. 410: "These provisions defining the duty of the auditor were obviously intended as safeguards for the preservation of the fund. Their whole

tenor indicates a careful purpose of the legislature to make every loan secure beyond any contingency. This, too, was unquestionably the only object sought to be attained." In the case of *State v. Kennett*, 114 Ind. 160, 16 N. E. Rep. 173, it was held that a married woman who had joined with her husband in executing a mortgage on lands owned by them as tenants by entireties to secure money from the school funds, which money was received and used by the husband, was void as to her; but it does not appear from the statement of the case as reported that she made the statutory oath, furnished the abstract of title, or that the warrant was issued in her name. As the title was in them jointly, her husband may have done all this alone. In fact, she does not seem to have done anything, except that she joined her husband in making the mortgage. In the more recent case of *Snodgrass v. Morris*, 123 Ind. 425, 24 N. E. Rep. 151, it was intimated, although not decided, that a married woman who makes the statements the statute requires to obtain a loan from the school funds cannot defeat it; and the court used these forcible words: "There are strong reasons why the rule which applies in ordinary cases should not apply to such a case." In making a loan of the school funds the auditor does not act for himself or for the borrower; he acts for the public. He is the officer designated by law to invest the school funds in order that the cause of education may be advanced. He is clothed with certain rights and charged with certain duties conferred by statute, and he possesses none other. All persons who deal with him are bound to take notice of his official and fiduciary character, and to know that he cannot bind the public corporation or government for which he acts, except within the strict letter of the law. When he has performed a public duty within the law, it is difficult to see how his knowledge of any extraneous matter can affect the validity of the transaction. When the auditor has satisfied himself of the sufficiency of the title and the value of the lands, has caused the same to be appraised, has received the certificate of the clerk and the recorder, and has caused the applicant who has capacity to contract to make the statutory oath, and has drawn his warrant in favor of the borrower, shall it be said that, because he knew the lands mortgaged belonged to a married woman, and the moneys realized were to be used to pay the debts of her husband, the security must fail? Such a rule would be dangerous indeed, for the auditor is only required to give a bond in the sum of \$2,000,—a sum wholly insufficient to protect the county against such liabilities. No one can mortgage his property to secure a loan from the school fund without his active participation in the transaction at some stage. If the knowledge of extraneous matters on the part of a public officer affects the validity of a voluntary contract at the option of the other contracting party, then there is but little security for school funds. The borrower and auditor do not stand in the relative position of mortgagor and mort-

gagee. The relation of debtor and creditor never can exist between them. The borrower is the debtor and the state is the creditor. The state acts through its agent, the auditor, but he is a special agent of limited and peculiar powers. His powers are conferred by the law, and all persons are bound to know the law, and to know what his powers and duties are. When any person has voluntarily contracted with such an agent, and in conformity with the method prescribed by law, we can conceive no greater wrong or fraud upon the public than to permit him to defeat the mortgage by saying that the state's agent knew or could have known by exercising diligence that the money obtained was used to pay the debt of another. The highest consideration of public policy requires, when the auditor has acted within the letter of the statute, that a mortgage which has been voluntarily executed shall not be defeated by his knowledge of such extraneous facts as are shown by the evidence in this case. In the recent case of *Lloyd v. Morgan Co.*, *infra*, decided by the supreme court, the validity of the same mortgage was upheld. We think that Margaret Lloyd has estopped herself against questioning the validity of the mortgage. The judgment is reversed, with instructions to sustain the motion for a new trial.

DAVIS, J. I do not concur in all the reasoning, but, in view of the fact that the supreme court has affirmed the judgment foreclosing the identical mortgage in question against said mortgagee, Lloyd, I concur in the result reached in the principal opinion.

GAVIN, C. J., (dissenting.) I am unable to concur in the opinion of the majority of the court. In addition to the facts set out in the principal opinion it appears that the auditor, with others, was surety for Frank Lloyd to Charles Seaton, the county treasurer, who paid the warrant drawn for the loan in question, and who testifies that these orders ran generally, "Pay to John Jones or bearer" and also: "Question. Was this order payable to her? Answer. I do not remember. I am not positive; but think it was payable to her; but I paid it to Frank," (the husband.) The warrant itself had been destroyed. Margaret Lloyd testified: "(2) You may state what, if anything, you had to do with borrowing that money from the school fund? Answer. I did not have anything to do with it, only to sign the mortgage. (3) Who borrowed the money? A. Frank borrowed it. Question. Did he [the auditor] call upon you in regard to that money? A. No, sir. Q. Who took the acknowledgment of the mortgage? A. Mr. Charles Lockhart. Q. Did he ask you anything about it? A. He did not; just came in, and asked if I understood it. Q. Did you ever see the warrant for the money? A. No, sir." Frank Lloyd testified: "I went to Mr. Prouser, and told him that there was some dissatisfaction about that note; and I told him that I would like to borrow \$300, and that I would give him a mortgage on my wife's

property. He said Mr. Halton was making the biggest kick. He said, 'If you can get your property appraised at \$600, I will loan you \$300.' By paying \$300 on the note he thought the securities would not say anything more about it until next year. It was understood that I was borrowing the money to pay on the Seaton note. Q. You took the warrant to Seaton, and got credit on the note for it? A. Yes. Q. Was the warrant drawn in your wife's name? A. I think the warrant was drawn in my name. Q. Did your wife have anything to do with making this loan? A. No, sir. Q. Was it for her benefit? A. No, sir." Under these facts and this evidence I think the court was abundantly justified in finding that Margaret Lloyd was simply the surety for her husband, as the auditor at the time knew. If she was simply surety, the mortgage was void, unless some element of estoppel prevents her from asserting the defense. There is not here a single element of estoppel. There is no misrepresentation upon her part, either express or tacit, if such there might be. There is absolute knowledge of the facts upon the part of the representative of the state. The statute, in imposing this disability upon a married woman, makes no exception in favor of school-fund mortgages. The same law applies both to the citizen and the sovereign. While the integrity of the school fund should be carefully preserved, let it be done by holding to a strict accountability an officer who makes a loan which he knows to be invalid, simply for the purpose of relieving himself from an individual responsibility.

(124 Ind. 506)

#### LLOYD v. MORGAN COUNTY et al.

(Supreme Court of Indiana. May 22, 1893.)

#### MARRIED WOMAN—MORTGAGE TO SCHOOL FUND—VALIDITY—ESTOPPEL.

Where a married woman borrows money of the school fund, and gives a mortgage on her separate property, and complies with all the statutory requirements necessary to procure such loan, she cannot, in an action by the state to foreclose the mortgage, set up as a defense the fact that the county auditor, by whom, under the law, the loan was made, applied the money to the payment of her husband's debts, for part of which such auditor was surety.

Appeal from circuit court, Morgan county; R. W. Miers, Judge.

Action by Margaret Lloyd against Morgan county, board of commissioners of Morgan county, and the state of Indiana, to cancel a certain mortgage executed by plaintiff and her husband to the school fund, in which the state, on relation of the county auditor, filed a cross complaint to foreclose such mortgage. From a judgment of foreclosure, plaintiff appeals. Affirmed.

W. S. Shirley and M. H. Parks, for appellants. A. G. Smith, Ed. S. Davis, Jordan & Matthews, and F. P. A. Phelps, for appellees.

OLDS, C. J. The questions presented by the record in this case may properly be said to arise in a proceeding on relation

of the state by the county auditor to foreclose a school-fund mortgage executed by the appellant and her husband on land held in her own right, to secure a loan for \$300. The proceedings were originally instituted by the appellant to cancel the mortgage, but later the issues were shifted, and a cross complaint on the relation of the state to foreclose the mortgage filed. The appellant was the owner in her own right of the real estate in controversy mortgaged to the state. The appellant seeks to defeat the mortgage on the grounds that she was at the date of the execution of the mortgage and since a married woman; that this fact was known to the auditor at the time he made the loan; and that the auditor never paid the money, or any part of it, to her, but applied the greater part of it in the payment of a debt of her husband, on which the auditor was security, and the balance he paid on her husband's debts. By reason of these facts appellant seeks to allege and prove these facts as a defense to the mortgage, and the question is, can she, under the circumstances, make this defense to the mortgage sought to be foreclosed? In the making of the loan all of the requirements of the law were complied with. The record shows the loan to be a loan made to the appellant. The papers are all executed by her individually, except her husband joins in the execution of the mortgage. The note and the sworn statement as to title are signed by the appellant alone. In *Snodgrass v. Morris*, 123 Ind. 425, 24 N. E. Rep. 151, it was sought to secure the cancellation of a school-fund mortgage on the same grounds of the defense sought to be made in this case, and this court said: "A county auditor is a public officer, invested by the statute with certain rights and duties, and he possesses no other rights than those conferred by the statute. He is in no sense the owner of the school fund, nor has he any right to release or cancel mortgages given to secure loans made from that fund, except as the statute provides; and there is nothing in the statute empowering him to decide whether a mortgage is or is not void because executed by a married woman to obtain money for the benefit of her husband." This, we think, enunciates the true doctrine. There is nothing to prevent a married woman from securing a loan from the school fund. If she complies with the law she is as much entitled to a loan as any other person; and she is presumed to know the law, as are all persons, and to know what rights and duties the county auditor is vested with. When she executes her note and mortgage, and it is accepted, she has the right to the money for which the loan calls; and if the officer or officers refuse to discharge their duties in this behalf, and pay the money over to her, she has a remedy, and may compel the payment of it to her; and if she fails to exact her rights in that behalf, or waives her right to the money, and directs the auditor to pay the money to another, or permits him to retain it and apply it to other purposes, she may have a right against him, but she cannot defend against the mortgage executed to the

state. The mortgage is the property of the state, and is enforceable against her. The state cannot be prejudiced or suffer loss by reason of her laches in failing to demand and receive the money on the execution of the mortgage, or directing or permitting the auditor to retain and apply it in payment of her husband's debts. What we have said disposes of all the questions involved in the case, for it follows that the appellant cannot defend against the mortgage on the ground that the money was not paid to her, but applied by the auditor in payment of her husband's debts. If she authorized such application, she may have waived her right to the money. If she did not, she had her remedy, and cannot defend against the mortgage. It is the policy of the law to guard with special care the school fund of the state. The conclusion we have reached leads to an affirmance of the judgment.

(135 Ind. 4)

BROWN et al. v. GREPE.<sup>1</sup>

(Supreme Court of Indiana. May 22, 1903.)

QUIETING TITLE—SUFFICIENCY OF COMPLAINT.

A complaint to quiet title by the purchaser at mortgage sale alleged that the land had been a part of a decedent's estate, to which defendants were heirs; that, while defendants were yet infants, other heirs, as such, conveyed the land to M., the mortgagor, as his portion of the estate, as heir; that afterwards, in a suit to which all of the heirs, including defendants and M., were made parties, the estate, except the land in suit, was partitioned, but M. received no portion thereof; that the value of the land was no more than M.'s share of the estate. Held, that the complaint showed a good cause of action, though defendants did not join in the conveyance to M., and were not made parties to the mortgage foreclosure, by which M.'s title passed to plaintiff, as it is presumed the rights of all parties were determined in the partition suit.

Appeal from superior court, Marion county; N. B. Taylor, Judge.

Action to quiet title by Roberta T. Grepe against May Belle Brown and another, by their guardian ad litem. Plaintiff had judgment, and defendants appeal. Affirmed.

Vincent G. Clifford and Wilbur F. Browder, for appellants. Geo. F. Porter, for appellee.

HOWARD, J. This was a suit to quiet title to a certain parcel of land in the city of Indianapolis, brought by appellee against appellants. A demurrer was filed to the complaint, which was overruled, whereupon an answer followed in general denial. There was a trial by the court, a special finding of facts and conclusions of law, and judgment for the appellee.

The first error assigned by appellants is the overruling of the demurrer to the complaint. The complaint alleges that in 1871 Joseph Marsee died intestate, being the owner of certain real estate in the city of Indianapolis, and leaving his widow and eight children surviving; that in 1873 Elizabeth M. Brown, one of the children of said Joseph Marsee, died testate,

<sup>1</sup>Rehearing denied.

leaving to her two children, the appellants, all her interest in her father's said real estate; that on the 27th day of September, 1876, the widow and living children of said Joseph Marsee (except Joseph W. Marsee) and Ignatius Brown, widower of said Elizabeth Brown, executed to said Joseph W. Marsee a warranty deed for a certain part of the land inherited by them from said Joseph Marsee, which part so deeded to Joseph W. Marsee is called, for convenience of reference, "Parcel A;" that at the date of the execution of said deed the appellants were minors, and had no legally-appointed guardian; that afterwards Joseph W. Marsee borrowed of Albert G. Porter, as guardian of appellee, then a minor, the sum of twelve hundred dollars, giving as security therefor a mortgage on said parcel A; that said money was used to erect a dwelling and make other improvements on said parcel A, and that the said Joseph W. Marsee went into exclusive possession of said parcel A, and thereafter resided thereon with his family; that one purpose of the execution of said deed was to put said Joseph W. Marsee in the exclusive possession of said parcel A, as an agreed partition, so far as said parties thereto could effect said purpose; that on the 31st day of January, 1883, a partition suit was brought, to which all the heirs of said Joseph Marsee, including Joseph W. Marsee, and also including appellants, were parties, in which all the lands then owned by said parties, as derived by them from their said ancestor, Joseph Marsee, except said parcel A, were partitioned among them, except that no share was set apart to said Joseph W. Marsee; that on the 11th day of March, 1885, said mortgage debt of Joseph W. Marsee being due and unpaid, appellee, having now become of full age, brought suit against him for the foreclosure of said mortgage on said parcel A; that said mortgage was foreclosed, and such proceedings were had that appellee purchased said parcel A at sheriff's sale, and afterwards, on July 22, 1886, received a sheriff's deed therefor, and took possession of said parcel; that said parcel A is not in excess in value of the share of the estate of which said Joseph Marsee died seised, to which the said Joseph W. Marsee was entitled as heir; that the real estate set off to appellants is the full share of the estate of the said Joseph Marsee to which appellants are entitled as devisees of their mother, Elizabeth M. Brown, heir of said Joseph Marsee,—concluding with a prayer to quiet title in appellee to said parcel A as against appellants.

From the averments of the complaint it thus appears that the appellants were not parties to the deed by which parcel A was conveyed to Joseph W. Marsee. Neither were they parties to the foreclosure suit by which Joseph W. Marsee's title passed to appellee. And so, at first glance, it would seem that the interest of appellants in parcel A, as heirs to Joseph Marsee's estate, still remains good, and that the demurrer should have been sustained. But it also appears from the

complaint that the appellants were parties to the partition suit; that a share of the ancestral land other than parcel A was set apart to them, of which they took possession, and which they still hold; that no share was set apart to Joseph W. Marsee, the holder of parcel A, although he also was a party to that suit; that parcel A was, in value, no more than the just share of the original estate of Joseph Marsee to which Joseph W. Marsee was entitled as one of the heirs; and that the share set apart to appellants was the full share of said original estate to which they were entitled as devisees of their mother, being the share to which she would have been entitled as heir if she were living. All parties in interest as heirs of the original estate were brought into the partition suit. No attempt was made to include parcel A in the partition, and while Joseph W. Marsee, to whom the parcel had been deeded by the adult heirs, was a party to the suit, yet nothing was set apart to him. It is therefore clear that the equities of all the heirs to Joseph Marsee's estate were considered, and partition made accordingly. In this state there is no longer a distinction, in pleading and practice, between actions at law and suits in equity; so that the courts having general jurisdiction may determine the legal and equitable rights of all the parties to the record. *Rout v. King*, 103 Ind., at page 557, 3 N. E. Rep. 250, and cases cited. The court before which the partition proceedings were brought had full power to determine all the rights of the parties, and to determine their respective ownerships in the ancestral estate. The presumption must be that this was done, and the complaint in this case avers positively that it was done. We think, therefore, that the complaint states a good cause of action to quiet title in appellee to the land in question, and hence that the demurrer was properly overruled.

The facts found by the court are those stated in the complaint, with some additional findings, not materially changing their effect. The court finds that at the time the loan was made to Joseph W. Marsee by Albert G. Porter, guardian, which was before the partition suit, the said Joseph W. Marsee told the said Albert G. Porter that appellants had a claim upon the land, and that thereupon the said Albert G. Porter insisted that the said parcel A should be enlarged from 37 feet to 60 feet in width, to make the security sufficient, over and above the interest of the appellants in said parcel, which was done. This only shows what is quite apparent otherwise,—that until the respective rights of the parties were settled in the partition suit the appellants had the same interest in parcel A that they had in the remainder of the ancestral estate,—their undivided interest as heirs and devisees. This interest, however, as we have seen, was afterwards determined, and set apart to them, in the partition suit. They took exclusive possession of their said allotment, and have held it ever since. It follows that the conclu-

sions of law found by the court in favor of appellee were correct, and that the judgment in her favor should be affirmed. Judgment affirmed.

(134 Ind. 509)

LOUISVILLE, N. A. & C. RY. CO. v.  
WRIGHT.

(Supreme Court of Indiana. May 22, 1893.)

DEATH BY WRONGFUL ACT—DAMAGES.

In an action by an administrator for damages for injuries causing death, where the father and mother of deceased are his only next of kin, it is error to instruct the jury that in computing damages they should "assess a sum of money equal to the amount plaintiff's decedent would most probably have earned \* \* \* during the period of his life in which he would probably have earned money," for the reason that it is improbable that the parents would have survived deceased, and thus become his heirs, and because it cannot be presumed that deceased would not have married.

Appeal from circuit court, Orange county; R. Applewhite, Special Judge.

Action by Jonathan Wright, administrator, against the Louisville, New Albany & Chicago Railway Company to recover damages for injuries resulting in the death of plaintiff's intestate. Judgment was rendered for plaintiff, and defendant appeals. Reversed.

Field & Matson and W. S. Kinnan, for appellant. John A. Zaring, Milton B. Hattell, Sam'l H. Mitchell, and Robt. B. Mitchell, for appellee.

COFFEY, J. In the year 1890 the appellant owned and operated a railroad from Chicago, Ill., to Louisville, Ky., running through Lawrence county, Ind. It carried the United States mail, and had one or more mail cars in its passenger trains, which were used for that business. The deceased, Charles G. Wright, was an agent of the government in handling and distributing mail on one of its trains; and on the 14th day of February, 1890, while he was engaged on one of the cars provided for said business on the appellant's road, there was a collision of his train with another train on the road, near Mitchell, in Lawrence county, Ind., in which he was bruised and wounded so that he died on the day following. He was 26 years of age at the time of his death, was unmarried, and left surviving him a father and mother, as his only heirs at law. He was a man of good habits, and in good health, and was at the time drawing a salary of \$75 per month as such mail agent. He lived at home until he was 21 years of age, and taught school. Afterwards he spent the time not occupied in business at his father's home, and called it his home. He was a dutiful son, and always kind to his parents. The collision was the result of negligence on the part of the trainmen, and without fault on the part of the deceased. The appellant concedes its liability, but there is a controversy between it and the appellee as to the measure of damages. Upon this subject the circuit court instructed the jury as follows: "(5) In case you conclude to find for the plain-

tiff, it will be necessary to determine the amount of damages to be assessed in plaintiff's favor. If you find a verdict favorable to him, you should be governed by ordinary human knowledge and experience as to the age of the plaintiff's intestate, during which he would likely or probably remain capable of labor, or of doing business, considering the evidence concerning his health, his habits as to industry, and other personal characteristics, merits, or demerits, and assess a sum of money equal to the amount plaintiff's decedent would most probably have earned, as shown by the evidence, not to exceed the amount claimed in the complaint, during the period of his life in which he would have probably earned money, deducting therefrom the reasonable and probable cost of his own support and personal outlay, and making a fair deduction for present payment of such sum." "(7) I instruct you that if you find for the plaintiff you cannot increase the damages, in any sum whatever, on account of the physical or mental sufferings of the deceased, Charles G. Wright, and cannot allow any sum whatever on account of the grief or loss of the society of the plaintiff, or any member of the family of the said Charles G. Wright, but the damages assessed must be from a pecuniary standpoint only."

Section 266, Rev. St. 1881, provides that "a father (or in case of his death, or desertion of his family, or imprisonment, the mother) may maintain an action for the injury or death of a child; and a guardian, for the injury or death of the ward. But when the action is brought by the guardian for an injury to his ward the damages shall inure to the benefit of the ward." Section 284 provides that "when the death of one is caused by the wrongful act or omission of another the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter, for an injury for the same act or omission. \* \* \* The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased." The measure of damages on account of the death of a child, in an action by the parent under the provision of the section first above set out, seems to be definitely settled. Thus, in the case of Pennsylvania Co. v. Lilly, 73 Ind. 252, it was said by this court: "It is well settled that in an action by a parent for the death of his child he is entitled to recover only for the pecuniary injury he has sustained, and the proper measure of damages is the value of the child's services from the time of the injury until he would have attained his majority, taken in connection with his prospects in life, less his support and maintenance. To this may be added, in proper cases, the expense of care and attention to the child, made necessary by the injury, funeral expenses, and medical services." Had Charles G. Wright been killed, under the circumstances involved in this case, at any time before he reached the age of 21 years, the measure of

recovery by his parents, for whose benefit this suit is prosecuted, would have been definitely fixed. Having been killed after he reached that age, and when the legal right of the parents to his services had ceased to exist, the question of the measure of damages becomes more difficult. In the case of *Mayhew v. Burns*, 103 Ind. 328, 2 N. E. Rep. 793, the two sections of the statute under immediate consideration received an extended examination, as a result of which this court said: "Under the first section the damages recoverable are arrived at from a consideration of the probable value of the child's services from the time of the injury until it would have attained its majority, taken in connection with its expectancy and prospects in life, less the probable cost of support and maintenance; added to this, the expenses of care and attention, etc., made necessary by the injury, as stated in *Pennsylvania Co. v. Lilly*. Under the second section it is evident the damages are to be considered in each case according to its circumstances. In assessing damages resulting to the wife, child, or next of kin, the ability of the deceased to have provided for the support and education of those dependent upon him, the number and degree of kindred mentioned in the statute, and their dependence upon him for support, are important considerations. Although it is not necessary to the maintenance of the action for the next of kin that the deceased should have been under legal obligation to render them support, it is nevertheless of consequence that their relation and situation should be shown, with a view of affording a basis upon which to determine the amount of pecuniary loss sustained." In a case where the deceased had left a widow and children the defendant would have no right to complain of an instruction such as we are now considering, because such a deceased person, if alive, would be under a legal obligation to support his wife during her life, and his children during their minority. Furthermore, in the course of nature, it would be fair to presume that the children would survive the father, in which event they would receive by inheritance, if he died intestate, his accumulations of property. For these reasons it was held in the case of *Railway Co. v. Volght*, 122 Ind. 288, 23 N. E. Rep. 774, that an instruction substantially like the one before us was not erroneous. But it must be plain, upon a moment's reflection, that the measure of damages in a case like this must be different. Here the deceased was under no legal obligation to support the next of kin for whose benefit this suit is prosecuted. In the course of nature it is not probable that they would have survived him, and thus become his heirs, nor can we presume that he would not have married. Their pecuniary loss, therefore, is not such as would have been sustained by a widow and children. For these reasons we think it was error to instruct the jury that they should assess a sum of money equal to the amount the deceased would most probably have earned during the period of his life in which he would probably have earned money. As the pecuniary loss in cases where the deceased left no

widow or children must, of necessity, depend upon the particular circumstances surrounding each case, it would be difficult, if not impossible, to lay down any general rule applicable to all cases.

The appellant in this case asked several instructions upon the subject now under consideration, which were refused by the court. We have given these instructions careful consideration, and think there was no error in refusing to give them to the jury. No good purpose would be subserved by setting them out in this opinion. It is sufficient to say that some of them were too indefinite, while the others were too narrow, and each omitted some elements which the jury might consider in estimating the pecuniary loss of the next of kin. Judgment reversed, with directions to the circuit court to sustain the appellant's motion for a new trial.

(24 Ind. 515)

WILLIS, Auditor, v. CROWDER et al.  
(Supreme Court of Indiana. May 23, 1893.)

#### TAXATION—VALUATION OF PROPERTY.

1. In an action to enjoin an assessor from increasing the assessed valuation of personal property subject to taxation, a finding, in regard to such property, that a certain sum is its "fair value for taxation as compared with other property and choses in action of a similar kind and character in said township," does not fix either its fair cash value or its actual value, as contemplated by Rev. St. 1881, § 6330, providing that in determining the taxable valuation of personal property the assessor shall be governed by what is the fair cash value, such being the market or usual selling price at the place where the property shall be at the time of its assessment, and, if there is no market value, then its actual value.

2. A finding, in such an action, that property is worth a certain amount to the owner, fixes the actual value of the property.

Appeal from circuit court, Sullivan county; J. C. Briggs, Judge.

Action by William H. Crowder and another against William Willis, auditor, to enjoin defendant from increasing the valuation of taxable property. A decree was entered in favor of plaintiffs, and defendant appeals. Reversed.

Hays & Hays, for appellant. Buff & Bays, for appellees.

HACKNEY, J. The appellees, conducting an unincorporated bank in the town of Sullivan, sought to enjoin the appellant, as auditor of Sullivan county, from adding \$27,425 to the valuation of their taxable property, as ordered by the board of equalization of said county in June, 1890. The complaint alleged that the appellees made to the assessor a statement of their property, with the true and correct amounts and values thereof, showing the amount of money on hand, \$807.45; amount of funds in other banks, \$12,098.90; bills receivable, credits, etc., \$197,738.90; additional property other than real estate, \$500; deposits held for others, \$182,569.57. After deducting the amount of the deposits from the amount of the bills receivable, credits, etc., the balance for taxation was \$28,575.68. The appellant an-

answered special facts showing additional property and additional values. The cause was submitted to the court, and upon request special findings of facts and conclusions of law were rendered. The findings state the face value of the bills receivable at \$263,651.80; "that their fair value for taxation of said bills receivable, as compared with other property and choses in action of a similar kind and character in said township, was \$197,738.90;" "that of said bills receivable there were, on April 1, 1890, \$200,000, which were worth their face value to said bank; that \$30,000 of said bills receivable were, at said date, worthless, and the residue of \$33,651.80 of said bills receivable were at said date worth seventy-five cents on the dollar to said bank." These two findings of the value of the bills receivable and credits of the appellees involve a difference of \$27,499.95. It will be observed that the first of the findings of the value of said bills receivable is the "value for taxation \* \* \* as compared with other property and choses in action of a similar kind and character in said township," while the second estimate or finding is that \$200,000 thereof were worth their face, and \$33,651.80 thereof were worth 75 cents on the dollar, or \$25,238.85, and together amounting to \$225,238.85, as against \$197,738.90. It will also be observed that the difference in the values so found is in excess of the sum directed by the board of equalization to be added to the taxable value of appellees' property. As to the item of property stated by the appellees in their schedule at \$500, the court finds that it was of the market value of \$750. If we must adopt the lower court's "value for taxation," we find the value of appellees' schedule insufficient by \$250, while, if we must adopt the court's valuation at the "worth" of the bills receivable, the appellees' schedule valuation is insufficient by the sum of \$27,749.95. By section 6330, Rev. St. 1881, the rule for the valuation of property for taxable purposes was provided. After requiring the owner to render a statement of his property, that section provides that "he shall affix what he deems the fair cash value thereof to each item of personal property for the guidance of the assessor." It is further directed by said section that "in determining and settling such valuation the assessor shall be governed by what is the fair cash value, such being the market or usual selling price at the place where the property shall be at the time of its liability to assessment, and, if there be no market value, then the actual value." It is manifest that the taxable value of property is its fair cash value, a fair cash value being the market or usual selling price, and, if there be no market value, then it is the actual value that rules. Such was the valuation required to be made by the property owner, by the assessor, by the board of equalization, and by the trial court sitting in judgment upon the action of the board of equalization. Such valuation was that to which the issue presented by the appellees' complaint was directed. As to the bills receivable and credits, the circuit court has made no finding that they possessed a market value, and we

must presume that no such value was shown. The finding states: "Their fair value for taxation, as compared with other property and choses in action of a similar kind and character in said township." This finding is not of the "fair cash value." It states a conclusion that the sum found is a fair value for taxation, but it further states that this value is measured by a comparison with the value of like property. This is not a finding of the market value of the credits. The comparison stated may be correct, and at the same time neither class of the property have a market value. This finding is not susceptible of the construction that it states the actual value of the property. Such construction is not contended for. We conclude, therefore, that this finding, so far as it states any fact, is not within any proper issue, and must be disregarded. As we have shown, the additional findings state the actual value of the bills and credits at \$225,238.85, and upon this valuation the appellees could, under the statute, deduct \$182,569.50, the amount of their deposit account. We conclude that upon the facts stated the law was with the appellant, and that the lower court erred in not so stating its conclusions of law. The decree of the circuit court is reversed, with instructions to restate the conclusions of law in accordance with this opinion, and enter a decree in favor of the appellant.

(124 Ind. 518)

**McCANN v. JEAN.**

(Supreme Court of Indiana. May 23, 1893.)  
TAXATION — COLLECTION BY SUIT — JUDGMENT —  
COLLATERAL ATTACK.

A decree for the sale of land, in an action under Elliott's Supp. § 2147, providing for the enforcement of liens for taxes on lands unsold by the county auditor for want of bidders, cannot be attacked collaterally by one who before the action had purchased the same land for taxes, but had not received his deed, on the ground that he was not made a party thereto.

Appeal from circuit court, Greene county; J. C. Briggs, Judge.

Action by Hiram Jean against Owen McCann to quiet title. Plaintiff had judgment, and defendant appeals. Reversed.

A. G. Cavins, E. H. C. Cavins, and W. L. Cavins, for appellant. Geo. O. Samples and Moffett & Davis, for appellee.

HOWARD, J. This was a suit to quiet title to real estate, brought by appellee against appellant. Appellant filed an answer in general denial, and also filed a cross complaint asking that his title to said real estate be quieted. Appellee filed a general denial to the cross complaint. The cause was submitted to the court for trial, and the court, at the request of appellant, found the facts specially. From the finding of the court it appears that the real estate in controversy, being lots 48 and 49 in the town of Point Commerce, Greene county, Ind., was duly listed for taxation for several years prior to the year 1885, and that said lots during all



said time, and up to February 12, 1891, were owned in fee by one Daniel Mathias, and appeared in his name on the tax duplicate. That said taxes were not paid, and became delinquent, and the lots were duly advertised for sale by the treasurer of said county, and were on the 12th day of February, 1889, duly sold for said taxes to appellee, who received a certificate of purchase from the county auditor; and, there being no redemption from said sale, appellee on the 12th day of February, 1891, received from said auditor a tax deed for said lots, which deed was duly placed on record. That on the 30th day of December, 1887, the county auditor duly certified to the prosecuting attorney of the Greene circuit court that said lots had been duly advertised and offered for sale for three successive years, 1885, 1886, and 1887, for delinquent taxes due thereon, that had been duly assessed, and had failed to sell for want of bidders, and that said lots were the property of Daniel Mathias. That on the 10th day of June, 1889, said prosecuting attorney commenced suit in the Greene circuit court to collect said delinquent taxes. That process by publication was duly had against said owner, Daniel Mathias, and such proceedings had that, at the November term, 1889, of said court, a finding was duly made that said taxes, interest, penalty, and costs had been paid since the commencement of said suit, but that the costs of said suit had not been paid; and a decree was duly entered declaring said costs of suit a lien on said lots, and ordering that said lots be sold to satisfy the same. That appellee was not a party to said suit. That said lots were duly sold by the sheriff of said county to appellant, who received a sheriff's certificate therefor February 15, 1890; and, there being no redemption from said sale, appellant, on March 3, 1891, received a sheriff's deed for the lots, which was duly placed on record. On these facts there were conclusions of law and judgment for appellee. Several errors are assigned and discussed by counsel, but the only alleged error which need be considered relates to the conclusions of law upon the facts found by the court.

The court found that on December 30, 1887, the county auditor duly certified to the prosecuting attorney that the lots in question had been duly advertised and offered for sale for three successive years, —1885, 1886, and 1887,—for delinquent taxes due thereon that had been duly assessed, and had failed to sell for want of bidders, and that said lots were the property of, and belonged to, Daniel Mathias. This certificate was made in compliance with the terms of the statute then in force. (Acts 1888, p. 123, Elliott's Supp. § 2147,) and imposed upon the prosecuting attorney the duty of enforcing the lien of the state for such taxes, penalty, interest, and costs upon such lands or lots. On June 10, 1889, the prosecuting attorney brought suit to collect said taxes by a foreclosure of the lien thereof claimed to exist upon said lots against said Daniel Mathias and wife. Process by publication was duly had upon said Mathias and Mathias, and such proceedings had that the court found

that said taxes, interest, penalty, and costs were paid after the commencement of the suit, but that the costs of the suit were not paid, and decreed such costs of suit a lien on said lots, and ordered the lots sold without relief from appraisement for payment of such lien. The lots were sold by the sheriff on such decree to appellant. There was no redemption from such sale, and appellant received a deed for them from the sheriff, which deed was duly placed on record. These proceedings were all in compliance with the statute, except that appellee was not made a party to the suit, although at the time "he appeared by the public records of the county to have a lien of record upon said lots," to wit, his tax lien, evidenced by his tax certificate, and the record thereof in the office of the county auditor. The suit brought by the prosecuting attorney did not, therefore, affect the tax lien of appellee, but the same remains good. The statute further provides (Elliott's Supp. § 2147) that all the proceedings for the sale of lands by decree of court in such foreclosure of tax liens shall be "conducted in the same manner as ordinary civil suits to foreclose mortgages are conducted, and the judgment obtained upon the lien for such taxes, penalty, interest, costs, and charges shall have priority over all other liens upon such lands or lots, and such liens shall in no wise be affected or destroyed by any sale or conveyance of such lands or lots." There was no appeal taken from the foregoing judgment and decree, and it cannot be successfully attacked in this proceeding unless it is utterly void. The judgment was rendered by a court of general jurisdiction, and is regular on its face, and cannot be attacked collaterally, even though it were erroneously rendered, or there were defects of form in the proceedings. *Jackson v. State*, 104 Ind. 516, 8 N. E. Rep. 863; *Pickering v. State*, 106 Ind. 228, 6 N. E. Rep. 611; *Spencer v. McGonagle*, 107 Ind. 410, 8 N. E. Rep. 266; *Phillips v. Lewis*, 109 Ind. 62, 9 N. E. Rep. 395; *Sims v. Gay*, 109 Ind. 501, 9 N. E. Rep. 120; *Kleyla v. Haskett*, 112 Ind. 515, 14 N. E. Rep. 387; *Oswald v. Kampmann*, 28 Fed. Rep. 36; *Barnard v. Barnard*, 119 Ill. 92, 8 N. E. Rep. 320. If the decree were simply erroneous or voidable, but not void, the remedy should be by appeal, but the judgment remains good as against collateral attack. *Kittredge v. Martin*, 141 Mass. 410, 6 N. E. Rep. 95. In *McCarter v. Nell*, 50 Ark. 188, 6 S. W. Rep. 731, in which there was a decree of sale for nonpayment of taxes, the court said: "Whether the tax decree which was the foundation of his title was open to collateral attack, and could be treated as a nullity, depended on the circumstance whether or not the court which rendered it had jurisdiction over the subject-matter, and over the parties concerned. For mere errors, irregularities, and even fraud, in its procurement, the judgment could only be assailed in a direct proceeding; that is, by petition in the same case to set it aside, or by some proceeding in the nature of a review on error;" citing *Cooley, Tax'n*, (2d Ed.) 530, and other authorities. In *McGregor v. Morrow*, 40 Kan. 730, 21 Pac. Rep. 157,

which was a similar suit to that in the case at bar, and under a similar statute to our own, the court says: "The district court having general jurisdiction over the subject-matter, all the presumptions which follow ordinary judgments should apply to judgments of this character, and they can only be attacked directly by proceedings in error, and not collaterally. This judgment cannot be attacked unless it is void. If it was simply irregular, erroneous, and voidable, and the court had jurisdiction, it must be held valid in this action." *Jones v. Driskill*, 94 Mo. 190, 7 S. W. Rep. 111, is also a similar case, and under a similar statute to ours. The owner, as in this case, was a nonresident, and served by publication. Speaking of the circuit court, and the judgment rendered in that case, the supreme court of Missouri says: "It was the tribunal created by the constitution and the laws of the land, in which was vested general original jurisdiction, within the boundaries of the county in which the land was situate, to hear and determine any issue of law or fact that might arise between the officials of the state charged with the duty of collecting the revenue, on the one side, and any owner of real estate subject to taxation, upon which the taxes were charged to have become delinquent, on the other," and holds that "the judgment is final and conclusive upon the defendant in any collateral proceeding." See *Harvey v. Tyler*, 2 Wall. 328; *Chauncey v. Wass*, 35 Minn. 1, 25 N. W. Rep. 457, and 30 N. W. Rep. 826; *Van Fleet*, Coll. Attack, subject, "Jurisdiction." This last authority, (section 60,) referring to the case of *Jones v. Driskill*, supra, says: "In a proceeding to foreclose an alleged tax lien, on service by publication, the jurisdiction depends upon the allegations of the petition, and not on the fact that the land was legally assessed, or that the taxes were unpaid." See, also, *Elliott's App. Proc.* § 332, and notes.

In the case before us the jurisdiction of the Greene circuit court over the subject-matter, to wit, the foreclosure of the lien of the state for delinquent taxes, and also over the person of the owner, Daniel Mathias, is unquestionable. The certificate of the auditor to the prosecuting attorney, and the bringing of suit by the latter, was the process provided by statute. The owner of the real estate was Daniel Mathias, a nonresident, and he was duly notified by publication. The court assumed jurisdiction, and proceeded in due course to a final determination of the cause. All the presumptions are in favor of the judgment rendered.

Two seeming irregularities may be noted, both due to neglect of duty on the part of the prosecuting attorney: The failure to bring suit on receiving the auditor's certificate, and the failure to notify appellee, and make him a party to the suit. As to the first of these irregularities, if it be one, we must presume that the court exercised its proper functions in taking jurisdiction when the suit was brought. As to the second,—the failure to notify appellee, and make him a party,—that simply left the appellee, Hiram Jean,

in the same condition in which he was before the bringing of the suit, and with his tax lien unimpaired. It must be noted that appellee had not then received his tax deed, and was not in any sense the owner of the land in question. Mathias was still the sole owner of the lots, with full right to redeem them from the tax sale of the preceding February, and notice to him was sufficient to give the court jurisdiction. It follows that the judgment and decree of the Greene circuit court in the suit brought by the prosecuting attorney June 10, 1889, is a valid judgment and decree, and that appellant, who was the purchaser of the said lots under said decree, and who received a sheriff's deed therefor, is the owner thereof, and should have his title quieted under his cross complaint. Appellant having thus become the owner of the lots in controversy, and so substituted to all the rights of Mathias, the original owner, it follows that appellee's complaint, and the findings thereunder in this suit, are not sufficient, as against such owner, to authorize a decree quieting his title under his tax deed. This is tacitly admitted by counsel for appellee, and the authorities so hold. A person claiming under tax title against the holder of the fee must show that every step required by statute to authorize a tax deed to him has been taken. *Gavin v. Shuman*, 23 Ind. 32; *Wilson v. Lemon*, 23 Ind. 433; *Ellis v. Kenyon*, 25 Ind. 134; *Steeple v. Downing*, 60 Ind. 478; *Millikan v. Patterson*, 91 Ind. 515; *Bowen v. Swander*, 121 Ind. 164, 22 N. E. Rep. 725; *Ward v. Montgomery*, 57 Ind. 276; *Woolen v. Rockefeller*, 81 Ind. 208; *Earle v. Simons*, 94 Ind. 573. But appellee holds a tax deed for said lots, executed by the county auditor for the nonpayment of taxes, and has brought suit to quiet his title thereto. In such case the statute (*Elliott's Supp.* § 2143) provides that "if, upon the hearing of such cause, it shall appear that the complainant's title was or is invalid for any cause, such suit shall not be dismissed by the court, but the court, in cases where the tax was due and unpaid, shall ascertain the full amount of taxes and lien which the state had in such land or lot for state, county, township, and all lawful purposes, which amount shall vest in, and be the property of, the holder of such tax deed, which, when ascertained, with interest at the rate of twenty per cent. per annum, together with all taxes paid by the holder of such tax deed subsequent to his said purchase, with like interest from the date of such payment to the date of the decree, shall be decreed to be a lien on such land or lot, and the owner, and those claiming adversely to such title, ordered and adjudged to pay the same within a reasonable time, and in default thereof shall direct that such land or lot be sold therefor, and that the equity and right of redemption of all defendants in such suit, and all persons claiming under them, shall be forever barred and foreclosed." Appellee is therefore entitled to a judgment in his favor against appellant for the amount of the taxes paid by him, with 20 per cent. interest thereon, and to have such judgment declared a lien on said lots.

The court erred in its conclusions of law. The judgment is in all things reversed, and the court is directed to restate its conclusions of law in accordance with this opinion, and to render judgment in favor of appellant on his cross complaint, and in favor of appellee for the amount of his tax lien.

(134 Ind. 536)

PEED et al. v. ELLIOTT et al.

(Supreme Court of Indiana. May 23, 1893.)

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. An insolvent directed his attorney to draw a mortgage securing one of his creditors, and at the same time told him to draw a deed of assignment for the benefit of all his creditors. While the mortgage was being executed the assignment was being drawn, and it was executed 20 minutes after the execution of the mortgage. Both instruments were delivered at the same time to the attorney for record, and the assignment was recorded three hours after the mortgage. *Held*, that both instruments should be construed together, and that, so construed, the mortgage was void, as it gave a preference in a voluntary assignment to a creditor.

2. Where an intervening petition filed by a creditor in insolvency proceedings contains an averment of the insolvency of the debtor, the court need not make a finding as to such insolvency, for the reason that the averment is unnecessary.

Appeal from circuit court, Madison county; Alfred Ellison, Judge.

James L. Peed made an assignment for the benefit of his creditors to John R. Peed, Elliott, Schroyer & Co. and Louis Holweg, creditors, filed an intervening petition asking that mortgages from the assignor to John R. Peed and Martin E. Peed be declared void, and that the sale of the mortgaged property subject to the mortgages be enjoined. Judgment was rendered for petitioners, and John R. and Martin E. Peed appeal. Affirmed.

M. E. Forkner, J. W. Lovett, and S. M. Keltner, for appellants. H. C. Ryan and Nelson & Myers, for appellees.

OLDS, C. J. On the 29th day of September, 1890, James L. Peed was the owner of certain real estate in Madison county, Ind.; also, certain real estate situated in the city of Indianapolis, and certain personal property. On said date he was indebted to his brother John R. Peed in the sum of \$1,400, on notes given long before that time, and on account. John R. was also the security for James L. on a note to Alice Hume for \$200. He was indebted to his son Martin E. Peed in a less amount than the sum due his brother. He was on said date indebted to Elliott, Schroyer & Co., the appellees, in the sum of \$2,076.32; and to the appellee Louis Holweg in the sum of \$350.16. On said date he executed mortgages to his brother and son, securing the sums due them, his brother agreeing to take \$1,000, instead of the \$1,400, which sum and the \$200 he secured by the mortgage, also secured the sum due his son by a mortgage, and on the same day made a voluntary assignment of all his property for the benefit of all his creditors, under the statute,

naming his brother John R. Peed and another as trustees. The other person named did not qualify, but John R. Peed did qualify as trustee, and was proceeding to sell the property, advertising the land for sale subject to the mortgages. The appellees filed in the Madison circuit court an intervening petition seeking to enjoin the sale of the real estate subject to the mortgages, and to have the mortgage in favor of said John R. Peed declared void for the reason that it was executed contemporaneously with, and as a part of, the instrument of assignment. Issues were joined by answer in denial to the petition. There was a trial by the court, and the court, on proper request, made a special finding of facts, and stated its conclusions of law in favor of the appellees. Exceptions were taken by the appellants to the conclusions of law, and certain motions were made, ruled upon, and exceptions reserved, which rulings of the court are made the subject of review by proper assignments of error. The principal question presented in the case relates to the validity of the mortgages in favor of John R. Peed, and this arises on the exceptions to the conclusions of law.

We deem it unnecessary to set out in detail the finding of facts, except as to the question presented on the findings in relation to the execution of the mortgages and the assignment; the court holding that they all are one transaction, executed contemporaneously. The court's finding in this respect is, in brief, that on the 29th day of September, 1890, Peed went from his home, in Elwood, Madison county, Ind., to New Castle, Henry county, Ind., where he consulted with his brother-in-law, one David W. Chambers, an attorney, in regard to his financial embarrassment, and as to the proper manner of securing his brother, John R. Peed, and his son, Martin E., and as to making an assignment for the benefit of his general creditors. That James L. went to his brother's (John R.) on that evening, remained all night, and told his brother of his financial embarrassment; and the two went together to the office of Chambers, and again consulted him as to the best method of securing his brother and son, and the making of an assignment, and were informed by Chambers that if he wished to prefer his brother and son he must first execute and deliver to them mortgages, and then execute the deed of assignment for the benefit of his general creditors, and, so executed, the mortgages would be valid. That thereupon said Chambers commenced the preparation of the papers, first drawing the mortgages and notes which they were to secure, and while said debtor was acknowledging and delivering the mortgages the said attorney was preparing the deed of assignment for the benefit of all creditors. That when the mortgages were delivered the deed of assignment was half written, and, in 20 minutes from the time the last mortgage was acknowledged and delivered, said deed of assignment was completed, acknowledged, and delivered to said Chambers to have it recorded. That each of said mortgages, and said

deed of assignment, were left with said Chambers to be brought to Anderson, in Madison county, to have them recorded. That said Chambers left New Castle at 10 o'clock, and at 11 o'clock he went to the recorder's office in Madison county, and had the mortgages marked by the recorder of said county "Recorded," having with him at the same time the deed of assignment, which he purposely withheld until 2 o'clock of said day, when he took it to the recorder's office, and left it for record. It is contended on the part of the appellants that this was a valid preference of creditors, prior to, and separate and apart from, the transaction of the assignment, in the making and execution of the deed, while on behalf of the appellees it is contended that it was one and the same transaction, and was an effort to avoid the statute, by indirectly, through the means of the mortgages, preferring a creditor, when he could not do so in the assignment itself.

The question here presented has been so recently considered by this court, and so fully considered and discussed, that we deem it necessary to say but little in addition to what was said in the case of *John Shillito Co. v. McConnell*, 130 Ind. 41, 26 N. E. Rep. 832, where the rule in relation to assignments, and giving preference to certain creditors, is properly stated. It is well settled in this state that a debtor, even though he be insolvent, may prefer and secure a bona fide creditor, and, as said in the case cited: "It is enough if there is a bona fide preference of bona fide creditors, which in fact precedes the making of the general assignment." But the question in this case, as in that, is whether the preference in fact precedes the assignment, for to prefer a creditor is a part of a general assignment. In the case cited this court said: "While it cannot be said that a debtor has in fact surrendered dominion over his property until the assignment is complete, as from the purely voluntary nature of the transaction he may at any time before the final act change his mind, and refuse to complete it, yet, being completed, we think it ought to be held to relate back to the time when it was actually commenced, and cover all intervening transactions. The act of making the assignment embraces the preparation and execution of the necessary instruments, and, whether that takes a long or a short time, it certainly must all be treated as one continuous act. To say that the debtor's surrender of his absolute control over the disposition of his property is to be dated from the time he actually commences to make the assignment is to give to the entire transaction the character of good faith, and make it in fact what it purports to be,—an effort to secure to all his creditors that equal consideration contemplated by the statute. But to hold that while he is thus engaged he may at the same time successfully prefer favored creditors is to hold that he may at one and the same time do two exactly contradictory acts," etc. To permit a party, in the same transaction, to make out mortgages in favor of some creditors, and make out a general assignment in fa-

vor of remaining creditors, and give preference to the mortgagees by purposely, and with a view of preferring them, delivering the mortgages in advance of the recording of the assignment, would be no different, in effect, than preferring certain creditors in the deed of assignment itself, which is not the purpose of the statute, and cannot be done. The court, in *John Shillito Co. v. McConnell*, supra, holds that so long as the purposed assignment remains mere matter of intention, contemplation, or determination, a debtor has done nothing to abdicate the dominion which the law gives him over his property, though he be hopelessly insolvent, but the court says: "Certain formalities are necessary to consummate such a purpose, and we think it may fairly be said that, when the debtor has once entered upon the doing of these formal acts necessary to make the assignment, he cannot thereafter make any valid preference, if he preserves and completes the assignment thus begun." The rule as stated in the case above cited, and which we have quoted, is in harmony with the other decisions of this court, many of which are cited, and the rules governing in such cases are fully and clearly stated in the case of *Gilbert v. McCorkle*, 110 Ind. 215, 11 N. E. Rep. 298; *Carnahan v. Schwab*, 127 Ind. 507, 26 N. E. Rep. 67. It matters not how short a time intervene between the conveyance or mortgage executed for the preference of creditors, and the making of the deed of assignment, if it be in fact a separate transaction, and a bona fide one, though the time may be properly considered in determining as to whether or not the transaction is bona fide or not, and whether or not it is in fact a separate transaction. The facts found in this case show that the debtor and the creditor, his brother, went to the office of his attorney to consult about, and to make and give, a preference, and make an assignment. He determines to do both at the same time. The attorney sets about drafting all the papers at the same time. To avoid the statute, and avoid what the law prohibits, he signed and delivered the mortgages some 20 minutes before the execution of the assignment. They were all delivered to the attorney to have recorded, and with the same purpose in view he delivers the mortgages to the recorder first, and withholds the delivery of the assignment some four hours, and then has it recorded. That it was all one and the same transaction, there can be no doubt. There could be no difference, in effect, in executing them, as they were, in separate papers, and giving a preference to the mortgagees in the deed of assignment; and, if held valid, it would be holding that the object of the law could be avoided by a mere pretext, and by merely executing two papers instead of one. Had these papers been executed as they were in relation to any other transaction, that they would be construed together, and have the same effect as if executed together, there can be no doubt; and, so construing them, the mortgage would be void, for it would be giving a preference to a creditor in a voluntary assignment, which cannot be done.

The court properly concluded that the mortgage to John R. Peed was void, and did not err in its conclusions of law.

The appellants moved for a *venire de novo*, which was overruled, and which ruling is assigned as error. The contention that this ruling is erroneous is based upon the theory that the complaint alleges that James L. Peed was insolvent, and that it is a necessary averment, and there is no finding of this fact. This ruling was not erroneous. The averment of insolvency was not a necessary averment in the complaint. The complaint did not proceed upon the same theory as a complaint to set aside a fraudulent conveyance. James L. Peed made a voluntary assignment under the statute, and the mortgagee, John R. Peed, was named as trustee. The validity of the mortgage was attacked upon the grounds that the mortgages and assignment were executed contemporaneously, and constituted but one instrument, and giving to John R. Peed a preference over the other creditors, and it was therefore void, as such a preference could not be given under the voluntary assignment law. The petition was filed as an intervening petition in the insolvency proceedings. The mortgage being void, the trustee had no right to sell the land subject to it, as he had given notice to do. There is no error in the record. Judgment affirmed.

(135 Ind. 158)

#### HORN v. BENNETT et al.<sup>1</sup>

(Supreme Court of Indiana. May 23, 1893.)

##### MORTGAGES—PRIORITY OF NOTES SECURED.

On foreclosure of a mortgage securing several notes payable at different times, and held by different persons, the proceeds of sale will be applied to the payment of the notes in the order in which, by their terms, they are payable, though the mortgage provides that, on failure to pay any of the notes at maturity, all shall become payable.

Appeal from circuit court, Fulton county; A. C. Capron, Judge.

Action by Charles O. Bennett against Mary E. Horn and others to foreclose a mortgage on land. Judgment of foreclosure was rendered, which provided that out of the proceeds of sale the notes held by plaintiff be first paid; and from this judgment, and an order denying a motion for a new trial, defendant Horn appeals. Affirmed.

Isaiah Conner, for appellant. J. W. Rickel, for appellees.

**OLDS, C. J.** This is a suit for the foreclosure of a mortgage, instituted by the appellees Charles O. Bennett against the appellant, Mary E. Horn, and Enoch Myers and his wife, Mahala, and William W. McMahan and his wife, Julia F., to foreclose a mortgage on lands therein described, and situate in the county of Fulton, in the state of Indiana, to secure the payment of a series of seven notes, each dated December 2, 1889, the first one of which notes, by its terms, became due on or before December 2, 1890, and each of the others, by its terms, on or before the

2d day of December thereafter, annually, until all should mature. The mortgage securing the notes contained the following stipulation: "It is agreed and understood by the parties hereto, upon the failure to pay any one of said notes at maturity, then all of said notes shall become due and payable, and this mortgage may be foreclosed." Each of said notes had been assigned, before this action was commenced, by indorsement on the back thereof,—the first five to the appellee Bennett, and the last two to this appellant, who was made a defendant in the complaint of said appellee Bennett to foreclose the mortgage, and she filed her cross complaint to foreclose said mortgage as to the two notes which she owned. Issues were joined, and trial had, and a decree of foreclosure entered, giving to the appellee Bennett priority as to the notes held by him, and that the proceeds arising from the sale be first applied to the payment of the sum found due on the notes owned by said Bennett, and the surplus, if any, to be applied on payment of the sum found due on the notes owned by the appellant.

Appellant moved the court to modify the judgment and decree so as to place the sums due on each on an equality, and allow her to share pro rata in the fund derived from the sale, which motion was by the court overruled, and exceptions reserved, and this ruling is assigned as error. The same question is presented by a motion for new trial, the court finding as a fact that appellee Bennett had a prior lien for the sum found due him on the first five notes, and the appellant had a subsequent or junior lien for the sum found due her on the two notes owned by her, being the sixth and seventh notes, and the notes last due in the series of seven. That under the stipulation in the mortgage all the notes matured and became due on the failure of the payor to pay the note due first, and that this was a failure to pay the note first due before the commencement of the suit, making all of the notes due before suit was commenced, is not doubted or questioned by either the appellant or appellees. That the notes did all mature upon failure to pay the first has been settled by this court. *Moore v. Sargent*, 112 Ind. 484, 14 N. E. Rep. 466. It is also the settled law of this state that when a series of notes falling due at various dates are secured by mortgage, without any condition in the mortgage such as is in the one in the suit at bar, whereby they mature earlier than the date fixed in the note on failure to pay any one when it matures, in case of an assignment of the notes to various persons they will be treated as several mortgages, and the persons holding the notes maturing first will have a prior lien to those holding the notes maturing subsequently thereto. This has been the rule in this state since the decision in the case of *Bank v. Tweedy*, 8 Blackf. 447, and has been uniformly so held whenever the question has been presented. *Doss v. Ditmars*, 70 Ind. 451; *Gerber v. Sharp*, 72 Ind. 553, and authorities cited in this opinion. Many other authorities might be cited. In this case it is

<sup>1</sup>For opinion on rehearing, see 34 N. E. Rep. 956. v.34N.E.no.4—21

contended by counsel for the appellant that the notes must be treated as all maturing at the same time, and that assignment transferred but a pro rata interest in the mortgage security, and that this question is an open and new one in this state, never having been passed upon by this court, while, on the other hand, counsel for appellees contend that the condition in the mortgage, upon which all of the notes should mature on failure to pay the note first due, in no way changed the rights of the parties; that they are the same as if they matured in the order and at the time named in the note; and that the decisions in *Bank v. Finney*, 68 Ind. 460, and *Doss v. Ditmars*, 70 Ind. 451, are decisive of the question in appellees' favor. In the latter case there was a condition in the mortgage similar to the one in this case, but it was not considered or discussed, or treated as having any bearing upon the case; and in the case of *Bank v. Finney*, supra, the assignee of the first note extended the time of payment until after the subsequent notes matured, and the holders of the junior notes sought to postpone the lien of the holder of the senior notes, and have it decreed to be a junior lien, on account of the extension of time of payment, and it was held that this could not be done; that the priority of liens was not affected by the extension of the payment.

The question presented in this case does not seem to have been considered and decided by this court, although the two decisions last referred to tend to support the contention of the appellees. The decisions of other states where the question has been passed upon are in conflict,—some holding that the assignees take pro rata, and some that they take pro tanto; but it may be remarked that there is a like difference in the holdings of the courts of other states, where the notes held by assignees mature at different dates. In *Parkhurst v. Steam-Engine Co.*, 107 Ind. 594, 8 N. E. Rep. 635, the law of this state is stated to be "that an indorser of a part of such notes so secured by mortgage is entitled, in equity, to payment out of the mortgage funds in preference to the notes retained by the mortgagee and assignor, although the notes so assigned may fall due subsequently to those retained by the mortgagee." This modifies to some extent the rule as held in *Bank v. Tweedy*, supra. It is also intimated, or suggested, rather, in the case of *Parkhurst v. Steam-Engine Co.*, supra, that a difference in the rule as to priority might exist between the assignees of notes assigned at different dates, and the assignees of notes assigned at the same date. It is a well-settled rule in equity that when the owner of real estate incumbered conveys a part to one purchaser for value, and afterwards conveys to another purchaser the remainder, equity will compel the creditor to resort to the real estate last conveyed, and in case it is sufficient to pay the debt the tract first sold will be freed from the lien, thereby giving the first purchaser the priority or advantage. When the notes and mortgage in suit were executed and assigned the presumption existed that the

notes would be paid at maturity. At the time the parties took the assignment the notes were payable at different dates, the notes assigned to the appellee Bennett being payable at a prior date than those assigned to the appellant. As they stood at the date of the assignment, they were not collectible until the date named in each for their maturity. Had the maker and mortgagor not made default in the payment, under the law of this state the appellee Bennett had the prior mortgage, securing the notes assigned to him. We do not think the rights of the parties were changed by the subsequent default of the mortgagor in the payment of the first note. Such default was not brought about by any act of the assignee of the notes first due, nor had he any control over the matter. In considering this question in the case of *Leavitt v. Reynolds*, 44 N. W. Rep. 567, the supreme court of Iowa says: "In this state, and in Ohio, Indiana, Illinois, Alabama, and some other states, the pro tanto or priority rule is followed, under which the notes first maturing are treated as prior, and to be first paid in full out of the security." The appellant contended in favor of the pro rata rule, and the court further says: "To apply the rule contended for by the appellant in a state where the pro tanto rule is the established law would add an element of uncertainty to mortgage securities that would affect their value. Such a rule would render it uncertain whether, under mortgages like this, the security would be applied pro rata or pro tanto. Take the case of three notes and mortgage, like these under notice, as an illustration: A party knowing that under the laws of the state the notes are entitled to priority according to the order of their maturity, and knowing the security to be sufficient for the first two notes, but insufficient for the whole, purchases and pays for the two notes first falling due on that basis. If the maker may, by defaulting, deprive these notes of their priority, then surely they would not be purchased so readily, nor at such a price. The rule contended for would render it possible for the mortgagor and holder of the notes last falling due to defeat the holder of the first notes of his priority by the makers failing to pay the interest on the last note, whereby all became due, and the holder of the last be entitled to a pro rata share of the security. Notes of this description, secured by mortgages and deeds of trust, enter largely into the business transactions of the state, and the courts should hesitate before pronouncing a rule that would render it uncertain whether security for such notes would be applied pro rata or pro tanto. Our conclusion is that the maturity of the notes by reason of default in making prior payment is not such a falling due as should change the rule for the application of the security." The court further says: "One of the grounds upon which the pro tanto rule is supported is that making the notes mature at different times evidences an agreement that they are to have priority in the order in which they fall due. Hence cases of default, like this, are not such a falling due as expunges from the

contract the agreement as to priority." We think this statement of the Iowa supreme court enunciates the better rule, and is in harmony with the holdings of this court, on the question of priority of liens, and assignees of notes take a pro tanto interest in the mortgage security, with priority according to the dates at which their notes mature, as stated in the notes, and that this rule, or their priority, is not changed by the default in payment by the mortgagor and maker, in the failure to pay either the principal or interest of any note at maturity, by which default all of the notes mature. It follows from the conclusion we have reached that there is no error in the record.

Judgment affirmed.

(134 Ind. 523)

JACKSON et al. v. LANDERS et al.

(Supreme Court of Indiana. May 23, 1893.)

IMPLIED TRUST.

Interveners' petition alleged that all testator's property except \$300, to be invested in land for his sons, A., T., and C., was left to his widow for life, remainder over to interveners, his daughters; that A. took possession of the estate; that he purchased land for himself with the money bequeathed him, and paid T. a sum in satisfaction of his bequest; that with money of the estate he purchased an 80-acre tract and also a 50-acre tract, the former purchase being in compliance with the bequest to C.; that C. died before attaining majority; that the purchase of the 50-acre tract was without the knowledge and consent of interveners. Held not to state facts sufficient to establish in interveners' favor an implied trust in the 50 and 80 acre tracts mentioned.

Appeal from circuit court, Morgan county: R. W. Miers, Judge.

Action for partition by George A. Jackson and others, heirs of Louisa Passmore. The estate sought to be divided was sold under decree of court, and Matilda Landers and others intervened before distribution was had, claiming a portion of the proceeds arising from the sale. There was judgment for interveners, and Jackson and others appeal. Reversed.

David Wilson, A. M. Cunning, Jas. H. Jordan, and Oscar Mathews, for appellants. W. S. Shirley and W. R. Harrison, for appellees.

COFFEY, J. At the September term, 1889, of the Morgan circuit court the heirs at law of Louisa Passmore commenced an action therein for the partition of the lands of which she died seized, consisting of 210 acres. Such proceedings were had in this action as that the lands were sold by a commissioner, and the proceeds of the sale paid to the clerk of the Morgan circuit court; but before any final order for distribution was entered the appellees appeared, and filing an intervening petition, claiming a portion of the funds arising from the sale of the land. So much of this petition as is necessary to present the questions involved in the case alleges substantially that Charles Hicklin died testate in the state of Kentucky in the year 1830, the owner of \$3,000, consisting of money, notes, and other personal prop-

erty; that by the terms of his will, which was duly probated, he gave all of his property to his widow, Jane Hicklin, during the term of her natural life, except the sum of \$300, \$100 of which was to be invested in land in the state of Indiana for the use of his son Allen Hicklin, \$100 invested in like manner for his son Thomas Hicklin, and \$100 in the same kind of land for the use of his son Charles M. Hicklin; that by the terms of the will all the property except the sum above named, invested for the use of his sons, was vested in the interveners, who are his daughters, to be enjoyed by them upon the death of the widow, who was their mother; that Allen Hicklin, with full knowledge of the will and its contents, took charge, control, and possession of the estate of Charles Hicklin, deceased, and with the proceeds thereof paid Thomas Hicklin \$100, which he accepted in full of the bequest to him; that he purchased for himself the W.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  of section 8, in township 13, range 2 E., in Morgan county, Ind., in discharge of the \$100 bequeathed to him; that with other money belonging to said estate he purchased and paid for the E.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  of section 3, in township 13, range 2 E., and 50 acres off of the east side of the S. W.  $\frac{1}{4}$  of section 3, in township 13, range 2 E.; that the said E.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  was purchased to comply with the bequest in favor of Charles M. Hicklin; that Charles died before he arrived at the age of 21 years, and that by reason of his death before arriving at the age of 21 he was, under the provisions of the will, entitled to no part of said estate; that the purchase of said last-named land was without the knowledge or consent of the interveners; that under the terms of the will the land so purchased for the use of the said Charles M. Hicklin at his death became the property of the interveners, as well as the said 50-acre tract, subject to the right of the widow to use the same during her natural life; that the widow, Jane Hicklin, died in the year 1848, leaving said lands to the interveners, having used and converted to her own use all the other property belonging to said estate; that Allen Hicklin died in March, 1871, holding said lands in trust for the interveners, leaving no children, but leaving his widow, Louisa Hicklin, who, after his death, intermarried with Willard Passmore, from whom she was afterwards divorced; that said Louisa Passmore died on the 15th day of August, 1889, still holding said lands in trust for the interveners. To this petition the appellants answered: First, a general denial; second, 20 years' statute of limitations; third, the 15-years statute of limitations; fourth, 20 years' adverse possession of the land described in the petition; fifth, repayment of the money mentioned in the complaint. To this answer the appellees replied: Second. That during all the time after Allen Hicklin received the moneys of the estate of the father of the appellees, and before the death of their mother, the appellees were nonresidents of the state; that the appellees Matilda Sanders, America McNabb, Mary Ann Perkypie, Malinda Scott, Maranda Hasty, and Nancy Evans were married women,



and under the disability of coverture; that the said Allen Hicklin at no time put of record any deed or other conveyance for the lands bought in trust for the interveners with the moneys belonging to them, nor did said Louisa, his widow, ever put any such deeds of record; that the interveners never had any notice of any disclaimer of said trust by the said Allen Hicklin until after his death, and until after the death of his widow, the said Louisa. The assignment of error calls in question the ruling of the circuit court in overruling a demurrer to the petition, and in also overruling a demurrer to the reply above set out.

The intervening petition in this case is very uncertain and indefinite in its allegations. It seems to proceed upon the theory that Allen Hicklin held the 50-acre tract of land therein described in trust for the appellees, because the purchase price was paid with money belonging to them, while it is claimed that he held the 80-acre tract in trust for them, because the same was purchased for Charles M. Hicklin, who died before he arrived at the age of 21, it being alleged that he was not entitled to any part of the estate except upon the condition that he reached that age. We are wholly without information, so far as it can be ascertained from the petition, of the name of the person or persons from whom the 50 acres was purchased, the amount paid for it, or whether it was conveyed to Allen Hicklin or some other person, or, indeed, whether it was conveyed at all. The petition falls far short of alleging sufficient facts to show that Allen Hicklin held this tract in trust for the appellees. It appears by the will, which is made part of the petition, that Jane Hicklin, the widow, was the executrix, and that she was given all of the property except the amount bequeathed to the three sons, during the period of her natural life. The arrangement between Allen Hicklin and the executrix by the terms of which he came into the possession of the money is not stated. Of course she had the right to loan it, otherwise the bequest giving it to her for life would be of no benefit. If Allen Hicklin received the money belonging to the estate under any arrangement by the terms of which he was to repay it, no trust in land bought with the money could arise. As the presumption is always against wrongdoing, we cannot, in the absence of an allegation or facts to that effect, presume that he took possession of the money belonging to the estate wrongfully, and without any agreement upon the subject between him and the executrix. The trust sought to be established is an implied trust. The elements necessary to create a constructive or implied trust are that fraud, either actual or constructive, must have intervened. Such trusts are raised by courts of chancery only in cases where it becomes necessary to prevent a failure of justice, and in most cases where there is no intention of the parties to create such a relation. *Elliott v. Armstrong*, 2 Blackf. 198; 1 Perry, Trusts, § 166; 2 Poin. Eq. Jur. § 1044; *Cox v. Arnsman*, 76 Ind. 210; *Tinkler v.*

*Swaynie*, 71 Ind. 562; *Wright v. Moody*, 116 Ind. 175, 18 N. E. Rep. 608. In this case we are asked to raise an implied trust in favor of the appellees as against the estate of Allen Hicklin without any allegation of fraud, either actual or constructive, or without any statement of facts from which such fraud can be inferred, for, as we have seen, all the facts alleged are consistent with perfect honesty on his part. This is not a case where one person has in his care the funds of another, charged with the performance of some specific duty. The executrix had a perfect right to loan or use the funds during her life, and she had the power to confer such right on another, subject, however, to the duty of accounting to the appellees for the principal sum upon the death of their mother. The money set apart to purchase the 80 acres of land for Charles M. Hicklin was not, under the terms of the will, the property of the appellees. The land, when purchased, was not coupled with any condition. It is true the will gave to the widow the right to occupy it during her life or widowhood, but the title vested in Charles absolutely. Upon his death it vested in his mother and brothers and sisters, under the terms of the statutes in force in this state at the time of such death. The uncertainty that surrounds the purchase of the 50-acre tract also surrounds the purchase of this 80. We are not informed by direct allegation as to whether Allen Hicklin took the title to this land in his own name, in the name of Charles M. Hicklin, or in the name of the widow, who was to occupy it during her life. In our opinion, this petition was not sufficient to entitle the appellees to the relief sought. A complaint, to be good, must be sufficient on the theory upon which it proceeds. The reply was, in our opinion, clearly bad. We are unable to perceive what proper place the allegations that the appellees were nonresidents of the state can have in this reply, inasmuch as the statute of limitations runs against a nonresident plaintiff the same as it does against a plaintiff who resides in the state. Nor can we attach any force to the allegations that certain of the appellees were married women, since the disability of coverture was removed in this state in the year 1881. *City of Indianapolis v. Patterson*, 112 Ind. 344, 14 N. E. Rep. 551; *Wright v. Kleyla*, 104 Ind. 223, 4 N. E. Rep. 16. The rule that the trustee must repudiate the trust, and that the cestui que trust must have notice of the repudiation, before the statute of limitations begins to run, is applicable to a direct and continuing trust only, of which courts of chancery alone have jurisdiction, and generally has no application to trusts which exist only by implication of law. *Churchman v. City of Indianapolis*, 110 Ind. 259, 11 N. E. Rep. 301; *Potter v. Smith*, 36 Ind. 232; *Newson v. County of Bartholomew*, 103 Ind. 526, 3 N. E. Rep. 163; *Raymond v. Simonson*, 4 Blackf. 77; *Smith v. Calloway*, 7 Blackf. 86; *Musselman v. Keut*, 33 Ind. 452. It often occurs that the act which creates the trust puts in operation the statute of limitation,

and to such cases the rule that the trustee must repudiate the trust does not apply. This reply certainly was not sufficient as to the fifth paragraph of the answer, which averred that Allen Hicklin had repaid the money mentioned in the complaint. Judgment reversed, with directions to the circuit court to sustain the demurrer to the intervening petition.

(134 Ind. 548)

### HASKETT v. ALEXANDER.

(Supreme Court of Indiana. May 23, 1893.)

#### TRUSTS—PRECATORY DEVISE.

1. A devise to H. "provided that when the said H. sells or disposes of said realty she may pay to A. or her guardian, out of the proceeds of said sale, the sum of \$1,000," is sufficient to create a trust in favor of A.

2. H. would not be personally liable for the sum bequeathed, unless, after a sale of the land, and receipt of the proceeds, she refused to pay the same to A.

Appeal from circuit court, Vigo county; D. N. Taylor, Judge.

Action by Georgia M. Alexander, by guardian, against Harriett E. Haskett, to recover the amount of a bequest. Judgment on demurrer was rendered for plaintiff, and defendant appeals. Reversed.

James M. Allen and I. N. Pierce, for appellant. Donham & Huston, for appellee.

COFFEY, J. The will of Mary Ann Erisman was probated in Vigo county on the 4th day of August, 1887. It contains, among others, the following provisions: "(2) I give, bequeath, and devise to my beloved daughter, Harriett E. Haskett, the following real and personal property, to wit: The north half of the southwest quarter of section No. twelve, in township No. eleven north, of range No. nine, situate in the county of Vigo, state of Indiana, except twenty acres heretofore transferred to Samuel Corby: provided that, when the said Harriett E. Haskett sells or disposes of said realty, she may pay to Georgia Alexander, or her guardian, out of the proceeds of said sale, the sum of one thousand dollars, (\$1,000.) I also give, bequeath, and devise unto Harriett E. Haskett all my personal property, of every kind and description, of which I may die seised." Based upon the above provisions of the will, the appellee filed in the Vigo circuit court the following complaint: "Georgia M. Alexander, by A. H. Donham, Guardian, vs. Harriett E. Haskett. Plaintiff says that on the — day of —, 1887, Mary E. Erisman died testate; a copy of the will being filed herewith, and made a part of this complaint. Plaintiff says that by the provisions of said will the defendant herein was made a devisee to certain lands therein described, provided that when she sold, or otherwise disposed of, said lands, she should pay over to this plaintiff one thousand dollars. Plaintiff says the defendant accepted said devise, and took possession of said land, but she has failed and refused to pay said one thousand dollars, although she has been asked to do so, and has had an opportunity to dispose of said

land to advantage." Prayer for a judgment for \$1,500, and a sale of the land for its payment. To this complaint the court overruled a demurrer, and, the appellant failing and refusing to plead further, the court rendered a personal judgment against her for the sum of \$1,000, and rendered a decree ordering the land described in the will to be sold as other lands are sold on execution, for the payment of such judgment.

It is contended by the appellant that under the terms of this will it is discretionary with her whether she shall pay the appellee the \$1,000 therein mentioned, or not; in other words, that she may pay that sum, or refuse to pay it, at her election. We cannot agree with the appellant in this contention. One of the fundamental rules for the construction of wills, as well as all other written instruments, is that effect shall be given to each word and sentence found therein, if it is possible to do so. The construction contended for by the appellant renders meaningless the clause, "Provided that, when the said Harriett E. Haskett sells or disposes of said realty, she may pay to Georgia Alexander, or her guardian, out of the proceeds of said sale, the sum of one thousand dollars;" for she would have had that right, at her election, had nothing been said upon the subject. In the construction of a will the intention of the testator is to be arrived at by an examination of the whole instrument, and not from any particular clause. *Pugh v. Pugh*, 105 Ind. 552, 5 N. E. Rep. 673; *Brumfield v. Druok*, 101 Ind. 190; *Critchell v. Brown*, 72 Ind. 539; *Kelly v. Stinson*, 8 Blackf. 387. When all of the provisions of this will are construed together, we think the intention of the testatrix to give Georgia Alexander \$1,000 out of the proceeds of a sale of the land devised to the appellant fully appears. In reaching this conclusion we are not unmindful of the fact that the case belongs to a class where there is always more or less difficulty in arriving at the intention of the testator, and in which it is difficult, if not impossible, to reconcile all the authorities with regard to precatory trusts. We are aware that the courts seem to be sensible of the fact that they have gone far enough in investing with the efficacy of a trust loose expressions, rarely intended to have that operation; but nevertheless the rule seems to be settled that words of recommendation, request, entreaty, wish, or expectation, addressed to a devisee or legatee, will make him a trustee for the person in whose favor the expressions are used, provided the testator has pointed out with sufficient certainty both the subject-matter and the object of the intended trust. *Jarm. Wills*, (6th Ed.) 356, 377, and authorities cited. In this case there is no uncertainty as to the subject-matter, nor as to the object of the trust, and we think the will clearly discloses a wish and expectation on the part of the testatrix that the appellee should receive \$1,000 out of the proceeds of the sale of the land devised to the appellant. This being true, the case falls, we think, within the rule above stated.

The question as to whether the appellant, in a proper proceeding for that purpose, could be compelled to sell the land devised to her, is not presented by the record, and for that reason we intimate no opinion upon the subject. No such end is sought by this suit. The complaint proceeds upon the theory that the appellant is personally liable because she failed to sell the land upon request, when she could have done so to advantage. A complaint, to be good, must be so on the theory upon which it proceeds. We have no information as to the value of the land described in the will. If it is not worth more than one-half the sum for which the appellee recovered judgment, there would be no conscience in requiring the appellant to pay her that sum. The appellant could not, in our opinion, be made personally liable until the funds with which to pay the appellee had come into her hands, and she had refused, upon proper request, to pay the same over. In that event the personal liability could not exceed the sum in her hands. The court erred, we think, in overruling the demurrer to the complaint. Judgment reversed, with directions to the circuit court to sustain the demurrer of the appellant to the complaint in this case.

(135 Ind. 373)

**RHODES-BURFORD FURNITURE CO. v. MATTOX et al.<sup>1</sup>**

(Supreme Court of Indiana, May 23, 1893.)

**JUDGMENT—COLLATERAL ATTACK—INJUNCTION.**

Under Rev. St. 1881, § 1148, which provides for restraining proceedings on a final judgment, the judgment of a justice of the peace will not be enjoined, on collateral attack, on the ground that the justice tried the case by a jury of 12, instead of 6, as the judgment was not void for that reason.

Appeal from circuit court, Floyd county; George B. Cardwell, Judge.

Suit by the Rhodes-Burford Furniture Company against Lafayette Mattox and others to enjoin a judgment alleged to have been recovered by defendants against plaintiff before a justice of the peace. From a judgment for defendants, plaintiff appeals. Affirmed.

Chas. D. Kelso, for appellant. Geo. H. Hester, for appellees.

MCCABE, J. The appellant sued the appellees to enjoin a judgment alleged to have been recovered by appellees against appellant before a justice of the peace. An emergency was alleged in the complaint, making it proper for the judge to, and he did, grant an emergency restraining order until a notice could be given appellees and a hearing had for a temporary injunction. The court, in term, after hearing evidence in support of the prayer for such temporary injunction, overruled appellant's motion to continue said restraining order, and dissolved the same, to all of which appellant excepted, has appealed to this court, and assigns those rulings as error. The appellees have moved to dismiss the

appeal on the ground that an appeal will not lie from either of such orders. But we can determine the merits easier than the motion to dismiss the appeal, and, as that practically reaches the same result, we adopt that course.

Section 1148, Rev. St. 1881, provides that "when it appears by the complaint that the plaintiff is entitled to the relief demanded, and the relief, or any part thereof, consists \* \* \* in restraining proceedings upon any final order or judgment, an injunction may be granted to restrain such act or proceedings," etc. It will be observed, then, it is only where it appears by the complaint that the plaintiff is entitled to the relief demanded, etc., in an application for a temporary injunction against a judgment, etc., that it may be granted. The sole ground on which appellant sought to enjoin the judgment of the justice was that he had tried the case by a jury of 12, instead of 6, as required by section 299, Elliott's Supp. This was a collateral attack upon the judgment; and it has been settled by a long line of cases in this court that for mere error or irregularity in the proceedings and judgment of a court of special and limited jurisdiction, where such court has jurisdiction over the subject of the action and the parties, the judgment cannot be collaterally attacked for such error or irregularity, any more than if the court was one of general jurisdiction. *Argo v. Barthand*, 80 Ind. 63; *Stoddard v. Johnson*, 75 Ind. 20; *Hume v. Draining Ass'n*, 72 Ind. 499; *Goddard v. Stockman*, 74 Ind. 400; *Mullikin v. City of Bloomington*, 72 Ind. 161; *Miller v. Porter*, 71 Ind. 521; *Porter v. Stout*, 73 Ind. 3; *Houk v. Barthold*, Id. 21; *Featherston v. Small*, 77 Ind. 143; *Board, etc., v. Hall*, 70 Ind. 469. It was even held that a judgment rendered by a justice of the peace was not void, when collaterally attacked, though the parties thereto were akin to him,—both plaintiffs and defendants,—within the sixth degree of consanguinity, in *Harbaugh v. Albertson*, 102 Ind. 69; and yet the statute provided that "no justice shall have jurisdiction in any action of slander, for malicious prosecution, or breach of marriage contract, nor in any action wherein the title to lands shall come in question, or the justice be related by blood or marriage to either party." The error or irregularity of trying a case by a jury of 12, instead of 6, it would seem, ought not to affect the validity of the justice's judgment, on a collateral attack, any more than, if as much as, his blood relationship to the parties, or any of them. We are of opinion that the judgment of the justice on the collateral attack made in the complaint for an injunction, on the ground that the justice tried the case by a jury of 12, instead of 6,—that being the sole ground of attack,—was not void for that reason, and hence it did not appear from the complaint that appellant was entitled to the relief demanded, and therefore the court below did not err in refusing to continue, and in dissolving, the injunction.

The judgment is affirmed.

<sup>1</sup> Rehearing denied, 35 N. E. 11. See 40 N. E. 545.

Rehearing denied.

(135 Ind. 664)

**BEMENT v. MAY.<sup>1</sup>**

(Supreme Court of Indiana. May 23, 1893.)

**JUDGMENT—SUIT TO REVIEW—COMPROMISE—EVIDENCE—ASSIGNMENT OF ERROR—NEW TRIAL—BILL OF EXCEPTIONS—SPECIAL JUDGE.**

1. Errors in overruling a motion for a change of venue, or in permitting an amendment, should not be assigned in a suit to review the judgment in a case, because such matters are but causes for a new trial, and, if not embraced therein, are to be deemed waived.

2. An offer to compromise a claim, colorable at least, in order to prevent litigation, is based on sufficient consideration.

3. No question is presented for review as to the exclusion of certain parts of an admitted affidavit where the language of such parts is not itself embodied in the bill of exceptions, but only referred to by page and line of the affidavit.

4. In an action for damages for conveying certain property to another instead of to plaintiff, as agreed, and for false and fraudulent representations, it is not competent to show by defendant's own declaration out of court that he had so conveyed the property at plaintiff's request, or what a third person had said in regard to there being no false or fraudulent representations.

5. Error in overruling a motion for a new trial, wherein all the instructions refused are joined by the copulative "and," and all those given and excepted to are likewise joined, is not available, unless all the instructions refused were not good, and all those given were not bad.

6. An instruction that, if a claim is not legal at the time it is compromised, the compromise is void, is incorrect in making the compromise depend entirely on the validity of the claim.

7. Rev. St. 1881, § 626, providing that if a motion for a new trial be filed in a cause in which a decision excepted to at the time is assigned as reason, such motion shall carry the decision and exception forward to the time of ruling on such motion, and time may then be given within which to reduce the exceptions to writing, carries forward any ruling properly assignable as ground for a new trial, even from a previous term.

8. After certain proceedings in a case a special judge was appointed. The record showed a bill of exceptions signed by the regular judge, followed immediately by a bill signed by the special judge, each presented on the same day. The formal parts of these bills were the same, except that the latter had a caption mentioning the special judge as presiding during the proceedings therein. The contents of the bills were totally different. *Held*, that the latter bill was not to be regarded as embracing the first.

9. A judge has no power to sign a bill of exceptions after appointing a special judge. *Lee v. Hills*, 66 Ind. 474, followed.

Appeal from circuit court, Vigo county; George A. Knight, Special Judge.

Suit by George W. Bement against Jane M. May. A demurrer to the complaint was sustained. Plaintiff appeals. Affirmed.

Nantz & Hammond, Wm. Eggleston, John L. McMaster, and Stanton & Scott, for appellant. Faris & Hamill, for appellee.

**MCCABE, J.** This was a suit brought in the court below by appellant against appellee to review a judgment alleged to have been recovered theretofore in the same court by appellee against appellant. A

demurrer was sustained to the complaint to review, which ruling is the only error assigned here. The errors assigned in the complaint to review are: (1) That the complaint did not state facts sufficient to constitute a cause of action. (2) Error in overruling defendant's demurrer to the complaint. (3) Error in overruling defendant's motion for change of venue from the county. (3½) Error in permitting plaintiff to amend complaint after the close of the evidence. (4) Error in overruling defendant's motion for a new trial. (5) Error in overruling defendant's motion in arrest of judgment.

The assignments of error 3 and 3½ are not well assigned, because they are but causes for a new trial; and, if not embraced therein, then they are waived, precisely the same as if appellant had appealed directly to this court for the correction of the supposed errors in said proceedings and judgment, instead of seeking to correct them by filing a complaint to review in the court where they are alleged to have been committed. *Insurance Co. v. Gibson*, 104 Ind. 336, 3 N. E. Rep. 892; *Baker v. Ludlam*, 118 Ind. 87, 20 N. E. Rep. 648.

The complaint sought to be reviewed is substantially as follows: "That heretofore, to wit, on the — day of April, 1891, said plaintiff had a valid claim for the sum of \$12,000 against said defendant, which said claim and demand accrued to said plaintiff because of certain false and fraudulent representations that had theretofore been made by said defendant to said plaintiff in reference to certain real estate that had theretofore been transferred by said defendant to said plaintiff, and because of the fact that theretofore, in said real-estate transaction the said defendant had promised and agreed to convey to the plaintiff certain real estate, which he had failed and refused to do, but had fraudulently conveyed the same to other persons than this plaintiff. The plaintiff avers that on said day the said defendant proposed to pay, in full settlement and adjustment of said claim, the sum of \$4,500, which said proposition the said plaintiff on said day accepted, but that thereafter, and ever since, the said defendant has refused to pay said sum, although this plaintiff has demanded payment of the same, and it is now due and wholly unpaid. Wherefore plaintiff prays judgment for the sum of \$5,000, and all proper relief." After the close of the evidence the appellee was permitted to amend her complaint so as to show that in said real-estate transaction plaintiff conveyed to defendant real estate of the agreed value of \$24,000, and that defendant was to pay plaintiff therefor in cash and other real estate, and that the transaction was consummated; and that plaintiff believes that she had been wronged and cheated, in that defendant had failed to convey to her certain of said real estate of the value of \$6,000 so to be by him conveyed to her, but had conveyed it to another, and that she had preferred a claim against defendant for such wrongful conveyance, and for falsely representing the values of the real estate so conveyed, and to be conveyed

<sup>1</sup> Rehearing denied, 35 N. E. 387.

to her, her claim therefor being for \$10,000. In all other material respects the amended complaint was the same as the original. Appellant's counsel refer us to *Jarvis v. Sutton*, 3 Ind. 289, in support of their contention that the complaint is bad because it does not show a sufficient consideration for the alleged compromise. There was no compromise involved in that case. The suit was founded on an alleged trespass, and the defense relied on a contract, void for want of consideration. All that is said in the opinion about a compromise was outside of the case, and not authority. They also cite *Smith v. Boruff*, 75 Ind. 412, where this court says, at page 416: "That there must be at least a colorable ground of a claim, in law or in fact, to sustain an executory contract given as a compromise of it. Can this be the case where the holder of a note has himself received payment thereof, and, notwithstanding such payment, insists on holding on to a security, and to the note secured, the helpless debtor protesting meanwhile that payment has been made. It is not laying down too stringent a rule in such a case that the creditor shall be held to have knowledge of payments that he has received, and that he cannot, by denying such payments, create a controversy which will support a promise to pay him a second time, in whole or in part, at the price of doing that which the law and equity and good conscience require that he shall do without further compensation." There are no facts alleged in the complaint as amended that bring it within the rule announced. On the contrary, it is alleged, in substance, that plaintiff and defendant had made a trade by which plaintiff had conveyed the defendant real estate of the agreed value of \$24,000, for and in consideration of which defendant had agreed to convey to her certain other real estate, and pay the balance in money; that certain of the real estate defendant was to convey to plaintiff he had failed and refused to so convey, but had conveyed it to another, and that defendant made certain false and fraudulent representations to her concerning the value of the real estate he was to convey to her, in all of which she claimed and believed he had damaged her \$10,000, and was demanding its payment; and that defendant proposed to pay to her in full settlement of said claim and demand \$4,500, which plaintiff accepted; and that defendant had ever since failed and refused to pay said \$4,500, which amount is now due and wholly unpaid. There is not a word in this complaint about the demand either of the \$10,000 or the amount agreed on as a compromise thereof of \$4,500, ever having been paid or settled in any way otherwise than by the compromise alleged. *Warey v. Forst*, 102 Ind. 209, 26 N. E. Rep. 87, cited also by appellant, has no application, because, like the other, it was a compromise founded on a claim absolutely void in law. *Wheeler v. Hawkins*, 101 Ind. 486, had no question of compromise in it, and has no bearing on this case. The complaint, as amended, comes very near showing, if it does not show, that the claim compromised was a valid cause of action,

which we need not and do not decide, because "the prevention of litigation is not only a sufficient, but a highly favored, consideration; and no investigation into the character or value of the different claims submitted will be entered into for the purpose of setting aside a compromise, it being sufficient if the parties entering into the compromise thought at the time there was a question between them." *Thompson v. Nelson*, 28 Ind. 431; *Wray v. Chandler*, 64 Ind. 146; *Insurance Co. v. McRichards*, 121 Ind. 121, 22 N. E. Rep. 875; *Smith v. Smith*, 106 Ind. 43, 5 N. E. Rep. 411. The complaint was clearly good, either on demurrer or on the assignment of error that it was insufficient in the complaint to review.

The next question made by appellant's counsel is that the evidence is not sufficient to support the verdict in the judgment sought to be reviewed. We have examined the evidence, and find that it was somewhat conflicting, but that the preponderance thereof is on the side of the verdict. However, if it appeared on paper here to preponderate against the verdict, still we could not reverse for that reason. We can only reverse when the facts in evidence, and the inferences which the jury might draw therefrom, tending to support the verdict, unopposed, are not sufficient to establish its truth.

The next question made relates to the exclusion of certain evidence contained in an admitted affidavit for a continuance. It was attempted to be shown in the bill of exceptions what parts of the affidavit were stricken out by reference to the page and line of the affidavit where the same began and the page and line where the part stricken out ended, without embodying the language into the bill of exceptions. This court has no means of knowing what language was intended to be stricken out, even though it should happen that the paging and lining of the affidavit, before it was copied into this record, should be the same as the paging and lining thereof now appears in this record. But we know that they were not the same, because the bill of exceptions as copied into this record says that the rejected language ended at line 31, page 49, at the word "agreement." Now we know that there could not have been 49 pages in the affidavit. Hence it clearly appears that that paging and lining could not have been in the original bill of exceptions, and therefore we have nothing but the clerk's statement as to what part was stricken out. The proper way would have been to have embodied in the bill of exceptions the language stricken out of the affidavit. No question is, therefore, presented as to that ruling.

The next complaint is made of the refusal "to permit appellant to testify that he had not refused to convey the Fourth street property to the plaintiff, but had conveyed the same to another, at the request of the plaintiff herself." The question was asked appellant: "What, if anything, was said by you at the time when you first met Mrs. May after the agreement to make the trade?" And it was proposed to prove in answer to this question "that the prop-

erty alleged in plaintiff's complaint to have been fraudulently conveyed to another person than plaintiff was conveyed to one McDonald by the personal request of the plaintiff, Mrs. May." If this evidence had been competent for any purpose, (which we do not and need not decide,) it was not competent to prove the fact by appellant's own declaration out of court, which the question proposed to do.

It was also proposed to prove by appellant what Balne had said out of court, namely, "that there was no false and fraudulent representations made in regard to said real-estate transaction." It was not proposed to prove that this declaration made by Balne was made while he was engaged in, and as a part of, a transaction of his agency for Mrs. May, or that he was an agent at all for her when it was made. Such a declaration, therefore, was mere hearsay, and inadmissible.

The motion for a new trial joins all the instructions refused from 1 to 17 by a copulative conjunction "and," and also in like manner joins all those given and excepted to. In such a case it has been held by this court that if all those refused were not good, and if all those given were not bad, there was no available error. *Railway Co. v. McCartney*, 121 Ind. 385, 23 N. E. Rep. 258; *Pennsylvania Co. v. Sears*, 34 N. E. Rep. 15, (at last term); *Railway Co. v. Madden*, 34 N. E. Rep. 227, (at last term.) And as to those given at request of plaintiff, as well as the one given by the court on its own motion, it may be properly observed that the record does not show that they were all the instructions that the court gave the jury. The presumption that the court did right prevails until the contrary is affirmatively shown by the record. For aught that appears, the court may have refused the whole 17 because the court had already fully instructed the jury as requested. And we find many, if not all, of the refused instructions, not a correct declaration of the law. The thirteenth instruction asked and refused is a fair sample of all, or nearly all, the refused instructions. It reads as follows: "If the plaintiff had no legal claim against the defendant at the time of the alleged agreement and compromise, it would be what is called in law a 'naked promise,' and void, and you should find for the defendant." This proposed instruction is so palpably wrong that comment is quite needless. It makes the compromise contract to depend wholly and entirely on the validity of the claim compromised. That simply would render a contract of compromise a useless and idle ceremony. If to enforce the compromise there must be under it a valid legal cause of action, the compromise is nugatory and worthless. In *Thompson v. Nelson*, supra, a compromise had been made of a bastardy suit by which a promissory note was assigned to the relatrix, she supposing she was pregnant with a bastard child. It afterwards turned out that she had not been pregnant at all, but that the defendant in the bastardy suit had had intercourse with her; and yet the compromise

was upheld by this court. And again, as to the instructions given and excepted to, it might be sufficient to say that, as the record does not show that they were all the instructions that were given, and as those given do not appear to be "so palpably erroneous as that no supposable instructions would have made them correct, a reversal will not follow, even if some inaccuracies appear in the instructions upon which error is predicated." *Marshall v. Lewark*, 117 Ind. 377, 20 N. E. Rep. 253; *City of Indianapolis v. Murphy*, 91 Ind. 382; *Conway v. Vizzard*, 122 Ind. 266, 23 N. E. Rep. 771.

The next error complained of is the refusal to grant a change of venue from the county in the proceedings and judgment sought to be reviewed. That proceeding took place at the adjourned May term of the Vigo circuit court, in the month of August, 1891. After overruling the motion for a change from the county, the appellant applied for and obtained a change from the regular judge of that court, the Honorable David N. Taylor, upon an affidavit of the bias and prejudice of the regular judge. The regular judge called and appointed the Honorable Cyrus F. McNutt, judge of the superior court of that county, to try the cause. Judge McNutt accepted the appointment, appeared, assumed jurisdiction of the cause, and tried it during said adjourned term before a jury; verdict for the then plaintiff, appellee here, for \$4,500; motion for a new trial was then filed by the then defendant, appellant here, assigning, among the various reasons therefor discussed above, that "the court erred in refusing to grant defendant a change of venue from the county of Vigo upon motion and affidavit filed." The motion for a new trial was not passed on until the next regular September term of the Vigo circuit court, when it was overruled by the special judge, McNutt, who rendered the judgment sought to be reviewed, and gave 60 days' time to file bill of exceptions. It appears from the record that the application for a change from the county was not made within the time required by the rule of that court, but to obviate which the affidavit stated that the affiant, the then defendant, appellant here, did not know of the alleged prejudice in the county against him until the making of the affidavit, which was after the expiration of the time required by the rule. It is but fair to the learned judge who refused the change on that kind of an affidavit to say that his ruling was justified and required by *Ringgenberg v. Hartman*, 102 Ind. 537, 26 N. E. Rep. 91, and *Witz v. Spencer*, 51 Ind. 253, the affidavit failing to state that any diligence had been used by the affiant to learn of the existence of the alleged prejudice at an earlier date. But those cases have been since overruled on that point by this court in *Ogle v. Edwards*, 33 N. E. Rep. 95, (at last term.) so that the affidavit is good, and entitled the defendant to a change of venue, as the law has since been declared by this court. To meet this appellee's counsel contend—First, that, as no time was given by Judge Taylor in

which to file a bill of exceptions to bring into the record the affidavit and motion thereon for a change, and the ruling thereupon, and as the bill was not filed until the next term, it is not properly in the record. On the other hand, it is contended by appellant's counsel that the proviso to section 626, Rev. St. 1881, carries such ruling and exception forward to the time the motion for a new trial was overruled. That proviso reads as follows: "Provided, that if a motion for a new trial shall be filed in the cause in which such decision so excepted to is assigned as a reason for a new trial, such motion shall carry such decision and exception forward to the time of ruling on such motion, and time may be then given by the court within which to reduce such exception to writing." Appellee's counsel contend that this court has decided, since the enactment of that proviso, that it does not operate to carry forward an exception to a ruling at a term previous to the one in which the motion for a new trial is overruled; and cited in support of that contention, *Smith v. Flack*, 95 Ind. 116; *Boyce v. Graham*, 91 Ind. 420. In both of these cases the decisions and exceptions sought to be carried forward by the motion for a new trial to another term than that at which they had been made and taken related to a decision rejecting pleadings and overruling a motion to make the complaint more specific, which could not constitute valid reasons for a new trial, and therefore could not lawfully be assigned as a reason in a motion for a new trial. Errors relating to pleadings, it has long been settled in this court, do not constitute reasons for a new trial. *Hamilton v. Elkins*, 46 Ind. 213; *Marshall v. Beeber*, 53 Ind. 88; *Railway Co. v. Stout*, Id. 143; *Denman v. McMahon*, 37 Ind. 241; *Line v. Hufer*, 57 Ind. 261; *Railway Co. v. Hemherger*, 43 Ind. 462; *Milliken v. Ham*, 36 Ind. 166; *Marks v. Trustees*, etc., 56 Ind. 288. Therefore, while a motion for a new trial under the proviso carries forward all the decisions and exceptions thereto which are legally assignable as grounds for a new trial to the time the motion is overruled, it does not carry forward any other decision and exception to another term. The refusal of the change of venue from the county related to the trial, as its object was to get a fair trial, and hence its refusal was ground for a new trial. *Shoemaker v. Smith*, 74 Ind. 71; *Horton v. Wilson*, 25 Ind. 316. We are of opinion that the decision refusing the change of venue from the county and exception thereto were carried forward to the overruling of the motion for a new trial, and that the time then allowed by the special judge to reduce the exception to writing authorized the incorporation into a bill of exceptions of the affidavit and motion for a change of venue, ruling thereon, and exception thereto. Appellee, however, contends that, if all that be true, the affidavit, motion, and ruling thereon, though copied into the transcript by the clerk, are not legitimately parts of the record, because not incorporated into the record by a valid bill of exceptions. Unless it is

so incorporated, it cannot be considered by this court. *Railroad Co. v. Leviston*, 97 Ind. 488. The bill of exceptions which attempts to bring into the record the affidavit, motion, and ruling purports to be in its inception and conclusion the act of the regular judge, Taylor. He signed the same within the time allowed by Judge McNutt for filing a bill of exceptions as to the matters occurring before him. The bill concludes thus: "And the defendant now tenders this, his bill of exceptions, and prays the same may be signed, sealed, and made a part of the record, which is done. Presented this 23d day of October, 1891. David N. Taylor." There is some contention by appellant that the bill of exceptions signed by Judge McNutt, which immediately follows in the record the above, embraces and includes the first. The beginning of the one signed by Judge McNutt is as follows: "Be it further remembered that on the 25th day of August, 1891, it being in chambers of the May term of the Vigo circuit court, the Hon. Cyrus F. McNutt presiding, the following further proceedings were had in this cause." And concludes as follows: "And the defendant now tenders this, his bill of exceptions, on this 23d day of October, 1891, and prays that the same may be signed, sealed, and made a part of the record, which is done this 4th day of Nov., 1891. Cyrus McNutt." We do not think there is any tenable ground for holding that these two documents constitute but one and the same bill of exceptions. To do so would require us to disregard what both judges have said over their signatures. One says that the document signed by him was tendered to him as a bill of exceptions, with a prayer that he sign, seal, and make the same a part of the record, which he says he did. The other certifies that the same things occurred as to the document presented to him. Each purports to be a separate bill of exceptions presented to the judge, with prayer that it be signed, sealed, and made part of the record by the judge, which was done in each case. Now, if that does not make the one signed by Judge Taylor his act, then it follows with equal force that the one signed by Judge McNutt is not his act. There is nothing in the record to show that both documents were embodied in one writing, or that they were attached together when signed. The contents of these two documents, except the formal beginning and conclusion, were wholly unlike and dissimilar. Therefore we see no more evidence that the bill of exceptions signed by Judge McNutt was intended to authenticate and bring into the record those matters embraced in the bill of exceptions signed by Judge Taylor, than that the latter intended to authenticate and bring into the record those matters embraced in the bill of exceptions signed by Judge McNutt.

The next question that confronts us is, had Judge Taylor any power to sign a bill of exceptions in that case after he had appointed a special judge, and such appointee had assumed and retained jurisdiction in the case to its close? The supreme



court of Wisconsin decided, under a similar statute to ours, that after the filing of a motion for a change, supported by affidavit, of the bias and prejudice of the presiding judge, he had no power or jurisdiction to make any order in the case except to order the change. *Fatt v. Fatt*, (Wis.) 48 N. W. Rep. 52. This court has by a long line of decisions decided that when a judge goes out of office he cannot sign a valid bill of exceptions as to matters occurring before he went out of office, but such bill to be valid must be signed by his successor. *Reed v. Worland*, 64 Ind. 216; *McKeen v. Board*, 60 Ind. 280; *Smith v. Bangh*, 32 Ind. 163; *Finch v. Insurance Co.*, 87 Ind. 302; *Insurance Co. v. Leeds*, 38 Ind. 444; *Ketcham v. Hill*, 42 Ind. 64; *Lerch v. Emmett*, 44 Ind. 331; *Railway Co. v. Rogers*, 48 Ind. 427; *Elliott's App. Proc.* § 798. Judge Elliott, in section 799 of that valuable work, doubts the soundness of our decisions above quoted so far as they sanction the power of the successor in office of the judge who tried the case to sign a bill of exceptions as to matters occurring under his predecessor, saying that the better rule is with those cases holding that in such case a new trial should be awarded by the new judge if there is a dispute as to what should go into the bill of exceptions. But nowhere is it either held or contended that the judge who goes out of office can afterwards sign a bill of exceptions that would be valid. It is contended by the appellee's counsel that Judge Taylor, as to that case, was as effectually deprived of all jurisdiction as if he had resigned immediately after appointing Judge McNutt. This court decided this precise question in favor of appellee's contention 14 years ago in *Lee v. Hills*, 66 Ind. 474. This court there said: "In another view of this question, we think that this pretended bill of exceptions did not become a part of the record of this cause. As we have seen, the decision of the court in overruling the said motion of the appellants was made at the April term, 1876, of the court, on the 10th day of June, 1876. The record shows that at the said April term, 1876, of the court, on the 13th day of June, 1876, on the appellant's application, the venue of this cause was changed from Judge Chambers Y. Patterson, the regular judge of said court, on account of his alleged interest and bias, and the Hon. Solon Turman, judge of the thirteenth judicial circuit of this state was then and there duly called and appointed to try this cause. It is further shown by the record that Judge Turman accepted such appointment, and on the trial of this cause, and when judgment was rendered therein on the 23d day of September, 1876, he was the judge of the court below. It seems to us that after this cause was so removed from before Judge Patterson, and after Judge Turman, as judge of the court below, assumed jurisdiction of the case, Judge Turman alone was authorized by law to sign any bill of exceptions therein. Judge Patterson's connection with or authority in or over said cause was permanently dissolved. For the reasons given, the second alleged error, in our opinion, is not apparent in the record." The record in that case

showed that Judge Patterson had signed the bill of exceptions after Judge Turman had assumed jurisdiction, attempting to bring into the record a motion and ruling thereon which had occurred under Judge Patterson, before the application for a change of judge. That is precisely the case here, and that case is decisive of the point here, and therefore we are constrained to hold that the affidavit and motion for change of venue and the ruling thereon are not properly in the record. If the complaint was sufficient to withstand a demurrer, as we have held it was, it was more than sufficient to withstand the motion in arrest of judgment; and, as the only reason pointed out in support of that assignment is the insufficiency of the complaint, there was no error in overruling the motion in arrest.

Having carefully considered all the errors embraced in the assignment and pointed out in appellant's very able brief and reply brief, and finding no available error in the proceedings and judgment sought to be reviewed, we therefore conclude the court below did not err in sustaining the demurrer to the complaint for review. The judgment is affirmed.

(50 Ohio St. 294)

SIEGFRIED v. NEW YORK, L. E. & W. R. CO.

(Supreme Court of Ohio. April 25, 1893.)

**LIMITATION OF ACTIONS — DISMISSAL — RIGHT TO BEGIN NEW ACTION.**

Where an action, which has been commenced in due time, is dismissed by the plaintiff after the time limited for the commencement of such action has expired, a new action for the same cause, thereafter commenced, is barred, though commenced within one year after the dismissal of the former action. Such dismissal is not a failure in the action, within the purview of section 4991, Rev. St.

(Syllabus by the Court.)

**Error to circuit court, Mahoning county.**

Action for personal injuries by Henry Siegfried against the New York, Lake Erie & Western Railroad Company. Defendant had judgment, and plaintiff brings error. Affirmed.

**Statement by the court:**

On the 9th day of January, 1890, Henry Siegfried commenced his action in the court of common pleas of Mahoning county against the New York, Lake Erie & Western Railroad Company to recover damages for personal injuries caused him, as in his petition alleged, on the 14th day of February, 1886, by the negligence of the defendant. After the issues were made up the cause was removed, on the application of the defendant, to the circuit court of the United States for the northern district of Ohio, where it was pending until the 14th day of May, 1891, when, as shown by the record, it was dismissed on motion of the plaintiff, without prejudice to a future action, and judgment rendered against the plaintiff for costs. On the next day, May 15, 1891, Siegfried commenced the action below in the court of common pleas of Mahoning county against the railroad company, upon the

same cause of action set forth in his first petition, filed January 9, 1890, against the railroad company. His last petition contains the further allegation of the commencement and dismissal of the former action at the times above stated. The answer, among other defenses, pleads the statute of limitations in bar of the action, and the reply controverts the allegations of that defense. On the trial the record of dismissal of the former action by the circuit court of the United States was given in evidence, from which it appears that action was dismissed, on motion of the plaintiff, without prejudice to another action; the record showing that the plaintiff directed the clerk to request the court to so dismiss it, which was accordingly done. At the conclusion of the evidence the defendant requested the court to charge the jury that the action was barred, and to return a verdict for the defendant, which the court refused to do, and the defendant excepted. The plaintiff obtained a verdict, upon which judgment was rendered, and the defendant prosecuted error to the circuit court, where the judgment was reversed, and the action dismissed. To reverse that judgment, the plaintiff prosecutes error to this court, and the only question raised is whether the action was barred.

George F. Arel, Frank Jacobs, and W. S. Anderson, for plaintiff in error. Hine & Clark and Williamson & Cushing, for defendant in error.

**PER CURIAM.** More than four years after the plaintiff's cause of action accrued having elapsed when the action below was commenced, the action, it is conceded, was barred, unless it is saved by the provisions of section 4991, Rev. St., which reads as follows: "If, in an action commenced in due time, a judgment for the plaintiff be reversed, or the plaintiff fail otherwise than upon the merits, and the time limited for the commencement of such has, at the date of such reversal or failure, expired, the plaintiff, or, if he die, and the cause of the action survive, his representatives, may commence a new action within one year after such date; and this provision shall apply to any claim asserted in any pleading by a defendant." The first action brought by the plaintiff was commenced within time, but when it was dismissed, on his motion, by the circuit court of the United States, to which it had been removed, the time limited for the commencement of the action had expired. The precise question in the case is, therefore, did the plaintiff fail in his first action, within the purview of the section of the statute above quoted? If he did not, the action below was barred; but, if he did, it was not barred, for it was commenced the next day after the dismissal of the first action. We think the plaintiff, by the voluntary dismissal of his action, did not so fail; and his second action—the action below—was therefore barred. To fail implies an effort or purpose to succeed. One cannot properly be said to fail in anything he does not undertake, nor in an undertaking which he

voluntarily abandons. The right to commence the new action is preserved by section 4991 only where, in the former action, judgment for the plaintiff has been reversed, or he has failed otherwise than upon the merits. The reversal of the judgment involves the action of the court, which may render it necessary or proper for the plaintiff to commence a new action; and a failure in the action, by the plaintiff, otherwise than upon the merits, imports some action by the court by which the plaintiff is defeated without a trial upon the merits. Under the provisions of section 5314, Rev. St., the court may dismiss an action without prejudice to a future action, (2) where the plaintiff fails to appear on the trial; (3) for want of necessary parties; (4) on application of some of the defendants, where there are others whom the plaintiff fails to prosecute with diligence; and (5) for disobedience by the plaintiff of an order concerning the proceedings in the action. Where the court, under either of these provisions, dismisses an action, the plaintiff fails, within the meaning of section 4991; and in that respect the case of *Bates v. Railroad Co.*, 12 Ohio St. 620, is distinguished from this case. By the provisions of section 5314 a plaintiff may voluntarily dismiss his action, either at term or in vacation, on payment of costs, without prejudice to a future action, at any time before the final submission of the case to the jury, or to the court when the trial is by the court, except that he cannot dismiss in vacation when a counterclaim or set-off has been filed in the action. A dismissal by the plaintiff involves no action of the court. It is a voluntary withdrawal of his case, and is not a failure in the action.

(50 Ohio St. 373)

### BONEWITZ v. BONEWITZ.

(Supreme Court of Ohio. June 13, 1893.)

#### JURY TRIAL—WAIVER.

1. A party may waive his right to a jury trial by acts, as well as by words.

2. And where, in a case of which the court of common pleas, having jurisdiction of the parties, may also, by consent, acquire jurisdiction to try the cause without a jury, the record shows that the parties appeared, and neither demanded nor waived a jury, but without objection submitted the cause to the court upon the pleadings, evidence, and argument of counsel, it is not error for the court to proceed to final judgment in the case.

3. An objection by the defeated party, first made after such submission and judgment, that his cause was not tried to a jury, comes too late.  
(Syllabus by the Court.)

Error to circuit court, Van Wert county.

The other facts fully appear in the following statement by SPEAR, J.:

In the petition the plaintiff in error, who was plaintiff below, set out an agreement in writing, of which the following is a copy: "Van Wert, Ohio, May 26, 1877. One day after date I promise to pay to Mrs. Elizabeth F. Bonewitz, or her heirs or assigns, thirteen hundred dollars, (\$1,300.00.) for value received. I also hereby agree for myself, my heirs and assigns,

that upon the presentation of this obligation to me, my heirs or assigns, by her or her heirs or assigns, to take up this obligation, and in lieu thereof to surrender to her, her heirs or assigns, one-quarter interest in the business of the firm of Bonewitz, Schumm & Co., as that interest may appear from the books of said firm, after deducting all expenses, losses, and liabilities, and making capital stock equal as between parties; that is to say, she would have an interest of thirteen hundred dollars in the capital stock and one-fourth part of the net gains or losses as the case may be. [Seal.] D. R. Bonewitz." She averred further, in substance, that at the time of the making of the agreement she was a married woman; that the defendant, one O. P. Bonewitz, and Louis G. Schumm, had about that time entered into a partnership to deal in dry goods, etc., under the name of Bonewitz, Schumm & Co.; that defendant urged her to give him the money to invest in the business of the firm, representing that she should be a dormant partner, and have a fourth interest, and, relying upon those representations, and agreeing thereto, she gave him said money, and thereupon defendant executed the writing. Subsequently, O. P. Bonewitz and Schumm retired from the firm, the defendant purchasing their interest and continuing the business, the plaintiff still retaining her one-fourth interest upon the assurance of defendant that her interest would not be affected by the change, and the business had been so conducted to a time shortly before the commencement of the action; that defendant now denies that she has any interest in the business, and refuses to allow her any participation therein. The firm has been successful; is possessed of a valuable stock of goods, and has a large amount of debts owing to it, and a valuable good will; and since the plaintiff so entered the partnership has gained a large amount of profits, the exact amount of which plaintiff cannot tell, though she believes and charges that it exceeds \$50,000, all of which defendant has kept and appropriated, and refuses plaintiff access to the books of the firm. No part of the \$1,300 has ever been paid to her. The prayer was that the contract be specifically enforced; that she be deemed to be a partner, and then that defendant be compelled to account with her, and pay what may be coming to her; but, if she be not entitled to such remedy, then for judgment for \$1,300, and interest from May 27, 1877.

By his answer, defendant admitted that he received \$1,300, but averred that the money, which was received on account of the husband of plaintiff, one Frank J. Bonewitz, and not on account of plaintiff, has been fully paid to said Frank J.; and took issue on the other allegations of the petition. Further answering, the defendant alleged "that he at no time, to his knowledge, signed the pretended contract set out in the plaintiff's petition, providing that the plaintiff could, on the surrender of said pretended contract, acquire an interest in the business of Bonewitz, Schumm & Co., and which pretended contract she asks to have specifically enforced

in this action; and he therefore denies that he did sign the same, and he avers that, if his name attached to said pretended contract is his genuine signature, it was procured by fraud and misrepresentation, and without his consent, and without his knowledge, and wholly without consideration. Wherefore the defendant prays that said pretended contract be declared fraudulent and void, and that the same may be canceled, and that the defendant go hence, and recover his costs."

The new matter was traversed by a reply. In the common pleas it was found, and stated in the journal entry, "that, the cause coming on for trial, came thereupon the parties and their attorneys, and neither party demanded or waived the interposition of a jury, but without objection submitted the cause to the court upon the pleadings, evidence, and argument of counsel." The court then found for the plaintiff, and rendered judgment for \$1,300, interest, and costs, but found against her as to the alleged partnership. Motion for new trial by defendant was overruled. Error was then prosecuted by him to the circuit court, where the judgment of the common pleas was reversed, and the cause remanded.

G. M. Saltzgaber, for plaintiff in error.  
H. G. Richie, for defendant in error.

SPEAR, J., (after stating the facts.) The ground of error alleged in the circuit court was that the common pleas erred in proceeding to trial without the intervention of a jury. To sustain the judgment of the common pleas, it must appear either that a jury was waived, or that the issues were such that the cause could of right be tried by the court without a jury. Section 5130, Rev. St., provides that "issues of fact arising in actions for the recovery of money only \* \* \* shall be tried by a jury, unless a jury trial be waived," etc. And, by section 5204 it is provided that, in actions arising on contract, trial by jury may be waived (1) by consent of the party appearing when the other party fails to appear; (2) by written consent filed with the clerk; or (3) by oral consent in open court, entered on the journal. It is insisted by counsel for plaintiff in error that the record shows affirmatively there was a waiver of a jury trial, while opposite counsel contend that the journal entry not only fails to show there was a waiver, but does affirmatively show that a jury was not waived. The language of the entry is that "neither party demanded or waived the intervention of a jury, but without objection submitted the cause to the court upon the pleadings, evidence, and argument of counsel." There is apparent verbal contradiction in the entry, and the question is, what, taken as a whole, does the language import? Upon the whole case made, was there a waiver or not? Attention is called to the case of *Slocum v. Swan*, 4 Ohio St. 161, as settling the question in this case. Plaintiff's action was in ejectment. A plea of "not guilty" had been interposed. When the case was reached, the defendant came not, although called, and the court rendered judgment for plaintiff

without a jury, and, apparently, without proof. The statute then in force provided that "when the parties to such action shall agree to waive the intervention of a jury, and to submit the case to the court, it shall be the duty of such court to try and determine the facts," etc. Under such a statute, and upon such a record, this court held that the issue made could not be tried by the court without a waiver by the parties of a jury trial; that there was no such waiver; and reversed the judgment. The real question was hardly germane to our case. It was whether or not the absence of the defendant amounted to a waiver. The holding on that question cannot materially aid in the solution of the question here presented, much less settle it. We have examined the other cases cited by defendant's counsel, but do not find them applicable to the present facts.

As already observed, the statute indicates several methods of showing waiver. Where the parties are present, (as in this case,) there must be consent; and, if it be oral, it must be given in open court, and entered on the journal. When this sufficiently appears, there is, in law, a waiver. Does not just that thing appear here? We think it does. The parties were present. Without objection they "submitted the cause to the court upon the pleadings, evidence, and arguments of counsel." This means a trial of the cause. It means, also, that the parties consented to go forward and try the cause to the court; and their acts, in this regard, were entered on the journal. To submit a cause to a court is an affirmative act. It is to ask the court to hear the evidence, consider it, and apply the law. What more potent "consent" could be given than this? A jury was not demanded, because, in all probability, the counsel and the court alike regarded it as a court, and not a jury, case. True, the entry says that neither party waived a jury. This language, in the light of the entire entry, naturally means, we think, and should be held to mean, no more than that no waiver was made in words; and it is true that none was so made, but actions sometimes speak louder than words. It was not until after the court had found and adjudged against the defendant that he discovered he had been prejudiced by not having his cause tried to a jury. His objection to the mode of trial, we think, comes too late. To sustain his claim would seem to be trifling with justice. He proceeded to trial, without objection, to a court having jurisdiction of the parties, and capable of being clothed with jurisdiction of the subject-matter for all purposes, taking his chance of a favorable result, and cannot, now that the chance has turned against him, be heard to question the authority of the tribunal to which he consented to submit his cause. He must be held to have waived his right to a jury trial, if he had such right. *Nicholson v. Pim*, 5 Ohio St. 25; *Ellithorpe v. Buck*, 17 Ohio St. 72; *Oil Co. v. Verner*, 22 Ohio St. 372; *Miller v. Longacre*, 28 Ohio St. 298; *Culver v. Rodges*, 33 Ohio St. 537. We think it was not error for the trial court to assume jurisdiction and try the issues; and, as this holding disposes of the case,

it is not important to consider whether, as a matter of law, either party had the right, under the pleadings, to demand a jury. The judgment of the circuit court will be reversed, and that of the common pleas affirmed.

(155 Mass. 273)

### COMMONWEALTH v. FROST.

(Supreme Judicial Court of Massachusetts.  
Suffolk. Jan. 6, 1892.)

#### INTOXICATING LIQUORS—LICENSE—SALE.

Intoxicating liquors, sold under a sixth-class license, for medicinal purposes, cannot be drunk on the premises. *Com. v. Mandeville*, 8 N. E. Rep. 327, 142 Mass. 469, followed.

Exceptions from superior court, Suffolk county; Braley, Judge.

Complaint against Frank M. Frost for the illegal sale of intoxicating liquors. Judgment of guilty, and defendant brings exceptions. Overruled.

A. E. Pillsbury, Atty. Gen., and C. N. Harris, Second Asst. Atty. Gen., for the Commonwealth. D. F. Kimball, for defendant.

**MORTON, J.** The defendant's license did not authorize him to sell intoxicating liquor to be drunk on the premises, even though it were sold and bought as medicine. The instructions were correct. *Com. v. Mandeville*, 142 Mass. 469, 8 N. E. Rep. 327. Exceptions overruled.

(125 Mass. 129)

### DICKINSON et al. v. NEW HAVEN & NORTHAMPTON CO.

(Supreme Judicial Court of Massachusetts.  
Franklin. Nov. 25, 1891.)

#### HIGHWAYS—OBSTRUCTIONS—RAILROAD COMPANIES.

Pub. St. c. 112, § 119, provides that when a railroad is laid out across a highway or other way it shall be so constructed as not to obstruct it. Section 135 provides that the county commissioners shall have original jurisdiction of all questions touching obstructions to highways or town ways, caused by the construction of railroads within their respective jurisdiction. Section 136 provides that the supreme court may by proceedings in equity compel railroad corporations to comply with the orders and decrees of county commissioners in all cases touching obstructions to highways. *Held*, that under such statutes railroad companies which lay out their lines across highways are subject to the jurisdiction of the county commissioners in which such highway is located in respect to their duty of not obstructing the highways, not only at the outset of the construction, but continuously, and that such commissioners may at the outset pass such decrees as seem suitable, and, if necessary, pass further decrees at a later date.

Report from supreme judicial court, Franklin county.

Proceeding by Frank Dickinson and others to compel the New Haven & Northampton Company to comply with an order of the county commissioners requiring defendant to provide for certain drainage to prevent obstruction to a highway crossed

by defendant's railroad track. Decree for plaintiffs.

C. C. Conant, for plaintiffs. J. C. Hammond, for defendant.

ALLEN, J. At the outset, when the defendant company found it necessary in the construction of its railroad to cross the highway in question, it made application to the county commissioners for a decree prescribing what alterations should be made; and the county commissioners passed a decree prescribing the alterations, and made a provision for the drainage of the highway, by ordering a drain to be built which began at a point 331 feet away from the highway. The reason for this apparently was because the company, in constructing its railroad, had made an excavation alongside thereof from the highway at the place of the proposed crossing, over its own land, to the point where the drain ordered by the county commissioners was to begin. The drain could not well be laid along the highway itself, but the contemplated method of draining the highway was to use the existing excavation by the side of the railroad as a drain for the distance of 331 feet, and then to excavate a drain connecting therewith across the land of Mrs. Graves to a brook. At the time of the original order this was sufficient to provide effectual drainage, and the decree of the county commissioners was complied with, and the drain was built, and the damages for crossing the land of Mrs. Graves were paid by the defendant company, and the highway was in fact effectually drained for four years thereafter, and then the excavation and drain became obstructed with grass, weeds, willows, and other materials. The question is whether, under this state of things, the county commissioners had authority to pass a new order providing for effectual drainage at the expense of the company. It is conceded that the county commissioners at the outset had authority to provide for drainage at the expense of the company, but it is contended that this authority was exhausted by the decree which they passed in 1880. The authority to pass the original decree was not conferred by any language which in express terms empowered them to require drainage to be provided by the company, but is derived incidentally from other provisions of statute which imply its existence. Thus, in Pub. St. c. 112, § 119, it is enacted that, "when a railroad is laid out across a highway or other way, it shall be constructed so as not to obstruct the same;" and a similar requirement is found in earlier statutes. Gen. St. c. 63, § 46; Rev. St. c. 39, § 66. Then in Pub. St. c. 112, § 121, it is enacted that "a railroad corporation may raise or lower a highway or other way for the purpose of having its road pass over or under the same; but before proceeding to cross or to alter or excavate for the purpose of crossing the way it shall obtain from the county commissioners a decree prescribing what alterations may be made in the way, and the manner and

time of making the alterations or structures which the commissioners may require at the crossing." This, in like manner, comes from earlier statutes. Gen. St. c. 63, § 48; Rev. St. c. 39, §§ 67, 68. No express provision is found that the county commissioners may require drainage, but it is properly assumed that such power was given by implication. The primary and fundamental provision is that, when a railroad is to cross a highway, it must be so constructed as not to obstruct the same. The highway is recognized as an existing thing, and, if a railroad company finds it necessary to cross it, the railroad must be so built that the highway will not be obstructed thereby. The obvious meaning of this is that the railroad must be so built that no obstruction of the highway will result from the building of the railroad; and, if drainage is necessary to prevent the highway from being obstructed by water, the county commissioners have power to require such drainage. Any other construction would be narrow, and insufficient to carry out the plain purpose of the legislature; and, indeed, to this extent we do not understand the learned counsel for the defendant to deny the authority of the county commissioners. But it seems to us that, if thus much is to be assumed, the rest follows. By Pub. St. c. 112, § 135, "original jurisdiction of all questions touching obstructions to highways or town ways, caused by the construction or operation of railroads, shall be vested in the county commissioners within their respective jurisdiction;" and by section 136 this court is authorized by proceedings in equity to "compel railroad corporations \* \* \* to comply with the orders and decrees of county commissioners in all cases touching obstructions to such ways by railroads." These statutes, also, are not new, but originated in St. 1849, c. 222, §§ 4, 5, re-enacted in Gen. St. c. 63, §§ 62, 63. It seems to have been contemplated that the original orders or decrees of the county commissioners might prove insufficient, or that circumstances or questions might arise which were not, and perhaps could not be, adequately considered or provided for in the first instance. Railroad companies which lay out their railroads across existing highways are made subject to the jurisdiction of the county commissioners in respect to their duty of not obstructing the highways, not only at the outset, but continuously. The general policy of the legislation is to authorize the county commissioners to put upon the railroad companies the burden of keeping the highways free from obstructions which result from building railroads across existing highways. To this end the county commissioners may at the outset pass such decrees as seem suitable for the purpose, and, if necessary to pass further decrees at a later date, jurisdiction is conferred upon them to enable them to do it. There is no reason why the legislature may not properly subject railroad companies to this duty, and such appears to have been the purpose of sections 135 and 136. See *Com. v. New Bedford Bridge*, 2 Gray,

839; *Cooke v. Railroad*, 133 Mass. 185; *Wellcome v. Leeds*, 51 Me. 313. No objection is made to the form of the order of the county commissioners. For these reasons, in the opinion of a majority of the court, the entry must be, decree for the plaintiffs.

(159 Mass. 281)

**PADELFORD v. PADELFORD.**

(Supreme Judicial Court of Massachusetts.

Bristol. June 9, 1893.)

DIVORCE—DESERTION.

Pub. St. c. 146, § 1, providing that a divorce may be decreed for utter desertion, does not apply to cases in which the libelant was the deserting party, even though such desertion was caused by the misconduct of the other party.

Exceptions from superior court, Bristol county; Caleb Blodgett, Judge.

Libel for divorce by Harriet Padelford against David Padelford on the ground of desertion. From an order dismissing the libel, after sustaining a demurrer to it, libelant brings exceptions. Order dismissing libel affirmed. Exceptions overruled.

Read & Dean, for libelant. W. H. Fox, for libelee.

**MORTON, J.** It was formerly provided that "a divorce from the bond of matrimony may be decreed in favor of either party in all cases where one of the parties has deserted, or shall hereafter desert, the other, for the term of five years consecutively: provided, that when the libel is filed by the party deserting it shall appear that the desertion was caused by extreme cruelty of the other party, or, in case the libel is filed by the wife, that the desertion was caused by the gross or wanton and cruel neglect to provide suitable maintenance for her by the husband, he being of sufficient ability so to do." St. 1857, c. 228, § 2. This statute was re-enacted in (Gen. St. c. 107, § 7, as to divorces from the bonds of matrimony. It did not apply, and never did, to divorces from bed and board. St. 1857, c. 228, § 2; Gen. St. c. 107, § 7. Prior to 1857 it had been provided that a divorce from the bond of matrimony, in favor of either party, might be decreed when the other had deserted for five years. St. 1838, c. 126. This last statute was expressly held not to include a case where the libel was brought by the deserting party, even though the desertion was caused by the misconduct of the other party. *Pidge v. Pidge*, 3 Metc. (Mass.) 257; *Fera v. Fera*, 98 Mass. 155. There can be no doubt that St. 1857, c. 228, § 2, was passed in consequence of the decision in *Pidge v. Pidge*, supra. The statute of 1870, c. 404, which made a material change in the divorce laws, apparently left the provisions of Gen. St. c. 107, § 7, still in force. In this situation, the law, as it stands now, was enacted, providing simply for divorce for "utter desertion continued for three consecutive years next prior to the filing of the libel." Pub. St. c. 146, § 1. We must regard the omission by the leg-

islature from the Public Statutes of the provisions formerly contained in St. 1857 c. 228, § 2, and in Gen. St. c. 107, § 7, permitting a libel to be brought in certain cases by the deserting party, as significant, and as manifesting an intention on its part, not only to limit divorces for desertion to cases in which the libelant has actually been deserted by the other party, but to exclude cases in which the libelant was the deserting party, even though such desertion had been caused by the misconduct of the other party. The ruling sustaining the demurrer was therefore correct, and as it is decisive of the case there is no need to consider whether the judgment dismissing the former libel is a bar to this libel. Order dismissing libel affirmed. Exceptions overruled.

(159 Mass. 74)

**GRAVES v. DILL.**

(Supreme Judicial Court of Massachusetts.

Suffolk. May 17, 1893.)

ACTION FOR COMMISSIONS—EVIDENCE—QUESTIONS FOR JURY—INSTRUCTIONS.

1. Where, in an action to recover for the alleged sale of an option to purchase property, there was some evidence from which the alleged sale might be inferred, the court properly refused to charge that plaintiff was not entitled to recover.

2. Instructions assuming, as proved, matters which are in issue, are erroneous.

3. Instructions disregarding material facts supported by some evidence are erroneous.

4. In relation to a count on a quantum meruit in an action for services as a broker in procuring defendant a contract to purchase certain land, defendant requested the court to charge that plaintiff would be entitled to recover the usual broker's commission, which, upon the evidence, was 1 per cent. of the purchase money. The court charged that plaintiff "was entitled to recover reasonable compensation," and that was "the usual fair market value for the services which are rendered." *Held*, that the manner in which the amount of compensation due plaintiff as a broker, if due at all, was left to the jury, was not prejudicial to defendant.

Exceptions from superior court, Suffolk county.

Action by Valentine Graves against Charles H. Dill to recover for an alleged sale of an option to purchase land. There was judgment for plaintiff, and defendant excepts. Exceptions overruled.

Ranney & Clark, for plaintiff. J. D. Ball and B. L. M. Tower, for defendant.

**MORTON, J.** The rulings asked for were rightly refused, and the instructions that were given were correct.

1. There was evidence from which the jury could properly infer that, in procuring from Hall the agreement to sell, the plaintiff was acting for himself, and not as the agent of the defendant, nor as a broker for Hall. The letter sent by the plaintiff to the agent of Hall, and the reply, were consistent with this view, as well as the plaintiff's account of what occurred between the defendant and himself in relation to the sale of the property to the de-

endant. The defendant testified, among other things, that he did not employ the plaintiff. If the plaintiff had an option to purchase the property, and agreed with the defendant to give him the benefit of it for \$1,500, and further agreed to assist him in procuring a deed from Hall, and the defendant agreed to give him \$1,500 on obtaining a deed from Hall, such an agreement constituted a valid and binding contract, and on receiving the deed from Hall the defendant became bound to pay to the plaintiff the \$1,500. Whether there was such an agreement was a question of fact for the jury upon all the evidence. The defendant seems, in substance, to have admitted that there was an agreement between the plaintiff and himself that he should pay the plaintiff one-half the difference between fifteen and eighteen thousand dollars, but says then the plaintiff was acting as broker for Hall, or as agent for himself, and therefore that the agreement was invalid. But whether the plaintiff was acting in either capacity was, as already observed, a question for the jury. The fact that the plaintiff inserted into the agreement, which he prepared for Hall to sign, a stipulation that Hall should pay him a broker's commission of 1 per cent., was evidence bearing on the question whether the plaintiff was acting as broker; but in view of the fact that Hall did not agree to it, and that no commission appears to have been paid to the plaintiff, it would not operate of itself to release the defendant from the agreement which, as the jury must have found, he had made with the plaintiff. The first request, namely, that the plaintiff, upon all the evidence, was not entitled to recover, was therefore rightly refused.

2. The second request was that the plaintiff could not recover more than a quantum meruit for his services as broker, if he was entitled to recover anything. It is obvious, from what has already been said, that this request, also, was rightly refused. It assumed, for one thing, that the plaintiff had been acting as a broker. Whether he had been so acting or not was one of the questions in issue. Again, it disregarded the plaintiff's claim that there was a special agreement between the defendant and himself, and of which there was evidence for the jury.

3. The third and last request related to the count on a quantum meruit, and was, in substance, that what the plaintiff would be entitled to recover would be the usual broker's commission, which, upon the evidence in the case, was 1 per cent. upon the purchase money. The court instructed the jury that on this count the plaintiff was "entitled to recover reasonable compensation," and that that was "the usual fair market value for the services which are rendered." The court then observed: "If he acted as broker, I think I do no injustice to either party in saying that the fair, ordinary commission which brokers charge is regarded as a fair compensation for what he should receive." We think the defendant can have no just ground of complaint as to the manner in which the court left the matter to the jury.

Exceptions overruled.

v.34N.E.D.5—22

(138 N. Y. 500)

**KIMBALL v. FARMERS' & MECHANICS' NAT. BANK OF BUFFALO.**

(Court of Appeals of New York. June 18, 1893.)

**MORTGAGES ON SHIP—PRIORITY.**

Where a second mortgagee of a vessel seized her for foreclosure, but surrendered possession to the mortgagor for specific trips on assignment to him of the earnings of such trips, he is entitled to the net earnings of the vessel on such trips as against a third mortgagee without notice of the assignment, who seized her after her surrender by the former, and before any freight was earned, though the last seizure was made with the assent of the first mortgagee, whose mortgage was past due when the other mortgages were executed. *Earl and Peckham, JJ., dissenting.*

Appeal from superior court of Buffalo, general term.

Action by Louis M. Kimball against the Farmers' & Mechanics' National Bank of Buffalo to recover freight earned by the schooner George D. Russell in a voyage from Milwaukee to Buffalo. From a judgment of the general term (16 N. Y. Supp. 838) reversing a judgment for defendant, the latter appeals. Affirmed.

Spencer Clinton, for appellant. Sherman S. Rogers, for respondent.

O'BRIEN, J. This appeal involves but a single question, and that is the right to a fund representing freight earned by a vessel, each party claiming to be entitled to it. The material facts out of which the controversy arises are these: On December 22, 1871, Mrs. Sarah E. Nims, being the owner of the schooner George D. Russell, mortgaged her to the firm of George D. Russell & Co. to secure the payment of her three notes of \$2,000 each payable, respectively, one, two, and three years from date. The mortgage was duly recorded in the proper office January 31, 1872, and on December 21, 1872, was duly assigned with the debt to Elbridge G. Spaulding. On April 16, 1873, she executed another mortgage on the vessel to the plaintiff to secure her note for \$8,000 and interest, payable in 90 days from that date, and this mortgage was duly recorded June 18, 1873. On October 27, 1873, she executed a third mortgage to the defendant upon this and another vessel to secure the payment of \$20,000, which was to become due December 1, 1874. This mortgage was also duly recorded in the proper office. On the 5th of November, 1875, all these mortgages were due, and the owner had made default in the payment of the moneys to secure the payment of which they were given. They all contained the usual power of sale in case of default, the proceeds of the sale in each case to be applied in satisfaction of the debt. On the day last mentioned the plaintiff, being the owner of the second mortgage, took possession of the vessel under it, and was proceeding to execute the power of sale. While all the mortgages were due, the plaintiff's superior vigilance may be accounted for by the fact that the holder of the first mortgage felt perfectly secure, and the holders of the third mortgage



had other security. The owner and mortgagor then applied to the plaintiff to permit her to make two round trips from Buffalo to Chicago for the purpose of earning freight before the close of the season of navigation. He consented to allow the vessel to sail for that purpose, upon condition that the freight earned upon the voyages should be paid to him, and applied upon his mortgage. Thereupon the owner and mortgagor executed and delivered to the plaintiff an instrument in writing, which recited the execution of the mortgage, the default in payment, and the seizure of the vessel by the plaintiff, and then in terms assigned to the plaintiff, to be applied upon his mortgage, the entire freight or earnings of the vessel upon the two trips, exclusive of charges for towage; and the vessel, having been thus permitted by the plaintiff to sail, proceeded on her voyage to Chicago. Not having obtained freight at that place, she proceeded to Milwaukee, and took on a cargo of wheat for Buffalo, but before sailing on her return voyage was frozen in, and remained there till the spring of 1876. While there she was attached under state process at the suit of an insurance company, and delivered to the sheriff. The defendant then asserted its right under the third mortgage, and took the vessel from the sheriff, and towed her to Buffalo, having been first obliged to pay \$538.76 in claims that had accrued against the vessel while in the port of Milwaukee, and which were liens; and it is admitted that \$500 was a proper charge for towing the vessel and cargo from the latter place to Buffalo. On the 15th of May, 1876, she arrived at Buffalo, delivered the cargo, and the freight earned, amounting to \$2,748.10, was paid to the defendant, without notice of the assignment of the same by the owner to the plaintiff; but the next day the plaintiff demanded the money thus received of the defendant, and it refused to pay it to him. This action was brought to recover the money thus paid to the defendant for freight. It has been twice tried before referees, and each trial resulted in favor of the defendant, and was followed by a judgment of reversal at the general term.

When default is made in the payment of the debt secured by a mortgage on personal property the legal title to the property becomes vested in the mortgagee, and thereafter the mortgagor, or any one holding his title, has but the equitable right of redemption. *Butler v. Miller*, 1 N. Y. 496; *Judson v. Easton*, 58 N. Y. 664; *Tremaine v. Mortimer*, 128 N. Y. 1, 27 N. E. Rep. 1060; *Leadbetter v. Leadbetter*, 125 N. Y. 290, 26 N. E. Rep. 265; *Champlin v. Johnson*, 39 Barb. 606. Therefore the legal title to this vessel passed to Mr. Spaulding, the holder of the first mortgage, upon default of the mortgagor to pay the debt when due, and thereafter the only interest which the mortgagor had was equitable, and she could, of course, transfer no greater right to her assignees. Default having been made in the payment of the first mortgage before the second was executed, and in the second before the third was executed, the last two mort-

gages transferred nothing but the equity of redemption, because the legal title had become vested in the first mortgagee, who could at any time assert that title by taking the property into his possession. Therefore, when the plaintiff took the vessel into his possession, as the holder of the second mortgage, his equitable title was subject to the whole claim of the first mortgagee. The latter was satisfied to wait, and while, by taking that course, he lost nothing, neither did his superior title or interest confer any right upon the defendant as the holder of the third mortgage. As against the defendant, the plaintiff had the prior right and the greater equity. This was the situation when the plaintiff seized the vessel, and took her into his possession. He had the right to retain the vessel as against the defendant, though not as against Spaulding. So long as the latter did not interfere, the plaintiff, as to the defendant, was the owner of the vessel in equity from the time that he took possession, and entitled to the freight earned while in his possession, the same as a mortgagee of land in possession is entitled to the use or rents after such possession is taken. But while the holder of the first mortgage, after default in payment of his debt, became vested with the legal title to the vessel, yet, as he never took possession, he did not acquire all the rights nor subject himself to all the duties and responsibilities of owner. So long as the possession of the mortgagor was not disturbed, she was entitled to receive the earnings of the vessel, and was liable for supplies and repairs and for the discharge of those duties and obligations which are due from the owner of a ship or vessel to the crew. These obligations generally devolve upon the person who has the possession and control of the vessel, and who navigates her, and he is entitled to receive the freight earned and paid while this possession and use is permitted to continue. The mortgagee, though having the naked legal title after default, is not charged with any of these obligations, in the absence of express contract, until he assumes them by taking possession of the vessel, and then he becomes entitled to receive the earnings or moneys due for freight. These principles are quite familiar in maritime law, having been settled by numerous cases in this country and in England. *Miln v. Spinola*, 4 Hill, 177; *Champlin v. Butler*, 18 Johns. 169; *Thorn v. Hicks*, 7 Cow. 697; *Hesketh v. Stevens*, 7 Barb. 488; *McIntyre v. Scott*, 8 Johns. 159; *Delano v. Wright*, 1 Rob. (N. Y.) 298; *Weston v. Wright*, 1d. 312; *Webber v. Sampson*, 6 Duer, 358; *Scarf v. Metcalf*, 107 N. Y. 211, 13 N. E. Rep. 796; *Gabrielson v. Waydell*, 135 N. Y. 1, 31 N. E. Rep. 969; *Wilson v. Wilson*, L. R. 14 Eq. 40; *Brown v. Tanner*, L. R. 3 Ch. App. 597; *Credit Co. v. Wilson*, L. R. 7 Ch. App. 507.

When the plaintiff took the vessel into his possession he acquired these rights, and subjected himself to all these duties and responsibilities, and it would be quite difficult to show that he lost the one or relieved himself from the other by permitting the original owner to use the vessel for a special voyage which was to insure

to his benefit. He did not release any right that he had acquired by the seizure of the vessel in express terms, and as the voyage was undertaken for his benefit, and depended upon his assent, it is quite likely that he remained charged with all the obligations of owner during the trip. The paper that he took from the general owner had no other effect than to secure to him, so far as she was concerned, the freight earned upon the voyage. The fact that plaintiff contracted with her to make a special trip for his own profit had no more effect upon his status as a mortgagee in possession than if he had made the same contract with a stranger. The right of the mortgagor to receive the earnings of the vessel was interrupted by the plaintiff's seizure, and never restored to her. After that she made the voyage by his permission, and for his benefit; and while the holder of the first mortgage might have asserted his superior right to the possession at any time, and to the freight, which was but an issue or incident of the vessel itself, yet, as he did not, the right to the moneys in controversy becomes a question of prior or superior equities between the plaintiff and the defendant. We have seen that a mortgagee of a vessel in possession is, for all practical purposes, and for the time being, the owner, and therefore the plaintiff's right in equity to the freight must prevail, unless it was displaced by some superior equity in favor of the defendant. The mortgagor, if she had any right whatever to the freight in question, had expressly assigned it to the plaintiff; and such a transfer, though the subject had no actual existence at the time, but rested in expectancy merely, is good in equity, and takes effect in favor of the assignee when the thing or demand assigned comes into existence, and when no superior right of third parties has intervened in the mean time. This equitable principle has been applied to freight to be earned in the future as well as other demands, and to property potentially, but not actually, in existence at the time of the assignment. *McCaffrey v. Woodin*, 65 N. Y. 459; *Coats v. Donnell*, 94 N. Y. 177; 2 Story, Eq. Jur. § 1055 et seq.; *Field v. Mayor*, etc., 6 N. Y. 179; *Stover v. Eycleshimer*, 42 N. Y. 629; *Douglas v. Russell*, 4 Sim. 524; *Curtis v. Auber*, 1 Jac. & W. 526; *Langton v. Horton*, 1 Hare, 549; *Mitchell v. Winslow*, 2 Story, 630. It is apparent, therefore, that up to the time that the defendant seized the vessel and took her from the sheriff at Milwaukee, by virtue of its mortgage, the equity of the plaintiff, and his right to the unearned freight, was prior and superior to that of the defendant. The equity of the plaintiff under his mortgage was prior in point of time. He was the first to seize the vessel and assert his right of possession as against the defendant, and this right was not waived by contracting with the owner to make a special voyage for his benefit. He was the assignee of the freight, and a party to the arrangement under which the vessel sailed upon the last trip, and the cargo was procured and loaded which produced the freight in controversy; and, unless the parties

changed places when the defendant took the vessel from the sheriff in Milwaukee and towed her to Buffalo, the plaintiff has the greater equity still. Suppose that the vessel had not been frozen in at Milwaukee, but had completed the voyage, as was expected, in the fall of the year 1875, and the defendant had seized her when within a few miles of Buffalo, or even in the harbor, before she had delivered her freight, and then had received the money, and retained it as it has in the present case. Upon such facts the right of the plaintiff in equity to the freight moneys would be so manifest as scarcely to permit of argument, and yet the case now is not essentially different if we eliminate from its consideration two facts, not at all material, but which tend to confuse the question and possibly mislead the mind in the process of the investigation:

First. The defendant paid certain sums of money in Milwaukee, which were charges or liens upon the vessel, in order to obtain the possession, and it also incurred certain expenses in towing the vessel with her cargo to Buffalo. The plaintiff admits that the defendant should be made good for all moneys thus paid and expenses incurred. This concession cancels all equities arising from such facts, and reduces the controversy to the balance of the fund; and in determining who is entitled to that the case stands in the same position as if the defendant took possession of the vessel, for the first time, after she had arrived with her cargo at Buffalo.

Second. The holder of the first mortgage had the legal title to the vessel, and it may be admitted also that he had a prior right to the freight earned and payable after he elected to take possession, but that consideration is entitled to no weight whatever, for the plain reason that he never took possession, and the defendant can claim no right under his mortgage. The controversy is between the plaintiff and the defendant as the owners of the second and third mortgages, and the admitted superior right of Mr. Spaulding, as owner of the first mortgage, plays no part in the contest. The defendant must stand upon its own mortgage, and can derive no aid from the prior claims of others. The rights of the defendant and those of the first mortgagee must be kept distinct from each other in order to get a clear and correct view of the question. It is apparent from the findings of fact and law made by the learned referee that he has been misled by blending these rights together. He has found as a fact that the defendant took possession of the vessel, which was then in the custody of the sheriff, and received the freight, upon delivery of the cargo, with the knowledge, consent, and approbation of Spaulding, who held the first mortgage; and from this fact he draws the legal conclusion that the possession of the defendant was the possession of Spaulding, and that, as he could and did waive his superior right to the freight in favor of defendant, the plaintiff could not recover. The meaning of the finding of fact is perfectly evident from the record. Spaulding was the defendant's president. As such, he no doubt

had knowledge of the defendant's proceedings in Milwaukee to get possession of the vessel, and of her arrival at Buffalo, and the receipt of the freight money by the defendant. As the principal officer of the defendant, he was naturally interested in the collection of the debt, and, of course, approved of and consented to the proceedings. But there is no finding that the defendant or any one else asserted any right under the first mortgage. On the contrary, the finding is that the defendant took possession under its own mortgage. Spaulding could have taken possession under his prior mortgage, or he could have assigned it to the defendant; but he did neither. He simply held his security, undiminished by any payments, for three months after the defendant had received the moneys in question, and then he assigned it to the plaintiff, receiving from him the whole amount, principal and interest.

Of course neither he nor the defendant could assert any right to the freight moneys under this mortgage without applying them upon it. Then the plaintiff could not complain, as the fund would have gone in reduction of a claim to which his own was subject, and the transaction would accrue to his benefit. But Spaulding could not keep his own mortgage intact, and at the same time, by his mere knowledge, consent, or approbation, confer a right upon the defendant to receive the freight moneys, to the prejudice of the plaintiff, who, as between himself and the defendant, had the first claim, and the superior equity. Until possession was taken under the first mortgage no right could be acquired in virtue of it to appropriate the earnings of the vessel, and hence Spaulding could confer no right to the freight moneys by consenting that defendant might take them, because he had no more right to them himself than an ordinary mortgagee of land, out of possession, to the rents and profits. The findings of the learned referee were, therefore, obviously insufficient to uphold any claim on the part of the defendant to the freight, based upon the first mortgage. The equities of the parties rest wholly upon their respective mortgages, and what was done under them. When all other considerations are eliminated from the case, it will be seen that every fact upon which the plaintiff's claim rests is prior in point of time, and this gives him the prior equity. As between him and the defendant, he is in equity a first mortgagee, with all the rights and equities incident to such relation. Pom. Eq. Jur. § 413 et seq.; Story, Eq. Jur. § 64; Moore v. Supply Co., 133 N. Y. 144, 30 N. E. Rep. 736.

The defendant's claim to the fund rests wholly upon the seizure of the vessel at Milwaukee under its mortgage. If it appeared that the plaintiff had abandoned her at that port, and, with knowledge of the situation, had refused to redeem her from the claims that accrued there, and which were liens, so as to enable her to complete the voyage and earn the freight, then the case would present some equitable features in favor of the defendant that do not exist now. It does not appear

that the plaintiff knew of the detention of the vessel under state process, or that he abandoned her, or refused to pay the charges incurred while the vessel was in port. For aught that appears, the plaintiff would have done in due time just what the defendant did, namely, pay the charges against the vessel, and complete the voyage. The fact that the defendant had no notice of the assignment to the plaintiff is not important. An unknown equity is sometimes postponed in favor of one subsequent in time, but that is when it appears that the party has done some act, incurred some obligation, or made some advances that he would not have incurred or made had the true situation been disclosed to him. The record discloses nothing of that kind in favor of the defendant, except, possibly, the advances made on expense incurred in completing the voyage, and, when indemnified for this out of the fund, any equity arising from that circumstance is satisfied. The judgment of the general term reversing that of the referee should therefore be affirmed, and judgment absolute ordered for the plaintiff, with costs, in all the courts.

EARL, J., (dissenting.) A mortgage upon a vessel in this country is precisely like other chattel mortgages, except that it must be registered as required by the federal law; and it is not claimed by the counsel who argued this case that the mortgages in question are not to be treated just as if they were upon other chattels. The facts are undisputed, and there is no real dispute about the principles of law. The dispute is as to the application to the facts of this case of principles of law recognized by both parties, and established beyond controversy by numerous decisions. There were three chattel mortgages upon the vessel. The first was held by Spaulding, the second by the plaintiff, and the third by the defendant. The first mortgage was in default when the other two were given. A chattel mortgage carries the legal title to the property mortgaged to the mortgagee conditionally, and, if the condition be not performed, the mortgagee at once upon the default becomes the absolute owner of the property at law. The only right then remaining to the mortgagor is an equity of redemption, a right which he can enforce only in equity. He has no title, legal or equitable, to the property. The mortgagee may permit him to remain in the lawful possession of the property, but his use and possession of the property are merely permissive, and the mortgagee may at any moment put an end to the same. If any one wrongfully takes the property out of the possession of the mortgagor, the mortgagee can sue him in trover, trespass, or replevin; and if any one, without authority of legal process, seizes the property against the will of the mortgagor upon any pretense, he is in like manner liable to the mortgagee; and one interfering with the property left in the possession of the mortgagor by the mortgagee after default may be liable to the latter. If either of the subsequent mortgages, the plaintiff or defendant, had

seised and sold the vessel, he would have been a wrongdoer against the first mortgagee. The mortgagee of a vessel has no lien on the freight she earns, or absolute right to the freight as an incident to his mortgage. He can obtain the freight by taking possession of the vessel, (or doing something equivalent thereto,) after default in the condition of the mortgage, at any time before the cargo has been fully discharged, and the freight thus fully earned. I do not understand that these principles of law are in any degree disputed by the learned counsel for the plaintiff, and they are substantially laid down in many cases, among which are the following: *Butler v. Miller*, 1 N. Y. 496; *Judson v. Easton*, 58 N. Y. 664; *Cassidy v. Witherbee*, 119 N. Y. 522, 23 N. E. Rep. 1000; *Leadbetter v. Leadbetter*, 125 N. Y. 290, 26 N. E. Rep. 265; *Moore v. Supply Co.*, 133 N. Y. 144, 30 N. E. Rep. 736; *Essex v. Tarbell*, 9 Cush. 407; *Ring v. Neale*, 114 Mass. 111; *Pecker v. Silsby*, 123 Mass. 108; *The Wexford*, 7 Fed. Rep. 674, 681; *Wilson v. Wilson*, L. R. 14 Eq. 32; *Brown v. Tanner*, L. R. 3 Ch. App. 597; *Collins v. Lamport*, 11 Jur. (N.S.) 1; *Credit Co. v. Wilson*, L. R. 7 Ch. App. 507; *Kerswill v. Bishop*, 2 Crompt. & J. 529; *Rusden v. Pope*, L. R. 3 Exch. 269.

The plaintiff does not base any substantial right here upon his mortgage. By virtue of that taken after default in the first mortgage he obtained no title, interest, or property in the vessel. He did not, as against the first mortgagee, obtain even a lien on the vessel. All he got was the mortgagor's right of redemption. His mortgage was, however, of some further value to him against the mortgagor. As against her he could, after default in the payment of his mortgage, if the first mortgagee did not interfere, take possession of the vessel, and might thus intercept freight which she had earned in the manner above stated; and he could retain the possession of the vessel as against the defendant, the third mortgagee. But the seizure and possession of the vessel in this case by the plaintiff were of no value or importance, as there was no freight to intercept, and he could not sell her, or make any profit out of her, having no right or title whatever to her. Therefore, when he surrendered the possession of the vessel, he parted with no valuable right. He then obtained from the mortgagor an assignment of the freight to be earned by the vessel upon the two round voyages to Chicago and back to Buffalo. His surrender of the possession of the vessel was absolute, and it was the inducement to and consideration for the assignment of the freight. The mortgagor resumed the possession of the vessel as she had her before. She was not to navigate her in any sense as the agent of the plaintiff, nor upon his responsibility, but she was to navigate her in her own right, for her own benefit, and at her own expense, except that she was to apply the freight earned, less the towage charges, in discharge of her debt to the plaintiff. The position of the plaintiff, then, is as assignee of the freight, and only that. His position as assignee is not improved or strengthened

by the fact that he also held the second mortgage. His rights, whatever they may be, are as such assignee, and his counsel does not contend that he has any other upon which to base his action. But here occurs the fallacy in his counsel's argument. What right had the mortgagor to assign the freight? She had no title to or property in the vessel. She could assign freight which she expected to earn, and if she earned it, it would belong to her assignee; but she could not in any way bind the vessel by such an assignment for freight which she never earned. Plaintiff's counsel does not take notice of the fact that all she owned as to the vessel at the time of the assignment was a mere equity of redemption, enforceable in equity. Whatever right, therefore, the plaintiff, as assignee, got was the right, not to the freight which the vessel might earn, but only to the freight she might earn with the vessel, and which would thus otherwise be payable to her. But, even if she had been the legal owner of the vessel at the time of the assignment of the freight to the plaintiff, it would make no difference. The unearned freight of a vessel may be assigned in equity, and such an assignment is governed by the same rules which govern the transfer of anything not in esse. The assignment can have no positive operation to transfer in present property in a thing not in esse, but it operates by way of present contract to take effect and attach to the thing assigned when and as soon as it comes in esse. *Mitchell v. Winslow*, 2 Story, 630, 639. Suppose Mrs. Nims, after the assignment of the freight, had sold the vessel to a bona fide purchaser, and he had made the voyage and earned the freight; or suppose some mere wrongdoer had taken the vessel against her will, and had earned the freight,—could the plaintiff in either case have claimed the freight? Suppose the owner of a farm assigns the crops to be grown upon his farm the ensuing year, and he afterwards sells his farm to a bona fide purchaser, who sows and harvests the crops, can the assignee claim them? Or suppose the owner of a farm, to secure an antecedent debt, or money presently advanced, assigns the proceeds of all his crops for the ensuing year, and the owner, after sowing the crops, is ejected from the farm, either by legal process or by a wrongdoer, and the person thus taking possession cares for the crops, harvests them, sells them, and thus obtains the proceeds, can the assignee maintain an action against him for such proceeds, claiming to be the legal owner thereof? All that is assigned or can be assigned in such cases is the freight or property to come in esse in the future, which, but for the assignment, would belong to the assignor. His assignment operates to take the property away from him then, and vest it in his assignee. But when he never brings the property in esse, there is nothing for his assignment to operate on.

Now, what happened here? The vessel was taken to Chicago, and then to Milwaukee, where, after taking on a cargo, she was frozen in for the winter. Then to—

wards spring she was attached for Hens and claims against her, and the defendant found her in the possession of the sheriff under his seizure. It then, knowing nothing about the claim of the plaintiff, using its mortgage, replevied the vessel from the sheriff, and paid \$538.76 to discharge the claims; and then it took possession of the vessel, and navigated her to Buffalo, paying all the expense, and discharged the cargo, and received the freight before it knew anything about the claim of the plaintiff. It probably knew of her mortgage, but that gave the plaintiff no lien upon the freight. All this the defendant did by the consent, permission, and authority of the first mortgagee, the general, absolute owner at law. The defendant was thus a wrongdoer to no one in taking possession of the vessel at Milwaukee. Its act was not a wrong to the plaintiff as mortgagee, because, as such, he had no title or property, legal or equitable, in the vessel, and no lien upon or right to the freight. It was not a wrong to him as assignee of the freight, because the vessel had been lawfully taken out of the possession of the mortgagor, and her voyage thus broken up, and because, for reasons above stated, he acquired no right to unearned freight, and had no lien on or interest in the vessel for the freight. It was not a wrong to the owner, the first mortgagee, because he consented to and authorized it. Having taken possession of the vessel with the consent of the owner, its possession was lawful against the whole world. The mortgagor did not earn the freight, but the defendant earned it. We are not necessarily dealing here with the rights which the owner can give to an assignee of freight, but with the rights which one not having an atom of ownership or property in the vessel can give. We are not dealing with freight earned by the assignor, but with freight earned by the defendant. Under such circumstances, there is absolutely no authority—absolutely no principle—which sanctions the maintenance of this action by the plaintiff as assignee of the freight. He could not even have maintained the action against a wrongdoer who had seized and navigated the vessel to Buffalo, and had thus earned the freight. Much less can he maintain it against one who had the consent and sanction of the true owner.

It is probably true that the first mortgagee, by expressly assenting to and countenancing the action of the defendant in taking the vessel and the freight, became just as accountable for the freight in an action for redemption from his mortgage as if he had actually himself received the freight. *Credit Co. v. Wilson*, supra. But he could be made liable for it only in an equitable action for redemption, brought against him by the mortgagor, or one of the subsequent mortgagees. In such an action he could be compelled to account for all the profits he had permitted and allowed any one else to make. But no action whatever can be maintained against the defendant for the freight, because its receipt of it was rightful against the whole world; and certainly a legal action like this cannot be main-

tained against it by the plaintiff, claiming to be the legal owner of the freight.

Much has been said in this case about the superior equity of the plaintiff to this freight. Upon the trial he planted himself upon his legal rights as assignee, and no proof was given as to the equities, and there are no findings of fact or law as to the equities. There are no findings from which we can know or determine anything except the legal rights of the parties. As we have shown, plaintiff's mortgage gave him no equitable right to the freight, and he obtained no equitable right to it as assignee. Where, then, does his equity come from? What equity has he against the defendant, which took the vessel at Milwaukee, paid the charges upon which she had been seized and was detained, navigated her to Buffalo at its own risk and expense, and thus earned the freight? If we were willing to dispose of this case upon mere humanitarian views, guided by our feelings of beneficence, we cannot even determine upon this record which of the two parties will suffer or lose the most by being deprived of this freight. All we have showing the relations and equities between these parties is the three mortgages and their amounts, the assignment and earning of the freight, and the fact that the plaintiff finally took an assignment of the first mortgage, paying the full amount due thereon. For aught that appears in this record, he may have full security for all that is due to him from Mrs. Nims. We know nothing about the equities, and we must dispose of this case upon the facts as they appear, applying to them the rules of law, mostly elementary, which we are bound to administer. The order of the general term should be reversed, and the judgment entered upon the report of the referee affirmed, with costs. All concur with O'BRIEN, J., except EARL and PECKHAM, JJ., who dissent.

(128 N. Y. 517.)

#### HEMMENS v. NELSON.

(Court of Appeals of New York. June 13, 1893.)

#### SLANDER—EVIDENCE—DIRECTION OF VERDICT—ACTIONABLE WORDS—WHAT ARE.

1. In an action for slander in charging plaintiff with sending an obscene letter through the mail, plaintiff contended that defendant himself sent the letter, for the purpose of basing a charge thereon against plaintiff. The evidence to support this issue was that, at the meeting of the committee before whom the charge against plaintiff was being heard, defendant refused to allow her to see the letter; that she took it out of his hand, and looked at it, and that in her opinion the letter "t" in a word written on the margin of the letter was in defendant's handwriting, her reason for such conclusion being that defendant always crossed his t's in the middle; that the "s" in "Mrs." in the direction on the envelope was also in defendant's handwriting. The letter, when produced on trial, had no writing on the margin, which she explained by saying that it had been cut off, but the letter showed no evidence of having been cut, and on a former trial of the same cause she had testified that she thought the direction on the envelope was in a woman's handwriting. *Held*, that such issue was properly taken away from the jury.

2. Words spoken of a woman, "that she was in the habit of entertaining gentlemen callers at all hours of the night," do not necessarily impute unchastity.

Peckham and Maynard, JJ., dissenting.

Appeal from supreme court, general term, fourth department.

Action by Emily Hemmens against Edward B. Nelson for slander. From a judgment of the general term (13 N. Y. Supp. 175) affirming a judgment entered on a verdict directed for defendant, plaintiff appeals. Affirmed.

Oswald B. Backus, for appellant. John D. Kernan, for respondent.

O'BRIEN, J. The principal question in this case arises upon an exception taken to the direction of a verdict for the defendant upon the fifth trial of an action of slander. The defamatory charge is alleged to have been made by the defendant of and concerning the plaintiff, in the month of February, 1878, and consisted, in substance, of a statement to B. J. Beach, and other worthy citizens, that the plaintiff on January 19, 1878, mailed to the defendant's wife, at Rome, N. Y., a sealed prepaid envelope, directed to her, in which was inclosed a printed letter or circular containing obscene and indecent matter. The defendant was at the time, and still is, the principal of the institution for deaf-mutes at Rome, one of the charitable institutions of the state. The plaintiff was then the superintendent of the sewing department, and her duty was to superintend the making of clothing for the children in the institution, and also to instruct a class in sewing. The general management of the institution is committed by the statute to a board of trustees or directors, with power to enact by-laws or rules and regulations for the government of the institution, and Mr. Beach was the president of the board. Under the by-laws adopted the actual management is, to a great extent, devolved upon an executive committee composed of five members of the board, of which the president was always to be one. The defendant was really the executive head and manager of the institution. It was his duty and his right, under the rules and regulations adopted for its government, to attend the meetings of the board, to make reports in writing, and to participate in the discussions. Subject to the directions of the board, he had charge of the technical, moral, and religious instruction of the inmates. He was required to regulate the course of instruction in the classes, examinations, exhibitions, religious services in the chapel, and was himself to have the immediate charge of the advanced class. He was required to conduct all the correspondence, employ and dismiss all persons necessary to be employed, unless officers of the institution or persons appointed by the board, and, with the approval of the executive committee, he had power to suspend any professor, officer, or teacher appointed by the board. It was his duty to keep a book in which should be entered all events worthy of note relating to the institution, which was to be the property

of the trustees, and submitted to them at the quarterly meetings, and always open to the inspection of the executive committee.

There is no dispute as to the fact that the defendant received the letter referred to in the regular mail of the institution. The proofs show that he gave it to his wife, to whom it appeared to be directed, and that she opened it, and, after looking at its contents, nature, and character, handed it back to him. An inspection of the paper indicates that it had been cut from a book or pamphlet prepared for advertising what were called female remedies of one Dr. Goff, of Syracuse. At the bottom of one of the pages it is signed, "A Lady Friend," in pencil, the writing appearing to be that of a woman, and in another part of the paper, following an advertisement of certain appliances for females, there was written, in apparently the same hand, in pencil, a statement that she, whoever the author was, had used them, and that they would accomplish the desired purpose. Without further description, it is sufficient, for every purpose of this appeal, to say that it was grossly obscene and indecent, and the charge that the plaintiff was the author of it, or rather sent it to the defendant's wife, through the mail, was defamatory, and *prima facie* actionable. The defendant examined the writing in the body of the paper and the directions on the envelope, and compared it with signatures and letters of the plaintiff and others in the institution, which were in the office, and he then formed the opinion that the plaintiff was the person who sent it. Having made this examination, he took the letter and papers to Mr. Beach, the chairman of the board and of the executive committee, and consulted with him in regard to the matter. In this interview, it may be assumed from the proof that the defendant expressed the opinion, in words of more or less positiveness, that the plaintiff was the person who sent the letter. Mr. Beach, after an examination of the letter, and comparing it with the genuine letters and signatures of the plaintiff, which were before him, agreed with the defendant, but, for greater caution, suggested that all the papers be sent to an expert in New York for examination and his opinion. This course was adopted, and all the papers were sent, and in due time returned, with the expert's opinion that the address on the envelope and the pencil writing in the circular were written by the plaintiff. A meeting of the executive committee was then called, and the plaintiff notified, and she was present at the meeting, and so was the defendant. There is considerable conflict in the testimony with respect to what actually took place at the meeting, and especially as to what the defendant said, but the jury could have found that he then and there stated and charged, in substance, that the plaintiff sent the letter, and she was discharged under the direction of the committee that day.

The court held that the defense of privilege, contained in the answer, was established, and that there was no question for

the jury. The general term has repeatedly reversed judgments in the plaintiff's favor, (24 Hun, 395, 36 Hun, 149, and 13 N. Y. St. Rep. 211,) and has finally affirmed the judgment entered upon the verdict directed against her. There can be no doubt that the occasions upon which the defendant is shown to have made the charge were privileged; the only question being as to its nature and extent. The defendant occupied an important and responsible office under the authority of the state, involving the performance of duties of the most varied and delicate nature, upon which the efficiency and welfare of the institution largely depended. It was his duty to watch and carefully observe the moral conduct, not only of the children committed to his charge, but, even in a greater degree, the teachers, upon whose influence and example so much, for good or evil, depended. It was essential that he should be at liberty to communicate freely with the governing body as to any matter touching the conduct of either the teachers or the pupils. This he could not do if hampered by the fear of penalties that could follow errors of judgment or mistakes, as to who was or was not properly chargeable with improper conduct. In some cases the privilege which the law gives to persons in such circumstances, to speak freely, is absolute, however malicious the intent or false the charge may be. This immunity applies to words defamatory of the character of another spoken by a member of a legislative body in debate or in due course of proceedings, by counsel in arguments pertinent to the issue before the courts of justice, by military officers in reports or statements to their superiors, and all acts of state. From considerations of public policy, and to secure the unembarrassed and efficient administration of justice and public affairs, the law denies to the defamed party any remedy through an action for libel or slander in such cases. *Hastings v. Lusk*, 22 Wend. 410; *Moore v. Bank*, 123 N. Y. 420, 25 N. E. Rep. 1048.

The courts have refused to extend the class of cases where absolute privilege applies, and I shall assume it does not apply to this case, though it would perhaps be difficult to make a satisfactory distinction, founded upon principle, between the case of defamatory words in a petition to a legislative body or committee, or the reports of military officers, and the character of the charge in this case, and the circumstances under which it was made. If the defendant believed that the plaintiff was the person who sent the letter, it was his duty to communicate the fact to the executive committee and the president, all of whom had a corresponding duty with respect to everything that concerned the welfare of the institution, and his statements, under such circumstances, were confidential and privileged until the plaintiff removed the privilege by proof, on her part, of actual, as it is sometimes called, express malice, or malice in fact. *Iyam v. Collins*, 111 N. Y. 143, 19 N. E. Rep. 75; *Vanderzee v. McGregor*, 12 Wend. 545; *Van*

*Wyck v. Aspinwall*, 17 N. Y. 190; *Washburn v. Cooke*, 8 Denio, 120; *Halstead v. Nelson*, 36 Hun, 155; *Moore v. Bank*, supra. This kind of malice which overcomes and destroys the privilege is of course quite distinct from that which the law, in the first instance, imputes with respect to every defamatory charge, irrespective of motive. It has been defined to be an "indirect and wicked motive which induces the defendant to defame the plaintiff." *Odgers, Sland. & L.* 267. Unless we can find in the record in this case some proof which would warrant the jury in finding the existence of such wicked motive on the part of the defendant when he made the charge in question, then the direction of the learned trial judge was correct, and the judgment must stand. The question is not whether the charge is true or false, nor whether the defendant had sufficient cause to believe that the plaintiff sent the letter, or acted hastily, or in a mistake, but the question is, the occasion being privileged, whether there is evidence for the jury that he knew or believed it to be false. The defendant may have arrived at conclusions without sufficient evidence, but the privilege protects him from liability on that ground until the plaintiff has overcome the presumption of good faith by proof of a malicious purpose to defame her character, under cover of the privilege. The plaintiff must be able to point to some evidence in the record that would warrant the jury in imputing this guilty motive to the defendant before her appeal can be sustained. As malice was an essential element of her case, not to be implied from the charge itself, but, quite the contrary, from the occasion on which it was made, the burden of establishing that fact was upon her. The record discloses no motive whatever on the part of the defendant for any charge against the plaintiff which he knew to be false, or did not believe to be true. We must therefore look through the evidence for proof of malice without any apparent reason or motive for it. In the first place, whoever sent the letter, there is no dispute as to its character, or the fact that the defendant received it. Having received it, nothing could be more natural on his part than to form some opinion from the facts at hand as to who sent it. He knew the plaintiff's handwriting, or at least he supposed he did. With this knowledge, and a careful comparison of the letter with the genuine writing of the plaintiff, which he had at hand, he says that he formed the opinion that she was the person who sent the letter. Then, for greater caution, he consulted Mr. Beach, who was not only a lawyer of experience, but the president of the governing body, having general charge of the institution, and of the executive committee, and he agreed in that conclusion. Whatever statements he made to Mr. Beach, and whatever opinions he expressed, however strong or erroneous, were of the most confidential character. But, as there was still the possibility of mistake present to their mind, both concurred in the suggestion to procure the opinion of a compe-



tent expert, and it was procured, with the result already stated. Thus far there is not the slightest ground for imputing bad faith to the defendant, because every move is consistent with the conduct of a man honestly seeking for the truth. The learned counsel for the plaintiff has collected some facts and circumstances that antedate the receipt of the letter, which he contends tend to prove malice. There is some proof that in the fall of 1877 the defendant criticised the plaintiff's conduct, and said something about discharging her. It was the defendant's right and duty to freely criticise, and even reprove, the plaintiff or any other teacher, whenever, in his judgment, it was necessary, and the exercise of that right in the performance of that duty is not evidence of malice, or of that wicked design to assail the plaintiff's reputation without cause. If this were not so, the head of such an institution could not perform his duty without incurring the charge of acting from malicious motives. There was evidence in the case that on the evening of January 19, 1878, the plaintiff went from Rome to Utica, returning on the 6:25 train the same day. This was for the purpose of showing that she could not have put a letter in the mail received when this one was. The absence of the plaintiff for a very short time on the afternoon that the letter was received proves very little that is material to the case. If it had the slightest bearing on any question in the case, it certainly did not prove, or tend to prove, that the defendant knew she was absent, or knew that she could not have mailed the letter, or that she did not mail it, and nothing short of such proof could have any bearing on the question of malice.

There is really but one theory of the case upon which actual malice can be imputed to the defendant, and that is the one which the counsel for the plaintiff urges, and to which most of the testimony in the case is directed,—that he himself sent this letter and circular to his wife. Of course, this involves the further hypothesis that he sent it for the purpose of basing upon it a false charge against the plaintiff as its author and sender. It need not be said that, if this theory is correct in fact, it establishes malice of the blackest kind, and, if there is any proof of it, the case should have been submitted to the jury. In searching for any evidence to sustain this theory, or tending to sustain it in the slightest degree, the mind naturally looks for some motive on the part of the defendant that could possibly move him or any one to defame the plaintiff's reputation by such dark and crooked methods, and none whatever is suggested. On the contrary, the proof is that but a short time before the transaction in question she was an applicant before the board of trustees for an increase of salary, and the defendant aided and sustained her application, and it was successful. In the summer of 1877 the defendant was married, and visited England with his wife. While there he received a letter from the plaintiff, informing him in regard to the progress of affairs at the in-

stitutions of gratitude and friendship towards him. The plaintiff, on the stand, says that she was not quite sincere in these professions of gratitude and friendship. However that may be, there is not the slightest proof that the defendant understood the letter in any other sense than that plainly expressed upon its face. There is some proof of an incident connected with this letter that, in behalf of the plaintiff, it is insisted tends to prove malice. The plaintiff testifies that in fore part of January, 1878, she went to the defendant's house to get a key, and found him sitting at a desk with a pen and the letter she had written him while in England before him. On seeing her, she says that he gathered up the letter, and put it in a drawer, and then asked her what she wanted, to which she replied, "My letter that I wrote you while in England." He then informed her that the letter had been burned, and then she asked for the key, and left. The letter, as already observed, was produced at the trial, and appears in the record. The plaintiff's version of these transactions is flatly contradicted by the defendant. But assuming, as we must, that she knew the letter to be the one written by her by the glance she was able to give it, and that she demanded it when she went to the house for another purpose, it is difficult to see how it bears on the question of malice. At best, it proves that the defendant gave a false excuse for not returning a letter which belonged to him, and which the plaintiff had no right, so far as appears, to demand. The fact, if it be true, that the plaintiff demanded its return, is as high evidence of malice or some sinister purpose on her part as was the defendant's refusal to return it upon grounds that turned out to be false, and neither furnishes any proof of malice.

The evidence in support of the theory that the defendant himself mailed the letter, which the learned counsel for the plaintiff claims should have been submitted to the jury, consists of two items taken from the testimony of his client. In the complaint the plaintiff stated that at the meeting of the executive committee, when she desired to look at the contents of the letter, the defendant refused to allow her to see it, stating that it was obscene, and not fit or proper for a lady to see, and that she did not see the contents of the letter so as to read the same. On the last trial her testimony, in substance, was that she took the letter in her hand, and partially drew out the printed paper from the envelope, when Mr. Beach snatched or took it from her, saying it was not fit for her to see. She claims that it then had writing in ink on the margin, no word of which she could give, but that in her opinion the "t" in some word was made by defendant, or at least looked like his. Her reason for this conclusion was that the defendant crossed the "t" in the middle, and not at the top, which was an unusual thing, and peculiar to him. The paper, when produced in court, had no writing whatever on the margin, and no writing in ink upon any part of it, but the plaintiff's explanation of that is that the margin with the writing has been cut off by

some one in the interest of the defendant. An inspection of the paper lends no support to this claim, and as the defendant, and practically all the executive committee, say there never was any writing in ink on the paper, or any other writing, except that in pencil already described, it can scarcely be claimed with any reason that the hurried glance which the plaintiff had of a single letter, and her opinion that it resembled the defendant's mode of making the same, was any evidence of the important fact that the defendant's handwriting was on the paper, competent to submit to a jury. Moreover, this theory is a departure from the original position of the plaintiff on the first and second trials. Then she testified that the writing was on the paper, but, as she was confronted with the fact that neither writing nor erasure was visible upon an inspection of the letter, on the third trial she attempted to avoid the difficulty by claiming that the margin upon which the writing was had been cut off, and this claim she subsequently adhered to. On the last trial this claim was reinforced by another, and, if possible, of a still weaker character. The plaintiff testified that in her opinion the "s" in "Mrs." at the commencement of the direction on the envelope was written by defendant. There was no other word or letter on the paper that she would claim was written by him. At every trial down to the last the plaintiff testified that the direction on the envelope was, in her opinion, the writing of another lady whom she named, and who had been, or was then, connected with the institution. On the third trial her counsel in open court, and in her presence, conceded that none of the writing on the envelope was that of the defendant. To submit the case to the jury upon such evidence would in my opinion be little short of a travesty upon the administration of justice. The theory that the defendant sent this letter to his wife is devoid of evidence or probability. It ascribes to him not only a dark and wicked design to defame the plaintiff's reputation, but also the knowledge that he could do it with impunity, under cover of a privileged occasion, which is a necessary part of the plot, and attributes to a layman an intimate knowledge of the law of slander and libel quite extraordinary. There were so many other and simpler methods of gratifying malice, if it existed, available to the defendant, that the suggestion to his mind of such a complicated scheme savors more of fiction than truth. Still, however improbable it may appear, if there was any evidence of it, the question was doubtless for the jury. But the only proof given was an attempt to connect the defendant with some part of the writing on the letter or envelope as the author, and this, as we have seen, utterly failed. It is now well settled that to show that the charge was false is not evidence of malice which entitles the party to have the question submitted to the jury. *Fowles v. Bowen*, 30 N. Y. 20.

A privileged communication may be defined to be a statement or charge, defamatory of the character of another, but

made under such circumstances as to rebut the legal inference of malice. *Klinck v. Colby*, 46 N. Y. 427; *Hamilton v. Eno*, 81 N. Y. 116; *Lewis v. Chapman*, 16 N. Y. 374. The charge in question was one of that character, and the burden was thrown upon the plaintiff of giving proof of actual malice sufficient to take the case to the jury. Whether the plaintiff met the requirements of the case in this respect rendered it necessary to examine the testimony more minutely than usually falls within the province of this court, and we think she has not. The most that can possibly be said is that there was a scintilla of evidence on the question of malice, which, under the doctrine of some older cases, was sufficient to carry the question to the jury. But this court is now firmly committed to the more modern and reasonable rule, that where there is no evidence upon an issue before the jury, or the weight of evidence is so decidedly preponderating in favor of one side that a verdict contrary to it would be set aside, it is the duty of the trial judge to nonsuit, or to direct a verdict, as the case may require. In a recent decision, in which the opinion was given by Judge Gray, after an elaborate examination of the authorities, which are there collected, this court has given the fullest assent to the rule. *Leinkauf v. Lombard*, 137 N. Y. 417, 33 N. E. Rep. 472. I will only add that, in my opinion, there was much more evidence to submit to the jury in that case than can be found in the record in this upon the questions with respect to which the plaintiff's counsel requested the submission of the case.

Another exception remains to be considered, of quite a different character. In a separate cause of action it is stated in the complaint that, at a date subsequent to the transactions which have been discussed, the defendant, in the presence of another person, stated of and concerning the plaintiff that she "entertained gentlemen callers at late hours, and he thought it did not speak well for her; that he did not like the plaintiff for these reasons;" that she "entertained gentlemen company at all hours of the night; that young men had been seen leaving plaintiff's sleeping room at different hours of the night." On the trial the plaintiff's counsel offered some evidence tending to prove that the defendant, in a conversation with the person named in the complaint, used some of the words charged in the pleading, not, as he stated, to prove malice in making the other charge, but to support another and independent cause of action. The words offered were that "she was in the habit of entertaining gentlemen callers at all hours of the night." The court held that, standing alone, they did not necessarily impute unchastity, and were not admissible to sustain the separate cause of action. The plaintiff's counsel excepted to the ruling. The statute now makes words imputing unchastity to a woman actionable, without proof of special damages, (Code Civil Proc. § 1906,) but it has not dispensed with the necessity of innuendoes pointing to an injurious intent or meaning in the use of the words. It cannot be held that these

words necessarily, and as matter of law, charge unchastity. That would depend upon who the callers were, and their purpose in calling, and her purpose in receiving them. It is possible that a call upon a lady, at a later hour than that prescribed by conventional rules, by gentlemen relatives or friends, may be entirely innocent. It is quite possible, also, that a jury could find that the defendant intended, by the use of the words, to make a defamatory charge. The intent of the defendant, and the sense in which the words were used, become in such cases an important inquiry, not permissible at the trial without an allegation of some kind in the pleading that he intended to impute unchastity. Such a charge, and even words of much plainer and unmistakable import, were not actionable at common law without allegation and proof of special damages. *Odg. Sland. & L. p. 84, note a; Anon., 60 N. Y. 262.* It has been held that to say of a female that "she is a bad girl," or a "bad woman," was not actionable, even with an innuendo averring that the intent was to charge her with being a prostitute, unless, at the same time, there were averments and a colloquium that would warrant the innuendo. *Snell v. Snow, 13 Metc. (Mass.) 278; Fitzgerald v. Robinson, 112 Mass. 380; Riddell v. Thayer, 127 Mass. 489.* While this court would not be inclined to go so far as to adhere to so strict a rule, yet we think that a pleading, in an action of slander, averring the use of words like these, that may or may not be harmless, according to the intent of the party using them and the sense in which they are used, is not sufficient without an innuendo or allegation of some kind that they were used in a sense to render them actionable.

The other exceptions in the case present no ground of error, and the judgment should therefore be affirmed. All concur, except PECKHAM and MAYNARD, JJ., dissenting.

(138 N. Y. 386)

PEOPLE v. PECK et al.

(Court of Appeals of New York. June 6, 1893.)

DESTROYING PUBLIC DOCUMENTS — INDICTMENT — DUTY OF LABOR COMMISSIONER.

1. An indictment which alleges that the commissioner of labor statistics willfully and unlawfully mutilated, obliterated, and destroyed circulars issued by him in his official capacity, and the answers received by him thereto, showing the condition of workmen, and of the various productive industries of the state, which papers were filed and deposited by him in his office at the state capitol, charges an offense under Pen. Code, § 94, which makes it a crime for any person to willfully and unlawfully remove, mutilate, or destroy any record, paper, or other document "filed or deposited in a public office, or with any public officer, by authority of law." 22 N. Y. Supp. 576, affirmed.

2. Such an indictment cannot be defended on the ground that the papers were the private papers of the persons sending them to the commissioner, or that the information thus communicated was confidentially disclosed.

3. Since Laws 1883, c. 356, as amended by laws 1886, c. 205, imposes on the commissioner of labor statistics the duty of gathering statistical information for public purposes, and em-

powers him to compel the production to him of information, in writing, by persons and corporations, to be used by him as a public officer, the commissioner is charged with the duty of preserving the answers and statistics thus furnished to him as a public officer; and their willful destruction or mutilation by him is an offense under the above section. 22 N. Y. Supp. 576, affirmed.

Appeal from supreme court, general term, third department.

Charles F. Peck and Elbert Rodgers were indicted for the destruction and removal of public documents. From a judgment of the general term (22 N. Y. Supp. 576) reversing a judgment sustaining a demurrer to the indictment, defendants appeal. Affirmed.

The other facts fully appear in the following statement by EARL, J.:

This is an appeal from the judgment of the general term of the supreme court, reversing the judgment of the court of sessions of Albany county, which sustained the demurrer to the indictment against the defendants, and discharged them. The indictment is as follows: "The grand jury of the county of Albany accuse Charles F. Peck and Elbert Rodgers of the crime of removing and destroying public documents, committed as follows: The said Charles F. Peck, heretofore and at the time of the commission of the acts hereafter stated, was and now is the commissioner of statistics of labor of the state of New York, a public officer and a public office duly created by an act of the legislature of the state of New York, and as such commissioner it became and was his duty to collect, assort, systematize, and present, in annual reports to the legislature, statistical details relating to all departments of labor in this state, and especially in relation to the commercial, industrial, social, and sanitary conditions of workmen, and to the productive industries of this state, and that at all the times hereafter referred to it was the legal duty of every person, owner, operator, manager, and lessee of every mine, factory, workshop, warehouse, elevator, foundry, machine shop, and other manufacturing establishment in the state, and of every agent and employee of such owner, operator, manager, and lessee of every such mine, factory, workshop, warehouse, elevator, foundry, machine shop, and other manufacturing establishment, to furnish to such commissioner, when requested by him, statistical and other information in their possession or under their control relative to the lawful duties of such commissioner, as above set forth, and to truthfully answer questions concerning such lawful duties of the said commissioner, sent to them, by said commissioner, by circular. That heretofore, and in the year 1891, between the 1st day of January and the 31st day of December in said year, and in the year 1892, between the 1st day of January and the 1st day of September in said year, the said defendant Charles F. Peck, as commissioner of statistics of labor of the state of New York, in pursuance of the duties devolved on him by law, to collect, assort, and systematize statistical details relating to all departments of la-

bor in this state, and especially in relation to the commercial, industrial, social, and sanitary condition of the workingmen and to the productive industries of this state, sent circulars to the owners, operators, managers, and lessees of the mines, factories, workshops, warehouses, elevators, foundries, machine shops, and other manufacturing establishments of this state, which said circulars did then and there contain questions asking for statistical information relating to the lawful duties of such commissioner, and relating to the details of all departments of labor in this state, and especially in relation to the commercial, industrial, social, and sanitary condition of workingmen in this state, and to the productive industries of this state, and did at the times aforesaid receive answers to the questions contained in said circulars, from the owners, operators, managers, and lessees of the mines, factories, workshops, warehouses, elevator, foundries, machine shops, and other manufacturing establishments of this state, which said answers were contained in and written on the circulars so sent out by the said Charles F. Peck, as commissioner of statistics of labor of the state of New York, and which said answers, then and there being, were and are the statistical details relating to all departments of labor in the state of New York, and especially in relation to the commercial, industrial, social, and sanitary condition of workingmen of the state of New York, and to the productive industries of the state of New York, and which said circulars containing the questions aforesaid, and the answers aforesaid, were sent to and received by the said defendant Charles F. Peck, as such commissioner of statistics of labor of the state of New York, by due authority of law, at his office in the new capitol in the city of Albany, and known as the 'Bureau of Labor Statistics of the State of New York,' he, the said Charles F. Peck, being then and there a public officer of the state of New York, and received and filed and deposited by said Charles F. Peck in the office of the bureau of labor statistics of the state of New York at the headquarters thereof in the new capitol, in the city of Albany, the said bureau of labor statistics being and was then and there a public office of the state of New York, and being then and there received, filed, and deposited by due authority of law, and being and were then and there public records, books, papers, and documents of the state of New York. And the grand jury further say that the said Charles F. Peck and Elbert Rodgers, on the 11th day of September, 1892, at the city of Albany, in this county, feloniously, willfully and unlawfully did remove, mutilate, conceal, and destroy the public records, books, papers, and documents so as aforesaid filed and deposited, by due authority of law, in the office of the bureau of labor statistics of the state of New York, in the new capitol, at the city of Albany, the same being then and there a public office of the state of New York, and the same being then and there filed and deposited, by due authority of law, with the commissioner of statistics of labor of the state of

New York, at his office in the new capitol, in the city of Albany, he being then and there a public officer of the state of New York, and which said public records, books, papers, and documents aforesaid did then and there relate to and were the official statistical details relating to all departments of labor in the state of New York, and especially in relation to the commercial, industrial, social, and sanitary condition of the workingmen of the state of New York, and to the productive industries of the state of New York for the years 1890 and 1891, and were and are the official and public records, books, papers, and documents of the bureau of labor statistics of the state of New York, and the official and public records, books, papers and documents of the people of the state of New York. And the grand jury aforesaid further say that the public records, books, papers, and documents aforesaid have been and are withheld by the said Charles F. Peck and Elbert Rodgers, and have been and were removed and mutilated by the said Charles F. Peck and Elbert Rodgers, and have been destroyed by the said Charles F. Peck and Elbert Rodgers, so that the grand jury are unable to give a better description of them than as above set forth, and so that the grand jury are unable to set them out in detail, and are unable to set them out in words and figures. And so the grand jury aforesaid charge and accuse the said Charles F. Peck and the said Elbert Rodgers with feloniously, willfully, and unlawfully removing, mutilating, concealing, and destroying public records, books, papers, and documents, contrary to the statute in such case made and provided. James W. Eaton, District Attorney of the County of Albany." The defendants demurred separately to the indictment on the ground that it did not state facts sufficient to constitute a crime.

Edward J. Meegan, for appellants.

The proper pleading to raise questions of law, decisive of the validity of an indictment, is a demurrer. 1 Bish. Crim. Proc. (1st Ed.) § 411; Code Crim. Proc. § 236; Abb. Tr. Brief, § 55, (on the pleadings;) Id. §§ 36, 38; 1 Rice, Ev. p. 34. Judicial notice will be taken that the commissioner's report was filed long prior to September 11, 1892; also, that the circulars and answers thereon were the report. 1 Rice, Ev. p. 36, subds. p, u. Keyser v. Hits, 133 U. S. 138, 146, 10 Sup. Ct. Rep. 290; Cary v. State, 76 Ala. 78; Major v. State, 2 Sneed. 11; Wells v. Manufacturing Co., 47 N. H. 235; Wetherbee v. Dunn, 32 Cal. 106; Ex parte Kearny, 55 Cal. 221; State v. Wagner, 61 Me. 178; 1 Greenl. Ev. § 6, (14th Ed.), and note A. "Statistics" may be defined as a collection of facts illustrative of the condition of the people or state. 2 Rap. & L. Law Dict. 1218; Webster Dict.; 22 Enc. Brit. p. 464; 3 Lalor, Enc. Pol. Science, tit. "Statistics." A "circular" is a letter or paper sent to various persons. Webster Dict.; New Amer Dict. An indictment must contain a plain and concise statement of the facts constituting the crime. Code Crim. Proc. § 275; Wood v. People, 53 N. Y. 513, Allen, J.; U. S. v. Cruikshank,

92 U. S. 543, *People v. Dumar*, 106 N. Y. 502, 13 N. E. Rep. 325. The indictment in the case at bar is repugnant in charging both the concealment and destruction of public documents. 1 Arch. Crim. Pr. & Pl. (Pom. Ed.) 260; 1 Whart. Crim. Law, (7th Ed.) § 396. The commissioner has no office in which documents may be filed; the term "headquarters," used in the act, not being synonymous with "office." Laws 1883, c. 356; Laws 1886, c. 205. If there is a fair doubt whether the act charged is embraced in the criminal prohibition the statute should be construed in favor of the accused. U. S. v. Whittier, 6 Reporter, 260; Com. v. Macomber, 5 Mass. 254; Com. v. Barlow, 4 Mass. 439; Com. v. Martin, 17 Mass. 359; Com. v. Keniston, 5 Pick. 420; Bish. St. Crimes, (2d Ed.) § 218; *People v. Gates*, 18 Wend. 317; Com. v. Hunt, 4 Metc. (Mass.) 111. An allegation that a paper is a public record does not preclude the court from examining whether there is any law making it a public record. In re Corryell, 22 Cal. 179. A private person cannot claim the right to make a general inspection and copy of papers in a public office. *Randolph v. State*, 82 Ala. 527, 2 South. Rep. 714, 60 Amer. Rep. 761, and note; *People v. Cornell*, 35 How. Pr. 31, reversing 32 How. Pr. 149, 47 Barb. 320; In re McLean, 8 Reporter, 813; *Bean v. People*, 7 Colo. 202, 2 Pac. Rep. 909; *Belt v. Abstract Co.*, (Md.) 20 Atl. Rep. 982, 10 Lawy. Rep. Ann. 212, note. The fact that a paper comes into a public office does not make it a record, unless there is some law requiring it to be filed therein. In re Corryell, 22 Cal. 179; *Blunt v. Patten*, 2 Paine, 393; *Smith v. Lawrence*, 12 Mich. 431; *Dunn v. Games*, 1 McLean, 321; 2 Bouv. Dict. p. 520; *Davidson v. Murphy*, 13 Conn. 213; *Barnes v. Lee*, 1 Cranch, C. C. 430; *Keller v. Killon*, 9 Iowa, 329; *Moore v. Brown*, 10 Ohio, 198; *Willard v. Whitney*, 49 Me. 235; *Taylor v. Com.*, 44 Pa. St. 131; *Leathers v. Cooley*, 49 Me. 345; *Sayles v. Briggs*, 4 Metc. (Mass.) 424; *Ordway v. Conroe*, 4 Wis. 45; *Uddleston v. State*, 7 Baxt. 55; *Noble v. Shearer*, 6 Ohio, 426; *Bank v. Donaldson*, 6 Pa. St. 179; *Williams v. Norris*, 12 Wheat. 117; *Bella v. Railroad Co.*, (Super. Buff.) 6 N. Y. Supp. 552; 20 Amer. & Eng. Enc. Law, p. 474; *George v. Toll*, 39 How. Pr. 504; *Coyner v. Boyd*, 55 Ind. 166; *Bohr v. Neuenschwander*, 120 Ind. 447, 22 N. E. Rep. 416. The words "authority of law" can refer only to an act of the legislature. *Reinman v. Railroad Co.*, 7 Neb. 313.

James W. Eaton, Dist. Atty., for the People.

The indictment is not demurrable merely because there is no express provision of law declaring the papers in question to be public papers, and requiring them to be kept. Public documents are instruments or records concerning the business of the people at large, and as such are admissible in evidence. And. Law Dict. 371, 372, tit. "Document;" 1 Rice, Ev. § 126, p. 186; Black, Law Dict. tit. "Pub. Document;" 20 Amer. & Eng. Enc. Law, p. 506, § 2, and note; Id. pp. 508, 509, § 4, and notes; 1 Greenl. Ev. § 483; *Evanston v. Gunn*, 99 U. S. 660; *Kyburg v. Perkins*, 6 Cal. 675; 20

Amer. & Eng. Enc. Law, 507, and cases in note; *Sturla v. Freccia*, L. R. 5 App. Cas. 623-642; *Irish Soc. v. Bishop of Derry*, 12 Clark & F. 641-668; *Richardson v. Mellich*, 2 Bing. 229, 9 Moore, 435; *Grindell v. Brendon*, 6 C. B. (N. S.) 698; *Burton v. Tuite*, 78 Mich. 363, 44 N. W. Rep. 2-2; *Bell v. Kendrick*, 25 Fla. 778, 6 South. Rep. 868; *Kerr v. Farish*, 52 Miss. 101; *Dent v. Bryce*, 16 S. C. 1; *Hedrick v. Hughes*, 15 Wall. 123; *Miller v. City of Indianapolis*, 123 Ind. 196, 24 N. E. Rep. 225; *Groesbeck v. Seeley*, 13 Mich. 329; *Chamberlain v. Sands*, 27 Mo. 458; *Gearhart v. Dixon*, 1 Pa. St. 224; *Thornton v. Campton*, 18 N. H. 20; *Construction Co. v. Gelst*, 37 Mo. App. 509; *Light Co. v. St. Louis*, 86 Mo. 495; *Kyburg v. Perkins*, 6 Cal. 674. The allegation that the papers in question were filed and deposited by authority of law with Peck, as a public officer, and in his public office, is sufficient. A paper is filed when delivered to the proper officer, and in his official custody. And. Law Dict. tit. "File" pp. 459, 460; 7 Amer. & Eng. Enc. Law, 960; 1 Bouv. Law Dict. 587. And the indorsement or file marks are merely prima facie evidence of the filing. *Franklin Co. v. State*, 24 Fla. 55, 3 South. Rep. 471. "Deposit" means to lodge in some one's hands for safe-keeping. Webster's Dict. See, also, opinion in this case of Mr. Justice Herrick, (general term,) 22 N. Y. Supp. 582. A paper is filed or deposited with a public officer by authority of law when it reaches the public officer under the permissive sanction of the law, and when it appertains to his office as a convenient and appropriate record of the transactions of his office, quite irrespective of the fact that a statute does or does not specifically direct its preservation; when it is, in short, a "public document." *Coleman v. Com.*, 25 Grat. 865. The commissioner has an "office" in which documents may be filed, although the word "headquarters," instead of "office," is used in the act. Opinion of Mr. Justice Herrick. The word "headquarters" is synonymous with "office," and means a place for the transaction of business. Abb. Law Dict. tit. "Office;" And. Law Dict. tit. "Office." The indictment is sufficient in setting forth the offense as the statute defines it, and it is not necessary to state any circumstances, save those which constitute the definition of the offense in the statute. *Phelps v. People*, 72 N. Y. 334, and cases cited in opinion of Mr. Justice Herrick.

EARL, J., (after stating the facts.) Chapter 356 of the Laws of 1883, as amended by chapter 205 of the Laws of 1886, provides as follows: "Section 1. The governor shall, by and with the advice and consent of the senate, appoint, within ten days after the passage of this act, and thereafter triennially on the first Wednesday in April, some suitable person who shall be designated 'Commissioner of Statistics of Labor,' with headquarters in the new capitol, at Albany. Sec. 2. The duties of such commissioner shall be to collect, assort, systematize, and present in annual reports to the legislature, within ten days after the convening thereof in each year, statistical details relating to all departments of labor in the state, especially in

relation to the commercial, industrial, social, and sanitary condition of workingmen, and to the productive industries of the state. Sec. 3. Said commissioner shall also have power to send for persons and papers, to examine witnesses under oath, to take depositions, to cause them to be taken by others by law authorized to take depositions; and said commissioner may depute any uninterested person to serve subpoenas upon witnesses, who shall be summoned in the same manner, and paid the same fees, as witnesses before a county court; and any person or owner, operator, manager, or lessee of any mine, factory, workshop, warehouse, elevator, foundry, machine shop, or other manufacturing establishment, or any agent or employe of such owner, operator, manager, or lessee, who shall refuse to said commissioner admission therein for the purpose of inspection, or who shall, when requested by him, willfully neglect or refuse to furnish to him any statistical or other information relative to his lawful duties, which may be in their possession or under their control, or who shall willfully neglect or refuse, for thirty days, to answer questions by circular or upon personal application, or who shall knowingly answer any such questions untruthfully, or who shall refuse to obey the subpoenas and give testimony according to the provisions of this act: provided that no witness shall, against his will, be compelled to answer any question respecting his private affairs, shall, for every such willful neglect or refusal, be deemed guilty of a misdemeanor, and on conviction therefor shall be punished by a fine of not less than fifty or more than two hundred dollars." Section 4 provides that the commissioner shall receive an annual salary of \$2,500, and his expenses, and that he may appoint a clerk at an annual salary of \$1,200.

There can be no doubt that the commissioner is a public officer. He has a fixed term of office, a salary, and discharges duties for the public. He is to have and keep an office in the capitol, where he and his clerk are to discharge their principal functions. What can a statute mean which requires a public officer to have his "headquarters" at the capitol? It does not mean temporary headquarters, but permanent headquarters, during his term of office. It does not mean that he is to occupy the corridors, rotunda, or some other open space in the capitol. Obviously, it means that, like the other public officers, he is to have a room in the capitol for his occupation, and for the discharge of his duties. The statute gives him the right to such a room; and thus it is made the duty of those who, by law, have charge of the capitol, to assign him a room, and if they should refuse to do so they could be compelled by mandamus. The indictment shows that he did occupy a room in the capitol as his office, which was styled the "Bureau of Labor Statistics." So here was a public officer, and a public office officially occupied by him.

This act has relation to the workingmen of the state engaged in productive industries. They constitute a very large portion of the people. They are generally

without capital, and more or less dependent. The relations between capital and labor are yet an unsolved problem, and statesmen and scholars are engaged in its solution. Measures for the amelioration of the condition of workingmen, and the promotion of their welfare, are frequently agitated, many of which are based upon imperfect knowledge and crude ideas. Knowledge of the facts, knowledge of the social condition, the wages, the material needs of the workingman, of the profits of labor and of capital, and of the condition of the productive industries, must precede any intelligent legislation, any remedial measures looking to the welfare of workingmen, and the wise and beneficent solution of the problem above mentioned. So the main purpose of this act is to get at the facts. The primary duty of the commissioner is to collect the facts—called in the act "statistical details"—in relation to labor and production. Having collected the facts, then he is to assort and systematize them, and then present them in his annual report to the legislature. He is not to collect the facts merely to enable him to discharge a duty, but in the discharge of a duty. He is to collect them, not for his private, personal use, but for a public purpose,—not merely to enable him to make his report, but for preservation so long as they can be useful. These statistical details for a single year would be inadequate for accurate deductions and generalizations. For that purpose a series of years are needed. One year may be abnormal as to the conditions of labor and industries, and thus the statistical details for that year might be misleading and illusory. The facts gathered are not only for the use of the commissioner, but for everybody who has occasion to use them,—for lawmakers; for students of sociology, political economy, and the science of government; and for the general historian,—and they may become more valuable as the years go by, and the opportunity to gather them has in a great measure passed away. Could it have been the intention of the legislature that there should be no means to test the accuracy and value of the report of the commissioner? Is he, under the act, to be permitted to present a picture of the condition of labor, and the productive industries, the accuracy of which, in consequence of the suppression of the facts, cannot be tested? Shall an inferior state officer be the sole judge of the significance and value of the facts he gathers under the act? Can he be permitted to manipulate the facts to sustain some pet theory of his own, or even to serve some perverse purpose, without the opportunity of detection and exposure? It is obvious that the act would be worse than useless—might even be dangerous in its operation—if the statistical details are not to be preserved, and the manifest purpose of the act makes it important that they should be preserved. If untruthful answers be given to questions contained in circulars sent out to the persons named in the act, any person giving such answers is guilty of a misdemeanor, and may be convicted and punished, and to this end it is impor-

tant that the written answers be kept. The act clothes the commissioner with extraordinary powers to gather the facts. He may use compulsory process for that purpose, and yet may he destroy the papers and documents in which they are contained at any time after receiving them? The duty to preserve them after he has received them, and they have reached his office, we think, is plain, and is implied in the act, and just as much a part thereof as if expressly written therein. *U. S. v. Babbitt*, 1 Black, 55, 61; *Gelpcke v. City of Dubuque*, 1 Wall. 221. It is true that the commissioner may, under the act, obtain pertinent information by observation, which may not be reduced to writing, and thus become a record. But if he examines witnesses under the act it is implied that such examination is to be reduced to writing, and all the pertinent information which is furnished to him in writing under the act should be preserved by him in his office. It belongs to the public, is obtained at the public expense for the public, and should be preserved until it may be destroyed, or otherwise disposed of, by authority of law. Such we believe to be the scope and purpose of the act.

It appears from the indictment that the commissioner sent out circulars calling for the statistical details mentioned in the act, and that he obtained answers to such circulars written thereon, which were filed and deposited by him in his office in the capitol, and that he and the other defendant subsequently destroyed the papers and documents thus filed and deposited; and the indictment was found against them under section 94 of the Penal Code, which provides as follows: "A person who willfully and unlawfully removes, mutilates, destroys, conceals, or obliterates a record, map, book, paper, document, or other thing filed or deposited in a public office, or with any public officer, by authority of law, is punishable by imprisonment for not more than five years, or by a fine of not more than five hundred dollars, or by both." We can perceive no defect in this indictment. The facts alleged therein show the commission of a crime. As we have shown, the circulars and answers written thereon were public papers or documents. They were deposited, and also, according to the general and common understanding of the term, "filed," with a public officer, by authority of law, and the indictment alleges that the defendants feloniously, willfully, and unlawfully destroyed them. It matters not, as we have shown, whether this destruction took place before or after the commissioner had prepared his report. As the destruction is alleged to have taken place on the 11th day of September, it was certainly before he had made his report to the legislature. To test the matter a little further, suppose the commissioner resigns, or is removed from his office, after he has, at great labor and expense, obtained these statistical details. Can he destroy the papers containing them? Can he use such parts of them as tend to support some

theory or some policy which he wishes to maintain and foster, and destroy the rest? Can a clerk in his office, or some stranger, take and destroy them, without responsibility under the law? Are these valuable papers absolutely without protection, except such as the commissioner may voluntarily give? Can he not be compelled to deliver them over to his successor in office under the Revised Statutes and under the Code, as now amended? The answers to these questions, it seems to us, are quite obvious.

The learned counsel for the defendants claims that these circulars, with the answers therein, were not "statistics" as defined by the authorities which he cites. But that they contained statistical details—the primary elements—out of which a table or system of statistics could be framed, cannot be doubted. It is quite true that every paper that comes into a public office in the performance of the duties of the officer who has charge of the office is not within the section of the Penal Code claimed to have been violated by the defendants. It is not easy to give a definition or description so comprehensive and accurate as to include every paper contemplated by the section. It is enough for the present purpose to say that papers which a public officer is required to obtain, in the discharge of his official duties, which have public importance and are of permanent value, and may serve a useful purpose after they have been deposited in his office, or with him, are under the protection of the law. If these papers had actually served their whole purpose, so that they could no longer be of any use, they could have been destroyed with impunity, as it cannot be supposed that it was intended by the law to save such papers from destruction. If these papers contained material and pertinent information collected under the act, and for the purposes contemplated by the act, then the indictment could not be defended on the ground that the papers were the private papers of the persons sending them to the commissioner, or that the information thus communicated was confidentially disclosed. The statute makes it the duty of the commissioner to procure the information, and makes it the duty of the persons designated to give it, and when the information is given it becomes public, and is for a public purpose, and no stipulation or promise on the part of the commissioner can give it any other character.

We regard this as a plain case, involving no abstruse questions of law. We have not, therefore, deemed it important to refer to or criticise the authorities having more or less bearing, cited upon the argument. They will be found in the carefully-prepared briefs submitted. We ought not to close this discussion without referring to the very able prevailing opinions delivered in the court below. We would have rested our decision upon those opinions, but for the novelty of this case, and its public importance. The judgment should be affirmed. All concur.



(50 Ohio St. 277)

**WOOLWEAVER v. STATE.**

(Supreme Court of Ohio. April 25, 1893.)

**HOMICIDE — WHAT CONSTITUTES AN AIDER AND ABETTOR.**

1. A person who becomes involved in a fight with one or more antagonists should not, upon that ground only, be held an aider and abettor of another, who may be present, and incited by the struggle to commit an independent act of violence that causes the death of the antagonist, or one of them, if there were more than one.

2. In such case, to constitute the person engaged in the fight an aider or abettor of the homicide, it should appear, either that there was a prior conspiracy, or that he purposely incited or encouraged the slayer, or did some overt act himself with an intent to cause the death of his antagonist.

(Syllabus by the Court.)

Error to circuit court, Vinton county.

One Woolweaver, together with his sons, Henry and Ellsworth, was indicted at the September term, 1891, of the Vinton county common pleas court, for murder in the second degree in having killed one Frank Lehman, in said county, on the 1st day of the preceding August. He was tried at the March term, 1892, of said court, for said offense, convicted of manslaughter, and sentenced to imprisonment in the penitentiary of the state for a term of years, which conviction and sentence were sustained by the circuit court of said county. He thereupon instituted proceedings in this court to reverse the judgments of both said courts. Reversed.

C. H. Grosvenor and J. M. McGillivray, for plaintiff in error. O. W. H. Wright, R. S. Swepston, and James W. Darby, Pros. Atty., for the State.

BRADBURY, C. J. Upon the trial of this cause the plaintiff in error excepted to a number of rulings made by the trial court, only one of which, we think, merits consideration here, namely, the exception taken to the refusal of the court to give to the jury that proposition of law requested by plaintiff in error, which relates to the proof necessary to constitute one an aider and abettor of a homicide occurring upon a sudden quarrel, where the proof is insufficient to establish a prior conspiracy. Over many of the circumstances that occurred on the day of the homicide, and which led up to it, there seems to have been no substantial controversy. The record discloses that the plaintiff in error resided and kept a saloon at McArthur Junction, a small village located where the track of the Columbus, Hocking Valley & Toledo Railway Company and that of the Baltimore & Ohio Southwestern Railroad Company cross each other; that George T. Ewing was the station agent there; that mutual enmity existed between Ewing and the plaintiff in error; that the saloon of plaintiff in error was situated 100 feet or more from the station buildings; that the plaintiff in error, in the early part of the day of the homicide, was intoxicated, and continued in that condition until after the homicide occurred, which happened near the middle of the afternoon;

that Ewing was absent from the station most of the day, until about 1 o'clock, when he returned; and that during his absence the plaintiff in error came up about the platform and station building, exhibiting special ill will towards Ewing, and one or two other employes about the station, and ill will generally towards the rest of them, applying to him and to them vile and abusive epithets, though exhibiting no ill feeling towards the deceased personally. So far as the record discloses, the plaintiff in error had become quiet before the return of Ewing, though for how long before is left uncertain. Ewing, after his return, though how long thereafter is not made quite clear, walked along the station platform to a point nearly opposite the saloon of plaintiff in error, where he and the latter engaged in a quarrel, on the termination of which the plaintiff in error seems to have entered his saloon, while Ewing returned to his office. A short interval, fixed by one witness at 1 hour and 20 minutes, occurred now, during which little, if anything, transpired, unless the plaintiff in error may have occasionally indulged in bolsterous language, addressed to no one in particular. At the expiration of this period he started from his residence or saloon towards the station with a ginger ale bottle in his hand. He came near the deceased, and they engaged in a sharp and short quarrel, which resulted in the deceased going to the railroad office, getting Ewing's revolver, and starting to return towards the plaintiff in error. Ewing and Lyons, another employe about the station, took the revolver from the deceased, and all three moved in the direction of the plaintiff in error, who about this time was joined by his two sons and his wife. An encounter followed, in which Henry Woolweaver, a son of the plaintiff in error, shot and killed the deceased. There were many other circumstances and facts over and about which the parties contested, and which for that reason are unnoticed in the general statement of what seems not to have been controverted. The plaintiff in error did not fire the fatal shot, and therefore, if a party to the homicide, became such either because of a prior conspiracy, that made him a party to the act of his son, by reason of inciting or encouraging his son at the time of its commission, or by some overt act of his own, designed or done with a view to bring about that result.

The proposition requested, and which the court declined to give to the jury, reads as follows. "In the absence of a conspiracy, one who is present when a homicide is committed by another upon a sudden quarrel, or in the heat of passion, is not guilty of aiding and abetting the homicide, although he may become involved in an independent fight with others of the party of the deceased, unless he does some overt act with a view to produce that result, or purposely incites or encourages the principal to do the act; and so, in this case, if you find the defendant on trial, although present at the time of the shooting, knew nothing of his son Henry having a revolver, or intending to

shoot, and took no part in the killing, and did no overt act to produce that result, then he is in no way responsible, and must be acquitted, unless you find from the evidence, and beyond a reasonable doubt, that the shot was fired by Henry in pursuance of a conspiracy previously formed by them." This proposition the court modified by erasing the words "with a view," and inserting in their place the word "tending," so as to make it read "unless he does some overt act tending to produce that result," and gave it to the jury as thus modified. If there was no prior conspiracy, and the act was committed upon a sudden quarrel, without the plaintiff in error having purposely incited or encouraged the perpetrator thereof, he ought not to be held to have a guilty connection therewith, unless he did some overt act "with a view"—that is for the purpose—to produce the result he is charged with aiding and abetting, for in such a state of fact no criminal intent would exist. But under the rule of law embraced in this proposition, as modified and given to the jury, the plaintiff in error might have been convicted without proof of a guilty purpose, and when he had a casual connection, only, with the homicide; for it authorized a verdict of guilty if he did any overt act that tended in any degree to cause the death of the deceased, although the act was done by him without any purpose to cause that result, and in fact did not produce it, and although there was neither a previous guilty conspiracy, nor any incitement or encouragement, purposely given, by him, at the time, to the actual perpetrator of the homicide. Whenever a father engages in a fight, the tendency of that act is to incite a son, who may be standing by, to acts of violence, either towards the immediate antagonist of the father, should there be but one, or towards the party of that antagonist, if there should be more than one. This tendency may be affirmed in respect to many other ties of kindred, or in many instances of merely close companionship. What rash or violent act the bystanding son, kinsman, or comrade may be moved to do depends in a great measure upon the quality of his temper, the strength of his affection, and the notion, often mistaken, that he may hastily gather, under the excitement of the moment, as to who is in fault, and to be held responsible for bringing on the conflict. And if the bystanding son, other kinsman, or comrade should, of his own volition, by an independent act of violence, slay the antagonist, the party engaged in the fight should not be charged with this act merely because he was engaged in a conflict with the deceased, and in that way, but in that way only, incited the fatal act. This is not enough to show a criminal intention. Something more must appear. He must have purposely incited or encouraged the party in that course of violence that led to the homicide, or done some overt act himself with a view to that result, and that in some degree contributed thereto. This is the principle that underlies the eighth clause of the syllabus in the case of *Goins v. State*, 46

Ohio St. 457, 21 N. E. Rep. 476. True, in the *Goins* Case, *supra*, the plaintiff in error, at the moment of the killing, was engaged in an independent struggle with a person other than the one who was killed; but *Goins* was of the party with the one who gave the fatal stab, and his immediate antagonist was of the party of the one who received the death wound. In the case under consideration there was evidence tending to show that the plaintiff in error and his two sons composed one party, while the deceased and Mr. Ewing, and probably Mr. Lyons, composed the other party. This difference in the circumstances in no wise affected the principles by which the criminal character of the acts of the parties should be tested. If there was a conspiracy, each conspirator was chargeable with the acts of his co-conspirators. If there was no conspiracy, then, upon the springing up of a sudden fight, each should be chargeable only with his own acts, and such acts of the others as he may purposely incite or encourage. The charge, in the form in which it was requested, correctly stated this proposition. Where satisfactory proof of a conspiracy has not been produced, it often becomes a nice and difficult matter to determine the criminal liability of each of a part of friends or kindred for the violent and unlawful acts of his fellows, committed in the course of a conflict, arising upon a sudden quarrel, with one or more antagonists; and in such case, upon the trial of one of them, it is of the first importance that the correct rule of liability should be laid down to the jury, and if the instructions should extend too far as to the liability of the one on trial for the acts of his fellows it would be, necessarily, prejudicial to his rights. Therefore, as the proposition, in the form requested by the plaintiff in error, prescribed the correct rule of liability in the absence of proof of a conspiracy, it should have been given to the jury, and any modification that extended the liability as thus prescribed must be regarded as erroneous. Judgment reversed.

(50 Ohio St. 361)

#### CITY OF TOLEDO v. PRESTON.

(Supreme Court of Ohio. May 9, 1893.)

CONSTITUTIONAL LAW—CONDEMNATION PROCEEDINGS—JURISDICTION OF PROBATE COURTS—PRACTICE—BILL OF EXCEPTIONS.

1. Section 2316, Rev. St., authorizing municipal corporations to postpone, until after a proposed public improvement shall have been completed, a judicial inquiry into claims for damages filed on account thereof by owners of abutting property, is not in conflict with section 16, art. 1, Const. 1851.

2. The jurisdiction conferred upon probate courts by sections 2317-2321, inclusive, Rev. St., to inquire into and determine the damages sustained by owners of abutting property on account of such improvements, is warranted by section 8, art. 4, Const. 1851; and the proceedings had in the probate court may be pleaded in bar of an action subsequently brought in a court of common pleas upon the same claim.

3. A probate court has no power, under the form of a procedure to obtain an order *nunc pro tunc*, to inquire into, ascertain, and declare

of record the reasons that induced a jury to arrive at the verdict it had rendered in a cause theretofore tried in that court.

4. The only lawful method of bringing into the record the proposition of law given to the jury on the trial of a cause is by a bill of exceptions taken and perfected within the time and in the manner provided by statute; and where at the trial no exception was noted to the charge of the court, and no bill of exceptions attempted to be taken to make that charge a part of the record, the court has no jurisdiction, after the cause has ended, to ascertain and declare what those propositions were, and a nunc pro tunc order to that effect is absolutely void.

(Syllabus by the Court.)

Error to circuit court, Lucas county.

Action by F. W. Preston against the city of Toledo to recover damages sustained on account of a change in the grade of a street. Plaintiff had judgment, and defendant brings error. Reversed.

The other facts fully appear in the following statement by BRADBURY, C. J.:

In the year 1854 the city of Toledo established a grade for Erie street of said city at its intersection with Jefferson street. The defendant in error was at that time, or afterwards became, the owner of certain real estate located on one of the corners formed by the intersection of said streets, and improved the same with reference to said grade. Afterwards, in the year 1880, the city changed the grade of Erie street in front of the lot of the defendant in error by raising it about  $4\frac{1}{2}$  feet above the grade established in 1854, and proceeded to improve the street with reference to such new grade. The plaintiff was notified of the adoption of the resolution providing for the improvement, and he filed with the city clerk a claim for the damages claimed by him on account thereof. Afterwards the city, in the ordinances providing for the improvement and the method for paying the cost thereof, also provided that the claims for damages arising from said improvement should be inquired into after the completion of the proposed improvement. On October 18, 1881, after the improvement had been completed, the city, through its solicitor, instituted proceedings in the probate court of Lucas county to ascertain the damages that had accrued to the owners of property adjoining said improvement, making the defendant in error, among others, defendant thereto. A trial was had before the probate judge and a jury, which resulted in the jury returning a verdict of "No damages" in respect to the claim of the defendant in error. The defendant in error took no exceptions either to the rulings of the judge or to the finding of the jury; nor did he institute any proceedings whatever to set aside the verdict or reverse any ruling of the probate court that led up thereto. In 1886, over four years thereafter, however, he began a suit in the court of common pleas of Lucas county to recover from the city the damages he claimed to have sustained on account of the improvement. To this action the city answered, setting up in bar thereof the proceedings had upon the inquest of damages in the probate court. To this answer the defendant in error replied as follows: "The plaintiff,

for reply to the matters set forth in the said answer of said defendants, admits that in a certain so-called proceeding in the probate court begun in November, 1881, by the city of Toledo, the said plaintiff was summoned into said court under the order and direction of the city of Toledo, for the purpose of summoning a jury to assess the damages sustained by said plaintiff by reason of the change of grade and the filling of Erie street in front of said plaintiff's said premises. That at the time of said proceedings the said property of said plaintiff had been injured and damaged to the amount claimed in his said petition, and said plaintiff made it appear then and there, in said probate court, upon the hearing before the jury to assess the said damage, which amount of his said damage and injury was undisputed by said city of Toledo. That the sole ground upon which said city sought to defeat an award to said plaintiff was upon the ground that his said claim for damages had not been filed within time. Said plaintiff says that the jury was instructed by said court, and the jury found, or attempted to find, in said action, that the said plaintiff's claim had not been filed within the time provided by law, and for that reason, and none other, the said jury returned in said proceedings no award in favor of said plaintiff. Attached hereto, and marked 'Exhibit O,' and made a part hereof, is that part of the record and finding in said cause made May 19, 1887, as relates to the said matter. That in fact and in law the said plaintiff's claim had been filed within the time provided by law, and in fact said plaintiff had suffered and sustained damages to the extent and amount claimed in his said petition; but that, under the instructions of the probate court, the jury in said proceedings in said probate court made no award in favor of said plaintiff for the sole and only reason, as aforesaid, that said plaintiff's claim had not been filed within the time. Said plaintiff says that he was served with a notice, which is hereto attached, marked 'Exhibit A,' and made a part hereof, upon the 9th day of June, 1880, and thereafter upon the 25th day of June, 1880, filed said written claim for damages (Exhibit A) with the clerk of the city council of the city of Toledo. Said plaintiff says that said proceedings in said probate court, to assess said compensation and damages to said plaintiff were made after said improvement had been made, and after said plaintiff had suffered and sustained the injury and damages that he claims herein. That at the time of said appropriation or improvement the said city had failed and omitted to make compensation to him in any manner whatever before making said improvement or since. Said plaintiff says that said proceedings by said city of Toledo in said probate court were unconstitutional and void, and the action of said probate court therein is in no way binding upon said plaintiff herein, and was not in due course of law. That the provisions of the statute under which said proceedings were instituted were in violation of the provisions of the constitution of the state of Ohio, art. 1, §§ 16-19, and art. 18, § 5. The

said plaintiff denies the validity of said proceedings or said judgment in said probate court, or that the same has any force or effect whatever as against said plaintiff herein. Denies that said court and jury found that the property of said Preston had sustained no damage by reason of the said improvement of Erie street, set forth in said defendant's answer."

The following is Exhibit O, referred to in the reply, and made a part thereof: "Probate Court, May 19, 1887. The City of Toledo v. James W. Myers et al. Erie street damages, from Madison to Monroe. This day came the plaintiff by its attorney, G. W. Kinney, and one of said defendants, F. W. Preston, by his attorney, E. D. Potter, Jr., on application of said defendant, and showing that the record in said cause was and is incomplete; and the court, being advised in the premises, does find that the said probate court on the trial of said cause against said Preston charged the jury that if they found that the notice to file his claim for damages was served upon him on the 9th day of June, A. D. 1880, and he filed his said claim for damages upon the 25th day of June, 1880, then they should return no award in his favor, for the reason that he had not filed his claim within the time provided by law. That thereupon said jury retired, and returned no award in his favor, and for the only reason that said claim had not been filed in time. And the court now orders that this finding be made a part of the record in said cause; and thereupon the said plaintiff, by its said attorney named herein, excepts to the order made herein."

A demurrer to this reply was interposed by the city, and overruled by the court of common pleas, to which ruling the city excepted. Thereupon, a jury being waived, the cause was tried to the court, and a finding made in favor of the defendant in error, upon which he recovered judgment. The circuit court having affirmed this judgment, the proceedings are brought here for review.

W. H. Read, for plaintiff in error. E. D. Potter, for defendant in error.

BRADBURY, C. J., (after stating the facts.) The only question for this court to consider is whether the proceedings had in the probate court upon an inquest of damages are a bar to the action of the plaintiff below, brought to recover upon the identical claim passed upon by the jury in the probate court. The jurisdiction of the probate court to inquire by jury into a claim for damages like that of the defendant in error, caused to abutting property by a street improvement, is clearly established by sections 2315-2327, inclusive, of the Revised Statutes, if there is no constitutional objection to such jurisdiction being exercised by that court; section 2319 going to the extent of making the verdict of the jury final, and prohibiting an appeal therefrom, leaving to the aggrieved party such remedy only as may be provided by the statutes regulating proceedings in error. Section 8, art. 4, Const. 1851, relating to probate courts and their jurisdiction, provides that "the pro-

bate court shall have jurisdiction in probate and testamentary matters, \* \* \* and such other jurisdiction as may be provided by law." Under the provisions of this section of the constitution the general assembly were fully warranted in conferring upon the probate court the jurisdiction under consideration.

Counsel for defendant in error further contended that section 2316, Rev. St., that authorizes councils of municipalities to postpone the inquest of damages until after the improvement should be completed, violates section 16, art. 1, and section 5, art. 13, Const. 1851, designed to protect private property from unjust seizure and appropriation to the use of the public; and also conflicts with section 16, art. 1, of that instrument, which secures a speedy remedy by due process of law to one who may be injured in his person, reputation, or property. Section 5, art. 13, does not apply to cases of property taken to construct roads which shall be open to the public without charge, in which class the streets of our towns and cities belong. The rights of the owners of property taken and applied to such use fall within the protection guaranteed by section 19, art. 1, by the provisions of which compensation is not required to be made before the property is taken. The jurisdiction conferred on probate courts, and the course of procedure prescribed by statute for ascertaining the damages resulting to abutting property on account of improving a street, do not conflict with section 16, art. 1, of the constitution, which provides that "all courts shall be open, and every person, for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and justice administered without denial or delay," for the probate court is a tribunal provided by the constitution itself, and the statute authorizing the proceedings before it gives "a remedy by due course of law" in prescribing that notice shall be given to all parties to be affected by the inquiry, and that the trial shall be by jury. The constitutionality of the provision of the statute authorizing the inquiry to be postponed until after the improvement should be completed may be a question not so readily and satisfactorily solved, for certainly it might be claimed with great show of reason that, when an injury has been fully accomplished, section 16, art. 1, denies to the general assembly the power to postpone, directly or indirectly, to a future period, the right of the injured party to seek redress in the tribunals established to administer justice. The statute under consideration, however, only contemplates a delay until the injury shall be fully accomplished; for, until the improvement has been completed, it is, perhaps, always impracticable to ascertain with certainty the extent of the injury the fill or excavation, as the case may be, will cause; in fact the injury has not been completed until then; and a delay of the proceedings until that time we do not think necessarily conflicts with that provision of the constitution before quoted, which provides that the administration of justice shall neither be denied nor delayed. No doubt a

municipality should be required to proceed in good faith and with reasonable diligence with the work of improvement. We are of the opinion, therefore, that the statute which confers the jurisdiction under consideration upon the probate court of the state is not in conflict with any of the provisions of our present constitution.

The defendant in error contends further that, if the jurisdiction exists, the probate court and jury are limited to the question of the amount of damages, and if any other ground to defeat a recovery existed than that the improvement caused no injury, it was not available in the inquiry before that tribunal. This, we think, is too narrow a construction of the statute (sections 2317, 2321, Rev. St.) that confers the jurisdiction. The municipality, in availing itself of the remedy thus provided, should not be held to have confessed its liability in every particular except one, and limited itself to contesting the claim on the sole ground that the property was not injured at all, or, if injured, that the damages were less than the sum claimed. The object of the statute was to provide a more summary and less expensive proceeding to ascertain the liability of the municipality arising from the improvement than was afforded by the usual method of procedure. The statute authorizes the inquiry to be had before either the common pleas or the probate court; but, whichever tribunal may be selected, the jurisdiction should be held broad enough to determine the full measure of the liability of the municipality or exonerate it altogether if no legal obligation exists against it at the time of the inquiry. However, if the contention of the defendant in error in this particular was right, it would not aid him in the case under consideration, for the verdict of the jury in the inquiry before the probate court was that the defendant in error had sustained no damages. The record of this inquiry is not set forth in *haec verba*, but the answers of the city, setting up the proceedings in the probate court in bar of the action brought by defendant in error in the court of common pleas, shows that the defendant in error was served with process, and appeared in the probate court; that the cause was tried to a jury, who rendered a verdict of "no damages" against the defendant in error; and that the claim involved in that proceeding is the same that he afterwards sued on in the court of common pleas. The record of the proceedings in the probate court seems to have correctly recited every step taken therein, omitting nothing that should have been recorded. Nearly six years after the cause was tried and the verdict rendered application was made to the probate court by the defeated party to correct the record by supplying an alleged omission. This application was successful, and Exhibit O, which attempts to show the instructions given by the probate court upon the inquest of damages,

and the reasons that controlled the jury in returning its verdict, was added to the record. We know of no practice by which a court can ascertain and declare of record the reasons which induced a jury to arrive at a particular conclusion, or by which the jury itself is permitted to assign and place upon record the reasons that produced its verdict. If the court committed an error in some material part of its instructions, it will be presumed that the verdict may have resulted therefrom; but the only legal and proper method of bringing upon the record the instructions given to a jury by the trial court is by a bill of exceptions taken at the time and in the manner prescribed by statute. In the inquest of damages had in the probate court no bill of exceptions was taken, and therefore the charge of the court was not preserved in that, the only manner known to the law for its preservation. For aught that appears, another judge than he who instructed the jury was called upon to ascertain—how is not shown, but probably by the introduction of evidence pro and con—what legal propositions had been submitted to a jury by his predecessor upon the trial of a cause six years before. Judicial determinations could have but little stability or value in causes or tribunals where this is permissible. No doubt that in a proper case and upon satisfactory proof a *nunc pro tunc* entry may be had many years after a record has been made up, correcting the entry so that it shall conform to the actual order or judgment of the court; but the order or judgment must have been in fact made, and in no case should that be added to the record which is not properly a part thereof.

If the probate court had jurisdiction in the matter of ascertaining the damages that accrued to the owners of property abutting on the improvement, it is now too late to review its action, however erroneous it may have been. That could only be done by a proceeding instituted for that purpose directly upon the record itself. If the jurisdiction existed, the verdict is equally binding whether it was for a large sum, a small sum, or no sum at all. If no damages had been sustained, the jury were bound by their oaths to return a verdict accordingly. If, in obedience to an erroneous charge of the court, the jury returned a verdict for too large or too small an amount, or for "no damages," as in the case under consideration, it is nevertheless their verdict, and binding on the parties until set aside either by the probate court or some one of the superior courts vested with power to review its proceedings, and this would be so even if the claim of the defendant in error for damages caused by the improvement should be regarded as in the nature of a claim for property taken and appropriated to a public use. It follows from these conclusions that the demurrer to the reply ought to have been sustained.

Judgment reversed.

(137 Ind. 127)

WILMORE et al. v. STETLER.<sup>1</sup>

(Supreme Court of Indiana. May 18, 1893.)

## PARTITION—LIMITATION—ESTOPPEL.

1 Where cotenants own land, but neither holds possession adversely to the others, the statute of limitations does not run against the right of either to partition, though they might have enforced that right at any time after the date when they became tenants in common. *Peden v. Cavins*, (Ind. Sup.) 34 N. E. Rep. 7, followed.

2 Where land of an estate was sold on petition of the administrator, and the heirs thereafter received and accepted their pro rata shares of the purchase price, knowing what their interest in the land was, and that the moneys received and accepted by them were the proceeds of the sale of their interest therein, they are not entitled to recover their interest in the land from the purchaser, without returning the purchase price, though the sale was void.

3 The fact that after the sale, but before payment of the purchase price, one of such heirs died, does not eliminate the element of estoppel as to the other heirs' interest in the share of decedent; they having received all the purchase price, — both the amount given for their own interest, and that paid for the interest of decedent.

Appeal from circuit court, Adams county; A. A. Chapin, Special Judge.

Action by John A. Wilmore and others against Jeffry Stetler for partition, and to quiet title, and get possession of their alleged interest in the land sought to be partitioned. From a judgment for defendant, plaintiffs appeal. Affirmed.

J. W. Ryan, W. A. Thompson, A. O. Marsh, J. W. Thompson, J. T. France, and J. T. Merryman, for appellants.

At the time the land in controversy was sold, appellants were minors; were not present at the sale, or did anything, or made any representations as to the title, that misled the purchaser. On general principles, they are not estopped from asserting their title thereto. In order to create an estoppel there must be ignorance of the true state of the title on the part of the purchaser, and it must concur with willful misrepresentations or concealment on part of the vendor. 2 Herm. Estop. §§ 857-860; *Ferris v. Coover*, 10 Cal. 599; *Crest v. Jack*, 3 Watts, 238; *Hepburn v. M'Dowell*, 17 Serg. & R. 883; *Scranton v. Stewart*, 52 Ind. 94. Equitable estoppels are based upon a fraudulent purpose and a fraudulent result. If, therefore, the element of fraud is wanting, there is no estoppel, as if both parties were equally cognizant of the facts, and the declaration or silence of the one party produced no change in the conduct of the other, he acting solely upon his own judgment. There must be deception, and change of conduct in consequence, in order to estop a party from showing the truth. *Davidson v. Young*, 38 Ill. 152; 2 Story, Eq. Jur. § 1543; *Dixfield v. Newton*, 41 Me. 221; *Taylor v. Ely*, 25 Conn. 250; *Hill v. Epley*, 31 Pa. St. 331; *Odlin v. Gove*, 41 N. H. 465; *Dorlarque v. Cress*, 71 Ill. 382; 2 Herm. Estop. §§ 790, 791, 792; *Cox v. Matthews*, 17 Ind. 378; *City of Aurora v. West*, 22 Ind. 515; *Duchess of Kingston's Case*, 2 Smith, Lead. Cas. pt. 2, p. 890; *Sims v. City of*

Frankfort, 79 Ind. 452; *City of Logansport v. La Rose*, 99 Ind. 131. When the purchaser acts upon full knowledge of all the facts, where nothing is concealed, and no false representations are made, and no fraud practiced, there arises no estoppel. *Rogers v. Higgins*, 48 Ill. 220; *Board v. Herrington*, 50 Ill. 236.

The law presumes that the purchaser inspects the public records, through which title must be derived, before he receives a conveyance. If he does so, and the decree of the court was unwarranted, a sale made on the decree could pass no title. If he failed to examine the record it was his own fault, and he should suffer the consequence of his own negligence. *Morris v. Hogle*, 37 Ill. 155; *Cox v. Matthews*, 17 Ind. 379; *Duchess of Kingston's Case*, 2 Smith, Lead. Cas. pt. 2, p. 891; *Bigelow, Estop.* (New Ed.) p. 808; *Gale v. Mensing*, 64 Amer. Dec. 201; *Buck v. Milford*, 90 Ind. 292. Neither the law nor equity requires that one having title to property shall seek out a party who is about to buy it from a supposed owner, and inform him of his title. All that is required is that he shall do no act, and be guilty of no misleading silence or apparent acquiescence, by which another may be entrapped into a transaction which otherwise he could not have entered into. 2 Herm. Estop. § 774. In order to work an estoppel as against an infant, at the time of his act, he must be fully apprised of the facts in the case, and of his rights, and when he has forgotten, or is ignorant of, the fact that he is interested in the property, he is not estopped. *Spencer v. Carr*, 45 N. Y. 406; *Ewell, Lead. Cas.* 226. When the title of the infant is not concealed from, but is known to, the purchaser, who is therefore not misled nor deceived, the infant is not estopped, though present at the time of the sale, and promising to convey his share when he should become of age. When the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel. *Brant v. Iron Co.*, 93 U. S. 326; *Kingman v. Graham*, 51 Wis. 247, 8 N. W. Rep. 181; *Knouff v. Thompson*, 16 Pa. St. 364; *Hill v. Epley*, 31 Pa. St. 333; 2 Herm. Estop. §§ 957, 968, 974. When there is notice by record in judgment of law a party buying at public or judicial sale knows the title of the property he is buying, and what interest he is getting. *Hill v. Epley*, 31 Pa. St. 335; *Gale v. Mensing*, 64 Amer. Dec. 201. To constitute an estoppel in pais, it may be stated, as a general proposition, that the party to be estopped must, either by himself or some one authorized to act for him, have done some act, or made some statement, or remained silent under circumstances that require him to speak, on the faith of which act, statement, or silence the other party has been induced to invest his money, or change his position. *Black v. Mitchell*, 14 Ind. 397; *Carter v. Harris*, 16 Ind. 388; *Ray v. McMurry*, 20 Ind. 307.

*Bell & Morris and Morris & Barrett*, for appellee.

OLDS, J. The appellants brought this action in the court below, averring in

<sup>1</sup> Rehearing denied, 36 N. E. 356.

their complaint that one Addison G. Wilmore died testate at the county of Adams, seised of certain real estate; that he left, surviving him, as his heirs at law, his widow, Elanor, appellants, and Ellen, who died in 1871, his children. A copy of the will is set out, and it is charged that the widow took under the law, and not under the will; that in 1868, after the death of her husband, Elanor was declared of unsound mind, and a guardian was appointed for her; that the guardian applied to the Randolph common pleas court for an order to sell the real estate of which Wilmore died seised; that the court ordered the guardian to sell the interest of his ward in the lands he had described in his petition; that said Elanor had no interest in the real estate, except the one-third interest inherited from her husband; that the appellants had never transferred or conveyed the interest in this real estate which had descended from their father and sister Ellen; that the guardian of Elanor pretended to sell the entire fee of the real estate; that one Lewis Edwards purchased the real estate at guardian's sale; that at the time he purchased he had notice and knowledge that appellants, and the sister since dead, had and held an interest in said real estate as the heirs at law of Addison G. Wilmore; that Lewis Edwards afterwards conveyed a part of this real estate to appellee, who holds possession of said part, and claims the entire fee therein, and denies appellants' right and title to said real estate, or any part thereof; that the claim of appellee is a cloud upon the appellants' interests in and title to said real estate. The relief asked was for partition, to quiet title, and possession of the interest in the land.

A demurrer was filed to the complaint, and overruled, and the appellee answered in six paragraphs. The appellants demurred to the paragraphs of answer, and the court overruled the demurrer to the 2d, 4th, and 5th paragraphs of answer, to which ruling the appellants excepted. The 4th paragraph pleads the 15-years statute of limitation, and the 5th paragraph pleads the 20-years statute. They are general pleas of the statutes, alleging that the cause of action did not accrue within the 15 and 20 years, without alleging adverse possession. It is contended by appellants that the complaint is for partition between tenants in common, and that the answers are not good, while the appellee contends that the action is not for partition, but for possession, and to quiet title, and, even if held to be in partition, the paragraphs of answer are good. There was a special verdict returned, finding the facts, and, owing to the view we take of the case, it matters not whether there was error in ruling on the demurrers to these paragraphs of answer, or not, for, if error, it was harmless. We have recently considered and passed upon the question as to the sufficiency of answers of this character in actions for partition in the case of *Peden v. Cavins*, 34 N. E. Rep. 7, (this term.) See, also, *Patterson v. Nixon*, 79 Ind. 256; *Nutter v. Hawkins*, 93 Ind. 260; *Wood, Lim. Act. § 266*, p. 559.

The next question discussed by counsel relates to the sufficiency of the second paragraph of answer. The complaint sets out a copy of the will; alleges the death of the testator; the survivorship of the widow and children; the insanity of the widow; the appointment of Adamson as her guardian; the petition to sell the real estate, including that in controversy. The petition to sell, which is sworn to, alleges that Mrs. Wilmore owned the land in fee simple. The answer admitted the foregoing facts. It averred that the court ordered the whole of said real estate to be sold by the guardian; that the guardian did, pursuant to the order of the court, cause the fee simple of said land to be sold for \$3,500, being \$400 more than its appraised and actual value in fee simple, to Lewis Edwards; that the sale was reported to, and approved and confirmed by, said court; that one-third of the purchase money was paid in hand, and the balance properly secured, and afterwards paid, and the land conveyed to said Edwards; that some \$500 of interest accrued on the purchase was applied to the support of the appellants and their insane mother, in accordance with the terms of the will of Addison P. Wilmore; that the said Adamson ceased to be guardian of said insane widow; that one Bodkins, the uncle of Mrs. Wilmore, was appointed the successor of said Adamson in said trust, to whom Adamson paid the money by him received as the purchase money of said land, being \$4,146 and more; that after the appellants became of full age, and after the death of Mrs. Wilmore, the said Bodkins settled with them, and paid to each over \$1,000, being the purchase money of said land received by him from said Adamson; that said appellants accepted said moneys so paid them by said Bodkins, knowing it to be the proceeds of the sale of said real estate, and knowing at the same time what their interest in said real estate was, and that the money received and accepted by them was the proceeds of the sale of their interests therein, and their full shares thereof. This paragraph of answer is based upon the theory that the appellants, by accepting the money, ratified the sale, and estopped them from attacking its validity, and, while retaining the money, recovering the land, and thus receive and retain both the money and the land, and this paragraph of answer presents the controlling question in the case; for if, by the acceptance of the money, the appellants, who are the heirs, ratified the sale, and estopped themselves from recovering the land while retaining the proceeds derived from the sale, it puts an end to the case, and the many other questions so ably discussed by counsel are immaterial. If the appellants ratified the sale, and estopped themselves from recovering the lands by accepting the money, such ratification and estoppel took place at the time of accepting the money; and it is immaterial how many years had elapsed afterwards, and between that time and the commencement of this suit, nor is it material as to what construction should be placed upon the will. That this answer is good, we think, there can be



but little doubt. The petition of the guardian of Mrs. Wilmore to sell the real estate in controversy was sworn to, and alleged that she owned the whole of the land. The court ordered the whole of the real estate to be sold. It was duly appraised, and sold for more than the full appraised value, and the sale was approved and confirmed by the court. The money was retained by the guardian, and loaned, and the accumulated interest added to it, only expending a small amount for the support of Mrs. Wilmore, and after her death the guardian paid to the appellants, who, it is claimed, owned the undivided two-thirds of the land sold, the purchase money received, with the unexpended interest; and said heirs accepted it, knowing it to be the proceeds of the sale of said land, and knowing at the same time what their interest in the land was, and that the money received and accepted by them was the proceeds of the sale of their interests therein, and their full shares thereof. In the face of such a state of facts as are alleged in this paragraph of answer, to allow the appellants to maintain an action for, and recover, the two-thirds interest in the land, from the purchaser for value, whose money they had received, would be such a wrong and injustice as it would seem no court ought or would tolerate, even if the sale was invalid, and subject to being set aside, had the heirs not received the proceeds of the sale. The doctrine ruling in this case is well stated in the case of *Palmerton v. Hoop*, 131 Ind. 23, 30 N. E. Rep. 874, though the facts in that case differ some from the facts in the case at bar. It is held in that case that the party could not recover for two reasons: First, because she was a party to the proceedings to sell; and, secondly, it is said by the court that "she is also estopped from claiming the land by reason of accepting, and still retaining, a part of the price for which it was sold. She cannot have both the land and the purchase price." That is just what the appellants contend they have the right to do in this case, viz. retain the purchase money, and also recover the land, and, if they cannot be permitted to do so, then the answer is clearly good as a defense to the action. In *Bumb v. Gard*, 107 Ind. 575, 8 N. E. Rep. 713, it is said: "Where an heir, having full knowledge that all of the estate in the land has been sold on petition of the administrator, receives and retains the purchase money remaining after the payment of debts, he cannot avoid the sale. He cannot have both the money and the land. Equity will not uphold such a claim. In accordance with this general doctrine it has often been held that an heir who has full knowledge of his right, and with such knowledge receives and retains the purchase money, cannot vacate the sale, and obtain the land. This principle is often applied in analogous cases." The case at bar is analogous to the class of cases cited. It could be no different, in equity, if the widow, under claim of right or ownership, had in her lifetime sold and conveyed, for full value, the whole of the land, to a purchaser, and then paid the full

amount of the purchase money over to the heirs; they knowing at the time she had no legal right to convey their interest, but that she had in fact conveyed it, and received full value for it, and the heirs, with full knowledge of the facts, and their rights, accept and retain the purchase money so paid, and, while so retaining it, seek to recover the land. In either case it would be inequitable to allow the heirs to recover the land without refunding the purchase money. It is contended by counsel for appellant that the cases holding that the heirs or legal owners are estopped by the receipt of the purchase money are cases where the land was attempted to be sold as the property of the parties afterwards receiving the money. This fact, it seems to us, can make no difference. In either case, if the sale was void, it would pass no title. The principle applies when there has been an illegal sale of the parties' land, and they, with knowledge of the facts, receive and retain the purchase money. The case of *Pepper v. Zahnsinger*, 94 Ind. 88, is a case, as we think, directly in point. There the administrator sold the whole of the land, and afterwards paid to the widow the one-third, or nearly the one-third, of the purchase money, and she received and retained it; and it was held that she was estopped from recovering the land. It is true, in that case, she directed the administrator to sell it, but he conveyed only as administrator; and the court held that the sale of the widow's interest was void, and the estoppel rested on the grounds of the receipt and retention of the purchase money, with knowledge of the facts. In *Karns v. Olney*, 80 Cal. 90, 22 Pac. Rep. 57, the court says: "It is a well-settled rule of estoppel that one who, with knowledge, accepts the proceeds of an unauthorized sale of his property, is estopped to dispute the validity of the sale." It would seem unnecessary to multiply authorities on this question. *Smith v. Warden*, 19 Pa. St. 424; *State v. Stanley*, 14 Ind. 409; *Rowe v. Mayor*, 92 Ind. 206; *Kent v. Taggart*, 68 Ind. 163; *Armstrong v. Cavitt*, 78 Ind. 476; *Byran v. Uland*, 101 Ind. 477, 1 N. E. Rep. 52. *Maple v. Kusart*, 53 Pa. St. 348, is a case where the administrator sold the land to the widow, which he had no right to do, and she received the purchase price for which it sold, and it was held that she was estopped from claiming the land. In that case the court says that "it is a maxim of common honesty, as well as of law, that a party cannot have the price of the land sold, and the land itself. Accordingly, it has been uniformly held that if one receives the purchase money of land sold he affirms the sale, and he cannot claim against it, whether void or only voidable." We think the facts pleaded show an affirmation of the sale, and an estoppel on the part of the appellants from claiming the land. Counsel for appellants, in an able brief, cite numerous authorities, and draw distinctions endeavoring to show that the parties are not estopped. We do not agree with their theory, and deem it unnecessary to take up the decisions cited, and draw the distinctions in each. It is

possible that the doctrine announced in some cases, carried to its full length, may conflict with the rule laid down in some of the cases cited, but that this case falls clearly within the rule laid down in the decisions we have cited and quoted from, there can be no doubt.

The next question presented arises on the special verdict. It is unnecessary to set this verdict out in full. It clearly supports the second paragraph of answer, and entitles the appellee to judgment on the theory upon which the paragraph is based, and which we have discussed. The jury find said Adamson, guardian, paid to his successor, Bodkins, the proceeds of the sale of said real estate, being \$4,154.19; that Bodkins made a settlement with the appellants in relation thereto, and distributed and paid over to each of them the sum of \$1,036.71, making, in all, \$4,154.19; that prior to the settlement and receipt of the money, and at the time thereof, the appellants, and each of them, knew their rights in and to said land so sold by said guardian of their mother; that at the same time each of them knew that the money so paid and distributed to them was money derived from the sale of the land; that the purchaser believed the land was being sold and purchased by him in fee; that before the commencement of this suit the appellants knew that the money paid to them was derived from the sale of said land, and, with full knowledge of their interests in and rights to said lands, they have retained the money, still have it, and have never offered to pay it back, or any part thereof, to the purchaser or his grantees, or either. Some distinction is sought to be made as to the language of the verdict, so as to construe it as not showing but that the heirs may not have known that they were receiving any pay except for their mother's one-third. The verdict will not bear the construction contended for by appellants' counsel.

It is further contended that as one of the heirs died after the sale, and before the settlement, as to appellants' interest in the share of the deceased heir a different rule applies. We do not think so. The appellants received all of the purchase money, both the amount received for sale of their own interests, and that of the interests of the deceased heir, and they affirmed the sale as well in so far as it related to the share derived from the other heirs as that portion derived from their father. There is no error in the record.

Judgment affirmed.

(159 Mass. 245)

#### CUSTY v. DONLAN.

(Supreme Judicial Court of Massachusetts.  
Middlesex. May 22, 1893.)

##### LIMITATION OF ACTIONS—ACKNOWLEDGMENT.

1. A writing, "Received of plaintiff the sum of \$700 at various times to date, which is hereby acknowledged," is not merely an acknowledgment that, at certain times in the past, the signer had borrowed money from plaintiff, but is an acknowledgment of a present indebtedness, and hence sufficient to take the debt out of the statute of limitations.

2. A promise to pay is implied from an acknowledgment of a debt as an existing debt.

Report from superior court, Middlesex county; Braley, Judge.

Action of contract by Patrick J. Custy against Michael J. Donlan to recover \$700, alleged to have been loaned defendant's testator at different times between September 15, 1869, and March 17, 1888, and for which no notes were given. The defendant pleaded the statute of limitations as to three of the items of the bill of particulars, amounting to \$500. The plaintiff, in order to take these items out of the statute, offered the following, signed by defendant, and which it was agreed related to the \$700 in suit: "Lowell, Sept. 15th, '90. Rec'd of Patrick J. Custy the sum of seven hundred dollars at various times to date, which is hereby acknowledged. [Signed] J. H. Custy." Plaintiff testified that, when the writing was given, defendant's testator said to plaintiff, "I will pay you this seven hundred dollars." A verdict was ordered for the plaintiff, and the case was reported to the supreme judicial court. Judgment on the verdict.

L. T. Trull and F. N. Wier, for plaintiff.  
W. H. Anderson, for defendant.

LATHROP, J. The only question in this case is as to the correctness of the ruling of the justice who tried the case in the superior court, that there was sufficient evidence to take the first three items of the account out of the statute of limitations. Pub. St. c. 197, § 1. In considering this question we shall lay aside the oral evidence of a promise to pay, which, under Id., § 15, was not admissible. *Sumner v. Sumner*, 1 Metc. (Mass.) 391, 396; *Chace v. Trafford*, 116 Mass. 529. There remains the writing signed by the defendant, and delivered to the plaintiff on the day of its date, together with the fact that no part of the money lent had been repaid. This writing, omitting the signature and the date, is in these words: "Rec'd of Patrick J. Custy the sum of seven hundred dollars at various times to date, which is hereby acknowledged." We are met at the outset of this inquiry by the question of the meaning of this writing. If it is to be construed as merely an acknowledgment that, at certain times in the past, the signer had borrowed money of the plaintiff, it would not be sufficient, for there must be an acknowledgment of a present indebtedness. We are of opinion that the words "which is hereby acknowledged" have a broader meaning. The word "which" refers to the word "sum." The acknowledgment is an acknowledgment as of the date when made. The language used is to be construed as if it were: "I have received of Patrick J. Custy the sum of seven hundred dollars at various times to date, which sum of money I now acknowledge." If, then, there is the unqualified acknowledgment of an existing debt, nothing more is needed, as the acknowledgment was made within six years before the bringing of the writ. It is undoubtedly true, as said by Chief Justice Morton in *Krebs v. Olmstead*, 137 Mass. 504, that "it is not the acknowledgment which renews or revives the debt."

The question is whether there has been a new promise within six years, of which the acknowledgment is evidence more or less controlling." But it is also true that an unqualified acknowledgment of a debt as an existing debt is conclusive. This is conceded by all of the authorities in England, whence we derive our statute on this subject, and in this commonwealth, from the case of *Tanner v. Smart*, 6 Barn. & C. 603, to the present day. The difficulty has arisen in cases where the debtor went beyond an acknowledgment, and used language which rendered it doubtful whether a promise to pay could fairly be implied. Thus, in *Tanner v. Smart*, Lord Tenterden, C. J., said: "Upon a general acknowledgment, where nothing is said to prevent it, a general promise to pay may, and ought to be, implied." The law on this subject is thus stated in *Phillips v. Phillips*, 3 Hare, 281, 299, by Vice Chancellor Wigram: "The legal effect of an acknowledgment of a debt barred by the statute of limitations is that of a promise to pay the old debt, and for this purpose the old debt is a consideration in law. In that sense, and for that purpose, the old debt may be said to be revived. It is revived as a consideration for a new promise. But the new promise, and not the old debt, is the measure of the creditor's right. If a debtor simply acknowledges an old debt, the law implies from that simple acknowledgment a promise to pay it, for which promise the old debt is a sufficient consideration; but if the debtor promises to pay the old debt when he is able, or by installments, or in two years, or out of a particular fund, the creditor can claim nothing more than the promise gives him." In *Mitchell's Claim*, L. R. 6 Ch. App. 822, the rule is thus stated, to the same effect, but more concisely, by Lord Justice Mellish: "There must be one of these three things to take the case out of the statute. Either there must be an acknowledgment of the debt, from which a promise to pay is to be implied, or, secondly, there must be an unconditional promise to pay the debt; or, thirdly, there must be a conditional promise to pay the debt, and evidence that the condition has been performed." To the same effect are other English cases. *Chasemore v. Turner*, L. R. 10 Q. B. 500; *Quincey v. Sharpe*, 1 Exch. Div. 72; *Skeet v. Lindsay*, 2 Exch. Div. 314; *Green v. Humphreys*, 23 Ch. Div. 207; *Firth v. Silingsby*, 53 Law T. (N. S.) 484. These rules have been often recognized in this commonwealth. Thus, in *Barnard v. Bartholomew*, 23 Pick. 291, it was said by Mr. Justice Dewey: "Applying the familiar rule, now well settled in this commonwealth, that in most cases there must be either an express promise to pay or an unqualified acknowledgment of present indebtedness, and this unaccompanied by any evidence showing a determination not to pay, we think the case of the plaintiff may well be sustained." In this case the debtor wrote: "I will thank you to let me have your account that you hold against me; also, I will thank you to state to me the credit that you have given me. You may depend on seeing me at your office on Monday next. I will endeavor to settle all my accounts with you. Perhaps I shall

not be able to pay the money. If not, we can find some way to settle." This was held to be a sufficient acknowledgment to take the case out of the statute. In *Penniman v. Rotch*, 3 Metc. (Mass.) 216, it is said by Chief Justice Shaw: "The fact to be proved is a new promise to pay the debt. This may be inferred from an express and unqualified admission that the debt is due, but not from remote implication, or doubtful or equivocal words." See, also, *Bailey v. Crane*, 21 Pick. 828; *Woodbridge v. Allen*, 12 Metc. (Mass.) 470; *Roscoe v. Hale*, 7 Gray, 274. In *Walsh v. Mayer*, 111 U. S. 31, 4 Sup. Ct. Rep. 260, in answer to a letter from the holder of a note secured by mortgage, calling attention to the want of insurance on the mortgaged property, and saying, "The amount you owe me on the \$2,500 note is too large to be left in such an unprotected condition, and I cannot consent to it," the mortgagors replied that they expected to insure, in about four months, twice that amount, and added: "We think you will run no risk in that time, as the property would be worth the amount due if the building was to burn down." This was held to be an acknowledgment of an existing liability. Judgment on the verdict.

(159 Mass. 248)

## BOYNTON v. MOULTON.

(Supreme Judicial Court of Massachusetts.  
Essex. May 22, 1893.)

## LIMITATION OF ACTIONS—ACKNOWLEDGMENT.

After a debt had been barred by the statute of limitations, the debtor wrote on the account: "Dec. 1, 1888, will pay on this bill such amount as I can." Held, that this was not an unqualified acknowledgment, from which a promise to pay may be inferred, and that, the debtor being unable to pay on the day named, the creditor could not recover, since he can claim only what the promise gave him.

Exceptions from superior court, Essex county; Daniel W. Bond, Judge.

Action of contract on an account annexed, by Charles P. Boynton against George H. Moulton. Defendant pleaded the statute of limitations, and the court found in his favor. Plaintiff excepted. Exceptions overruled.

W. S. Peters and H. J. Cole, for plaintiff.  
Brickett & Poor, for defendant.

LATHROP, J. In August or September, 1888, the debt due from the defendant to the plaintiff on an account having become barred by the statute of limitations, (Pub. St. c. 197, § 1,) the defendant, at the request of the plaintiff, wrote upon the account the following: "Dec. 1, 1888, will pay on this bill such amount as I can,"—and signed the writing. This is not an unqualified acknowledgment of the debt, from which a promise to pay may be inferred. *Custy v. Donlan*, 34 N. E. Rep. 860. It is merely a promise to pay, on a certain day, such an amount as the defendant then could pay. The judge has found that the defendant on that day was able to pay nothing. The plaintiff can claim only what the promise gave him. The ruling

of the court below that the evidence was not sufficient to entitle the plaintiff to recover was clearly right. *Bidwell v. Rogers*, 10 Allen, 438; *Bethell v. Bethell*, 34 Ch. Div. 561. Exceptions overruled.

(159 Mass. 203)

**PIERCE et al. v. CABOT et al.**

(Supreme Judicial Court of Massachusetts.  
Norfolk. May 20, 1893.)

**MECHANICS' LIENS—LABOR—STATEMENT—STATUTES.**

1. A lien for labor performed under an entire contract between the laborers and a contractor for the erection of a building is not defeated by the fact that the laborers were prevented from completing their contract by the insolvency of the contractor, and his failure to pay them as he agreed.

2. The failure of a lien statement, for labor furnished on a building, to specify the contract price, as required by Pub. St. c. 191, § 6, is a fatal defect.

3. St. 1892, c. 191, relating to mechanics' liens and their enforcement, is prospective in its operation, and does not apply to contracts performed, statements filed, and petitions brought before its passage.

Exceptions from superior court, Norfolk county; Charles P. Thompson, Judge.

Petition by Frederick L. Pierce and others against F. Elliot Cabot and others to enforce mechanics' liens for labor furnished by petitioners on a building erected on defendants' land under a contract with one Morton. Morton failed before the completion of the building, and petitioners did not, for that reason, fulfill their contract. The court ruled that the failure of petitioners' lien statements to specify the contract price rendered it insufficient, and petitioners excepted. Defendants also excepted to various rulings during the trial. Petitioners' exceptions overruled.

Hesseltine & Hesseltine and N. Sumner Myrick, for petitioners. Arthur Lyman and E. T. Cabot, for respondents.

FIELD, C. J. If the petitioners' exceptions are overruled, the respondents' exceptions need not be considered. This is an attempt to enforce a lien for labor furnished under an entire contract for labor and materials to be furnished at an entire price. The petitioners were prevented from completing the contract by the failure of Frank M. Morton, with whom they made the contract, and who was employed by the respondents. It does not appear that any notice was given to the respondents that the petitioners would claim a lien for materials, and the petition is to enforce a lien for labor only. The fact that the petitioners were prevented from completing the contract by the failure of Morton to pay them as he agreed does not show that the petition cannot be maintained. *Moore v. Erickson*, 157 Mass. —, 32 N. E. Rep. 1031. The objection is that the statement filed in the registry of deeds did not contain the contract price. Pub. St. c. 191, § 6. We think that this is fatal, unless the defect is cured by St. 1892, c. 191. The statement was filed September 11, 1891, and the petition was filed

in court November 2, 1891. St. 1892, c. 191, was approved April 22, 1892, and went into effect on the thirtieth day thereafter. Pub. St. c. 3, § 1. Unless, therefore, the statute was intended to apply to contracts performed, statements filed, and petitions brought before its passage, the statute has no effect upon the present suit. We think that the statute cannot be held to be applicable to statements filed before it went into effect. In *Shallow v. Salem*, 136 Mass. 186, the court say: "That certain statutes retrospective in their operation may be passed, when of a remedial character, is not controverted; but the general rule applicable to all statutes is that they are to have a prospective operation only, unless it is otherwise distinctly expressed in them, or clearly implied from the necessity of thus giving effect to their provisions." See *Bucher v. Railroad Co.*, 131 Mass. 156; *Lynch v. Cronan*, 6 Gray, 531. Exceptions overruled.

(159 Mass. 205)

**FRENCH v. HUSSEY.**

(Supreme Judicial Court of Massachusetts.  
Middlesex. May 20, 1893.)

**MECHANICS' LIENS—NOTICE TO OWNER—STATEMENT.**

1. Under Pub. St. c. 191, § 3, which requires notice to be given the owner of a building of the furnishing of material under a contract with the contractor before a lien in favor of the material man can attach, the notice must be given before any of the materials are furnished under the contract; and, if some are furnished before, and some after, the giving of the notice, the material man is not entitled to a lien, since the statute provides for no apportionment.

2. Pub. St. c. 191, § 6, which requires the lien statement to give the contract price where the lien is claimed for labor only, cannot be evaded by ignoring the contract altogether, and filing a statement as if the labor had not been furnished under a contract for an entire price; and such a statement is insufficient as the basis of a lien when the labor is furnished under a contract for labor and material at an entire price.

3. St. 1892, c. 191, relating to mechanics' liens and their enforcement, is inapplicable to cases where the statement was filed, and the petition brought, before its passage.

Report from superior court, Middlesex county; J. B. Richardson, Judge.

Petition by Allen D. French against Louisiana W. Hussey to enforce a mechanic's lien. The court ruled in defendant's favor, but with the consent of both parties the case was reported to the supreme judicial court. Decree according to findings of superior court.

The report is as follows:

"In the autumn of 1890, a contract was made by the petitioner with one Haskell Preble for furnishing certain labor and materials in the erection of a building upon land of the respondent for the entire contract price of \$285. After a part of the materials called for by the aforesaid contract had been furnished, the petitioner, on September 26, 1890, served a notice in writing upon the respondent of his intention to claim a lien for the materials furnished by him in the erection of the build-

ing aforesaid. After the notice aforesaid was served, the petitioner, at the request of said Haskell Preble, furnished and put up conductor pipes in the erection of said building at an additional entire contract price therefor of \$8.10. The said Haskell Preble was the duly-authorized agent of the respondent for making the said contracts. The respondent was at that time, and ever since has been, the owner of the said building and the lot of land upon which it is situated, and both the aforesaid contracts have been fully performed by the petitioner. The value of the materials furnished under the first-named contract prior to the serving of the aforesaid notice was \$24.25. The value of materials furnished on said first contract after serving said notice was \$210.02. The labor performed and furnished by the petitioner under the first-named contract, in all, was worth \$127.50. How much of it was performed or furnished before, or how much was performed or furnished after, said notice was served, did not appear. Said contracts were fully completed, and the last day of labor performed on the aforesaid building thereunder, on the eighteenth day of October, A. D. 1890, and within thirty days thereafter the petitioner filed in the registry of deeds for the district in which the aforesaid building is situated the statement hereto annexed. The statement was signed and sworn to by the petitioner, and a lien was claimed for the labor performed under the contract first above named, for the materials furnished under said contract after the aforesaid notice was given, and also for the entire amount of said conductor pipes, \$8.10. I find that the petitioner, in said statement, did not willfully and knowingly claim more than was due him, and there was no intention to mislead by said statement.

"On the above facts the court ruled, as a matter of law, (1) that the materials furnished under the first-named contract cannot be apportioned so that a lien can be enforced for a part of the said materials, and, as notice of intention to claim a lien for materials was served after some of the materials were furnished, a lien cannot be enforced for any of the materials furnished under said contract; (2) that the said statement filed in the registry of deeds is insufficient as far as it applies to the first contract, in that it fails to state the entire contract price, and no lien can be enforced for the labor performed under said contract; (3) that a lien should be established to secure the payment of \$8.10, and the property be sold, and the proceeds applied to the discharge of said claim,—but at the request of the petitioner and consent of the respondent I report the case for the consideration of the supreme judicial court. If the above rulings are correct, decree is to be entered in accordance therewith. If on the above facts and findings the petitioner can maintain a lien for the materials furnished under the first contract after the aforesaid notice was served, and for the labor also, a lien should be established for \$268.85. If the petitioner can maintain a lien for the labor performed and furnished under the first contract, but

not for the materials furnished under it, a lien should be established for \$135.60."

G. L. Mayberry and C. F. French, for petitioner. B. B. Johnson and J. L. Harvey, for respondent.

FIELD, C. J. Under Gen. St. c. 150, §§ 1, 2, if labor was performed or furnished, and materials were furnished, to a person not the owner of the property, under an entire contract for an entire price, and no notice was given to the owner, before furnishing the materials, of an intention to claim a lien, there was no lien for either labor or materials. *Morrison v. Minot*, 5 Allen, 403. St. 1872, c. 318, was passed for the purpose of giving a lien for the labor performed or furnished in the case above stated, provided it could be distinctly shown what such labor was worth; the lien in no event to exceed the price agreed upon for the entire contract. This is now Pub. St. c. 191, § 2. But no statute has been passed permitting a lien for the materials in the case above stated unless notice of an intention to claim a lien is given to the owner of the property before the materials are furnished. The statute<sup>1</sup> must mean that the notice must be given before any of the materials are furnished under the contract. If some are furnished before, and some after, the statute provides for no apportionment of the value, and no mode for ascertaining the price to be charged for the materials furnished after the notice. The first ruling was therefore correct.

In the present case the statement filed in the registry of deeds does not state any entire contract price, but it is a statement of a certain number of days' labor, and of certain materials furnished, with prices for each, as if there had been no entire contract price. It apparently includes everything that was furnished, both under the first and second contracts, and the whole amount claimed is \$345.56, while the price agreed upon in the first contract is \$285, and in the second \$8.10. When labor and materials are furnished for an entire contract price, and the contract is fully performed, and a lien is claimed for both, the statement, if true, must necessarily contain the contract price. If a lien is claimed only for the labor, the statute expressly requires that the contract price shall be stated. Pub. St. c. 191, § 6. The reason is that, for labor furnished under a contract for an entire price, the amount of the lien can never exceed the contract price. As the petitioner had no lien for materials furnished under the first contract, he should have filed a statement for labor only, and in it should have stated the contract price, etc. We think that this provision of the statute cannot be evaded by ignoring the contract altogether, and filing a statement, as if the labor and materials had not been fur-

<sup>1</sup>Pub. St. c. 191, § 3, provides: "No lien shall attach for materials furnished unless the person furnishing the same, before so doing, gives notice in writing to the owner of the property to be affected by the lien, if such owner is not the purchaser of such materials, that he intends to claim such lien."

nished under a contract for an entire price. Such a statement is insufficient as the basis of a lien when the labor is furnished under a contract for labor and materials at an entire price. St. 1892, c. 191, was passed long after the statement in this case was filed, and after the petition was brought, and is therefore inapplicable. *Pierce v. Cabot*, 34 N. E. Rep. 362; *Moore v. Erickson*, 157 Mass. —, 32 N. E. Rep. 1031; *Ellinwood v. City of Worcester*, 154 Mass. 591, 28 N. E. Rep. 1053; *Hurley v. Lally*, 151 Mass. 131, 23 N. E. Rep. 834; *Gogin v. Walsh*, 124 Mass. 516.

Whether a lien should be established for \$8.10 for labor and materials furnished under the second entire contract may depend upon facts which are not stated in the report, and the form of the notice given to the respondent might be important. The case was reported at the request of the petitioner, and, although the respondent consented, yet we infer that he did not request a report, or except to the ruling of the court. From the conclusion of the report we infer that it was not the intention of the justice that the correctness of his finding for the petitioner for \$8.10 should be reviewed by this court. A decree is to be entered in accordance with the finding of the superior court.

So ordered.

(159 Mass. 306)

**LYNCH v. UNION INSTITUTION FOR SAVINGS et al.**

(Supreme Judicial Court of Massachusetts. Suffolk. June 21, 1893.)

**LANDLORD — ALTERATION OF PREMISES — INJUNCTION — RESTORATION.**

Plaintiff occupied, as lessee, the basement of a building. The floor above was occupied by defendant bank, which had become owner of the building. In one corner of the basement claimed by plaintiff was a vault, built by defendant. A mandatory injunction requiring defendant to remove the vault would have left unsupported a vault in the room above, and have compelled defendant to find some other place of deposit while the work was being done. The cost of removal would have been about \$3,500. Plaintiff, who was a mason and builder, leased the premises merely for a store room, paying \$15 per month. His lease had a year and a half to run. *Held*, that defendant might, on restoring the remainder of plaintiff's premises, and giving him an equivalent or larger space in another part of the basement, retain the space occupied.

Report from superior court, Suffolk county; James R. Dunbar, Judge.

Action by Edward Lynch against the Union Institution for Savings, E. C. Woodworth, and Bernard Foley to enjoin the construction of certain walls and partitions in plaintiff's tenement, and for other relief. On report from the superior court an injunction was ordered. 33 N. E. Rep. 603. After further hearing, there was an interlocutory decree granting the relief, which the defendant Institution for Savings proposed should be modified so as to permit of its building a wall across a certain space occupied by its vault on giving plaintiff an equivalent or larger space. The decree was ordered suspended, and the case reported. Modified.

F. L. Whipple, for plaintiff. R. M. Morse, for defendant.

KNOWLTON, J. After the decision in this case reported in 33 N. E. Rep. 603, a hearing was had in the superior court in regard to the decree to be entered, and the evidence tended to show that to restore the plaintiff's premises to their former condition would involve not only material and extensive changes in the different parts of the basement of the building, but would require the defendant to remove a vault inclosed in masonry, in which were kept the books of the corporation, leaving unsupported its vault and safe in the banking room above, in which were kept its securities, bonds, notes, and stocks, representing a value of about \$45,000,000. To do this would cost about \$3,500, and would compel the defendant to find some other place of deposit for the contents of this safe while the work was being done. The portion of the plaintiff's premises occupied by this vault was an alcove or corner of the basement about 13 by 12 feet in area. This was but a small part of the space covered by the plaintiff's lease, all of which was in the basement. At the hearing the defendant asked for a decree which would permit it to retain the space occupied by its vault, and to build a brick wall across, inclosing the vault, and to give the plaintiff a space somewhat larger than this in the front part of the basement adjoining the portion covered by his lease, and which should also require it to restore to its original condition, so far as possible, all the remainder of his premises. The plaintiff objected. The court made a decree requiring the removal of the vault, and the case comes to this court on the question whether the defendant may be permitted to retain the small space occupied by its vault, and to restore to the plaintiff the remainder of his premises, and to enlarge them by the addition of an equivalent or larger space on the front.

When a plaintiff brings a bill to prevent a continuing trespass or a permanent injury to his real estate, the question whether he shall have a prohibitory injunction, or, if the work affecting the property has been done, a mandatory injunction, requiring the restoration of the estate to its former condition, depends on a consideration of all the equities between the parties. In general, where a defendant has gone on without right and without excuse in an attempt to appropriate the plaintiff's property, or to interfere with his rights, and has changed the condition of his real estate, he is compelled to undo, so far as possible, what he has wrongfully done affecting the plaintiff, and to pay the damages. In such a case the plaintiff is not compelled to part with his property at a valuation, even though it would be much cheaper for the defendant to pay the damages in money than to restore the property. The principal reason for this is that which lies at the foundation of the jurisdiction for decreeing specific performance of contracts for the sale of real estate. A particular piece of real estate cannot be replaced by any sum of money, however large; and one who wants a particular

estate for a specific use, if deprived of his rights, cannot be said to receive an exact equivalent or complete indemnity by the payment of a sum of money. A title to real estate, therefore, will be protected in a court of equity by a decree which will preserve to the owner the property itself, instead of a sum of money which represents its value. One who has gone on wrongfully in a willful invasion of the plaintiff's right in real estate has no equity to set up against the plaintiff's claim to have his property restored to him as it was before the wrong was done.

Upon the evidence before us at the former hearing of the present case it was held that the plaintiff might have a mandatory injunction requiring the defendant to restore the premises to their former condition. *Lynch v. Institution*, 33 N. E. Rep. 603. See, also, *Tucker v. Howard*, 128 Mass. 361, and cases cited; *Attorney General v. Algonquin Club*, 153 Mass. 454, 27 N. E. Rep. 2. On the other hand, where by an innocent mistake erections have been placed a little upon the plaintiff's land, and the damage caused to the defendant by removal of them would be greatly disproportionate to the injury of which the plaintiff complains, the court will not order their removal, but will leave the plaintiff to his remedy at law. *Hunter v. Carroll*, 64 N. H. 572, 15 Atl. Rep. 17; *Low v. Innes*, 4 De Gex, J. & S. 286; *Aynsley v. Glover*, L. R. 18 Eq. 544, 553. See, also, *Ford v. Knapp*, 102 N. Y. 135, 6 N. E. Rep. 283; *Thomas v. Evans*, 105 N. Y. 601, 12 N. E. Rep. 571. The doctrine applied by the courts of equity in cases of this kind calls for a consideration of all the facts and circumstances which help to show what is just and right between the parties. In *Brande v. Grace*, 154 Mass. 210, 31 N. E. Rep. 633, where it appeared that the defendant proceeded with full knowledge of the facts, and with notice of the plaintiff's claim, but with good reason to doubt whether the law would recognize such rights as the plaintiff claimed, it was held, when the claim was sustained, that, as the plaintiff's title was only under a lease that had less than a year to run, and as the cost of restoration of the premises would be greatly disproportionate to the advantages which the plaintiff could derive from the enjoyment of his estate, he should not have a decree for a restoration of the premises, but should be compensated in money. In the case before us the plaintiff's title is only under a lease which will expire on December 1, 1894, and the defendant owns the reversion. It has already been decided that he is to have an injunction giving him the enjoyment of his premises. He is a mason and builder, and he has used the property heretofore only as a place for the storage of doors, window sashes, and other similar property. He pays for the rent of it \$15 per month. Upon evidence taken at the last hearing it now appears that he can have substantially the same premises without

the removal of the defendant's vault. It was conceded by him in his testimony that the change of the small space occupied by the vault for the space proposed to be given him in the same basement adjoining the leased premises on the other side would not leave his estate in any particular less desirable for any use to which he might wish to put it. In cross-examination he gave as the only reasons for his unwillingness to accept the substituted space—First, that he had not been treated properly by the defendant; and, second, that he thought it easier for the defendant to arrange a settlement with him. The decree suggested by the defendant gives the plaintiff substantially the same property which he has sought to recover, and provides compensation for the injury which he has received. The principal reasons for the former decision are fully regarded by the defendant's proposition. It would be inequitable, under the circumstances of this case, to compel the defendant to expend \$3,500, and to suffer, in addition, great inconvenience and loss in its business, simply to enable the plaintiff to enjoy for a year and a half the use of the basement including the space in one corner, 18 by 12 feet, instead of the same basement without that space, and with a greater space added to it on the opposite side towards the front. The case shows no such deliberately wrongful conduct on the part of the defendant as should deprive it of the benefit of equities such as these. The evidence tends to show that the defendant did not believe the plaintiff's claim to be valid until it was shown to be so at the first hearing, and at that time the work had so far advanced that the judge who heard the case thought it equitable to apply the rule laid down in *Brande v. Grace*, 154 Mass. 210, 31 N. E. Rep. 633, and to hold that the plaintiff should not have an injunction, but should be compensated in money. After the decision to that effect in the superior court the defendant finished the work. This court thought the defendant should be held more strictly, but it is enough, under the facts shown at the final hearing, if the plaintiff receives the premises substantially as they were before the work was begun, so that they are as good for every kind of use to which he can put them during the remainder of the short term which his lease runs, and if he also receives full compensation in money for all the injuries which he has suffered. This principle, which calls for a consideration of all the equities, has repeatedly been applied in the same way in analogous cases. *Curran v. Water Power Co.*, 116 Mass. 90; *Morse v. Hill*, 136 Mass. 60-70; *Attorney General v. Algonquin Club*, 153 Mass. 447, 455, 27 N. E. Rep. 2. The decree must be modified in accordance with the defendant's proposition, which appears in the report, on the defendant's renewal of that proposition in the superior court.

Decree accordingly.



(159 Mass. 279)

**KEENAN v. EDISON ELECTRIC ILLUMINATING CO.**

(Supreme Judicial Court of Massachusetts. Suffolk. June 22, 1893.)

**MASTER AND SERVANT—NEGLIGENCE—DANGEROUS APPLIANCES—KNOWLEDGE OF DEFECTS.**

Where, in an action by an employe for personal injuries, it appears that defendant's negligence, if any, consisted in a failure to provide an automatic guard to an elevator shaft into which plaintiff fell, and that plaintiff had been at work on and about the elevator, without objection by him, during eight or nine weeks just previous to the accident, he is not entitled to recover, though the use of the elevator by defendant in its condition was illegal.

Exceptions from superior court, Suffolk county; James R. Dunbar, Judge.

Action by Patrick H. Keenan against the Edison Electric Illuminating Company for personal injuries caused by defendant's negligence. There was a verdict for defendant directed by the court, and plaintiff excepted. Exceptions overruled.

Plaintiff was employed by defendant in its factory. His duty was to fill at the lower floor a coal car, which ran to and in an elevator car. The track in the latter connected with a similar track upon the roof of the building. After filling the coal car he would run it into the elevator car, run the elevator car to the roof, push the coal car off, weigh it, push the car 40 or 50 feet along the track to a chute, dump it, push it back, and take it down on the elevator. This process was repeated every few minutes during the day, and plaintiff had been engaged at this work eight or nine weeks at the time of the accident. When the latter occurred the elevator car by some means descended from the roof where plaintiff had left it while he was dumping the coal car at the chute, and when he pushed the car back he did not observe the absence of the elevator car, but pushed the former into the elevator well, and, losing his balance, fell in with it, and was injured. There was evidence by the official inspector that there were no automatic guards on the elevator, as required by statute, and no guards of any kind. Plaintiff testified that he knew there were no gates of any kind on the elevator, and that he never reported that fact to any one.

G. W. Pearson, for plaintiff. J. Lowell, Jr., and S. H. Smith, for defendant.

**HOLMES, J.** We assume for the purposes of decision that by reason of St. 1885, c. 874, § 110, the defendant was using the elevator illegally, and that the plaintiff did not share equally in the breach of law. We also assume that there was evidence of negligence on the part of the defendant towards the plaintiff. But the negligence, if any, consisted only in the failure to provide an automatic guard to the shaft. So far as appears, the defendant was not responsible for the elevator car having been moved. This being so, whether it be said that the plaintiff took

the risk, or that he was negligent, or that the defendant's negligence was not the proximate cause of the injury, the result must be that the plaintiff cannot recover; for the plaintiff knew as well as the defendant that there was no guard to the shaft, and we must presume understood that if the elevator car was not there when he pushed his coal car into the well, his car would tumble down the hole. In other words, he appreciated the danger so far as the defendant contributed to it. Although very possibly a guard would have prevented the injury, the plaintiff's conduct was nearer to the event. He did not rely on any such preventive, but took the chances of the elevator car being where he left it.

Exceptions overruled.

(159 Mass. 299)

**MOORE v. BOSTON & A. R. CO.**

(Supreme Judicial Court of Massachusetts. Suffolk. June 21, 1893.)

**ACCIDENTS AT RAILROAD CROSSINGS.**

In an action against a railroad company to recover for the death of plaintiff's intestate, the only direct evidence of the accident was that of the engineer, who testified that he saw decedent the instant before she was struck by his train, and that she was standing between the rails of the track on which the train was approaching. It appeared that she was on her way to the railroad station, to reach which she had to go upon the property of the railroad, through an opening in a fence, and had to cross several tracks upon which trains might pass at any time. *Held*, that there was no evidence that decedent exercised due care.

Exceptions from superior court, Suffolk county.

Action by Mary Moore, administratrix, against the Boston & Albany Railroad Company, to recover damages for injuries resulting in the death of plaintiff's intestate. Judgment was rendered for defendant, and plaintiff brings exceptions. Overruled.

E. M. Johnson and J. C. M. Bayley, for plaintiff. Saml. Hoar, for defendant.

**BARKER, J.** It is unnecessary to consider the other questions raised, because we are of opinion that there was no evidence to justify a finding that the plaintiff's intestate was herself in the exercise of due care. The crossing was not one to which the provisions of Pub. St. c. 112, § 213, apply, and it is conceded by the plaintiff that the burden of proving that her intestate was in the exercise of due care rested upon the plaintiff. Assuming in her favor, without so deciding, that the jury might properly have found that the plaintiff's intestate was upon the cross walk when struck by the engine, there is no evidence as to her acts or thoughts from the time when she left the house where she was employed until the instant before she was struck. She was then seen by the engineer, erect, and facing the locomotive, and between the rails of the track on which it was approaching her, which was the first of the tracks over which her

course to the station led. Her errand to the station required her, as she knew, to enter upon the railroad through the opening in the fence, and to cross several tracks upon which trains might pass at any time. But she could select her own time to cross, and due care required of her that she should use her faculties of perception, and reasonable thought and judgment, in selecting an opportunity to cross in safety. There is no direct evidence that she did any of these things, nor can it fairly be inferred. The inference that she walked carelessly into danger which reasonable care would have enabled her to avoid is at least as natural and proper, from all the known circumstances, as that she was careful. To say that she was careful would, at the best, be a conjecture, and conjecture is not to be allowed to supply the place of proof. *Mayo v. Railroad Co.*, 104 Mass. 137, 143; *Hinckley v. Railroad Co.*, 120 Mass. 257, 262.

Exceptions overruled.

(159 Mass. 383)

### BOOTT COTTON MILLS v. CITY OF LOWELL.

(Supreme Judicial Court of Massachusetts. Middlesex. June 21, 1893.)

#### TAXATION—ABATEMENT—RECOVERY OF INTEREST.

1. Pub. St. c. 11, §§ 69, 71, provide that when a taxpayer is overrated the assessors or county commissioners shall make an abatement. If the tax has been paid, the taxpayer has the right, under sections 75, 76, to be reimbursed out of the city or town treasury to the amount of the abatement, with charges, etc. *Held*, that an abatement is not a judgment, within chapter 171, § 8, authorizing the computation of interest, when a judgment is made upon an award, from time of the award to time of the judgment, and hence interest is recoverable on the abatement and charges only from time of a demand, and not from the abatement.

2. The doctrine that taxes illegally assessed may be recovered, with interest from time of payment if paid under protest, and from time of demand if without protest, does not apply to legal taxes, subject only to partial abatement by reason of overrating.

3. Interest is not recoverable, under said sections, on the ground that a municipality has received the profits or earnings of a fund belonging to the taxpayer.

Report from superior court, Middlesex county; John Hopkins, Judge.

Action of contract, brought by the Boott Cotton Mills against the city of Lowell to recover interest on taxes abated, under Pub. St. c. 11, §§ 69-76. Plaintiff contended—First, that it was entitled to recover interest on the several sums abated from time of payment of the same as a part of the taxes to said city to the time of repayment by said city to plaintiff, with interest on that amount of interest in each case from the time of demand and therefor; second, that if, for any portion of the time, it was not entitled to interest, then for such portion it was entitled to recover so much as the use and benefit of said several sums by and to said city was fairly and reasonably worth. Plaintiff had judgment for \$1,212.47, being the

amount of interest upon the various sums abated from the date of the order of abatement respectively, in each case, to the time of the repayment of said sums to plaintiff, with interest thereon from the time of demand. At request of the parties the case was reported to the supreme judicial court for final determination. Finding set aside.

C. S. Lilley, for plaintiff. J. J. Hogan and F. T. Greenhalge, for defendant.

BARKER, J. 1. The abatement which assessors or county commissioners may make under the provisions of Pub. St. c. 11, §§ 69, 71, when a taxpayer is overrated, is not in itself a judgment for money, and it is not returned to a court, and cannot be entered in any court, either by the taxpayer or by the authority which makes the abatement. If the tax has not been paid, it gives no right to ask for the payment of money, but merely the right to discharge the tax by the payment of less than the amount assessed. If the tax has been paid, the taxpayer, under the provisions of Id. § 75, has the right to be reimbursed out of the treasury of the city or town to the amount of the abatement, with all charges, except legal costs previously accrued; and he is also entitled to a certificate of the abatement. See Id. § 76. But this certificate cannot be entered in court, and no court can make up a judgment upon it alone. If the reimbursement is not duly made, the taxpayer may have his action, founded on the breach of the statute obligation to reimburse, and if he obtains judgment it is upon establishing in court all the facts essential to his right of recovery, of which the making of the abatement is but one. The provisions of Id. c. 171, § 8, authorizing the computation of interest, when judgment is made up upon an award, from the time when the award is made to the time of making up the judgment, are therefore not applicable to the present case, and give the plaintiff no right to recover interest from the times when the abatements were made.

2. Nor is interest included in the charges which are also to be reimbursed. A collector of taxes may proceed in either of several ways to enforce payment, while the application for an abatement is pending or before it is made, and may thus create charges other than legal costs, and such charges are, in effect, added to the tax. It is such charges only which the section (Pub. St. c. 11, § 75) says shall be reimbursed with the amount of the abatement.

3. The doctrine that taxes illegally assessed may be recovered with interest from the time of payment if paid under protest, and from the time of demand if paid without protest, (see *Glass Co. v. Boston*, 4 Metc. [Mass.] 181; *Water-Power Co. v. Boston*, 9 Metc. [Mass.] 199.) is not applicable to the present case. In such cases the tax is void, and the proceedings for its collection are without legal sanction, and the money paid is the property of the taxpayer, of which the municipality has obtained wrongful possession. But a tax abata-

ble because the taxpayer is overrated is nevertheless a valid tax. Proceedings to enforce its payment have the sanction of law; and when it is paid, and the proceeds turned into the municipal treasury, the money is the proper money of the city or town. The municipality has no right or duty to reimburse any portion of it until an abatement has been made. Under our system of taxation the state and county taxes are included in one assessment with the city or town levy, and the treasurer of the municipality is often a different person from the collector of taxes, and has no official knowledge of the particular sources from which are derived moneys turned into the treasury as the proceeds of taxes. If he knows that an abatement has been made in favor of a particular taxpayer, he has no official knowledge whether the tax has or has not been paid. Nor is it a treasurer's duty to volunteer to make such a reimbursement. Some proper demand must be made before it is his duty to pay, and before the municipality is placed in default by mere nonpayment. But in the case of taxes illegally assessed the municipality is in default when, without warrant of law, it receives money which it is informed by the protest that it takes illegally, or when it retains it after a demand. But the duty to reimburse an overrated taxpayer springs solely from the statute. Although the assessors may have erred in judgment, the city or town has not been at fault in the assessment or collection of the tax, nor in the retention of the money paid; and it is not compelled to make the reimbursement because of its default, but because for that purpose it is the designated instrument of the government. Its duty to reimburse, therefore, cannot begin until the abatement is made, and this disposes of the contention that the plaintiff ought to recover interest from the times when the taxes were paid.

4. The same considerations negative any obligation on the part of the municipality to make reimbursement until demand therefor is made. The sums received into the treasury are not ear-marked. They are the property of the municipality, and

it is under no obligation to the taxpayer until his abatement is allowed. Whether its allowance gives him a right to reimbursement depends upon whether the tax has been paid,—a fact not to be presumed to be within the knowledge of the treasurer. It follows that the municipality is in no default in not making reimbursement until demand; and, as interest is not given by the statute which devolves upon the city or town the duty to make reimbursement, only such interest can be included in the judgment as is given for the improper detention of money, which would not be until after a demand. We notice in this connection that the government of the United States does not pay interest except where the demand is under a special contract or special law providing for the payment of interest, and that no obligation to pay interest is to be implied against the government from the mere fact that it has detained the principal after the creditor's right to receive it has accrued. *U. S. v. Sherman*, 98 U. S. 565; *Stephani's Case*, 26 Int. Rev. Rec. 313; *Tillson v. U. S.*, 100 U. S. 43; *Rev. St. U. S.* § 1091; *Id.* § 3011, as amended by Act Feb. 1, 1888, c. 4, (25 Stat. 6;) 9 Op. Attys. Gen. U. S. 59; 16 Op. Attys. Gen. U. S. 97.

5. Nor has the plaintiff any right to recover on the ground that the defendant has received the profits or earnings of a fund belonging to the plaintiff. As we have seen, the taxes, though in part abatable, were legal; and their proceeds, when paid, were the property of the city, and not of the taxpayer. If it could be demonstrated that the sums on which the city received interest were in part composed of the moneys paid by the plaintiff, they were not the plaintiff's property, and it has no right in the earnings of the fund.

The result is that interest should have been allowed only from the time of demand, and not from the dates when the abatements were made. The finding is set aside, and judgment is to be entered for a sum to be ascertained by the rule above given. If necessary to determine the amount of the judgment, the case will stand for further hearing in the superior court. Findings set aside.

(133 N. Y. 659)

**STEUBING v. NEW YORK EL. R. CO.**  
et al.

(Court of Appeals of New York. June 20, 1893.)

**ELEVATED RAILROAD — ACTION FOR DAMAGES BY  
ABUTTING OWNER—FINDINGS OF FACT—CONCLU-  
SIONS OF LAW—HARMLESS ERROR—JUDGMENT—  
WHEN REVERSED—PRACTICE.**

1. Though the easements appurtenant to land taken by the construction of an elevated railway in the street on which the land abuts have in themselves, aside from any damage to the land from the taking, only a nominal value, a refusal to so find, in an action by an abutting owner for damages to his land caused by the construction and operation of an elevated road, is harmless error, where other findings show that no allowance was made for the easements as detached property, but that the entire amount of fee damage was for consequential damages to the land.

2. Where, in such action, there is evidence that the value of plaintiff's premises was not increased on account of the construction and maintenance of such road, it is not error to refuse to find that the presence of such road and its station brings many people daily into the immediate locality of the premises in suit, and increases the traffic at such point, and that "said premises would not be worth as much as they are now had the said railway station not been built."

3. Where the referee refuses a finding of fact as a whole, and defendants except to it as a whole, the latter cannot complain of error in its refusal unless the entire request is proper.

4. It is not error in such action to refuse to find that the effect of the proximity of defendants' station to plaintiff's premises is advantageous to the business portion of such premises, and produces a special benefit to the same for business uses, since the subject of inquiry was not the proximity of such station to plaintiff's lots, but the effect on such lots of the construction of the road, in determining which the referee was bound to consider the proximity of the station.

5. A referee may properly refuse a request not founded on undisputed evidence.

6. The practice of making numerous requests to find facts and conclusions of law, and then requesting the referee, if he refuses to find the facts as requested, to find the same matters as conclusions of law, and vice versa, and adding that "each sentence of each proposed finding is prepared separately, as if separately numbered," is improper, and not to be tolerated.

Appeal from supreme court, general term, first department.

Action by Henry Steubing against the New York Elevated Railroad Company and the Manhattan Railroad Company to recover damages for a trespass to plaintiff's premises, and to enjoin defendants from operating their road. From a judgment of the general term (19 N. Y. Supp. 313) affirming a judgment for plaintiff, defendants appeal. Affirmed.

Arthur O. Townsend, for appellants.  
Henry G. Atwater, for respondent.

CARL, J. The complaint in this action, which is in the usual form for such actions by abutting owners against the elevated railroad companies, relates to two lots, Nos. 900 and 902, on Third avenue. The referee awarded for No. 900 rental damages \$2,160, and fee damages \$2,600; and

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for lot 902 no rental damage, and fee damages \$2,600. The defendants' sole complaint now is that the referee erroneously refused to make certain findings of facts and law requested by their counsel, and the following requests to find facts are specified: "Fifteenth. The easements, if any, appurtenant to the land described in the complaint, and taken for the said railway uses, aside from any damage to said land from the said taking, have in themselves only a nominal value." "Thirty-first. The presence of defendants' railway and station at Fifty-Third street brings a large number of persons daily into Third avenue, in the immediate neighborhood of the premises in suit, and increases the traffic in and upon said avenue at this point. Said premises would not be worth as much as they are now had the said railway station not been built. Thirty-second. The existence of said station and railway, and the maintenance and operation of the same, have rendered the premises in suit accessible to other parts of the city of New York. Said premises would not be worth as much as they now are were said railway and station removed. Thirty-third. The effect of the proximity of defendants' station at Third avenue and Fifty-Third street to the premises in suit is advantageous to the business portion of said premises, and produces a special benefit to the same for business uses. Thirty-fourth. The special benefits accruing to the business portion of said premises from said railroad station are equal to and offset any disadvantage to the dwelling apartments in said premises accruing from the maintenance and operation of said railroad." And our attention is called to the refusals of the following findings of law requested: "Tenth. The damages, if any, to the use of the premises included in any recovery in this action, should be computed with respect to the actual condition of said premises, and the uses to which the same have actually been put during the period for which said damages, if any, are awarded. Eleventh. In estimating damages, if any herein, the benefits accruing to said premises, and peculiar thereto, from the maintenance and operation of said railway, should be set off against any inconveniences resulting from said railway to said premises." "Fifteenth. The defendants should not be required to pay for the easements in question, as a condition of avoiding the operation of any injunction herein, any greater sum than one sufficient to compensate plaintiff for the injuries caused by the perpetual taking of the easements aforesaid for the maintenance of defendants' railway, as at present maintained. Sixteenth. The sum fixed which the defendants may pay to obviate the injunction herein should not be greater than the value of so much of the easements of light, air, and access appurtenant to plaintiff's premises as are impaired by the defendants' railroad, and excluding all other incidental injuries to the fee value of said premises resulting from the acts of the defendants." The fifteenth finding of fact requested should have been found, as we have held in several recent cases; but, in order to determine whether

any prejudicial error was committed by the refusal to make the finding, we must examine and consider all the findings of facts, among which are the following: "Thirty-first. By reason of the construction, maintenance, and operation of the said railroad opposite to the said described premises No. 900 Third avenue, the plaintiff has sustained damages in loss of rentals from the 6th day of June, 1884, to the 6th day of June, 1890, [the date of the commencement of this action,] in the sum of twenty-one hundred and sixty dollars. Thirty-second. The permanent or fee value of the said premises No. 900 Third avenue has been diminished by the construction and maintenance of said railroad opposite to the said premises to the extent of twenty-six hundred dollars. Thirty-third. The permanent or fee value of the said described premises No. 902 Third avenue has been diminished by the construction and maintenance of said railroad opposite to the said premises to the extent of twenty-six hundred dollars." These findings show that no allowance was made for the easements as detached property, but that the entire amount for the fee damages was for consequential damages to the lots, and the proper rule of law appears to have been applied.

The thirty-first finding of fact was properly refused, if for no other reason, on account of the last clause contained therein, to wit: "Said premises would not be worth as much as they are now had the railway station not been built." The referee could properly refuse to find this, as there was abundant evidence that the value of the premises was not increased on account of the construction and maintenance of the elevated railroad. It may be that, the railroad being there, the existence of the station lessened the damage to the plaintiff's premises. But the effect of the station was merely one of the facts to be considered by the referee in making his determination as to the damages. It was not vital or controlling; it was mere evidence as to which he was not bound to make a finding. It does not appear that he did not give due weight to the proximity of the station.

A practice seems to have grown up in this class of cases which must be somewhat embarrassing to the trial courts. The defendants made 47 requests to find facts and 24 to find conclusions of law, and requested the referee, if he refused to find the facts as requested, to find the same matters as conclusions of law, and, if he refused to find the law as requested, to find the same matters as facts. This is not all. They stated that "each sentence of each proposed finding is prepared separately, as if separately numbered." This is a practice not to be tolerated. The large number of requests are generally quite embarrassing to the court; but, when the same matter is requested to be found both as fact and law, it duplicates all the specific findings requested, and the number is still largely increased when every sentence is also requested to be found both as fact and law. Such a practice is not needful for the protection of the rights of any party, and the

tendency must be to ensnare the trial judge, and frequently to defeat the ends of justice, by introducing mistakes, confusion, and uncertainty into the records of cases brought up for review. Proper practice requires that a request to find either facts or law should be plainly stated in a single proposition, the whole of which can be granted or refused, and any modification of the requested finding should be left to the discretion of the trial judge. But, as to the thirty-first finding of fact requested, the referee refused it as a whole, and the defendants excepted to the refusal as a whole, and hence they cannot complain of error unless the entire request as a whole was proper; and that it was not, we think, has been shown.

The thirty-second finding of fact requested was properly refused. The first sentence thereof is a mere statement of evidence, not disputed or disputable, which the referee was not bound to find, and the last sentence does not rest upon undisputed evidence. Therefore the referee, for reasons above given, was not bound to make the finding.

As to the thirty-third request, it may be said that the effect of the proximity of the station to the plaintiff's lots was not the subject of inquiry. The matter to be determined was the effect upon the plaintiff's lots of the construction and maintenance of the railroad in front of the lots, and, in determining that, the referee was bound to take into consideration the proximity of the station and all the other facts bearing upon the matter. It cannot be perceived that any harmful error was committed in refusing this request.

The thirty-fourth request was not founded upon undisputed evidence, and the referee could properly, upon the evidence, refuse it.

As to the tenth, eleventh, fifteenth, and sixteenth requests for findings of law, it is sufficient to say that it is obvious from the findings actually made that the law was applied as requested, and that the damages awarded appear to have been estimated upon the proper basis.

There is considerable difficulty attending the trial of this class of cases, and a judgment should not be reversed if upon the whole record we can see that no harmful error was committed, and that the proper principles of law were not misapprehended or misapplied. The judgment should be affirmed, with costs. All concur.

(128 N. Y. 543)

PEOPLE ex rel. EDISON ELECTRIC LIGHT CO. v. CAMPBELL, Comptroller.

(Court of Appeals of New York. June 20, 1893.)

TAXATION OF CORPORATIONS—CAPITAL EMPLOYED IN STATE—INVESTMENTS IN STOCKS AND BONDS OF FOREIGN CORPORATIONS—EXEMPTIONS.

1. Where the entire capital of a domestic corporation is invested in patent rights, and it grants the right to use such patents to other corporations, some of which are formed within, and some without, this state, and in consideration of such grants it receives and holds in this state stocks of the latter corporations, and the dividends thereon, the capital of such

domestic corporation, to the extent of the stock of the foreign corporations held by it, is not "employed within this state," so as to make it taxable under Laws 1880, c. 542, and acts amendatory thereof.

2. Where such domestic corporation holds bonds of foreign corporations issued to it in payment for the patent rights granted, the capital thus invested is taxable, since such bonds have their situs at the domicile of the owner, unless kept employed outside the state.

3. Where the main business of such domestic corporation is to perfect and protect its patents, and grant rights to do whatever is needful and incident to such business, which is conducted from the home office, patent rights retained by it for use in territory not covered by grants made are employed within the state, and capital represented thereby is taxable.

Appeal from supreme court, general term, third department.

Certiorari by the Edison Electric Light Company against Frank Campbell, comptroller of the state of New York, to review respondent's decision in declining to set aside taxes assessed on the relator, under the corporation tax laws, for the year ending November 1, 1891. From an order of the general term (22 N. Y. Supp. 1113) affirming the determination of the comptroller, relator appeals. Reversed.

S. B. Lewis, for appellant. S. W. Rosendale, Atty. Gen., for respondent.

EARL, J. The relator is a domestic corporation with a capital of \$1,500,000. The comptroller, under the act chapter 542 of the Laws of 1880, and the acts amendatory thereof and supplementary thereto, determined that its entire capital in the year 1891 was employed in this state, and estimated its value at \$3,000,000, and upon that sum imposed the tax authorized by the act. The relator does not complain that the value placed upon its capital was too high, but it claims that none of it was employed within the state, and hence that none of it was taxable under the act; and whether this claim, as to the entire capital, or any portion of it, is well founded, is the sole matter for our determination. The tax could be imposed only as to so much of the capital as was "employed within this state," and the comptroller claimed that the whole of it was so employed. We think he was mistaken. It is sufficiently accurate, for the purpose now in hand, to say that the entire capital of the relator was originally invested in patent rights. Corporations were formed in various cities of this state, and to a large extent in cities outside of this state, to use these patents; and to these corporations the relator granted the right to use the patents, and in compensation for such grants it received stocks of such corporations, and during the year 1891 it held such stocks, and received the dividends declared thereon. As to so much of such stocks as was in corporations organized and existing in this state, it cannot be doubted that its capital was employed within this state. So much of its capital, to wit, its patents, as was used to purchase such stocks, was employed for that purpose, and was thus used for the business of the relator. The stocks existed

within this state, and were kept and held to produce revenue here, and hence, in every sense, were employed within this state. They took the place, as a portion of the relator's capital, of the patent rights transferred in payment for them. The stocks which the relator took in companies organized outside of this state stood for so much of the relator's capital invested outside of the state. It took a portion of its capital, to wit, a portion of its patent rights, and employed it outside of the state to purchase those stocks. Its property in those corporations, represented by its shares of stock, was outside of this state, and was in no sense employed here. Those stocks had no situs here, and were not taxable here, under any system of taxation which has ever existed in this state. *People v. Commissioners of Taxes, etc., of New York*, 5 Hun, 200, 64 N. Y. 541; *People v. Commissioners of Taxes, etc., of New York*, 4 Hun, 595, 62 N. Y. 630; *People v. Wemple*, 133 N. Y. 323, 31 N. E. Rep. 235; *People v. Same*, 129 N. Y. 558, 29 N. E. Rep. 812. It is quite true that so much of the relator's capital as was invested in these stocks was not employed in business outside of this state. But that was not requisite to entitle it to the exemption. To subject it to taxation it must have been employed within this state, and that it was not so employed we think we have sufficiently shown. The case of *People v. American Bell Tel. Co.*, 117 N. Y. 241, 22 N. E. Rep. 1057, is not an authority for the comptroller in this case. In that case the defendant, a foreign corporation, held stocks in various companies in this state; and it was held that it could not be taxed under the act of 1880, on account of the investment of a portion of its capital in such companies, for the reason that it was not doing business in this state. Before a foreign corporation can be taxed under that act in this state it must not only employ a portion of its capital in this state, but it must also be engaged in business here. *People v. Wemple*, supra. As to a domestic corporation, it is sufficient, to subject its capital to taxation under the act, that it was employed within the state, and it is employed where it is kept and used for the purposes of the corporation.

It is said in this record, although not distinctly shown, that the relator also held bonds of foreign corporations, issued to it in payment for patent rights granted. We think that so much of the capital as was invested in such bonds was taxable here, under the act. Those bonds were presumably held at its office in this state, and such bonds, as well as all choses in action, unless kept employed or used outside of the state, have their situs at the domicile of the owner. The bonds took the place of the patent rights granted for their purchase. They were kept and held here to earn revenue for the relator, and they were, in a proper sense, employed here for that purpose.

The relator had granted to various corporations, within and without the state, rights to use its patents, and thus far it had disposed of its patents. But it retained its patents for use in territory not covered by the grants made, and the re-

maining question is, where were the patent rights not granted employed? We think they were employed at the home office in this state. The main business of the relator was to perfect and protect its patents, and to grant patent rights, and to do whatever was needful and incident to that business, and that business was managed at and conducted from the home office, and its patents were kept and employed there in that business. A patent is an incorporeal right,—a franchise conferred by the sovereign power upon the patentee. It is personal to him, and until he is divested of the title thereto, like other personal rights, it attends his person, and exists where he is, or where he puts it to use. We are therefore of opinion that the comptroller did not err in including in the capital of the relator, to be estimated for taxation, its patents, so far as they had not been disposed of.

It follows from these views that the order of the general term should be reversed, and that the determination of the comptroller should be reversed, so far as it included, for the purposes of taxation, the stocks held by the relator in foreign corporations, and that the matter should be remitted to the comptroller to the end that he may readjust the tax upon the relator's capital in accordance with the views expressed in this opinion, without costs to either party in any of the courts. All concur, except MAYNARD, J., taking no part.

(133 N. Y. 590)

PEOPLE v. MYERS, Comptroller.

(Court of Appeals of New York. June 30, 1893.)

TAXATION—CITY QUOTA OF STATE TAXES—INTEREST.

Laws 1882, c. 410, § 153, provides that in order to enable the city and county of New York to pay its quota of tax to the state, unless the money for the payment of the same has been otherwise provided, the comptroller may issue revenue bonds for the payment of such tax. *Held*, that the comptroller, on failure to pay the tax on the date it fell due, was liable, not only for the amount due as taxes, but also for interest thereon from the date of his default of payment, in that interest must be paid on a debt due by the terms of a statute, the same as if the debt were due under a contract. 21 N. Y. Supp. 79, affirmed.

Appeal from supreme court, general term, third department.

In an action by the state of New York against Theodore W. Myers, as comptroller of the city of New York, for taxes due the state, the court issued a peremptory mandamus ordering defendant to issue sufficient revenue bonds of the city and county of New York, and to negotiate the same, for the purpose of raising taxes due the state from the city and county of New York. Defendant appealed to the general term, which affirmed the decision. Defendant again appealed. Affirmed.

David J. Dean, for appellant. S. W. Rosendale, Atty. Gen., for the People.

O'BRIEN, J. The comptroller of the city of New York is authorized and re-

quired by statute to issue and negotiate revenue bonds for the purpose of raising money to pay the quota or proportion of the state tax chargeable to the city and county of New York. He is required in this way, unless the money is otherwise provided, to pay the state tax at the same time or times that the other counties of the state are or may be required to make payment by law, to wit, one-half thereof on the 15th day of April, and the other half on the 1st day of May in each and every year. Laws 1882, c. 410, § 153. A portion of the tax due and payable by the city and county of New York to the state treasury on May 1, 1890, was not paid, and the comptroller neglected or refused to issue revenue bonds to raise the money for its payment. The attorney general, in behalf of the state, applied for a peremptory mandamus against the comptroller, requiring him to issue and negotiate the bonds, and out of the proceeds to draw his warrant, and pay the tax. Certain allegations in the petition for the writ were put in issue, and an alternative writ was issued, to which a return was made, and upon the petition, writ, and return the cause was tried. The court directed a verdict for the state for the amount of the tax unpaid on May 1, 1890, and the interest thereon from that date. Judgment having been entered on the verdict, and affirmed at general term, the case comes here upon appeal; and the record presents but a single question, and that is whether the city and county of New York was properly charged with interest on the unpaid taxes from the time when they should have been paid into the state treasury.

We think there was no error in the direction of the learned trial judge with respect to the interest. Under the system for the assessment and collection of taxes that prevails in this state, the several counties represent the individual taxpayers, as between them and the state. The county is responsible to the state for its quota of the state tax, and is clothed with all the powers necessary to enable it to collect the tax and pay the same into the state treasury. The powers conferred for this purpose and the duties imposed create an obligation against the county to levy, collect, and pay the tax to the state at the time designated by law, and for failure to do so is in default. Each county becomes a debtor to the state for its quota or proportion of the tax, payable at a specified time; and if, for any reason, it neglects or refuses to perform the obligation, the same consequences must follow as in the case of any other debtor who fails to meet his obligations, and that is the liability to be charged with interest from the time the debt or obligation became due. Mayor, etc., v. Davenport, 92 N. Y. 604, 616; People v. County of New York, 5 Cow. 331. In this respect the relations of the city and county of New York to the state are precisely the same as the other counties of the state; so that upon general principles, and irrespective of any statute on the subject of interest, the appeal cannot be sustained. By chapter 427 of the Laws of 1855 the comptroller is required to charge the several county treasurers with the amount of



the state tax to be raised in their respective counties, crediting them with their fees, and to state the account between the state and the several counties, and transmit a copy of the same to the county treasurers on the 1st day of May in each year, requiring payment of any balance then due. This statute further provides that in the event of default, refusal, or neglect on the part of any county treasurer to pay any balance, the same shall be referred to the attorney general, who shall prosecute forthwith, and the state shall be entitled to recover the balance due, with interest thereon from the 1st day of May in the year in which the same ought to have been paid. The comptroller of the city of New York is the fiscal officer that bears the same relations to the state, with respect to the payment of the state tax, as the county treasurers in the other counties, and he is chargeable with the same duties and obligations; so that this statute applies to him, when he omits or refuses to pay the state tax when due.

It is said that interest should not have been allowed, because not claimed or demanded in the alternative writ. This objection, we think, comes too late. The people claimed interest at the trial, because proof was given by them as to the amount and computation, and the defendant made no objection upon this or any other ground; and raised no question, in any form, as to the amount or items included in the judgment. Indeed, there is but one exception in the record, and that is a general one, to the direction of a verdict. When a party seeks to recover or compel the payment of a specified sum of money alleged to have fallen due before the commencement of the proceeding, and proof is given, without objection, as to the amount of interest that has accrued since the date when payment should have been made, and a general verdict is directed for a sum which includes interest, to which direction an exception is taken, the question as to the right to interest is not raised. The attention of the court should be directed to the question, either by objecting to the proof of interest, or by requesting some specific ruling or direction on the point. It is apparent from the record that the attention of the trial court was not called to the question of interest at all. The judgment should be affirmed, with costs. All concur, except MAYNARD, J., not sitting.

(133 N. Y. 679)

#### MOORE v. MOORE.

(Court of Appeals of New York. June 30, 1893.)

#### REVIEW ON APPEAL.—DISCRETION OF TRIAL COURT.

An order of the general term affirming an order of the special term granting plaintiff in divorce proceedings leave to dismiss is not reviewable.

Appeal from supreme court, special term, Albany county.

Action by William Moore against Maria Moore for divorce. Plaintiff applied to special term for leave to discontinue the action, which was granted. 22 N. Y.

Supp. 451, affirmed on appeal by the general term. Defendant appeals. Affirmed.

R. A. Parmenter, for appellant. Arthur L. Andrews, for respondent.

PER CURIAM. The order of the general term, which affirmed an order of the special term granting the plaintiff's application to discontinue this action upon payment by him of the costs, is not reviewable in this court. The action was for a divorce, upon the ground of adultery, and was on the circuit calendar when the order of discontinuance was made. The court had before it the moving affidavits and the opposing affidavits made by the defendant and her attorney, and it was upon their consideration, as well as of the pleadings, that the order was granted. Under the circumstances developed, it was within the discretion of the court to grant or to refuse the plaintiff's application. It does not appear that there was any violation of any right or interest of the defendant. In fact, the granting of the order of discontinuance might be regarded as a concession on the part of the plaintiff that he was unable to prove his case. There was no abuse of the discretion which rested in the court with respect to the application, and it was for it to pronounce upon the terms to be imposed upon the plaintiff as a condition of the discontinuance. The appeal should be dismissed, with costs. All concur.

(146 Ill. 468)

#### YOUNG v. FARWELL et al.<sup>1</sup>

(Supreme Court of Illinois. June 19, 1893.)

#### ACCOUNTING—PROOF OF CONTRACT.

Defendants orally agreed to employ complainant at a certain salary, and to give him in addition a share of the profits of the business, but the evidence did not clearly show what share he was to receive. Held, that on account of the uncertainty of the agreement a bill for an accounting would not lie.

Appeal from appellate court, first district; O. H. Horton, Judge.

Bill by George W. Young against the firm of J. V. Farwell & Co. for an accounting. Defendants obtained a decree, which was affirmed by the appellate court. Complainant appeals. Affirmed.

W. A. Gardner and A. D. Currier, for appellant. Flower, Smith & Musgrave, for appellees.

CRAIG, J. This was a bill brought by George Wright Young against John V. Farwell & Co., the appellees herein, for an accounting under an alleged verbal contract, by which it is claimed he was to act as manager of the department of silks and velvets in appellees' wholesale establishment in the city of Chicago for a period of six months from July 1, 1889, to January 1, 1890, for a fixed salary, and, in addition thereto, under certain conditions, an interest in the profits of the department in which he was employed. At the time of the making of the alleged contract the ap-

<sup>1</sup> Reported by Louis Boissot, Jr., Esq., of the Chicago bar.

<sup>2</sup> Rehearing denied, October term, 1893.

pelles were conducting a large wholesale dry goods house in Chicago. The house was divided into floors and departments, with distinct heads and subheads, but the entire business was under one general management. The complainant, Young, had been in the employment of appellees for a number of years, and for some time prior to the making of the alleged contract he had been subhead of the department of dress goods, silks, and velvets; W. C. Rice being at the head of the department. During the year 1888 he received a salary of \$2,250. A few days before the close of the year 1888 he was notified by John V. Farwell, Jr., who was manager, and employed all the help on certain floors, that for the year 1889 his salary would be reduced to \$2,000, and he was employed for that sum. In the month of June, 1889, Rice resigned his position as manager of the department of dress goods, silks, and velvets, and in the month of June, Farwell and Young had an interview in regard to the employment of Young from July 1st to January 1st, to take the position made vacant by the resignation of Rice. At this interview a verbal contract was made, but no person was present to witness the contract, and no one knew what the contract was but the two contracting parties. It appears from the evidence of both Young and Farwell that Young insisted upon an increase of his salary. He testified that he insisted on \$4,000, while Farwell says the amount insisted on was \$3,000. Farwell, however, refused to increase the fixed salary beyond \$2,250 a year, and it was finally agreed that the fixed salary should be \$2,250 per annum for the six months. In addition to this amount it was understood by the parties that Young should have an additional sum from the profits realized from the department which he was employed to manage, but the parties do not agree as to the terms of this part of the contract, and from the evidence of the two parties there is much doubt and uncertainty in regard to what the real contract was. Indeed, the statements made by complainant himself in reference to the terms of the contract are not harmonious. In his letter of February 21, 1890, he wrote appellees as follows: "I wish to recall, and for your consideration, the verbal contract with the writer of last June. As a compromise for your not doing more than reinstating the amount of salary of previous two years, you offered to divide, if I did well, and the profits was good under my management." On July 5th he again writes, as follows: "You recollect he [I] resigned June 21, 1889, because of a difference of seventeen hundred and fifty dollars (\$1,750) increased salary asked for, and other good reasons. Then you offered as a compromise, in lieu of the seventeen hundred and fifty dollars, (\$1,750) to divide with him [me] the surplus above past percentages made." The complainant, in his bill, alleged he was to have an interest in the profits, "which interest it was agreed should be an equal division between writer and J. V. Farwell & Co. of all the profits that should accrue over and above the past average of profits in the business of

the department of silks and velvets under the management of writer." In his deposition taken September 1, 1891, complainant testified to the contract as follows: "Farwell said: 'I will do this with you: We will divide with you all the profits made over the past percentage.' I knew the best I had ever done was eight to twelve per cent., but more frequently from ten to eleven per cent., profit. Therefore I accepted his terms, and he immediately arranged for me to go to New York, and buy and sort up goods, that very next day." Upon a subsequent examination the complainant, in detailing the terms of the contract, testified as follows: "Farwell said, 'I will divide with you all the profits that your department makes over your past average percentage of profits.'" As to the average percentage of profits, the complainant testified: "They varied from eight to twelve per cent. It was always according to the elements and the crops, which made the good or bad seasons." It will be observed that there is a radical difference between the different statements of the complainant in regard to what the contract was. Which one of the statements shall be adopted as the contract? Shall we adopt the statement contained in this letter of February 21st? If so, then there was to be a division if complainant did well, and the profits were good under his management. Or shall we accept complainant's statement of July 5th? If so, then there was to be a division of the surplus above past percentages. Or shall we take the evidence of complainant in his second examination? If so, then there was to be a division of profits made in the department over the past average percentage of profits made by complainant. There is as much reason for adopting one of these statements as the other, and in arriving at a conclusion in regard to what the contract was the question is left in so much doubt and uncertainty that a court cannot reasonably determine from the contradictory statements what the contract really was. But the terms of the alleged contract are rendered more uncertain when the evidence of Farwell, the other contracting party, is considered. He denies that he agreed to give any definite share of the profits, but says that the salary for the six months was fixed on the basis of \$2,250 a year,—\$1,125 for the six months,—and, in addition, he agreed with complainant, if he did well, they would give him a bonus; and in his letter to complainant of February 25, 1890, he says: "By my remarks to you on the 21st of last June I meant that if the department did only what ought to be done by any good manager you would not receive any additional compensation, but that if it made more than its regular percentage I was willing 'to divide,' not in two equal parts, the extra amount, but to give you part of it. You made about \$2,500 over your percentage, and I am willing to give you 10 per cent. of it, or \$250."

We are satisfied from the evidence, after giving due weight to all of it, that appellees agreed to give appellant something in addition to his salary of \$2,250 per annum, but what amount was to be paid,

or under what terms and conditions complainant was to receive any more over and above his fixed salary, is left in such doubt and uncertainty that it is impossible to say from the evidence in this record that the minds of the parties ever met upon any definite proposition. And if the minds of the parties never met upon some definite proposition under which the complainant was to secure a part of the profits, we do not understand upon what principle he can maintain a bill for an accounting. It is the plain duty of courts to enforce contracts made by parties when the terms and conditions of the contract are established by evidence, but courts cannot make contracts for parties, and then enforce such contracts. Here it devolved upon complainant to allege in his bill a contract, and establish that contract by evidence. This he has failed to do. We think the decree of the circuit court was correct, and the judgment of the appellate court will be affirmed.

(7 Ind. App. 122)

KIPHART v. PITTSBURGH, C., C. & ST. L. RY. CO.

(Appellate Court of Indiana. June 8, 1893.)

PUBLIC IMPROVEMENTS—NOTICE—ASSESSMENT—  
COLLATERAL ATTACK.

Act March 8, 1889, (Acts 1889, p. 237,) provides that before making certain improvements the council of a city or board of trustees should declare, by resolution, the necessity thereof, and give 10 days' notice of the time and place where property owners could object thereto. *Held* that, in the absence of notice, the council had no jurisdiction over the person of the owner, or the property affected, as far as an assessment was concerned, and an assessment levied without such notice is void, and may be attacked in a proceeding by the contractor for the improvement to enforce his lien.

Appeal from circuit court, Delaware county; O. J. Lotz, Judge.

Action by Ezekiel E. Kiphart against the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company to enforce a lien against defendant's right of way. Judgment for defendant. Plaintiff appeals. Affirmed.

Henry C. Ryan, Wm. S. Diven, and E. B. McMahan, for appellant. Burchenal & Rupe, for appellee.

REINHARD, J. The appellant was a contractor for the improvement of a street in the city of Anderson, and he brought this action for the enforcement of a lien against the appellee's right of way. The improvement was made by the city authorities under proceedings of the common council of said city, commenced at the instigation of owners of abutting property. This action was commenced in the Madison circuit court, where the venue was changed to the court below. The cause was tried by the court, and there was a finding for the defendant below, who is the appellee here. The questions presented by the appellant's assignment of errors arise on the overruling of demurrers to the answers, and on exceptions to the conclusions of law upon the special findings.

The overruling of the demurrer to the complaint is assigned as cross error by the appellee. Among the special findings of the court is one to the effect that no notice, of any kind whatever, was given the appellee, or any one else, by the council, of its proceedings to improve said street. Was such notice necessary to the validity of the assessments? And can the omission be made available, as against the contractor, in a proceeding by him to have the lien declared and enforced?

The proceedings to improve the street were commenced by petition in the city council on the 14th day of October, 1889. The act of the general assembly relating to street improvements was approved, and became a law, on the 8th day of March, 1889. Acts 1889, p. 237. This act, before it was amended by the law of 1891, provided (section 2) that whenever a city or town should deem it necessary to make such improvements as are covered by the act the council or board of trustees should declare, by resolution, the necessity therefor, etc., and that notice, for 10 days, of the passage of such resolution, should be given, in some newspaper of general circulation in such city or town, stating the time and place when and where the property owners along the line of the proposed improvement could make objections to the necessity for the construction thereof. Section 7 provides that two weeks' notice shall be given, in two newspapers of opposite politics, of the assessments to be made, and persons aggrieved have the right to appear and make objections, etc. These provisions were in full force when the proceedings involved in this case were had. The fact that prior laws, though they may be still in force, in some of their features, did not require such notices, can, it seems to us, furnish no argument that notices were not required when these improvements were made. If such notices could be dispensed with, under the plea that the proceedings were conducted under the old law, which did not require them, we can conceive of no case where this could not be done, and the result would be the nullification of such requirement for notices entirely. The only serious question in connection with this point, as we see it, is whether failure to give either or both of these notices will render the assessments void. Doubtless the attack upon the validity of the assessments is a collateral one, and cannot avail the defendant in a suit to enforce the lien, unless the requirement is one essential to the jurisdiction, and consequently to the validity of the lien itself. Notwithstanding the general rule that statutes by which the property of the citizen is taken from him for public purposes require a strict construction, the laws governing the proceedings to be had in making improvements of this character have been most liberally construed by our supreme court. It has been settled by judicial construction of these statutes that if the owner of property stands by, and suffers the improvements to go on, without interposing any objections to the regularity of the proceedings, he cannot question their validity by any collateral attack. In such matter,

the legislature having conferred jurisdiction of the subject-matter upon the council, if jurisdiction has also been acquired over the person of the owner, or over the thing to be affected, the failure to comply strictly with the requirements of the statute will not render the proceedings void, as against a collateral attack. If, however, the statutory requirement is one affecting the jurisdiction of the person of the owner, or of the property sought to be charged, the statute by virtue of which the assessment is made must be strictly complied with. There is, however, another familiar rule, which, in this connection, must not be lost sight of, viz.: If notice of a certain kind is prescribed by the statute, and some notice has been given, and the tribunal making the assessment determines that the notice is sufficient, the property owner will not, as a general rule, be permitted to inquire into the sufficiency of such notice, in a collateral proceeding; but where, in such a case, no attempt has been made to give any notice whatever, and the proceedings do not show that the sufficiency or the question of notice has been passed upon by the tribunal making the assessment, the whole proceedings are void, and no judgment based upon them will be of any validity. See *Paving Co. v. Edgerton*, 125 Ind. 455, 25 N. E. Rep. 436; *Elliott, Roads & S.* 397-445.

It is not pretended that any notice was given, and, as we have seen, the special finding expressly declares that none whatever was given. It is insisted, however, that the only notice of assessment which is necessary to be given the property owner is that served upon the defendant in the proceeding to enforce the lien. In support of this contention we are directed to the case of *Garvin v. Dausman*, 114 Ind. 429, 16 N. E. Rep. 826. The proceedings involved in that case, however, were had under and by virtue of the special charter of the city of Evansville, and an ordinance passed in pursuance thereof. Provision was made in the charter for the improvements of streets by the council, and the assessments for the costs upon the lots of land fronting on such streets. There is no specific requirement in such charter for notice. The charter gives the council the power to provide by general ordinance for collecting the costs and expenses of such improvements, and for the enforcement of liens therefor as other liens are enforced. The court held in that case that the proceedings had for the enforcement of the lien included notice to the owner, and that this is sufficient to overcome the constitutional objection of taking the owner's property without due process of law. In that case, as the court correctly said, "the question presented is not whether the law and the ordinance regulating the improvement of streets have been followed, but, conceding that they have been, it is asserted that they are inadequate to create a charge against, or impose a burden upon, property, according to the 'law of the land.'" The question before us, it must be seen at a moment's reflection, is quite different. In the case at bar the inquiry is not whether the statute makes ample provision for notice, but whether

there has been a compliance with the statutory provision as to notice, and whether such compliance is necessary. The case is therefore not an authority upon the point involved. We are of opinion that it is essential to the validity of the assessment that the statutory provision respecting notice be substantially complied with. We think the council may determine the necessity of the improvement without any notice, but at some time during the proceedings the notice specified in section 7 of the act of 1889 must be given, so that the owner of the property may "have his day in court." In the absence of such notice the council have no jurisdiction over the person of the owner, or over the property affected, so far as the assessment is concerned; and such assessment, being in the nature of a final judgment, is void, and may be resisted in a collateral proceeding. Notice at some time during the proceedings, and before the assessment is made conclusive, is a condition precedent to the validity of the assessment lien. *McEnaney v. Town of Sullivan*, 125 Ind. 407, 25 N. E. Rep. 540. The appellee had a right to be heard upon the question of assessment, and was entitled to notice, such as the statute has provided. Contractors can easily protect themselves by inquiring whether or not proper notice has been given, and refusing to bid in the absence of such notice. The owners of property have no such protection if they are to be deprived of the right to be duly notified of the pendency of the proceedings, so that they may appear and object or defend, if they so desire. The court, having found that there was no notice, correctly determined that there was no valid lien. Even if all the other proceedings were regular and valid, the fact that there was no notice must defeat the appellant's right to enforce his lien, in any event. It would be futile, therefore, to attempt a solution of the other questions presented by the appeal. Judgment affirmed.

LOTZ, J., took no part in the decision of this case.

(3 Ind. App. 691)

CUTSHAW et al. v. FARGO et al.<sup>1</sup>

(Appellate Court of Indiana. June 6, 1893.)

SALE BY CORPORATION—ACTION FOR PRICE BY STOCKHOLDERS.

1. Stockholders of a corporation cannot sue in their own name to recover for goods sold by the corporation.

2. The interest which the stockholders of a corporation have in the proceeds of such goods is not such as to make them real parties in interest, so as to entitle them to bring such suit.

Appeal from circuit court, Washington county; D. B. Voyles, Judge.

Action by Charles H., Charles E., Samuel M., and Frank M. Fargo against Frank T. Cutshaw and others to recover for goods sold. Judgment for plaintiffs. Defendants appeal. Reversed.

H. Morris and Zaring & Hottell, for appellants. Alspaugh & Lawler, for appellees.

<sup>1</sup> Rehearing denied, 36 N. E. 650.

GAVIN, C. J. This was a suit upon an account, together with an attachment proceeding, brought by the appellees Charles H., Charles E., Samuel M., and Frank M. Fargo. The complaint is as follows: "The plaintiffs in the above-entitled cause, doing business under the firm name and style of C. H. Fargo and Co., complain of the defendants in said cause, who are partners doing business in the firm name and style of Cutshaw Bros., and say that the said defendants are indebted to the said plaintiffs in the sum of nine hundred and seventy-one dollars and fourteen cents for goods sold and delivered by said plaintiffs to said defendants at their special instance and request, a bill of particulars of which is filed herewith, marked 'Ex. A,' and made a part of this complaint; that said sum is wholly due and unpaid. Wherefore the plaintiffs demand judgment," etc. To this complaint a general denial was filed. There was a trial and judgment for appellees over a motion for new trial presented by appellants.

Numerous questions have been argued by counsel, but the determination of one will be decisive of this case, and that question arises upon the sufficiency of the evidence as presented under the motion for new trial. The evidence shows without contradiction that appellants purchased the goods described in the bill of particulars from C. H. Fargo & Co., and that C. H. Fargo & Co. is a corporation, and not a partnership, although the appellees are the sole stockholders in such corporation. Counsel for the appellants urge vigorously that the corporation is, in the eyes of the law, an individual, separate and distinct from its members or stockholders; that the right to contract and sue upon its contract is inherent in the corporation, and that the stockholders cannot as individuals recover upon causes of action belonging to the corporation. They further claim that the evidence in this case wholly fails to show any sale by appellees to appellants, or any contract by appellants with appellees. With these views of counsel we are compelled to agree, although quite reluctantly, under the circumstances of this case. It is of the very essence of a corporation that it should possess an existence and an individual personality distinct from that of its members. As defined by Chief Justice Marshall, "a corporation is an artificial being, invisible, intangible, and existing only in contemplation of law." "Among the most important [of its attributes] are immortality, and, if the expression may be allowed, individuality; properties by which a perpetual succession of many persons are considered as the same, and may act as an individual." *Dartmouth College v. Woodward*, 4 Wheat. 636. "The great object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men." *Bank v. Billings*, 4 Pet. 562. "A corporation is recognized by the law as having an existence as an artificial person, distinct from the members which compose it." 4 *Amer. & Eng. Enc. Law*, 203. The case then turns upon this proposition: Can one man sue for goods alleged to have

been sold by him, and recover on proof of goods sold by another? We cannot agree to an affirmative answer to this proposition. Appellees insist that appellants are estopped to question the existence of a partnership, because they dealt with appellees as a partnership. There is, however, no evidence of such a fact. On the contrary, the evidence is that appellants dealt, not with plaintiffs, but with someone else; that is, with the corporation. It is also claimed that the objection is one to the capacity to sue, and has been waived. In this counsel are in error. Appellees have ample capacity to sue and maintain this action if the proof will support their complaint. The objection that the plaintiff has not legal capacity to sue refers to some legal disability, such as infancy or idiocy. *Pence v. Aughe*, 101 Ind. 317. The fact proved does not constitute matter in abatement, but goes to the merits. *Morningstar v. Cunningham*, 110 Ind. 328, 11 N. E. Rep. 593; *Pixley v. Van Nostrum*, 100 Ind. 34. Neither is there here a simple defect of parties, as in *Thomas v. Wood*, 61 Ind. 182, or *Bledsoe v. Irvin*, 35 Ind. 293, cited by appellees. On the contrary, an issue is raised by the general denial on the main fact alleged in the complaint, to wit, that plaintiffs sold the appellants the goods described. To sustain their complaint, plaintiffs were required to prove that they did sell them. Instead of this, they proved that they did not sell them, but someone else did. A complaint, to be good upon demurrer for want of facts, must show a good cause of action in favor of the plaintiff, not in favor of some one else. If the complaint showed that the goods had been sold by the corporation, and not by the plaintiffs, it would certainly be bad upon demurrer. "A complaint by A. which shows a cause of action in favor of B. does not state facts sufficient to constitute a cause of action in favor of A., and a demurrer for want of facts raises the question." *Bond v. Armstrong*, 83 Ind. 65; *Railway Co. v. Lohges*, (Ind. App.) 33 N. E. Rep. 449; *Holman v. Langtree*, 40 Ind. 349; *Richardson v. Snider*, 72 Ind. 425. The allegation that appellees sold the goods being necessary to make the complaint good on demurrer, it was required to be shown by the proof. The plaintiffs being unable to establish even a prima facie obligation to themselves, the case is not brought within the rule of those cases wherein it is held that matter questioning the interest of the plaintiff must be set up specially. *Curtis v. Gooding*, 99 Ind. 45.

Finally, it is urged by appellees that the plaintiffs are the real parties in interest, and for that reason entitled to maintain this action, being all of the stockholders in said corporation. As we have already shown, the corporation has an existence and personality which is separate and distinct from its members. Its rights and liabilities are to be worked out through its corporate existence, and not through its individual members. If this suit were brought by the corporation, we do not think it could be reasonably contended that the suit could be defeated on the ground that it should be maintained by the individual members of the corporation

as the real parties in interest. The stockholders are not, in legal contemplation, the real parties in interest in the claim proved in this case. As stockholders, they may be finally entitled to the proceeds of this suit or they may not. That will depend upon the financial obligations of the corporation to which the fund thus derived is first applicable. Whatever interest these stockholders may finally have in such proceeds will be, not a direct interest in this particular cause of action, but a general interest in all the assets of the corporation, to be received in due time and proper manner from the corporation. The principle is plainly laid down in *Mor. Corp.* § 233, which is as follows: "It is of great importance that the title to property be kept free from complication or uncertainty. The title to property vested in a corporation should therefore not be affected by acts of the shareholders, except when acting in such corporate name. Although all the shares of a corporation belong to a single person, and there are no creditors, a conveyance or transfer by the sole shareholder, in his own name, of property vested in the corporate name, would not affect the legal title. The title would, in legal contemplation, remain in the fictitious entity called the corporation, irrespective of the equities which the transaction might give rise to." In the well-considered case of *Button v. Hoffman*, 61 Wis. 20, 20 N. W. Rep. 667, it is held that one who becomes the owner of all the capital stock of a private corporation does not thereby become the legal owner of its property, and cannot maintain replevin therefor in his own name. The case of *Hasselman v. Development Co.*, 2 Ind. App. 180, 27 N. E. Rep. 318, and 28 N. E. Rep. 207, does not aid appellees. It simply holds that where the contract is really made with the corporation, even though by a name other than its corporate name, it may recover upon it. We are constrained to hold that the motion for a new trial should have been sustained.

Judgment reversed.

(134 Ind. 527)

**GOLDTHAIT et al. v. WALKER et al.**

(Supreme Court of Indiana. May 23, 1893.)

**EXECUTION SALE—INJUNCTION—PLEADING.**

1. In an action to enjoin a sale of land under execution against one Jacob B. Buroker, where the petition alleges that plaintiff purchased the land at a sale by the executors of the will of Joshua Buroker, who died seised, it states sufficient facts to confer title on plaintiff, and it will not be presumed against the title so alleged that the execution debtor was a son of testator, and that he was not a party to the proceeding by the executors to sell the land, and therefore the petition is not demurrable on the ground that it thus appears that the interest, by descent or devise, of such son was not divested by the executors' sale.

2. A sale of land under execution will not be enjoined on the ground that it is within the exemption from liability for debts founded on contract, (Rev. St. 1888, § 703,) unless it is alleged by plaintiff or found by the court that the judgment on which the execution issued was founded on contract.

Appeal from circuit court, Grant county; R. T. St. John, Judge.

Action by George Walker and another against Martha E. Goldthait and others to enjoin the sale of lands under an execution. Judgment was rendered for plaintiffs, and defendants appeal. Reversed.

John A. Kersey, for appellants. Paulus & Dickens, for appellees.

HACKNEY, J. Appellees' petition was to enjoin the enforcement of an execution against lands specifically alleged to have been purchased by appellees at the sale by the executors of Joshua Buroker. It further appeared that the execution was upon a judgment against Jacob B. Buroker and in favor of the appellants.

The appellants insist that we must presume against the title so specifically alleged that the execution debtor was a son of the testator, and that he was not a defendant in the proceeding to sell under the direction of the will for the payment of the debts of the estate, and by the existence of such presumption that the complaint must be held bad on demurrer, in that it would thus appear that the interest by descent or by devise of such son was not divested by such sale. The complaint alleged title in the testator, and alleged facts sufficient, in the absence of the presumptions urged, to confer title upon the appellees. To indulge the presumptions so urged would require a pleading to state a cause of action or defense not only as against the parties to the action, but as against every imaginable circumstance and every possible conjecture or surmise.

To an answer by the appellants setting up the relationship of said Jacob B. Buroker to the testator, and that the said Jacob was not a party to said proceeding to sell, the appellees replied that Jacob was a householder, and entitled to an exemption; that his property, real and personal, including his interest in the lands in question, was of less value than \$300; that said property was not subject to the lien of appellant's judgment. A demurrer to this reply was overruled. Upon special findings of fact the court stated as a conclusion of law that said property was exempt from execution against said Jacob. It was not alleged in the reply, nor was it found by the court, that the judgment from which said property was so held exempt was upon contract, express or implied. It is only upon contracts, express or implied, that the right of exemption is secured,<sup>1</sup> and in pleading such right, or in finding the facts upon which to predicate such right, it must appear that the contract was of the character authorizing it, and a general allegation of the existence of such right is insufficient. *Russell v. Cleary*, 105 Ind. 502, 5 N. E. Rep. 414; *Huseman v. Sims*, 104 Ind. 317, 4 N. E. Rep. 42; *State v. McIntosh*, 100 Ind. 439; *Guerin v. Kraner*, 97 Ind. 536; *Berry v. Nichols*, 96 Ind. 290; *Boesker v. Pickett*, 81 Ind. 554; *Thompson v. Ross*, 87 Ind. 157; *Keller v. McMahan*, 77 Ind. 62; *Over v. Shannon*, 75 Ind. 355; *State v. Melogue*, 9 Ind. 196. We

<sup>1</sup>Rev. St. 1888, § 703.

have not been aided by a brief on behalf of the appellees, and we doubt if the point here disclosed was urged upon the able and careful judge of the lower court. However, it is fully presented by the record, and for that reason the judgment is reversed, with instructions to the lower court to sustain the demurrer to the second paragraph of reply.

(159 Mass. 363)

CHIPMAN v. McCLELLAN.

TRADERS' NAT. BANK v. CHIPMAN et al.

(Supreme Judicial Court of Massachusetts. Suffolk. June 22, 1893.)

FRAUDULENT CONVEYANCES—PREFERENCES—CONVEYANCE IN CONTEMPLATION OF INSOLVENCY—WRIT OF ENTRY—QUESTION FOR JURY—INSTRUCTIONS—NATIONAL BANK—COMMIT OF LAWS.

1. In a writ of entry by an assignee in insolvency against the grantee of one of the insolvents it appeared that the grantor and his son were partners; that the former furnished all the firm's capital; that he conveyed the land in dispute to the tenant to secure his note for \$12,000 to a bank, indorsed by the firm; that on the same day a past-due note for the same amount, which was similarly indorsed, was taken up and canceled; that the son had no individual assets, and the father's amounted to less than \$100,000; that the firm owed a past-due note of \$44,500, and notes for \$38,000 matured within 15 days after the deed was made, while its total debts were \$300,000 in excess of its assets. *Held*, that the question whether or not the grantor was insolvent, or contemplated insolvency, at the time of the conveyance, was for the jury, though the firm was not adjudged insolvent until 100 days thereafter.

2. Five days before the deed was made the grantor told the president of the bank what property the firm had; that its affairs were mixed, and it would be impossible to pay the note held by it at that time; and that the president then insisted on further security. Thereafter the latter made no inquiry about the firm or the grantor. *Held*, that whether or not the bank's president had reasonable cause to believe that such firm and the grantor were insolvent, or contemplated insolvency, at the time of the conveyance, was a question for the jury.

3. The court properly refused to instruct that demandant must satisfy the jury, by a fair preponderance of evidence, that such grantor was insolvent when the deed was made, and if he, at that time, was able to meet his obligations in the ordinary course of business, he was not insolvent.

4. The court properly instructed the jury that the test of solvency is not whether, on a postponement of payment and settlement of the trader's affairs, there is property sufficient to pay all his debts, but it is whether he is able, as the debts mature, to pay them as traders usually do, and that if, in order to pay a debt as it comes due, a trader is obliged to transfer a large part of his assets as security for a loan, at the same time leaving his other debts unprovided for, and insufficient assets in his hands to meet them, such payment would not be one in the ordinary course of business.

5. The court properly refused to charge that such deed was made to secure a contemporaneous, and not a pre-existing, debt, and charged that if the note made at the time of the conveyance was given and received in satisfaction of the past-due note held by the bank, and the latter was surrendered and can-

celed, and the interest paid, the parties intending to substitute the new note for the old, it would constitute a payment of the latter note, and if this was done without fraud, and the deed was given and received as collateral to the new note, then the deed was not given to secure a pre-existing debt, and was not in contravention of the insolvent law.

6. If there was an agreement between the grantor and the bank that if the former would convey the land to the tenant, as security for the last note given, the bank would loan to the grantor a sum sufficient to pay the past-due note, and for that purpose he made the deed, received the money, and paid the old note, such conveyance and payment would be the same as if the deed had been made directly to secure the old note, and if the arrangement made was for the purpose of paying an existing debt it was a preference.

7. Rev. St. U. S. § 5137, which provides that a national banking association may hold such real estate "as shall be mortgaged to it in good faith by way of security for debts previously contracted," and such "as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings," does not validate a conveyance to a national bank which is prohibited by the statute of the state relating to insolvency.

Exceptions from superior court, Middlesex county; Daniel W. Bond, Judge.

Report from supreme judicial court, Suffolk county; James M. Morton, Judge.

Writ of entry by George W. Chipman, assignee in insolvency of the joint and several estates of Dudley Hall and Dudley C. Hall, partners doing business under the name of Dudley Hall & Co., against Arthur D. McClellan, to recover possession of certain land; and an action by the Traders' National Bank against such plaintiff and defendant for an injunction restraining such assignee from further prosecuting his case, and for an order directing defendant McClellan to apply the land in dispute to the payment of a certain note of the insolvents, held by the bank, to secure which the land was conveyed by Dudley C. Hall to McClellan. In the writ of entry there was a verdict for plaintiff, and defendant excepted. Exceptions overruled. In the second case the bill is dismissed.

W. B. French, for plaintiff Chipman. A. D. McClellan, pro se. Strout & Coolidge, for defendant Traders' Nat. Bank.

LATHROP, J. The first case is a writ of entry to recover possession of two parcels of land in Medford. The demandant is the assignee in insolvency of the joint and several estates of Dudley Hall and Dudley C. Hall, partners doing business under the name of Dudley Hall & Co., who were adjudged insolvent debtors on March 23, 1891. The tenant claims title under a deed from Dudley C. Hall dated December 15, 1890, and delivered two days later. The tenant was at the time of the conveyance a director of, and counsel for, the Traders' National Bank, and the consideration of the conveyance was an indebtedness from the firm of Dudley Hall & Co. to the bank. At the trial in the superior court the demandant contended that the conveyance was a fraudulent preference, and in fraud of the insolvent law, under Pub. St. c. 157, §§ 96, 98. The case was tried as if the conveyance had been made



directly to the bank, and has been argued before us on this assumption, and we shall so consider it. At the close of the testimony the tenant asked the court to instruct the jury that, upon the whole evidence, the demandant was not entitled to recover. This request raises the question whether there was evidence for the jury on each of these propositions: (1) That, at the time of the conveyance, Dudley C. Hall was insolvent, or in contemplation of insolvency; (2) that he made the conveyance with a view to give a preference to the Traders' National Bank; (3) that the bank then had reasonable cause to believe Hall to be insolvent, or in contemplation of insolvency; (4) that the conveyance was in fraud of the laws relating to insolvency. We are of opinion that there was evidence for the jury on all of these points.

Dudley C. Hall was the father of Dudley Hall, and was 74 years old. He furnished all of the capital of the firm, and attended exclusively to its financial affairs. On October 16, 1890, he borrowed \$12,500 of the Traders' National Bank, giving his own note, indorsed by his firm, on one month's time. At the maturity of this note a demand note was given for the same amount, signed and indorsed in the same manner. Payment of this note was demanded by the bank about December 10, 1890. On December 17, 1890, the demand note was delivered up to Hall by the bank, and canceled. Hall paid the bank the interest then due, and indorsed on the note, "New note December 17, two months,"—the bank entering on its books the payment of the note; and at the same time another note for \$12,500, on two months' time, dated December 17, 1890, was discounted by the bank for Hall. This note was signed and indorsed in the same way. It was secured by shares of stock of a mining company, which had been given as security for the previous notes, and by the conveyance to the tenant of the two parcels of land in controversy in this action. The conveyance was, in effect, a mortgage, there being an agreement to reconvey on payment of the debt. Although payment of the notes of the firm, or of the individual members, was not suspended until March, 1891, there was abundant evidence that the firm and its members were, when the conveyance was made, hopelessly insolvent. The liabilities of the firm were then over \$300,000 in excess of their assets. Dudley Hall had no individual estate, and Dudley C. Hall's individual estate was less than \$100,000, leaving an excess of liabilities over assets of more than \$200,000. The firm owed an overdue note, \$44,500, and notes to the amount of about \$38,000 came due in December, after the date of the conveyance. During the preceding 10 years the firm had lost in speculations, and paid out, over \$500,000 in excess of their profits. Under these circumstances there can be no doubt that there was evidence that the firm and its members were insolvent. *Lee v. Kilburn*, 3 Gray, 594; *Peabody v. Knapp*, 153 Mass. 244, 26 N. E. Rep. 696. While the intent to prefer is essential, and must be proved, the intent may be inferred from the fact that a pref-

erence is given. *Denny v. Dana*, 2 Cush. 172; *Beals v. Clark*, 13 Gray, 18; *Sartwell v. North*, 144 Mass. 192, 10 N. E. Rep. 824. There was evidence that on December 10th Dudley C. Hall told the president of the Traders' National Bank that the affairs of the firm were terribly mixed up, and that it would be impossible to pay the note at that time; that he also told the president what property the firm had; and that the president then insisted on further security, and the conveyance was made. He made no inquiry after that about Dudley Hall & Co. or Dudley C. Hall. While this evidence was contradicted in some particulars, and while there was evidence in favor of the tenant's contention, it was for the jury to say what the facts were. The president of the bank had had 15 years' experience as a bank officer; and he testified that in his experience, as such officer, he did not recall an instance where a tradesman had conveyed a piece of land to a bank as security for a note that the bank held. On the evidence we are of the opinion that it was competent for the jury to find that the president of the bank had reasonable cause to believe that Dudley C. Hall and his firm were insolvent, or in contemplation of insolvency. See *Forbes v. Howe*, 102 Mass. 427; *Bank v. Cook*, 95 U. S. 342.

The tenant further requested the court to instruct the jury that the demandant must satisfy the jury, by a fair preponderance of the evidence, that Dudley C. Hall was insolvent at the time of the conveyance, and that if at that time Dudley C. Hall was able to meet his obligations as they came due, in the ordinary course of business, by resort to the means usual among business men, he was not then insolvent, and the verdict must be for the defendant. The judge declined to give this ruling, and instructed the jury as follows: "A trader is insolvent, within the meaning of the statute, when he is unable to pay his debts as they mature, and become due and payable, in the ordinary course of business, as persons carrying on trade usually do. The test is not whether, upon a postponement of the payment of the debts, and a financial settlement of the trader's affairs, there is property sufficient to pay them all. That is not the test, as applied with reference to an insolvent, within the meaning of the statute. It is whether the trader is able, as the debts mature, and become payable and due, to pay them as traders usually do. The statute does not contemplate that a person should have his property in such a condition that he can, at any and all times, pay his debts in lawful money, but he must be able to pay them as they become due; to meet them as business men usually do. The fact that a person cannot pay without borrowing would not render such a person insolvent, within the meaning of the statute, provided the borrowing for the purpose of paying is in the ordinary course of business, as persons in trade usually do. But if, in order to pay a debt as it becomes due, a trader is obliged to transfer a large part of his assets as security for a loan by means of which he makes payment of that particular debt,

at the same time leaving his other debts not provided for, which are certain to become due, and not leaving sufficient assets in his hands to meet them when they become due, and when he would have no right to expect that he would be able to meet them, such a payment would not be a payment in the ordinary course of business of persons carrying on trade." The charge is not reported in full, and it does not appear that the judge did not fully instruct the jury as to the burden of proof, and in connection with another branch of the case it appears that the judge used this language: "If the plaintiff has satisfied you by a preponderance of the evidence that Hall, at the time of the conveyance, was insolvent," etc. We do not think that it is now open to the tenant to contend that the jury were not instructed that the burden of proof was on the demandant to show that Hall was insolvent at the time of the conveyance. As to the rest of the instruction requested, we are of opinion that it was fully covered by the instructions given, and that these were correct. The jury might have been misled if only the instruction requested had been given.

The tenant requested the court to rule that upon the evidence the conveyance from Hall to the tenant was given to secure a contemporaneous, and not a pre-existing, debt, and that the demandant could not recover. This request was rightly refused; and the question was properly submitted to the jury in connection with the next request, which was, in substance, that if the note of December 17, 1890, was given and received in satisfaction of the demand note of November 18, 1890, and the latter note was thereupon surrendered and canceled, and the interest fully paid,—the parties intending to substitute the new note for the old,—that would constitute a payment of that note, and if this was done without fraud, and if the conveyance to the tenant was given and received as collateral to the note of December 17th, then it was not given to secure a pre-existing debt or claim, and was not in contravention of the insolvent law. The judge, after giving full instructions to the jury as to the elements necessary to be proved to constitute a preference, instructed them that if there was an agreement between Hall and the bank that, if Hall would make the conveyance to the tenant as security for the two-months note, the bank would lend to Hall a sum of money sufficient in amount and for the purpose of paying the demand note, and he made the conveyance, received the money, and paid the demand note, such conveyance and payment by Hall would be the same, in legal effect, as if the conveyance had been made directly to secure the demand note. That giving him credit was the same as paying him the money. That the question was whether the arrangement by which he raised the money and gave this conveyance was for the purpose of paying an existing debt,—the demand note. If that was the purpose, then it was a preference. And that if all the other elements were proved, and the new arrangement was for the purpose

of paying the demand note, the legal effect would be the same as though he made the conveyance for the payment of the demand note, and not for the two-months note. In our opinion the instruction requested did not meet the issues in the case, and the instructions given were correct. In *Crafts v. Belden*, 99 Mass. 535, it was said by Mr. Justice Foster, speaking of the provisions of Gen. St. c. 118, §§ 89, 91, which correspond to Pub. St. c. 157, §§ 96, 98: "The provisions of the statute are as broad and sweeping as possible, and are leveled against the most indirect and circuitous preferences." The law looks to the substance, rather than the form; and if the intent of the parties was to prefer the bank under the guise of a new note, with new security, and the other elements exist, it is no less a preference than would have been the keeping of the old note alive, and conveying the land as additional security.

The tenant further contends that as the bank was a banking association incorporated and existing under the national banking act of the United States the demandants are not entitled to recover, on the ground that Pub. St. c. 157, §§ 96, 98, are in conflict with sections 5136, 5137, Rev. St. U. S. These sections define the powers of a national bank. Under section 5136 it has the power to adopt and use a corporate seal; "to make contracts;" "to sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons;" "to elect certain officers; to make by-laws; and to do a banking business. Section 5137 is as follows: "A national banking association may purchase, hold, and convey real estate for the following purposes, and for no others: First, such as shall be necessary for its immediate accommodation in the transaction of its business; second, such as shall be mortgaged to it, in good faith, by way of security for debts previously contracted; third, such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings; fourth, such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts due to it." An elaborate and able argument has been addressed to us by the counsel for the plaintiff in the second case, in favor of the propositions that to receive such a conveyance as was made in this case is among the powers granted to national banks by the law of the United States; that such a conveyance is prohibited by the law of this Commonwealth; and that, therefore, the law of the state is inoperative and void as to a national bank, and the tenant has a good title to the land. We do not accede to this view of the law, but regard the enumeration of the powers conferred upon national banks by the sections above cited as defining the extent and limitations of their powers in a general way. If they act in excess of their powers, no one but the government can complain. *Bank v. Whitney*, 103 U. S. 99; *Reynolds v. Bank*, 112 U. S. 404, 5 Sup. Ct. Rep. 213. If they act within the powers designated, the legality of their action is still to be determined.

Thus section 5186 gives to national banks the power to make contracts, but it cannot be contended that they therefore have the power to make a contract which is illegal by the law of the state where the contract is made. Indeed, as is said by Mr. Justice Miller in *National Bank v. Com.*, 9 Wall. 353, 362, speaking of national banks: "They are subject to the laws of the state, and are governed, in the daily course of business, far more by the laws of the state than of the nation. All their contracts are governed and construed by state laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on state law. It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional." See, also, *Waite v. Dowley*, 94 U. S. 527. In *Bank v. Hunt*, 11 Wall. 391, the question of the validity of a mortgage to a national bank turned on the point whether it was recorded in accordance with a state law. It is also to be noticed that under section 5137, cl. 2, a national bank is authorized to hold real estate only when it is "mortgaged to it, in good faith, by way of security for debts previously contracted." The title of the bank to land must be determined by the law of the state in which the land is situated; and if a mortgage to it is not in good faith, by the state law, the bank gets no title. *Witters v. Sowles*, 32 Fed. Rep. 758. We find nothing in the act of congress which countenances the defendant's contention that congress intended that a national bank should have power to acquire land in fraud of our insolvent law. In the first case the order must be, exceptions overruled.

The second case is brought against the demandant and the tenant in the first case, and seeks to restrain the first-named defendant from the further prosecution of the first case, and to direct the other defendant to apply the parcels of land to the payment of the promissory note mentioned in the first case. The ground of the proceedings is the contention which we have last discussed in the first case; and, as this has been decided against the contention of the bank, there is no ground for sustaining the present bill. Bill dismissed.

(159 Mass. 233)

**BOSTON & A. R. CO. v. CITY OF CAMBRIDGE.**

(Supreme Judicial Court of Massachusetts. Middlesex. June 21, 1893.)

**EMINENT DOMAIN—COMPENSATION—RAILROAD CROSSINGS.**

1. Where a highway is laid out across a railroad the railroad company is entitled to compensation for the fair value of the land taken, subject to its use for railroad purposes.

2. Under Pub. St. c. 112, § 128, providing that, where a highway is laid out across a railroad, all expenses of, and incident to, constructing and maintaining the way at such crossing, shall be borne by the county, city, town, or other owner of the way, the railroad company is entitled to be compensated for the expenses of

erecting and keeping in repair the appliances and structures required by law at the new crossing.

3. Where gates are by law required at the crossing, the company is not entitled to compensation for the cost of operating the same, as such cost is properly chargeable to the ordinary expenses of operating the railroad.

4. The purpose of Laws 1853, c. 151, § 1, providing that the city council of Cambridge shall have power to determine whether a certain railroad shall cross at grade the streets of the city, and what securities shall be provided and maintained by the railroad company at such crossings, was merely to rescind the provision of Laws 1848, c. 296, § 2, that the railroad should not pass certain highways at grade, and did not authorize the city council to pass an ordinance permitting the railroad to cross the streets of the city on grade on the condition that, where streets were thereafter laid out across the road of the company, it would, at its own expense, set up and maintain gates at each crossing.

Report from superior court, Middlesex county; Daniel W. Bond, Judge.

Proceeding by the Boston & Albany Railroad Company to assess the damages caused by the laying out of a street in the city of Cambridge across petitioner's road. A verdict was rendered, fixing the damages, and upon the verdict, and the proceedings upon which it was based, the case was reported to the supreme court for its consideration. Judgment on verdict ordered.

Saml. Hoar, for petitioner. C. J. McIntire, for respondent.

**BARKER, J.** This petition for the assessment of damages caused by the laying out of Front street, in Cambridge, across the petitioner's railroad, on July 20, 1888, under St. 1882, c. 155, and St. 1887, c. 282, comes before us upon a report from the superior court presenting questions raised by both parties.

1. Considering first the respondent's contention that the laying out of a highway across an existing railroad is not such an appropriation of individual property to public uses as to require that the owner shall receive a reasonable compensation therefor, the contrary doctrine is well settled in this commonwealth, and we see no occasion to re-examine at length the grounds upon which it has been placed. *Parker v. Railroad Co.*, 3 Cush. 107, 113; *Boston & L. R. Co. v. Salem & L. R. Co.*, 2 Gray, 1; *Central Bridge v. Lowell*, 4 Gray, 474; *Old Colony & F. R. R. Co. v. Plymouth Co.*, 14 Gray, 155; *Grand Junction Railroad & Depot Co. v. Commissioners*, Id. 563; *Massachusetts Cent. R. Co. v. Boston, C. & F. R. Co.*, 121 Mass. 124. See, also, *Morris Canal & Banking Co. v. State*, 24 N. J. Law, 62, 70; *Philadelphia, W. & B. R. Co. v. Philadelphia*, 9 Phila. 563, 567; *Northern Cent. R. Co. v. Baltimore*, 46 Md. 425; *Detroit v. Detroit & H. Plank-Road Co.*, 43 Mich. 140, 5 N. W. Rep. 275; *Railway Co. v. Sharpe*, 38 Ohio St. 150; *Chicago & N. W. R. Co. v. Chicago*, (Ill. Sup.) 29 N. E. Rep. 1109. Assaid by Judge Cooley in *Detroit v. Detroit & H. Plank-Road Co.*, ubi supra, "It cannot be necessary, at this day, to enter upon a discussion in denial of the right of the government to take from either individuals or corporations

any property which they may rightfully have acquired." Evidence of the value of the land taken was relevant, and rightly admitted, and the ruling that the petitioner was entitled to recover for the fair value of its land taken, subject to its use for railroad purposes, was correct.

2. The other elements of damages allowed in the verdict may be classed together, as the expense of making and maintaining in repair the appliances and structures designed to make the crossing safe and convenient for the traffic of the railroad and of the highway. It is the duty of the petitioner, under the statutes and the order of the board of railroad commissioners, to make and keep in repair the planking, paving, cattle guards, fences, signboards, and posts, and the gates; and there was also evidence tending to show that the gatehouse and fences were necessary, in fact. Aside from the gates and the gatehouse, the expenses of making and maintaining all these structures and appliances were held in *Old Colony & F. R. R. Co. v. Plymouth Co.*, 14 Gray, 155, to be proper elements of damage; and the expenses of erecting and maintaining the gates—and of the gatehouse, if it was a necessary structure—are within the reason of that decision, and also of the rule given in *Massachusetts Cent. R. Co. v. Boston, C. & F. R. Co.*, 121 Mass. 124, that a railroad corporation, across whose road a highway is laid, has the right "to recover damages for the injury occasioned to its title or right in the land occupied by its road, taking into consideration any fences or structure upon the land, or changes on its surface, absolutely required by law, or in fact necessary to be made by the corporation injured, in order to accommodate its own land to the new condition." This requires us to allow in favor of the petitioner all the elements included in the verdict, unless we decline to follow those decisions. In discussing that question we assume that all these expenses belong to the class which the legislature has the right to impose without consideration, either upon the railroad company, or upon the instrumentalities charged with building and repairing highways; and this irrespective of any reserved right to amend corporate charters, or to control mere agencies of the government. *Thorpe v. Railroad Co.*, 27 Vt. 140; *Munn v. Illinois*, 94 U. S. 113; *Bear Co. v. Massachusetts*, 97 U. S. 25; *Stone v. Mississippi*, 101 U. S. 814; *Butchers' Union, etc., Co. v. Crescent City, etc., Co.*, 111 U. S. 746, 4 Sup. Ct. Rep. 652; *Com. v. Intoxicating Liquors*, 140 Mass. 287, 3 N. E. Rep. 4; *Veazie v. Mayo*, 45 Me. 560; *Railroad Co. v. Deering*, 78 Me. 61, 2 Atl. Rep. 670; *Boston & M. R. Co. v. County Com'rs*, 79 Me. 386, 10 Atl. Rep. 113. How such burdens shall be distributed is a question of practical economics, within the province of legislation. Such expenses imposed upon railroad corporations, if charged to operating expenses, are defrayed in payments of fares and freights by those who use the railroad, while, if imposed upon municipalities, they are paid out of the taxes. Which course places the burden where it ought to rest is fairly a legislative question. The fact that the

safety of railroad traffic requires that the railroad company only shall be allowed to do work within the lines of its location has constantly tended to induce legislatures to impose upon railroad companies the duty of maintaining the roadway and all structures and appliances necessary for safety and convenience at such crossings, and in some states the courts have refused to allow the cost of making or maintaining such structures as an element of damages to be recovered by railroad corporations for the crossings of railroads by highways. In Maine, if a new way is laid across an existing railroad at grade, the statute directs that the expense of building and maintaining so much of the way as is within the limits of the railroad shall be borne by the railroad company. *Rev. St. Me. 1883, c. 18, § 27; St. 1878, c. 43, § 1; St. 1883, c. 167, § 2*. But at common law the crossing of a new way with one already in use must be made with the least possible injury to the old way, and whatever structures are necessary must be erected and maintained at the expense of the party making the new way, and if the old way cannot be crossed without damage the damage must be ascertained and paid. *Perley v. Chandler*, 6 Mass. 454; *Richardson v. Bigelow*, 15 Gray, 156; *Lowell v. Proprietors*, 104 Mass. 22; *King v. Kent*, 13 East, 220; *King v. Lindsey*, 14 East, 317, 320; *King v. Kerrison*, 3 Maule & S. 526, 532; *Morris Canal & Banking Co. v. State*, *obisupra*; *Northern Cent. R. Co. v. Baltimore*, *obisupra*.

A brief historical statement will show that the cases which we are asked to reconsider are, so far as they support the verdict rendered in the present cause, not only consonant to the principles of the common law, but that they are in accord with, and give a practical operation to, the expressed will of the legislature. The earlier railroad charters of this commonwealth required railroad companies to construct and maintain the crossings of existing ways, canals, and navigable waters, and were silent as to the laying out of new ways across railroads. See *St. 1825, c. 183; St. 1829, cc. 25, 93, 94; St. 1830, c. 4; St. 1831, cc. 27, 55-57, 72; St. 1832, cc. 49, 97; St. 1833, cc. 109, 116, 118; St. 1835, c. 111*. All but the first two contained a provision, since made part of the General Laws, that the commonwealth might purchase the road upon a 10 per cent. basis, (see *Rev. St. c. 39, § 84; Gen. St. c. 63, § 138; St. 1874, c. 372, § 180; Pub. St. c. 112, § 7*;) and the presence of this provision implies that the legislature will discriminate with some care in imposing upon the corporations burdens which may diminish the value of the reserved rights of the commonwealth. In the general acts defining the rights and duties of railroad corporations, passed before the adoption of the Revised Statutes, (*St. 1833, c. 187; St. 1834, c. 137; and St. 1835, c. 148*;) the cost of alterations of existing ways to facilitate their crossing at different levels or otherwise was imposed upon the railroad corporations, (*St. 1833, c. 187, §§ 5, 6*;) and it was made their duty to ring the bell, and to place and maintain signboards, at each crossing, and, if necessary for the security

of the public, to erect gates across the railroad, with an agent to open and close them, (St. 1835, c. 148, §§ 4-6.) These provisions were substantially re-enacted in Rev. St. c. 39, with a new provision, (Rev. St. c. 39, § 69,) that if, after the making of a railroad, a new way should be laid across it, the way should in all cases be so made as not to obstruct or injure the railroad. St. 1842, c. 22, gave county commissioners power to require railroad companies, at their own expense, to separate the grades at any crossing. St. 1846, c. 271, forbade the construction of crossings at grade, unless by authority of the county commissioners, in which cases they were to prescribe the manner of constructing the crossing, and might order gates, and an agent to operate them. This statute also imposed upon railroad companies the duty of erecting and maintaining fences and cattle guards. St. 1849, c. 222, extended the provisions requiring signboards, and providing for the ordering of gates, to all grade crossings of any way or traveled place, and allowed county commissioners to direct the gates to be built across the way, instead of across the railroad, and also gave them original jurisdiction of all questions touching obstructions to ways by the construction or operation of railroads.

This was the state of the statute law when the rights of the parties to the earlier of the two petitions which were before the court in the case of *Old Colony & F. R. R. Co. v. Plymouth Co.*, *ubi supra*, were fixed by the laying out of a highway across the railroad, in January, 1852; the petition for damage having been filed on June 30, 1852. The other highway, for the laying out of which damages were claimed in that case, was laid on December 17, 1855, and before that date two additional general laws had been enacted. St. 1854, c. 401, authorized county commissioners, upon the petition of any party, for the better security of life, or convenience of travel, to alter the location and construction of gates at railroad crossings; and St. 1855, c. 350, required railroad companies, before constructing any crossing, to obtain a decree of the county commissioners prescribing the alterations to be made, and to give security for the performance of the decree, and also empowered the commissioners to decree alterations and repairs to be made by the railroad company, at its own expense, at any crossing, and gave cities and towns the right to recover all damages, charges, and expenses incurred by reason of the neglect or refusal of a railroad company to erect or keep in repair structures ordered or necessary at a crossing. While both of the petitions referred to were pending, and before the hearing in this court, St. 1856, c. 245, authorized the stationing of flagmen at crossings, and St. 1857, c. 287, dealing explicitly with the subject of laying turnpike and other ways across existing railroads, was also enacted. This statute provided that no such way should be laid across a railroad, except by the county commissioners, or by their permission, and upon notice to the railroad company, and that "all the expenses arising

from, and incident to, the construction and maintaining of the way across the railroad," were to, "in all cases, be borne by the county, city, town, or corporation whose duty it is to build and maintain such way." By the same statute, (section 6,) if the way crossed the railroad on a level therewith, the railroad corporation was required, at its own expense, to so guard or protect the rails as to secure a safe and easy passage across the railroad; and if a subsequent alteration of the way, or additional safeguards, were required at the crossing, the commissioners could order the railroad company to establish them. The cases reported in 14 Gray, 155, were argued in January, 1859; and the decision was announced in the following December, just before the final enactment of the General Statutes. But the report of the revising commissioners, containing, in chapter 63, § 57, the provision that "all expenses of, and incident to, constructing and maintaining the road or way at such crossing, shall be borne by the county, city, town, or corporation owning the same," was submitted on December 15, 1858. This provision has from the time of its enactment in 1857 been in substance a part of the general statute law; being found in Gen. St. c. 63, § 57, and incorporated in the general railroad act of 1874, as a part of section 95, St. 1874, c. 372, and re-enacted in Pub. St. c. 112, § 128. In the mean time the case of *Massachusetts Cent. R. Co. v. Boston, C. & F. R. Co.*, (decided in October, 1876,) 121 Mass. 124, had shown that this court adhered to the doctrine promulgated in 1859; and the legislature has not only given no sign of any intention to change the rules thus laid down, but has again re-enacted in the Public Statutes the provision that, when a way is laid across an existing railroad, "all expenses of and incident to constructing and maintaining the way at such crossing shall be borne by the county, city," or town. The opinion of the court in the cases reported in 14 Gray, 155, does not refer to this statute provision, which did not control those cases, because it was enacted after the rights there adjudicated had become fixed. The decision referred to rests upon the common-law doctrines above stated; and not only is it in harmony with the statute so often re-enacted, and yet in force, but the application of its doctrine by the courts is the only way in which the statute is given practical operation. It is only by allowing the expense of erecting and maintaining the appliances and structures necessary and required at the new crossing to be taken into account in the assessment of the damages done to the railroad company by the laying out of the way that the statute which says that those expenses are to be borne by the county, city, or town is given practical effect. For us, under such circumstances, to overrule the decisions referred to, would be to go contrary to the repeatedly expressed will of the legislature in a matter peculiarly subject to its control.

3. The petitioner contends that it is also entitled to have the cost of the operation of the gates, a reasonable compensation for which was found by the jury to be the

sum of \$14,875, included in its damages, and added to the verdict. In one sense the cost of operating the gates, like that of ringing the bell for the crossing, or of keeping a flagman to give notice of the approach of trains, is an expense arising from, and incident to, maintaining the way across the railroad; and it might, perhaps, without much strain, under the principles of the common law, and under the language of St. 1857, c. 287, and of its re-enactments, be considered as a fair element of damages. So, also, might the increased expense of ringing the bell, which was held not to be an element of damages in both of the former decisions; and so might the expense of maintaining a flagman, which was held inadmissible in the latter decision, both because the order to maintain the flagman might be changed, and because it was made since the time of the location, by relation to which the damages must be assessed. But all these things are, in a fair sense, part of the operation of the railroad, and are more properly chargeable to ordinary operating expenses than is the cost of erecting and keeping in repair the permanent structures and appliances at the crossing. They may well be classed with the inconveniences occasioned to the business of the railroad by the use of the crossing, which were held not to be proper elements of damages in *Massachusetts Cent. R. Co. v. Boston, C. & F. R. Co.* Upon the whole, we are not inclined to add this element of the cost of operation to those of the cost of construction and maintenance, and we hold that the cost of operating the gates is not an element in the damages to be assessed.

4. At the place where Front street now crosses the petitioner's railroad a railroad was first located and constructed by the Union Railroad Company, chartered by St. 1848, c. 296. By the second section of this charter it was provided that the railroad should not pass at the same level any highway or avenue to Boston. But by St. 1853, c. 151, § 1, the city council of the city of Cambridge was given full power to determine in what manner that railroad should be constructed across the streets within the city of Cambridge,—whether at grade or otherwise,—and what securities should be provided and maintained by the railroad company at such crossings. There was evidence tending to show that upon a petition of the directors of the Union Railroad Company, asking the city council of Cambridge to determine the manner of constructing the railroad across the streets in Cambridge, and what securities should be provided and maintained by the railroad company agreeably to St. 1853, c. 151, the city council, in the year 1854, permitted the railroad to cross the streets and avenues within the city upon condition that the company should provide, set up, and maintain, at its own expense, gates, wherever the railroad crossed the streets and avenues leading to Boston, or streets which should thereafter be laid out within the city of Cambridge, and one or more men at each

crossing to take charge of the gates, and to warn travelers of the approach of trains. By St. 1866, c. 278, the Boston & Worcester Railroad Corporation was authorized to purchase, among other railroad properties, the railroad, property rights, and franchises of the Union Railroad Company, and in default of such purchase within three months from May 28, 1866, to take, with other property, the Union Railroad, with all the franchises, locations, lands, and material thereto belonging and appertaining, and to locate, construct, and maintain thereon a railroad, the termini and courses of which were specified in the statute. The purchase was not made, and, on November 22, 1866, the Boston & Worcester Railroad Corporation exercised its power to take the Union Railroad, and filed a location of the railroad which by the statute it was authorized to locate, construct, and maintain, and which is the railroad across which Front street was laid by the respondent. At the point where Front street crosses this railroad its location coincides with the location filed by the Union Railroad Company. After the taking and the filing of the location by the Boston & Worcester Railroad Corporation in 1866, that company accepted a conveyance, dated on May 19, 1869, of the Union Railroad, including all the franchises, locations, lands, and material thereto belonging and appertaining, which conveyance recited that it was intended not to waive, but to confirm, the title and rights acquired by the Boston & Worcester Railroad Corporation by its taking and location above stated. The petitioner is the successor of the Boston & Worcester Railroad Corporation, under the provisions of St. 1867, c. 270. The respondent contends that these circumstances preclude the petitioner from recovering damages for the laying out of Front street across its railroad. In deciding this question we do not find it necessary to determine the effect of the new location, made under St. 1866, c. 278. In our opinion the whole office of section 1, c. 151, St. 1853, was to rescind the prohibition of St. 1848, c. 296, § 2, against grade crossings, and to give to the city council the power, theretofore in the county commissioners under general laws, to fix the details of the crossings, and to determine what securities should be provided and maintained by the railroad company. We see no reason to believe that it was intended, in case new streets should be laid out across the railroad, to provide that the damages to be awarded to the railroad company should be assessed otherwise than by the settled rule, or to abrogate, as to these crossings, the general statute which ordained that in such cases all expenses of and incident to constructing and maintaining the way at such crossings should be borne by the city.

5. We see no error either in the admission or rejection of evidence, or in the minor rulings, which, in the view we have taken of the case, should require a new trial. Judgment on the verdict.

(133 N. Y. 552)

PEOPLE ex rel. JOHN A. ROEBLING'S  
SONS' CO v. WEMPLE, Comptroller.(Court of Appeals of New York. June 30,  
1893.)TAXATION OF CORPORATIONS — EXEMPTIONS — AS-  
SESSMENT BY COMPTROLLER.

1. A foreign manufacturing corporation, bringing wire from its factory into this state, and here fitting it with hooks and loops to adapt it for sale, is not a corporation carrying on manufacturing in this state, within the meaning of Laws 1880, c. 542, § 3, exempting such corporations from taxation. 18 N. Y. Supp. 504, affirmed.

2. In determining the capital of a corporation for the purpose of general taxation, the true value of its corporate assets, less its debts, and not the market value of the shares, is to be considered.

3. In assessing taxes on real estate owned by a corporation the comptroller is not bound by the value placed thereon by local assessors.

4. Where a corporation fails for 10 years to comply with the statute requiring annual reports to be made to the comptroller, the assessment made by the latter in the absence of such report should not be disturbed, unless it clearly appears unjust, or based on an erroneous principle. 18 N. Y. Supp. 504, affirmed.

Appeal from supreme court, general term, third department.

Certiorari, on the relation of the John A. Roebling's Sons' Company to review the proceedings of Edward Wemple, comptroller of the state of New York, in assessing taxes on the relator, and in refusing a readjustment thereof. From an order of the general term (18 N. Y. Supp. 504) affirming the action of the comptroller, relator appeals. Affirmed.

Duncan Edwards, for appellant. S. W. Rosendale, Atty. Gen., for respondent.

O'BRIEN, J. The court below has confirmed the action of the state comptroller in assessing taxes under the corporation tax law, upon the relator, for the years 1880 to 1889, inclusive, and the question presented by this appeal is whether the record discloses any error of law in the proceedings. The relator is a manufacturing corporation created by the laws of the state of New Jersey. It has an office and place of business in the city of New York, and its real estate there has an assessed value of \$72,000. The principal, if not the sole, ground urged in support of the appeal, is that during all the years for which the tax complained of was imposed by the comptroller the relator was a manufacturing corporation carrying on its manufacturing business within this state. If this contention be sustained, as matter of fact, then it would follow that the tax in question was improperly imposed, for the reason that corporations so engaged are expressly exempted from the tax, by the terms of the statute.<sup>1</sup> The relator's charter, obtained under the laws of New Jersey, contemplated that its

manufacturing operations should be carried on within that state, and not elsewhere. The articles of incorporation state "that the city of New York, in the county and state of New York, is the place where said company may have an office and store for the sale of their manufactured goods, and for the transaction of other business connected therewith," and by a subsequent amendment made thereto in 1888 it was further provided that the portion of relator's business which may be carried on out of that state "is the buying and selling of materials, the making of contracts, the sale of the manufactured products of the said company, and the transaction of business incident thereto." The charter of the corporation is the measure of its powers, and from these provisions it would appear that it could not in fact have been engaged in manufacturing within this state during the years mentioned without disregarding the limitations upon its powers imposed by the law of its creation. While this consideration may not be conclusive in the determination of the question, yet it may well be presumed, in the absence of clear and satisfactory evidence to the contrary, that the relator is not engaged in a business in this state in violation of its charter, and which would subject it to dissolution in the jurisdiction of its creation. The business for which the corporation was organized, as appears from the certificate of incorporation, is "the manufacture, buying and selling of iron, steel, wire, wire rope, and all other materials used in connection therewith." In the petition for the writ of certiorari the relator does not allege that it manufactures any iron, steel, or wire within this state. It does allege, in a very general way, that during the years referred to it has been engaged in carrying on manufacturing here, where "wire rigging, endless chains, etc., and other useful articles, have been manufactured." If these operations could be held to constitute manufacturing, within the meaning of the statute, they would cover a little more than 1 per cent. of its whole business. The comptroller, in his return to the writ, states with more precision just what these operations consist of. It is there alleged that the building which the relator occupies in the city of New York is not occupied or used as a factory, but for its offices and general place of business, and the storage of its goods; that on each of the storage floors two or three men are employed in adapting the manufactured articles to such purposes as may be required, such as attaching loops to wire ropes for use as switching rods, attaching hooks and loops to wire cables for various purposes, and that no wire or wire rope or any other article is manufactured here. On the relator's own showing, the wire is all manufactured in New Jersey, and sent to New York in coils, and there some operations are performed, involving the employment of labor, to fit the goods for the market. There is but little if any conflict between the statements of the petition and the return, and the latter may be considered as an amplification of the former, and in this court the return is conclusive. *People v. Fire Com-*

<sup>1</sup>Laws 1880, c. 542, § 3, provides that every corporation incorporated or organized by or under the laws of any other state or county, doing business in this state, except manufacturing corporations carrying on manufacturing within this state, shall pay a tax.



missioners, 73 N. Y. 437. On these facts we think it cannot be held that the relator is engaged in the business of manufacturing in this state, within the true intent and meaning of the statute, and hence was not entitled to the exemption from taxation which the statute grants to corporations so engaged. When it is apparent that all that is done here by a foreign corporation organized for manufacturing purposes and engaged in such business in the state of its creation, consists of some incidental additional work to its manufactured products sent here from the other state, where its actual manufacturing operations are authorized by its charter, and carried on,—such as may be conveniently and suitably added at the place where the goods are exposed for sale,—this is not carrying on the business of manufacturing, within the meaning of the statute. Such a corporation cannot send its manufactured products here in an incomplete state, and then, by putting the several parts together, and by adjusting them to each other, or by performing some comparatively slight operation upon the article, or on the parts of which it is composed, though it may involve necessary labor before suitable for use or sale, and thereby entitle itself to exemption on the ground that it is carrying on a manufacturing business. The courts will not give to the language of the statute which confers the exemption any strained or unnatural construction, but it must be made to appear that actual manufacturing operations are carried on here, in the ordinary sense and meaning of the law. *People ex rel. Seth Thomas Clock Co. v. Wemple*, 133 N. Y. 323, 31 N. E. Rep. 238. While there is no reason to impute bad faith to the relator, or any intent to evade the statute, yet we think that the court below correctly held, upon the facts, that it was not entitled to the benefit of the exemption. The tax assessed upon the relator for the 10 years was \$9,403.79. The jurisdiction to tax, and not the measure of taxation, was the question presented to the comptroller. The relator had full opportunity to be heard as to the amount of the tax before it was imposed, and even after that, upon an application for a readjustment on the ground that it was excessive; but it does not appear that it made any complaint on that ground before the officer whose duty it was to make the assessment, with the exceptions which will be presently referred to. His determination as to the amount of the tax should not be disturbed now, unless it clearly appears to be erroneous. *People ex rel. American Contracting & Dredging Co. v. Wemple*, 129 N. Y. 558, 29 N. E. Rep. 812; *People ex rel. Southern Cotton Oil Co. v. Wemple*, 131 N. Y. 64, 29 N. E. Rep. 1002; *People ex rel. Seth Thomas Clock Co. v. Wemple*, supra.

The basis of the tax was the amount of the relator's capital employed within this state. This was ascertained by computing the value of the stock in trade here during the year in question, its other personal property, the average monthly bank balance, the rentals paid, and the value of the real estate owned and used in its business here. These were all proper ele-

ments to be considered in determining what portion of the capital was employed within this state. Without regard to the details from which the basis of the tax was made up, we think it sufficient to say that in the relator's petition it appears that but two objections were made to the manner in which the capital stock employed in this state was ascertained. These were: (1) That the comptroller erred in estimating the capital stock so employed at the actual value of the property, instead of the value of the shares at par; and (2) that the value of the real estate was fixed, not according to the assessment made by the local assessors, but according to the judgment of the comptroller himself, which is said to be an arbitrary estimate. In determining the actual capital of a corporation for the purpose of general taxation, the true value of its corporate assets, less the debts and obligations, and not the market value of the shares, is the rule of assessment. *People v. Coleman*, 126 N. Y. 433, 27 N. E. Rep. 818. If the statute under which the comptroller proceeded prescribes a different method, it does not appear that its adoption would result more favorably to the relator, or that an excessive tax has resulted from the course pursued. With respect to the real estate, he was not bound by the value placed upon it by the local assessors. He is made by the statute an assessor himself, and he had a right to estimate its value according to such information as he could obtain, or upon his own judgment. Moreover, it should be observed that the relator neglected or refused to comply with the statute which requires it to make annual reports to the comptroller. The first report made was in 1891, and then only under the coercive measures adopted by the comptroller, and which did not, in many material particulars, comply with the statute. The position of the relator was that it was not subject to taxation for any sum whatever, and the comptroller was thus obliged to get at the facts as best he could. The statute proceeds upon the theory of permitting corporations, in the first instance, to assess themselves by their annual report. If this is fairly made in compliance with the law, the comptroller should, and no doubt in most cases does, adopt it, and he proceeds to make the assessment himself only in those cases where no report is made, or where he has good reason to believe that it is not correct. When the corporation makes a fair report at the time required by law, it has no reason to fear any unjust or oppressive action on the part of the state; but when, after the lapse of 10 years, the officer charged with the duty of collecting the tax is obliged to make the assessment, and obtain the necessary information, his action should not be disturbed unless it clearly appears to be unjust, or based upon some erroneous principle. The relator has never given to the state authorities its own estimate of the burden which should be imposed under the law, except to deny all liability whatever, and after a careful examination of the record we are not able to say that any legal principle has been violated, or

any injustice done. For these reasons we think the order appealed from should be affirmed, with costs. All concur, except MAYNARD, J., not sitting.

(138 N. Y. 650)

SWEET v. MOWRY et al.

(Court of Appeals of New York. June 13, 1893.)

JUDGMENT PURSUANT TO REMITTITUR—RECALL OF REMITTITUR—EFFEOT.

Where, after a recall of a remittitur by the court of appeals, and a reargument, the original decision is adhered to, and the remittitur returned to the lower court, with an order annexed repeating the terms of the former adjudication, and giving "costs in this court," the orders and judgments entered below on the first remittitur are unaffected by the latter proceedings in the court of appeals.

Appeal from supreme court, general term, fourth department.

Action by William A. Sweet against Henry J. Mowry, the city of Syracuse, and others. From a judgment of the general term (20 N. Y. Supp. 924) modifying and affirming a judgment allowing defendants separate bills of costs, an order refusing to vacate the same, and an order denying a motion to modify a judgment for costs in the court of appeals, plaintiff appeals. Affirmed.

This action was brought by plaintiff, as a taxpayer of the city of Syracuse, under Code Civil Proc. § 1925, as supplemented by Laws 1881, c. 531, and Laws 1887, c. 673, against the city of Syracuse, its mayor, clerk, treasurer, the members of the common council, and the members of the water board, to perpetually restrain them from carrying into effect or exercising any of the powers conferred by Laws 1889, c. 291, as amended by Laws 1890, c. 314. Defendants the city and its officers appeared and answered by the law officer of the city, the corporation counsel, and the defendants constituting the water board appeared and answered by the attorneys for the water board. The special term dismissed the complaint, and awarded separate bills of costs to the defendant the city of Syracuse, and to the defendants constituting the water board. 11 N. Y. Supp. 114. From this judgment the plaintiff appealed, and the general term modified the judgment of the special term, with costs to the plaintiffs. 14 N. Y. Supp. 421. Thereupon both plaintiff and the defendants appealed to the court of appeals, which court reversed the judgment of the general term, and affirmed that of the special term, with costs. 27 N. E. Rep. 1081. Theresafter, two judgments for costs were entered,—one by the attorneys for the water board, and one by the attorney for the city and its officers. On October 27, 1891, the court of appeals, upon an application made by plaintiff, granted an order for reargument, and requested the supreme court to return the remittitur. 29 N. E. Rep. 149. On the 4th day of November, 1891, the supreme court granted an order returning the remittitur to the court of appeals. Upon the reargument in the court of appeals the judgment of the special term

was again affirmed, and that of the general term reversed with costs in the court of appeals to the defendants. 29 N. E. Rep. 289. The first remittitur was never vacated or annulled, but was returned to the Onondaga county clerk's office after the reargument, where that, together with a second remittitur sent down after the reargument, is on file.

Charles H. Peck, for appellant. C. L. Stone, for respondents.

GRAY, J. The granting of the motion for a reargument, and requesting the return of the remittitur, were in resumption of our jurisdiction, and had no effect whatever on the proceedings already had in the court below upon the remittitur. After the reargument was had, our decision remained unchanged, and the record returned to us went back with a further remittitur, ordering and adjudging as in the first remittitur, and granting costs in this court. This left the orders and judgments below, entered upon the first remittitur, unaffected, as the result of the further proceedings in this court. The second order of this court upon the reargument of the case was simply a reaffirmance of our former decision, and was not, as the appellant argues, a new and exclusive decision of the appeal. The resumption by this court of its jurisdiction of the appeal operated simply to suspend proceedings in the courts below. We acquired thereby the power to alter our former judgment; but this we did not do, and there was nothing in the second remittitur to indicate that we did. Our first adjudication, as evidenced by the remittitur, was retained, and again remitted to the court below, with an order annexed, which repeated the terms of the former adjudication, and then gave costs in this court. That award of costs related, obviously, to the second argument in this court. To warrant the supposition that the provisions of the remittitur were altered by our subsequent decision, there should be some language expressive of that result. The order should be affirmed, with costs separately to respondents. All concur.

(138 N. Y. 557)

In re ARGUS CO.

CASSIDY et al. v. MANNING et al.

(Court of Appeals of New York. June 27, 1893.)

CORPORATIONS—ELECTION OF DIRECTORS—DETERMINATION OF VALIDITY—PROCEDURE—CONSTRUCTION OF CONTRACT—RIGHT TO VOTE STOCK—INJUNCTION.

1. Under Gen. Corp. Law 1892, § 27, making it the duty of the supreme court, upon application of "any person or corporation" aggrieved by any corporate election, to determine the rights of the parties, the fact that, on petition by two stockholders to determine the validity of the election of directors, the corporation was joined as petitioner without authority does not affect the petitioner's rights.

2. In such proceeding, an order to show cause may be made by a judge out of court, though under such section the hearing is to be by a judge in court.

3. The order to show cause was returnable at a special term, held with a circuit and a court of oyer and terminer. Sup. Ct. Rule 38 provides that a contested motion shall not be noticed or brought for hearing at such a term. *Held*, that the rule does not prevent a judge holding a special term and a circuit at the same time, hearing such motion, if, in his opinion, the interests involved render it necessary for him to do so.

4. A purchaser of stock in a corporation is not affected by an unenforced equity growing out of an agreement of the seller not to sell the stock without giving the other party to the agreement an opportunity to purchase it, though the purchaser had notice of the agreement.

5. The agreement provided that it should terminate when either of the parties thereto should have parted with his interest. *Held* that, where a party to the agreement indorsed on her certificate of stock a transfer of the stock to her sons, with the knowledge of the other parties to the agreement, and the transfer was noted on the stock book of the corporation, the agreement was terminated, though no new certificate of stock issued to the sons.

6. A general notice to directors of a corporation of a meeting, not specifying the business to be transacted, is all that is necessary to authorize the transaction of the ordinary business affairs of the corporation.

7. Stock sold under an executory contract, the payment being conditioned on the transfer of the stock, may be voted by the seller, where the condition had neither been performed nor waived on the day the stock was voted.

8. At a lawful meeting of the directors of a corporation a new stock book of the corporation was adopted. An injunction was obtained forbidding the inspectors on an election of directors to use such stock book at such election. Gen. Corp. Law 1892, § 20, provides that, if the right to vote at such election is challenged, the inspectors shall use the company books, "if they can be had," to determine the right of the person challenged to vote. *Held* that, as the election itself was not enjoined, and the new stock book was not used, there was no violation of the injunction, there being no order compelling the use of the old stock book, and by the injunction the new stock book being as if it could not be had.

Appeal from supreme court, general term, third department.

Petition in behalf of the Argus Company and W. H. Johnson and William R. Cassidy to determine the validity of the election of directors of the corporation. From a judgment for petitioners, James H. Manning, Frederick C. Manning, and John A. Delehanty appealed to the general term, when judgment was affirmed, and they again appeal. Affirmed.

E. Countryman and E. J. Meegan, for appellants. Matthew Hale, Wm. N. Cohen, R. A. Parmenter, and Geo. L. Stedman, for respondents.

ANDREWS, C. J. By the order of Judge Parker, made at the Ulster circuit and special term on the 28th day of April, 1893, it was adjudged that William H. Johnson, William R. Cassidy, and William McM. Speer were duly elected directors of the Argus Company at the meeting of stockholders held on the 14th day of April, 1893, and that James H. Manning, Frederick C. Manning, and John A. Delehanty, who claimed to have been elected directors at said meeting, were not so elected, and they were enjoined from acting as directors, and required to deliver to the persons

so adjudged to have been elected the property of the Argus Company, and control of its affairs, and to refrain from any interference therewith. The general term, for the purpose of facilitating the final disposition of the controversy, promptly affirmed the order of the special term, and this appeal was taken from the order of affirmance. The matter has been fully argued in this court, and it remains to state the conclusions reached upon the questions presented. The proceeding which resulted in the order of the special term was instituted under section 27, Gen. Corp. Law 1892. That section, which is, in substance, a re-enactment of a provision in the Revised Statutes, (1 Rev. St. p. 603, § 5,) makes it the duty of the supreme court, upon the application of "any person or corporation" aggrieved by or complaining of any corporate election or any proceeding, act, or matter touching the same, upon notice to the adverse party or to those to be affected thereby, "forthwith and in a summary way" to hear the affidavits, proofs, and allegations of the parties, or otherwise inquire into the matters or causes of complaint, and to establish the election, or order a new election, or make such order and give such relief as right and justice may require.

Before considering the merits of the controversy, there are certain preliminary questions raised respecting the procedure which should be determined. The proceeding was commenced by verified petition addressed to the supreme court, purporting to have been made in behalf of the Argus Company and by William H. Johnson and William R. Cassidy individually, setting forth alleged facts relating to the election of April 12, 1893, resulting, as was claimed, in the election of William H. Johnson, William R. Cassidy, and William McM. Speer as directors of the Argus Company. The petition averred that James H. Manning, Frederick C. Manning, and John A. Delehanty claimed and pretended to have been elected directors at such meeting, and had taken possession of the property of the Argus Company, and excluded the rightful directors from the possession and control of its affairs. It concluded by a demand for relief, establishing the election of Johnson, Cassidy, and Speer as directors, and vacating and setting aside the pretended election of James H. Manning, Frederick C. Manning, and John A. Delehanty. Upon this petition, a justice of the supreme court in the third district, on the 2d day of April, 1893, made an order at chambers, requiring the contesting directors to show cause at a special term to be held at the courthouse at Kingston, on the 15th day of April, 1893, why the prayer of the petition should not be granted. Several objections to this order are made.

(1) It is insisted that the Argus Company was joined as one of the petitioners without authority. It is a sufficient answer to this objection that section 27 of the general corporation law authorizes the proceedings under that section to be taken upon the application of "any person or corporation" aggrieved. William H. Johnson and William R. Cassidy, two

of the petitioners, were stockholders in the Argus Company, and joined in the petition, and there can be no question of their right to make the application. It cannot affect their right to have their petition heard that another party was joined as petitioner without authority.

(2) It is insisted that, the matter being one which, under section 27, is to be heard and decided by a judge in court, an order to show cause could only be granted by a court, and could not be granted by a judge out of court. An order to show cause is a means of shortening the usual time of notice of a motion prescribed by the general rules of practice. Section 780 of the Code declares that a notice of eight days shall be given of a motion or other proceeding in an action, before a court or judge, where notice is necessary, and where special provision is not otherwise made by law, "unless the court, or a judge thereof, or a county judge," upon an affidavit showing grounds therefor, makes an order to show cause, and in the order directs that notice of less than eight days may be given. The jurisdiction of a judge out of court to make such an order is not restrained in terms to cases where the matter to be heard may be heard out of court, and we perceive no reason in policy or in the language of the statute for annexing such a limitation of his powers. It is obvious that the existence of a power in a judge out of court to make an order shortening the usual notice to be given of a proceeding in court may promote the administration of justice, and prevent unnecessary and injurious delay. The facts stated in the verification were sufficient to justify the granting of the order, and the discretion of the judge is not reviewable here.

(3) It is insisted that, conceding the power of a judge out of court to grant an order to show cause, returnable at special term, nevertheless this power is subject to a restriction imposed by rule 38 of the general rules of practice of the supreme court, which provides, subject to certain exceptions not here material, as follows: "Rule 38. Contested motions shall not be noticed or brought to a hearing at any special term held at the same time and place with a circuit." The order to show cause in this case was returnable at a special term which was then being held in the county of Ulster, in connection with a circuit and a court of oyer and terminer, duly appointed for that county. On Saturday, the 15th day of April, 1898, the day on which the order was returnable, the judge holding the circuit and special term, on the petition being presented, overruled the objection now being considered, and thereupon, on the petition, and upon affidavits in support and in opposition thereto, appointed a referee to take testimony, and adjourned the further hearing until Saturday, the 24th day of April, on which day the matter was heard on the petition, affidavits, and proofs taken before the referee, and the court subsequently, on the 28th day of April, decided the case, and made the order now in question. We think the order cannot be assailed for want of power of the court to entertain

jurisdiction of the proceeding under rule 38. There is much force in the suggestion that a proceeding instituted under section 27 of the general corporation law is not a "contested motion," within the meaning of the rule. In *Re Jetter*, 78 N. Y. 605, which was a statutory proceeding to vacate an assessment, Chief Judge Church, speaking of that proceeding, said: "Nor is it a motion under the Code. A motion, in general, relates to some incidental question collateral to the main object of the action. A motion is not a remedy in the sense of the Code, but it is based upon some remedy, and is always connected with and dependent upon the principal remedy. It is to furnish relief in the progress of the action or proceeding in which it is made, and generally relates to matter of procedure, although it may be used to secure some right in consequence of the determination of the principal remedy." The proceeding taken in this case was the special remedy given by statute for the summary determination of questions of disputed corporate elections. It was not incidental to a principal remedy, but was the remedy itself. The procedure is in form analogous to a motion. There are no pleadings, and the case may be heard upon affidavits in connection with oral proofs, as the court may determine. Rule 38 applies to contested motions, and may well be construed as referring alone to those incidental applications ordinarily denominated "motions," which are made during the progress of an action or special proceeding after its commencement, and not as embracing an application which is the foundation of a statutory remedy.

But, aside from this consideration, there is, we think, another answer to the objection made. Rule 38 must be interpreted in view of the reason upon which it rests. The object of the rule was to prevent interference with the ordinary work of a circuit or court of oyer and terminer by the interjection of motion business bearing no relation to cases on the calendar, and also to prevent the inconvenience to counsel of being compelled to attend a special term held in connection with a circuit, upon motions in outside cases, where the hearing might be delayed by the regular calendar business. Rule 38 is a rule primarily regulating the conduct of attorneys. The attorneys give notice of motions, and bring them on for hearing, and rule 38 prescribes a rule of conduct for their guidance. The rule does not undertake to exclude a judge at special term, engaged at the same time in holding a circuit, from entertaining a motion noticed for such term, if, in his judgment, the circumstances and the rights and interests involved render it proper that he should do so. He may refuse to hear a contested motion at such a term, upon the ground that it was irregularly noticed, but if he chooses to exercise the undoubted jurisdiction of a judge holding a special term, whether separately or in connection with a court, to dispose of any nonenumerated business appertaining to that branch of the court, and the parties are before him, the rule constitutes no limitation upon his power. Any other construction of the rule might

result in serious inconvenience. It often happens that the rights of parties require a prompt determination of a question brought up by motion, and, if there was an inflexible rule that the party must await the convening of a term appointed exclusively for special term business to bring it on, and that a judge holding a circuit and special term together could, under no circumstances, hear it at such term, it would be in many cases an obstruction to the administration of justice.

The twenty-seventh section of the general corporation law, under which the proceeding was taken, requires the court "forthwith and in a summary way" to hear and dispose of the application. The election of directors of the Argus Company was for the term of a year only, and it is manifest that any considerable delay in determining the contest would contravene the purpose of the statute, and continue a state of uncertainty which might be detrimental to the interests of the corporation. We think the special term properly entertained the application, and, even if any doubt existed as to the construction of rule 38, we should be disinclined to review a question of practice in the supreme court, which was determined in the first instance by the judge who granted the order to show cause, and afterwards by the judge who made the order under review, and where the general term has affirmed the order.

The disposition of the preliminary objections brings us to a consideration of the merits of the controversy. The sole question is, which of the contesting claimants are the lawful directors of the Argus Company? It is conceded by both parties that the stockholders' meeting held on the 12th day of April, 1893, was legally called. It was called pursuant to a resolution passed at a meeting of the directors of 1892, at which two only of the directors were present, viz. James H. Manning and William H. Johnson. They caused notice of the stockholders' meeting for the election of directors to be duly published on the 27th of March, 1893, the day on which the resolution was passed. It is also conceded by both parties that at the stockholders' meeting three directors for the ensuing year were legally chosen. It is not claimed that the purpose of the meeting failed, or that no directors were legally elected at the meeting. The title of the rival claimants is based upon the proceedings of that meeting, each party claiming that its candidates received a majority of the legal votes cast upon that occasion. There is no question of the failure of the meeting to elect directors, or of the holding over of the directors elected in 1892. The sole point in controversy is, which of the two contesting sets of claimants received a majority of the legal votes? The stockholders' meeting was organized, in the first instance, by the appointment of William R. Cassidy as chairman, and the appointment of three inspectors of election. We do not understand it to be claimed that the meeting was not legally organized, although its action is criticised. The meeting proceeded to the election of directors. The stock of the Argus Company

consisted of 500 shares. The whole number were voted upon at this meeting. If all the persons who voted were entitled to vote upon the shares voted by them respectively, then all the stockholders of the Argus Company participated in this election. The vote, when canvassed, showed the following result: William H. Johnson and William R. Cassidy each received 310 votes, and William McM. Speer 300 votes, and James H. Manning received 200 votes, and Frederick C. Manning and John A. Delehanty each received 190 votes. In other words, the Johnson directors (so called) each received at least 300 votes, and the Manning directors (so called) 190 to 200 votes each. It is obvious that if the votes cast for the Johnson directors were legal votes, or, if any of them were illegal, it nevertheless appears that the legal votes cast for them exceeded 200, the highest number cast for any one of the Manning directors, the Johnson directors were elected. The receipt of illegal votes in favor of a candidate who also has received a majority of the legal votes does not defeat his election. It is the rule of corporate elections in stock corporations that the majority of legal votes determine the election. The owners of the majority of the shares have the right to designate the directors to whom the management of the corporation shall be committed. The stockholders are the beneficial owners of the corporate property. The majority may act unwisely; but they may change the management for any reason, provided only they act within the limitations of the charter. The question now presented is purely legal, and the mass of evidence in the record, bearing upon the motive of the one party or the other, is wholly irrelevant to the case in its legal aspects.

During the progress of the meeting of the stockholders first organized a second meeting was organized in the same room at which votes were received for directors, the largest vote being for James H. Manning, who received 200 in all. It is unnecessary further to refer to the proceedings at this second meeting, for the reason that we find no ground for questioning the regularity of the meeting first organized, and it is properly admitted by the learned counsel for the appellants that the questions upon which he relies are raised by his objections to the proceedings of that meeting after its organization. The 300 shares voted upon in favor of the Johnson directors included 100 shares known as the "Worthington Stock," which, on the 28th day of March, 1893, was sold by Lily S. Worthington, the then owner, to William McM. Speer, for the sum of \$40,000, paid to her on that day. In making this purchase William R. Cassidy acted as the agent of Speer, but his agency was not disclosed to Mrs. Worthington at the time. On receiving the purchase money, Mrs. Worthington signed the printed transfer on the back of her certificate for the 100 shares, and delivered the certificate to Cassidy, who filled in the blank left for the name of the transferee with the name of Speer, the real purchaser, and on the same day (March 28th) delivered the certificate and transfer to him. These 100

shares of stock were voted upon by a proxy of Speer in his name at the stockholders' meeting April 12, 1893. The vote was challenged, and the right to receive this vote, which was cast for the Johnson directors, constitutes one of the principal contentions in this case. Besides this 100 shares of the Worthington stock voted upon, there were also included in the 300 votes given for the Johnson directors 150 votes on the Cassidy stock, (so called.) This vote was likewise challenged, and is claimed to have been illegally received. The Cassidy stock consisted of 150 shares, which stood on the books of the Argus Company on the 27th day of March, 1893, (when the notice of the stockholders' meeting was given,) in the names of the following persons: Lucie R. Cassidy, 30 shares; William R. Cassidy, 80 shares; John P. Cassidy, 40 shares. One hundred and thirty shares of this stock were voted on in the name of William R. Cassidy, and 40 shares in the name of John P. Cassidy. The objections to the legality of the vote by Speer on the Worthington stock, and to the vote on the Cassidy stock, are substantially as follows: (1) That the Worthington stock was transferred in violation of an agreement binding on Mrs. Worthington; (2) that it had not been transferred to Speer on the books of the company; (3) that the Cassidy stock had been sold to Speer, and that the vote thereon in the name of William R. or John P. Cassidy was illegal and void; (4) that there was no valid authorization from John P. Cassidy to vote upon his stock; (5) that the proceedings at the election were in violation of an injunction granted by Judge Edwards. These objections will be considered in the order stated.

First, The agreement which it is claimed was violated by Mrs. Worthington was made in 1873, between Daniel Manning, Lucie R. Cassidy, and J. Wesley Smith, then the owners of a large majority of the stock of the Argus Company. It is undated, and was drawn by Daniel Manning, who presented it to Mrs. Cassidy for her signature, directly after the death of her husband, from whom her interest in the company was derived. The agreement is, in substance, that neither of the parties will sell, assign, or dispose of any of the stock then held, or which should be subsequently acquired by him or her in the Argus Company, without having first offered and given to the other parties to the agreement an opportunity to purchase the shares "at a fair marketable price," and in case of the inability of the parties to agree upon a price it provided that it should be fixed by arbitration. The agreement further provided that, "whenever either party shall have disposed of his or her shares at that time owned by him or her, this agreement is to terminate;" and the concluding clause declared that the agreement "is to be of force and binding upon and to the heirs, executors, administrators, devisees, and legatees of the parties hereto." The 100 shares held by Mrs. Worthington prior to the sale to Speer on the 28th day of April, 1893, came to her from her father, J. Wesley Smith, one of the parties to the agreement, on his death

in 1886, and in 1887 were transferred to her on the books of the Argus Company, and a new certificate issued in her name. Assuming that the agreement of 1873 was binding upon Mrs. Worthington, as heir (next of kin) or as legatee of her father, and that her sale of the stock to Speer was in violation of the agreement, this fact is immaterial in this controversy, unless she was by force of the agreement disabled from transferring the stock, or unless Speer, who had notice of the agreement when he purchased, acquired no title as against the Manning interest, and could assert no rights founded upon such purchase as a stockholder in the Argus Company. This contention cannot be sustained in either aspect. Mrs. Worthington was the legal owner of the shares. The right of disposition of property is an incident to ownership. The transfer to Speer vested in him the legal title to the shares, although they were not transferred on the books of the company. The recital in the certificate that the stock was "transferable only on the books of said company by her or her attorneys on the surrender of the certificate" regulated the relation between the holder of the certificate and the corporation, but did not operate to prevent the vesting of the legal title to the shares in Speer upon the transfer and assignment by Mrs. Worthington. *Leitch v. Wells*, 48 N. Y. 586; *Bank v. Colwell*, 182 N. Y. 250, 30 N. E. Rep. 644.

The qualified nonalienability of the stock, sought to be imposed upon it by the agreement of 1873, rested in contract only, and in no respect disabled Mrs. Worthington from vesting the legal title by transfer in another, whether with or without the consent of the other parties to the agreement, or whether or not it was made in disregard of its provisions. The agreement was, in its character, executory, and for its violation the other parties could resort to such remedy as the law affords upon the breach of a contract by either party, which in ordinary cases is an action for damages. It is urged that in this case, considering the nature and object of the agreement of 1873, the remedy by an action for damages would be inadequate, and that the court may in such case specifically enforce its observance, and interfere to prevent either party from violating it, and that a purchaser with notice is subject to the same equity. The jurisdiction of a court of equity to enforce specific performance of a contract relating to personal property, though rarely exerted, cannot be denied, and may be exercised "where compensation in damages would not furnish a complete and satisfactory remedy." *Johnson v. Brooks*, 93 N. Y. 337. But the granting of this relief rests in the sound discretion of the court, and cannot be demanded as a right. Speer having acquired the legal title to the stock by transfer from Mrs. Worthington, it is not perceived how a court of equity could give any relief, unless by compelling him to transfer the stock to the other parties entitled to the benefit of the agreement, upon being reimbursed the sum expended in its purchase. But it is a decisive answer to the objection now being consid-

ered that, assuming upon the facts presented the court could, upon the application of the other parties to the agreement, or their representatives, enforce specific performance, or compel Speer to transfer the stock to the holders of the Manning interest, no such equity has been enforced. The fact that Speer may have held the stock subject to the enforcement of the equitable remedy in no way interferes with his legal title, nor did it preclude the corporation from treating him as a stockholder, or from according to him all the rights of a stockholder, so long as the company was not prevented from so doing by the judgment or process of the court. The corporation was not a party to the agreement of 1873. The agreement is between individual stockholders only. They may not elect to seek a remedy in equity. The court, upon application, might refuse, in its discretion, to grant equitable relief. The record shows that transfers of stock have been made from time to time by parties to the agreement, without any reference to its provisions; that the agreement remained in the possession of Daniel Manning from the time of its execution until his death, and that its existence was not known to his sons until about two years prior to the commencement of this proceeding, and that Mrs. Cassidy had but a faint recollection of its execution. The claim is made by the petitioners that the agreement had been disregarded and practically abandoned by the parties to it. We refer to these claims made by the petitioners to show the variety of considerations which might be presented to a court of equity to influence its action in granting or withholding the remedy of specific performance. But it is sufficient to say that the right of Speer to vote upon the stock purchased of Mrs. Worthington cannot be affected by the existence of an unenforced equity growing out of the violation by Mrs. Worthington of the agreement of 1873, although Speer had notice of the agreement when he purchased. The Argus Company might legally recognize him as owner of the stock, and cause it to be transferred to him on the books of the company, and his vote could not be legally excluded because of the existence of the agreement.

The objection to Speer's right to vote on the Worthington stock has so far been considered on the assumption that the agreement of 1873 was in force at the time of his purchase. But another conclusive answer to the defense, based on the agreement, is that the agreement had been terminated pursuant to a provision in the agreement itself prior to the purchase of the Worthington stock by Speer. The event provided for in the clause in the agreement, "that whenever either party shall have disposed of his or her shares at that time owned or held by him or her, this agreement is to terminate," had happened by the transfer by Mrs. Cassidy, one of the parties to the agreement, of all her shares in the Argus Company, with the consent or acquiescence of the other parties thereto, or their representatives, on or before March 27, 1888, and the agreement was thereby terminated, and all

parties released from its obligation. When the agreement was made, Mrs. Cassidy was the owner of 150 shares of the stock, 30 of which were represented by a separate certificate issued in her name. In 1881 she gave these 30 shares to her son, William R. Cassidy. Mrs. Cassidy indorsed on the certificate a transfer of the shares to her son William, and at her request, as the evidence tends to show, an entry was made on the stock book of the Argus Company referring to these shares as follows: "Transferred to William R. Cassidy, March 29, 1881," paid to the son. The original certificate issued to Mrs. Cassidy was retained by her, and the stock has never been formally transferred to William R. Cassidy on the books of the Argus Company. There were associations connected with the origin of Mrs. Cassidy's title to the 30 shares, and the issuing of the certificates, by reason of which she desired to retain the scrip in her possession, but the evidence that she intended to part with the ownership of the shares, and vest the beneficial title in her son, is full and complete, and the circumstances relied upon to show the contrary are not sufficient to overcome the clear and positive evidence of Mrs. Cassidy and her son, the written assignment, the entry in the books of the company, and the subsequent recognition by the company of the son as the owner of the shares.

In March, 1888, Mrs. Cassidy gave her remaining 120 shares to her two sons, William R. Cassidy and John P. Cassidy,—80 shares to William R., and 40 shares to John P. The shares were transferred to the sons on the books of the company in the same year, and new certificates issued in their names. As the result of these several transactions, Mrs. Cassidy, in March, 1888, had disposed of all her shares in the Argus Company, and the event had happened upon which, by the terms of the agreement of 1873, the agreement was to terminate. It is undoubtedly true that the clause providing that a disposition by either of the parties to the agreement of all the shares held by him or her should terminate the agreement means a disposition pursuant to its provisions. It was not intended to provide that a party transferring his shares in violation of the agreement should thereby be released from its obligations. But a transfer made with the consent of the other parties, express or implied, would give effect to the condition. In 1881, when the 30 shares were transferred by Mrs. Cassidy, Daniel Manning and J. Wesley Smith, the other parties to the agreement, were directors in the company, and must be assumed to have known and consented to the entry in the stock book; and the transfers of 1888 were made on the books of the company, of which all the persons interested are presumed to have had notice. The shares transferred by Mrs. Cassidy to her sons were, upon the transfer, liberated from the operation of the agreement. The sons did not take in the capacity of "heirs, executors, administrators, devisees, or legatees," and, the transfers having been made with the implied consent of the other parties to the agree-



ment, the shares in their hands were not bound by its restrictions. There was no reservation in the agreement of a right in the parties thereto by a transaction *inter vivos* to transfer the stock to the members of their respective families. The consent of the other parties to the transfer by Mrs. Cassidy of the stock to her sons may have been influenced by the fact of this relationship, but, the consent having been given when all her shares had been transferred, the event occurred which terminated the agreement. Upon both of the grounds stated we are of the opinion that the agreement cannot be interposed to deprive Speer of the character of a stockholder, as transferee of the Worthington stock.

Second. The objection that the Worthington stock had not been transferred to Speer on the books of the company, and that for this reason he was not entitled to vote thereon, assumes that the stock book of the Argus Company, used up to and prior to March 31, 1893, was the legal stock book of the company. In that book Mrs. Worthington appeared to be the owner of the 100 shares, which, on the 28th of March, 1893, she sold to Speer, and no transfer thereof to Speer appears thereon; but at a directors' meeting held on the 31st of March, 1893, a new stock book was adopted, and this action was ratified at another directors' meeting held on April 1st. The Worthington stock was transferred to Speer on the new stock book, and a certificate therefor was issued to him, and was delivered on the 1st of April, upon his surrender of the certificate standing in the name of Mrs. Worthington. The appellants assail the validity of this transaction on the ground that the meetings of March 31st and April 1st were not legally called, and that the action taken was void. It appears that Speer, on the 29th day of March, 1893, the day following his purchase of the Worthington stock, presented to Mr. Manning, the president of the Argus Company, the certificate issued to Mrs. Worthington, with her transfer indorsed, and requested that the stock should be transferred to him on the books, and a new certificate issued in his name, and he referred to the approaching election to be held on the 12th of April as the reason for requesting the transfer. The president of the company requested a postponement of the matter till the following day, (March 30th), and at an interview with Speer on that day refused to permit the transfer, assigning as a reason for the refusal the agreement of 1873. Early in the morning of March 31st, Mr. Manning left Albany for Washington. The stock book of the company was in a private drawer used by Mr. Manning, in a safe of the Argus Company, which drawer was locked, and of which Mr. Manning took with him the key. On the afternoon of the 31st of March, William R. Cassidy and William H. Johnson, two of the three directors of the company, met, and issued a notice for a directors' meeting to be held the same evening, and the notice was served on Mr. Manning by leaving the same at his residence with a servant

girl, who informed the person serving the notice that Mr. Manning had left the city; this being the first intimation or knowledge that his codirectors had of the fact. The meeting was held pursuant to the call, Cassidy and Johnson being present. At this meeting the directors were requested to cause a transfer to be made to Speer of the Worthington stock on the books of the company. Being unable to find the old stock book, the directors, by resolution, adopted a new stock and minute book, and proceeded to enter the names of the several stockholders of the company, with the number of shares held by them respectively, in the new stock book, and, among others, they entered the name of Speer as the holder of 100 shares, and issued a certificate, which was delivered to him on the next day on surrender of the certificate formerly issued to Mrs. Worthington.

We do not understand that the power of the board of directors, at a meeting lawfully convened, to adopt a new stock book, is denied. It is clear that such a contention, if made, could not be sustained. The adoption of a stock book in the first instance pertains to the duties of the directors of a stock corporation, and if for any reason the existing transfer book is not available for use by the directors for the making of transfers of stock, the adoption of a new stock book is incident to the original power vested in the directors. The denial of this power might result in depriving the real owner of stock of his right to participate in corporate elections. Section 29 of the stock corporation law of 1892 provides that no transfer of stock shall be valid for any purpose except to render the transferee liable for debts, until it has been entered in the stock book; and by section 20 of the general corporation law the stock book is made the evidence of the right of a person challenged to vote at a stockholders' meeting, and by the same section it is declared that no person shall vote at such meeting upon any stock which has not been owned by him at least 10 days next preceding.

There was an exigency which justified the adoption of a new stock book in this case. The old stock book was not accessible to the directors present at the meetings. The election was to take place on the 12th of April. Mr. Manning did not return to Albany until the evening of Sunday, April 2d, leaving but nine business days intervening between that date and the day appointed for the election. It is the duty of the directors of a stock corporation to provide a transfer book, to enable stockholders to exercise the rights given them by law. But it is claimed that the action of the directors in adopting a new stock book was invalid, for the reason that the notices of the meetings of March 31st and April 1st did not specify the purpose for which they were called. This objection assumes that there is a general principle in the law of corporations which requires the object of a directors' meeting to be specified in the notice, in order to validate corporate action. There is no statutory regulation, nor did the by-

laws of the Argus Company make any provision on the subject. We do not find that any such general rule has been established by the decisions, and it is believed that such a rule would be contrary to the general practice and understanding. When a meeting of directors is notified without specification of the particular purpose, it would naturally be understood that it was called to consider any matters pertaining to the conduct of the affairs of the corporation which might come before it. The statute regulates with great particularity how meetings of stockholders shall be called and conducted for the determination of important questions affecting the interests of the corporation, such as the mortgaging of the corporate property, the increase of stock, the incurring of liability by the guaranty of the bonds of other corporations. We need not determine whether a meeting of directors, called to take action upon an extraordinary emergency involving the exercise of unusual power, might require a departure from the ordinary rule. It is sufficient to say that the adoption of a new stock book was not an occasion of this character, and that a general notice is all that is required to a valid meeting of directors for the determination of matters pertaining to the ordinary business affairs of the corporation. The objection now made might be disposed of upon a narrower ground, viz. that no notice, however specific, could, under the circumstances, have reached Mr. Manning.

Third. The objection that the Cassidy stock had been sold to Speer, and, therefore, could not be legally voted upon by Cassidy, proceeds upon a mistaken assumption of fact. The transaction relating to the sale of the Cassidy stock to Speer is shown by writings. From them it appears that the contract was executory, and that the payment by the vendee was conditional upon the transfer of the stock to Speer upon the books of the company, and this condition had neither been performed nor waived on the 12th day of April. The title at that time remained in the Cassidys, and, being stockholders of record as to all except the 30 shares, which still stood in the name of Mrs. Cassidy, the 120 shares could be properly voted upon by William R. and John P. Cassidy.

Fourth. The 40 shares standing in the name of John P. Cassidy were voted upon by Mr. Cohen under a proxy executed to him by William R. Cassidy, as attorney for John P. Cassidy. It is claimed that the power of attorney held by William R. Cassidy from his brother did not authorize him to vote on the stock in the name of John P., and that the authorization to Cohen was, therefore, not within his authority. The judge at special term adopted this view, but, as the result would not be changed by rejecting the vote on the 40 shares, it is unnecessary to re-examine the question.

Fifth. The claim that the stock standing on the new stock book in the name of Speer and of the Cassidys was voted in violation of the injunction issued by Judge Edwards rests on the following facts: On the evening of April 1, 1893, an injunction

was issued by Judge Edwards in a suit commenced by James H. Manning and Frederick C. Manning, enjoining the defendants, Lucie R. Cassidy, William R. Cassidy, Ledyard Cogswell, and William M. Speer from voting either in person or by proxy on any shares of the stock of the Argus Company which were then registered in their names on the books of the company, "which have not been owned by them, or either of them, for at least 10 days next preceding the 12th day of April, 1893," and restraining the inspectors appointed at the meeting of March 31, 1893, who were made defendants in the action, or their substitutes, from receiving any votes "on said shares." The injunction contained a further provision restraining the defendants, or any of them, "from using at any such meeting or at said election [the election of April 12th] any book or paper purporting to contain the record of membership of the Argus Company, or any alleged stock or scrip book prepared in pursuance of any alleged resolutions adopted at said illegal meetings held on the 31st of March, 1893, and the said 1st day of April, 1893, by said defendants William R. Cassidy and William H. Johnson, until the hearing and determination of a motion to be made," etc. The injunction order was served on the inspectors appointed at a meeting of March 31st and the other defendants, on the morning of April 12th, before the election took place. Upon the organization of the meeting new inspectors were chosen, and the election proceeded. Cohen, as proxy for John P. Cassidy, William R. Cassidy, and Speer offered to vote on their shares, and the vote was received and counted. The first part of the injunction order was not violated, for the reason that the stock of Speer, William R. Cassidy, and John P. Cassidy had been owned by them, and was registered in their names, more than 10 days prior to the election. By the second clause the defendants were restrained from using the stock book adopted at the meetings of March 31st and April 12th. It was proved without contradiction that that book, although lying upon the table, was not referred to or used at the meeting. The votes were challenged, and the twentieth section of the general corporation law provides that, "if the right to vote at any such meeting shall be challenged, the inspectors of election, or other persons presiding thereat, shall require such books, (including the stock book,) if they can be had, to be produced as evidence of the right of the persons challenged to vote at such meeting, and all persons who may appear from such book to be members of the corporation may vote at such meeting in person or by proxy." The injunction neither enjoined the holding of the election, nor did it authorize or require the use of the old stock book. The new stock book having, as we hold, been legally adopted as the stock book of the company, and the inspectors having been enjoined from using it, the qualification in section 20 applied. The inspectors were to use the books of the company in determining the validity of the challenges, "if they can be had," and, having been

enjoined from using the new stock book, they were placed in the same position as if they could not be found, and they had no right to use a former stock book in determining the challenges. We think there was no violation of the injunction, and it is unnecessary to determine how such a violation, if it existed, would have affected the controversy. Striking out the 40 votes cast in the name of John P. Cassidy, and the 30 votes upon the shares which stood in the name of Mrs. Cassidy, there remains 230 to 240 votes cast for the new directors, while the minority vote ranged from 190 to 210 votes.

There were some objections to the reception and rejection of evidence on the hearing before the referee. They, in the main, were connected with an effort on the part of the counsel for the appellants to trace the identity of the persons who advanced the money to Speer for the purchase of the Worthington and Cassidy stock. The strict rules which govern the reception of evidence in civil actions are not applicable to a proceeding of this character, and we are of the opinion that no essential right of the appellants was prejudiced by the rulings made. Upon the whole matter we are of opinion that no substantial error has been pointed out, and that, therefore, the order of the general term should be affirmed. All concur.

Order affirmed.

(138 N. Y. 664)

#### PEOPLE v. FOY.

(Court of Appeals of New York. June 27, 1893.)

#### MURDER—EVIDENCE—INSTRUCTIONS—INSANITY.

1. On a trial for murder the evidence showed that defendant remarked in the morning before the killing that he had come to kill deceased; that after he had shot her twice he again shot at her, saying that he knew she was dying, and that he was glad of it; that afterwards, when told that deceased was yet alive, he said that he was sorry, as he had tried to kill her. *Held*, that the evidence justified the conviction of murder in the first degree.

2. On a trial for murder, defendant requested a charge that "insanity produced by jealousy or anger, if it incapacitates the subject from knowing right from wrong, would be a defense." To this the court assented by saying: "If there is any such thing as insanity produced by jealousy or revenge or wrath; \* \* \* if there is any genuine insanity produced by any cause,—then, so far as affecting the prisoner, it is the same as any other kind of insanity. The heat of passion, and feeling produced by motives of anger, hatred, or revenge, is not insanity. The law holds the doer of the act, under such conditions, responsible for the crime, because a large share of homicides committed are occasioned by just such motives as these." *Held*, that the charge was proper.

3. Where the jury return into court for further instructions, the reading of the evidence of one witness in answer to a question put by them, which is not contradicted by any other witness, is not subject to the objection of asking the jury to decide the case on the testimony of one witness, to the exclusion of any testimony before them.

Appeal from court of oyer and terminer, Saratoga county.

Martin Foy, Jr., was convicted of murder in the first degree, and appeals. Affirmed.

Willard J. Miner, for appellant. J. S. L'Amoreaux and John Person, Dist. Atty., for the People.

PECKHAM, J. The defendant was indicted for the murder of one Henrietta Wilson, in the village of Saratoga, on the 13th of May, 1892, and upon the trial of the indictment at the Saratoga oyer and terminer, held in January, 1893, he was convicted of the crime, and sentenced to death. From the judgment of conviction he has appealed to this court. In examining the record for the purpose of seeing whether justice requires a new trial, which in such case we have authority to grant, we entertain no doubt whatever of the propriety of the verdict. The evidence, in our judgment, shows most conclusively that the defendant has committed a deliberate and cruel murder. That he was laboring under the passion of jealousy, and was very angry with his victim, the evidence shows quite conclusively. It appears that he had known the woman for some time, and that a short period before the murder he had said to her, in a conversation in Saratoga, which was overheard, that he intended to go away, and she remonstrated, and said, as long as she had a dollar, he could have it, and he replied that she had ruined him; that he was broke, and she was throwing him out; that she had another man; and that he was going away. He did go away, and was gone a short time, and then came back to Saratoga, and said he had come to kill her and Dick Shay. This was said on the morning of the 13th of May, 1892, as he got off the cars, and at about 6:15 or 6:30 in the afternoon he shot the woman. The murder was committed in one of the public streets of the village, and while several people were on the street, and in the immediate neighborhood. The defendant was evidently waiting for the woman, and when he saw her coming along the street he walked towards her, at a quiet pace, and, upon coming up with her, pointed his pistol at her head, and deliberately shot her. She fell, and he then shot her again, while she was lying on the sidewalk. He then pointed the pistol at himself, and fired two shots, inflicting slight wounds upon his scalp, and, falling down near his victim, he heard her moan, when he forthwith emptied another barrel of his pistol at the dying woman, and accompanied the shot with an oath, saying he knew she was dying, and that he was glad of it, and that it was all for love; that Dick Shay had done it. The woman lived about a day. The defendant was taken to the lockup the evening of the shooting, and inquired the next day how the woman was, and when told she was still alive, said with an oath that he was sorry for it; that he had tried hard enough to kill her and himself, and was sorry he had not killed both. He said he had pawned his overcoat in New York to get the pistol, and a ticket to come to Saratoga, to kill the girl. He was taken into

the presence of the woman soon after the killing, and when identified by her he said, "Yes, I shot you, and I hope you will die, and I am willing to suffer for it." He said Shay was the cause of all of it.—Shay and Martin,—and that he had intended to kill them, also. The case thus made against the defendant was met by him with an effort to prove a kind of temporary insanity. The effort completely failed. The evidence in regard to his insanity is hardly sufficient to even give color to the defense, and the whole record leaves no doubt upon our minds that any verdict other than one for murder in the first degree would have been a sad miscarriage of justice. The defendant was seemingly carried away by his brutal passion of rage, intermingled with jealousy, and he indulged such passion to the extent of murdering the woman who was the cause of his jealousy. There was nothing to bring the case down to murder in the second degree, or to any of the degrees of manslaughter. The deed was too deliberate for anything of the kind, and the plea of insanity was wholly without evidence to support it.

There were some exceptions taken during the course of the trial, but we think there is not merit enough in them to call for their discussion. The counsel for the defendant criticises to some extent the charge of the learned judge upon the subject of what constitutes insanity, although the point to which he has directed our particular attention he did not except to. It is that portion of the charge given upon the return of the jury, without having, as yet, agreed upon a verdict, where the court stated that the insanity the law speaks of is that which comes by physical visitation of God; it is something that makes the man helpless, so that in killing a person he acts as though unconscious, with inability to control himself, as though the subject were struck by lightning. The court had prior to that time given correct instructions as to insanity, and subsequent to that time it explained to the jury the law upon the subject. Upon the merits it is apparent that no harm was suffered by the defendant from this charge, for the whole case is barren of evidence upon which to base a claim that the defendant was insane when the act was committed, or at any other time. The court in fact did, both before and after this expression, explain fully to the jury the law upon the question of insanity, and it is too clear for discussion that the defendant has suffered nothing at the hands of the court upon this branch of the case.

The defendant also complains of the charge made in reference to his request that insanity produced by jealousy or anger, if it incapacitates the subject from knowing right from wrong, would be a defense, to which the court assented, by saying: "If there is any such thing as insanity produced by jealousy or revenge or wrath,—genuine insanity; I do not mean turbulence of passion produced by desire for revenge, but if there is any genuine insanity, produced by any cause,—then, so far as affecting the prisoner, it is the same as any other kind of insanity." The defendant can find no fault with that defini-

tion. The court very properly continued with an explanation to the jury that "the heat of passion, and feeling produced by motives of anger, hatred, or revenge, is not insanity. The law holds the doer of the act, under such conditions, responsible for the crime, because a large share of homicides committed are occasioned by just such motives as these."

The remarks of the court to the jury upon the occasion of the reading to them the evidence of the witness Carawell were entirely proper. The record shows that the court had no thought of asking the jury to decide the case upon the testimony of any one witness, to the exclusion of any testimony that was before them. It is apparent from the questions put by the jury that some one or more of the members thereof had conceived the idea that the fatal shot, possibly, was not fired by defendant until he had shot himself twice, and that he might, after he was himself thus injured, have fired the last shot at the deceased, which possibly was the fatal one, and that when he did so he might have been temporarily insane, and not, therefore, responsible for his act. However extraordinary this theory might, in any event, be, it is clear the court had the evidence read for the purpose of showing that the facts left no foundation upon which to base it. The evidence of the witness who saw all the shooting is to the effect that the defendant shot the deceased first in the head, and that she then fell, and that the second shot was pointed at her back, as she was lying on the sidewalk; and after the second shot he fired twice at himself, and then a final one at the deceased. The wound in the back was the fatal one, and was fired before he shot himself. The evidence of the witness Smith is not in the slightest degree contradictory of this testimony. He first heard a shot and scream, and then he looked out of the window of the house where he was, and saw defendant shoot. The defendant "stood over the deceased, and held the revolver down like that," (illustrating,) and the witness saw the smoke, and heard the report. The witness does not pretend the second shot that was fired was not in the back of the deceased. There is no merit in the point here urged.

We have carefully read and considered all the other points made by the learned counsel for the defendant in his exhaustive brief on the subject, but fail to find any ground for disturbing the verdict. It would have been most unfortunate for the administration of justice, as we think, if, upon the whole evidence in this case, any other verdict had been rendered. The judgment must be affirmed. All concur.

(138 N. Y. 669)

FISCHER et al. v. BLANK.

(Court of Appeals of New York. June 27, 1893.)

APPEAL—AMENDING JUDGMENT—POWER OF SUPREME COURT AND COURT OF APPEALS.

1. Where the general term of the supreme court reviews the proceedings of a trial with-

out a jury, and the only error appearing consists in allowing greater relief than the successful party is entitled to, on the facts found, it may correct the judgment, and make it conform to the findings, and need not grant a new trial.

2. What the supreme court may do, the court of appeals may, on appeal, order to be done.

Action by Benedickt Fischer and others against Berthold Blank to enjoin defendant from using wrappers, labels, and packages alleged to infringe those used by plaintiffs, and for an accounting of profits and damages. A judgment of the general term (19 N. Y. Supp. 65) affirming an interlocutory judgment in plaintiffs' favor was modified by the court of appeals, (33 N. E. Rep. 1040,) and defendant moves to recall the remittitur, and amend it by granting a new trial. Motion denied.

Charles Goldzier, for appellant. Rowland Cox, for respondents.

PER CURIAM. Upon the decision of this appeal we held that the trial court had erroneously granted a greater measure of relief than the findings or pleadings would permit, and we therefore directed the interlocutory judgment to be modified by restricting the recovery within proper limits, and, no other error appearing, the judgment, as thus modified, was affirmed. As the case came here upon an appeal from an order of the general term denying a motion for a new trial under section 1001 of the Code, the appellant insists that this disposition of his appeal was unauthorized, and that this court had no jurisdiction to direct an amendment of the judgment, but was required, upon the discovery of an error of law, to reverse the order of the general term, and grant a new trial; and he now moves to recall the remittitur, and amend it accordingly. Whatever jurisdiction the supreme court possessed in the premises, this court could exercise, and whatever order that court ought to have made, we have the power to direct to be entered. But the point of the appellant's argument is that the general term was destitute of authority to modify the judgment so as to cure the manifest error in the record, and thereupon deny the motion for a new trial. We cannot assent to this view of the powers of the court below. It has general jurisdiction, and upon the review of the proceedings upon a trial had therein without a jury, where the sole error appearing consists in the allowance of greater relief than the successful party is entitled to upon the facts found, it may correct the judgment, and make it conform to the findings, unless there is some statute expressly limiting its power in this respect. Section 1001 contains no limitation of this kind, and there is no provision of the Code, that we can find, which, either in terms, or by necessary implication, prohibits such a procedure. We are referred to section 1317, which authorizes the general term, upon an appeal from a judgment or an order, to modify the judgment or order appealed from; and it is argued that the fair inference from this express grant of power is that without it the authority to modify would not exist,

and as it is there limited to appeals from judgments it cannot be extended to cases where the rightfulness of the judgment is brought under review by a motion for a new trial, as it is under section 1001. But, so far as it affects the jurisdiction of the supreme court, section 1317 is not an enabling act, but simply declaratory of the power which the court has always possessed, whenever it has been invested with a general authority to review its own judgments entered upon a trial without a jury, either before the court or a referee. The appellant is not aggrieved by the adoption of the practice. All that he can justly demand is the correction of any error of law appearing in the record, to which he has duly excepted; and where the error does not consist of any prejudicial ruling during the course of the trial, but only appears in the conclusions of law which lead to an excessive recovery, it is the duty of the general term to direct the correct judgment to be entered, and a new trial cannot be demanded as a matter of right.

It is claimed that the appellant has not yet had a review of the interlocutory judgment upon the facts, and that when final judgment is entered he may, if he deems himself aggrieved, appeal therefrom to the general term, and again bring up for review the interlocutory judgment under section 1316, and so possibly secure a reversal upon the facts, and thus the anomaly would be presented of the supreme court reversing a judgment which this court had directed to be entered. Whether such a result may happen, or whether the defendant, by electing to review the interlocutory judgment under section 1001, has not precluded himself from a further review thereof upon an appeal from the final judgment, if one should be taken, we are not now required to determine. That question is not involved in this motion, and the possibilities which it suggests cannot, therefore, be here considered.

There may have been a technical inaccuracy in the form of the remittitur sent down in this case. It should have stated that the order of the general term was modified by inserting therein a direction to modify the judgment in accordance with the views expressed in the opinion of this court, and that as so modified the order was affirmed, without costs to either party in this court. But as the variance is one of form, and not of substance, it is not necessary to recall the record for the purpose of amending it in this respect. The motion must be denied, with \$10 costs. All concur.

(128 N. Y. 554)

SQUIRE v. McDONALD et al.

SAME v. SENIA et al.

(Court of Appeals of New York. June 27, 1893.)

ORDER GIVING LEAVE TO APPEAL — SUFFICIENCY — MOTION TO DISMISS — SUBSTITUTION OF ATTORNEYS.

1. Under Code Civil Proc. § 191, subd. 3, providing that an appeal to the court of appeals can be taken from a judgment, where the amount involved is less than \$500, only

when the general term allows the appeal on the ground that a question of law is involved which should be considered by the court of appeals, the order giving leave to appeal must state the ground on which it is granted.

2. While an order of substitution of attorneys should be made only by the court of appeals after the returns are filed in that court, a motion to dismiss an appeal, made by one substituted as attorney by an order of the court below after such filing of returns in the appellate court, will be considered.

Appeal from court of common pleas of New York city and county, general term.

Actions by Newton Squire against Peter H. McDonald and others, and by the same plaintiff against Benjamin R. Senia and others. From a judgment of the general term in each case (21 N. Y. Supp. 1025; Id. 1027) affirming a judgment entered on a verdict directed by the court, defendants appeal. Appeals dismissed.

Kenneson, Crain & Alling, for appellants. Rudd, Hunter & Wilder, for respondent.

PER CURIAM. The judgments from which the appeals in these cases have been taken involve amounts less than \$500, and an order was obtained from the general term giving leave to the defendants to appeal to this court. This motion is made in behalf of the respondent to dismiss the appeals on the ground that the order giving leave to appeal does not state any ground. Subdivision 3 of section 191 of the Code of Civil Procedure explicitly provides that an appeal cannot be taken from a judgment, if the matter in controversy is less than \$500, unless the court below, by an order made at the general term which rendered the determination, or at the next general term after judgment is entered thereupon, allows the appeal on the ground that a question of law is involved which ought to be reviewed by the court of appeals. So much of the provision as requires that the order should state the ground mentioned had been enacted by the legislature in chapter 322 of the Laws of 1874. In the case of *Bastable v. City of Syracuse*, 72 N. Y. 64, this court had occasion to consider the form of the order prescribed by the act of 1874, and held, because the order of the general term in that case was lacking in the statement of the ground which is lacking in the order in this case, that it was not a compliance with the act of 1874, and dismissed the appeal. The decision in that case is authority for the dismissal of these appeals.

The appellants object that Mr. Wilder, who, as attorney for the respondent, moves for the dismissal of the appeal, has no standing to make the motion, inasmuch as he was substituted as attorney for the respondent by an order made in the court below after the returns were filed in this court. While that practice is irregular, and such an order of substitution of attorneys should only be made by order of this court after the returns are filed here, nevertheless we do not think the irregularity of the procedure is such as to preclude our acting upon this application to dismiss. There is no question

but what the respondent's attorney has been authorized to appear for him, and the fact that he has failed to proceed in a regular manner to cause his substitution through an order of this court is not necessarily fatal to the application now made in behalf of the respondent.

In view of the lack of importance of the questions involved in these cases, and of the smallness of the amounts in controversy, we do not think the matter should be remitted to the court below, as requested by the appellants. The appeals are dismissed, with costs. All concur.

(128 N. Y. 677)

# PEOPLE v. GEOGHAN.

(Court of Appeals of New York. June 30, 1893.)

## MURDER—EVIDENCE.

Where the evidence shows that defendant followed his wife to her mother's home, where she had gone for protection from his ill treatment, and there killed her, because she refused to go home with him, a conviction of murder in the first degree is justified.

Appeal from court of oyer and terminer, Kings county.

Edward Geoghan was convicted of murder in the first degree, and appeals. Affirmed.

J. Grattan McMahon, for appellant. Jas. W. Ridgway, for the People.

PECKHAM, J. After a careful reading of the whole record in this case, we fail to find any reason for a reversal of the judgment of conviction. The evidence shows the deliberate killing of a defenseless woman, and that woman the wife of the murderer. The couple had been married but about one year and a half, and the record shows that frequently during that time the defendant had ill treated the deceased, so that she had left him, and come home to her mother, for protection from his violence. They had one child, about five months old, and but a short time before the death of the wife the defendant had come to her mother's house, where the wife had fled, and had taken the child in his arms, and threatened to shoot both the child and the mother unless she came home again. The occurrence which resulted in the death of the deceased took place about midday on the 8th of September, 1892. The wife had taken refuge with her mother a day or two before, and was in a room with her baby, when the door was broken in by the defendant. He asked the deceased if she would come home with him, and upon her refusal he took out his revolver, and in the presence of a sister of the deceased, and while the deceased had her baby in her arms, he fired at her. The sister then ran out to summon assistance, and while gone she heard three others shot fired, and then the defendant ran out of the room, down the stairway, and out into the street, pursued by the sister. He was arrested while thus running, and the policeman who arrested him, assisted by another, took him back to the house, under the guidance of the sister, and he was there confronted with the deceased. She

identified him as the one who did the shooting, and he was then taken to the jail. He had been drinking, but was not drunk. The child in the mother's arms was slightly hit by one of the pistol bullets, and its dress was scorched by the powder from the weapon. The woman lingered for a few hours, and then died. The evidence was such as not to leave the slightest possible doubt that the defendant did the shooting. The defense was insanity. The evidence upon that point was so weak as not to call for any discussion in regard to it. The crime was undoubtedly the result of the anger and passion of the defendant, caused by the refusal of the deceased to return home with him. No intelligent and honest jury could, upon the evidence disclosed in this record, have come to any other conclusion than that the defendant was guilty of murder in the first degree. The charge of the learned judge who presided on the trial was a correct statement of the law applicable to the case. He charged as requested by the counsel for the defense, and there was not an exception taken to any part of the charge. There is nothing in the whole course of it to which exception could have properly been taken. The one or two exceptions taken in the course of the trial to the ruling of the court upon questions of evidence are too plainly frivolous to warrant further notice. Upon a careful review of the whole record, we find no error of law, and upon the merits we find no ground for interference. In this case we can plainly see that justice does not require a new trial. The judgment should be affirmed. All concur.

(128 N. Y. 676)

**MAYOR, ETC., OF CITY OF NEW YORK  
v. SMITH et al.**

(Court of Appeals of New York. June 30,  
1893.)

**APPEAL—DISCRETION OF TRIAL COURT.**

An order of a trial court, setting aside a judgment rendered therein by default, will not be disturbed by the court of appeals unless it appears that there was an abuse of discretion.

Appeal from superior court of New York city, general term.

Action by the mayor, aldermen, and commonality of the city of New York against James M. Smith, impleaded, and others. From an order of the general term (20 N. Y. Supp. 666) affirming an order vacating a judgment against defendant Smith, plaintiffs appeal. Appeal dismissed.

David J. Dean, for appellant. Wm. H. Newman, for respondent.

**PER CURIAM.** Whether, under the circumstances disclosed, the court below should set aside the judgment as to this respondent, was a matter which rested in its discretion. The circumstances were such as to warrant the action taken, in our opinion; but, irrespective of that opinion, there can be no doubt that the control possessed by courts of original

jurisdiction over their judgments and orders, as well as in reference to the fact or the sufficiency of a notice of appearance in the action, is absolute, and beyond any review by this court, unless it appears that there was an abuse of discretion. The appeal should be dismissed, with costs. All concur.

(138 N. Y. 548)

**SIXTH AVE. R. CO. v. METROPOLITAN  
EL. RY. CO. et al.**

(Court of Appeals of New York. June 20,  
1893.)

**ELEVATED RAILROAD—INJURY TO ABUTTING  
PROPERTY—DAMAGES—EVIDENCE.**

1. In an action for damage to the fee of plaintiff's property, arising from the construction of an elevated railroad, the fact that the court erroneously refused to find as a fact that the value of the easements taken, when considered alone, was only nominal, and that the damages to be recovered, if any, were consequential only, is not a ground for reversal, where the record shows, beyond any fair doubt, that the court adopted the true rule of damages, and considered the benefits, if any, arising from the construction of the railroad.

2. Where it appears from the decision of the lower court that the compensation awarded was for injury to the easements of light, air, and access only, the admission of evidence of noise and vibration caused by the railroad is harmless error.

3. In an action for damages to the fee of plaintiff's property, arising from the construction of an elevated railroad, expert opinions of the amount of damage sustained by plaintiff, or the possible value of the property if the railroad were not there, are inadmissible.

4. The limitation of the number of experts to be called to testify on an issue as to injury to property, resulting from the construction of an elevated railroad, is a matter of discretion for the court.

Appeal from supreme court, general term, first department.

Action by the Sixth Avenue Railroad Company against the Metropolitan Railway Company and another to restrain the maintenance and operation of defendants' elevated railroad in front of plaintiff's property on the east side of Sixth avenue, consisting of eight lots between Forty-Third and Forty-Fourth streets, eight lots between Fifty-Eighth and Fifty-Ninth streets, and one lot at the south-east corner of Fifty-Eighth street. From a judgment of the general term (18 N. Y. Supp. 939) affirming a judgment entered at special term, (14 N. Y. Supp. 97,) granting the injunction unless defendants pay \$28,000, \$35,000, and \$5,000 for a conveyance of that part of plaintiff's easements in Sixth avenue appurtenant to said lots, respectively, which has been taken by said railroad, or the aggregate sum of \$68,000, besides \$2,232.63 costs and disbursements, defendants appeal. Affirmed.

Edward C. James, for appellants. George Zabriskie, for respondent.

**PECKHAM, J.** The questions in this case relate solely to the damages to the fee of the property owned by the plaintiff herein. The court refused to find the fact



that the value of the easements taken by the defendants, when considered alone, was nominal only, or that the damage, if any, sustained by the plaintiff, was only consequential. In the abstract, this was error, and we have so held. Whenever it has appeared that the court, in awarding damages, was guided by an erroneous rule founded upon such refusals, we have always reversed; and if the record left the matter in doubt, and erroneous findings or conclusions of law appeared therein, we have also always reversed the judgment. We have done so because, when an erroneous ruling was made which might be material, we would reverse unless it appeared that no injury came to the defendant by reason of the erroneous finding or refusal to find. We intend to adhere strictly to the rule for the award of damages adopted in the Newman and in the Bohm Cases, 118 N. Y. 618, 23 N. E. Rep. 901, and 129 N. Y. 576, 29 N. E. Rep. 802. But when the record shows that the error in the finding as to the value of the easements, or as to the nature of the damages sustained, was only of an abstract nature, or, in other words, that it consisted of a merely erroneous description of the injury sustained, and it also appears that the correct rule for the ascertainment of damages was in reality adopted, it would be unjust to reverse a judgment on any such fanciful ground. In this case, notwithstanding the abstract error in refusing to find as a fact that the value of the easements taken was only nominal, when considered alone, and that the damages to be recovered, if any, were consequential only, the record shows, beyond any fair doubt, that the true rule of damages was adopted by the court. When the trial court speaks of the value of the easements or the property taken by the defendant, it is evident from the conclusions of law found by the learned judge that this language was used to express the idea of damages sustained by the appurtenant land on account of the taking of these easements, after a consideration of all the advantages, if any, arising from the presence of the railroad in the avenue. The court had the decision in the Newman Case before it at the time it made the findings in this case, and there is no evidence that the learned trial judge had the least reluctance to follow that decision in its essential and material features. Whether he called the easements of nominal value only, or refused so to designate them, is not of the least consequence, so long as the case shows that in arriving at the amount of the award to be paid the learned judge took into consideration the benefits, if any, arising to the land because of the railroad, and gave judgment accordingly. This the court did in the case before us.

2. As to the exception to the evidence of noise and vibration caused by the railroad, if the fact had been taken into consideration in fixing the amount of damages to the fee, it would, of course, have been error. It is, however, clear, from

the decision, that the compensation awarded was only for the injury to the easements of light, air, and access. It is these easements only which are taken by the railroad, and it is only for the injury consequent upon their taking that a recovery can be had. A careful perusal of the decision convinces us that no compensation or damage was awarded for vibration or noise.

3. We do not think that any error, for which this judgment should be reversed, occurred in the various rulings of the court upon the matters of expert evidence. The expert evidence, which has been condemned, has been that which related to the very fact in issue, viz. the amount of damages which the party has sustained. It has been held improper to show by the expert his opinion of what would have been the value of the property if the railroad had not been built. That, of course, is pure conjecture or speculation. All the facts necessary to enable any one to guess upon that proposition can be stated by the expert. All the facts upon which he is enabled to make up his own opinion might probably be stated for the information of the court or jury, but the express fact to be decided by the tribunal itself, viz. the amount of damage sustained by the plaintiff, or the possible value of property if the railroad were not there, is not the subject of expert opinion. Roberts' Case, 128 N. Y. 455, 23 N. E. Rep. 486; Doyle's Case, 128 N. Y. 488, 23 N. E. Rep. 495; Gray's Case, 128 N. Y. 499, 23 N. E. Rep. 498. The questions put to the witnesses Waterlow and Harnett were not of that character. The objections to their evidence are such as a cross-examination would obviate, which would bring out the grounds upon which the witnesses based their opinions as to the alleged existing values of property, and as to the course of rentals.

4. The refusal of the court to state, as a conclusion of law, that in order to recover, beyond a nominal sum, for the taking of the easements, the plaintiff must establish, by a preponderance of proof, that it has suffered consequential damages from the taking of the easements by defendants, was not error for which a new trial should be granted. It is, as has already been stated, apparent from the whole record that a proper rule of damages was followed by the court, and the refusal of this request to call them "consequential damages" was but a reiteration of the views on that part of the case already given by the court. That it was necessary for the plaintiff to prove its case by a preponderance of evidence is not a matter of doubt, and the trial court nowhere held the contrary.

5. The limitation of the number of experts who should be called was matter of fair discretion with the trial court, and there is not the slightest trace in this record of any abuse of that discretion.

After a careful consideration of all the questions in the case, we think the judgment should be affirmed, with costs. All concur.

(138 N. Y. 663)

**RICH v. MANHATTAN RY. CO. et al.**  
(Court of Appeals of New York. June 27,  
1893.)

**APPEAL—FINAL JUDGMENT.**

A judgment declaring that plaintiff is not entitled to the equitable relief sought, and directing dismissal unless within a stated time he shall serve on defendants notice of an election to try the cause as an action at law, is not final, and hence not appealable to the court of appeals.

Appeal from common pleas of New York city and county, general term.

Action by Alexander Rich against the Manhattan Railway Company and another to restrain the operation and maintenance of defendants' railroad in front of property belonging to plaintiff. From a judgment of the general term (19 N. Y. Supp. 543) affirming an interlocutory judgment denying the relief, plaintiff appeals. Appeal dismissed.

Leo C. Dessar, for appellant. Brainard Tolles, for respondents.

**PER CURIAM.** The judgment in this action adjudged that the plaintiff was not entitled to equitable relief, and directed a dismissal of the complaint, with costs, unless within 20 days from its entry, or, if an appeal was taken, within 20 days after the entry of the order on the final appeal, the plaintiff served notice upon the defendants that he elected to try the action for damages to the premises described as an action at law, before a jury, and pay the costs incurred to the date of notice; and, if the plaintiff failed to make such election within the time specified, the defendants might enter an order dismissing the complaint, with costs. This was plainly not a final judgment, and hence not appealable to this court, and we cannot, therefore, now consider or determine any of the questions involving the merits which have been discussed upon the briefs of the counsel for the plaintiff and the other property holders similarly situated. The appeal must be dismissed, with costs. All concur.

(159 Mass. 372)

**COMMONWEALTH v. ROBERTS.**

(Supreme Judicial Court of Massachusetts.  
Worcester. June 21, 1893.)

**SCHOOLS — COMPULSORY ATTENDANCE — TRIAL OF COMPLAINT AGAINST PARENT — EVIDENCE — ADMISSIBILITY.**

Acts 1890, c. 384, provides that a person having under his control a child between the ages of 8 and 14 years, and neglecting to cause the same to attend the public day school for at least 30 weeks during each school year, shall forfeit, etc., unless such child attended a private day school approved by the school committee, or "has been otherwise instructed for a like period of time in the branches of learning required by law to be taught in the public schools," or has already acquired such branches. *Held*, that on the trial of a parent for violation of such statute it was error to exclude evidence that during the time alleged in the complaint defendant's child had been instructed for the required time in the branches of learning taught in the public schools in a private day school not approved by such school committee.

Report from superior court, Worcester county; Robert R. Bishop, Judge.

Complaint charging Frank Roberts with neglecting to cause his child, aged 11 years, to attend any public school for a period of 28 weeks during a certain year, as required by chapter 384, Acts 1890. There was a verdict of guilty rendered, and defendant excepts. Exceptions sustained, and verdict set aside.

It was proved or admitted that at the time alleged in the complaint the defendant had under his control a daughter, named Mary Roberts, between the ages of 8 and 14 years, and that he neglected to cause her to attend a public day school in said Fitchburg at the time and for the period of time alleged in the complaint, public day schools of said Fitchburg being kept open in said Fitchburg for that period of time during the time alleged in said complaint. The government, upon proof of the above facts, rested, and the defendant offered to show that for a like period of time with the period alleged in the complaint, during the time alleged in the complaint, the said Mary Roberts had been instructed in the branches of learning required by law to be taught in the public schools in a private day school not approved by the school committee of said Fitchburg, application to approve said private day school having been made to said school committee and refused; and asked the court to rule that these facts, if proved, brought the case within the exceptions mentioned in the statute. The court declined so to rule, and excluded the evidence.

F. A. Gaskill, Dist. Atty., for the Commonwealth. W. S. B. Hopkins, Thos. F. Gallagher, and Frank B. Smith, for defendant.

**ALLEN, J.** The penalty imposed by St. 1890, c. 384,<sup>1</sup> is not incurred "if such child has attended for a like period of time a private day school approved by the school committee of such city or town, or if such child has been otherwise instructed for a like period of time in the branches of learn-

<sup>1</sup>Acts and Resolves 1890, c. 384, provides as follows: "Every person having under his control a child between the ages of eight and fourteen years shall annually cause such child to attend some public day school in the city or town in which he resides, and such attendance shall continue for at least thirty weeks of the school year if the schools are kept open that length of time, with an allowance of two weeks' time for absences not excused by the superintendent of schools or the school committee; and for every neglect of such duty the person offending shall, upon the complaint of the school committee or any truant officer, forfeit to the use of the public schools of such city or town a sum not exceeding twenty dollars; but, if such child has attended for a like period of time a private day school approved by the school committee of such city or town, or if such child has been otherwise instructed for a like period of time in the branches of learning required by law to be taught in the public schools, or has already acquired the branches of learning required by law to be taught in the public schools, or if his physical or mental condition is such as to render such attendance inexpedient or impracticable, such penalties shall not be incurred."

ing required by law to be taught in the public schools, or has already acquired the branches of learning required by law to be taught in the public schools." The words, "if such child has been otherwise instructed for a like period of time with the means of education," were in the earlier statutes. Pub. St. c. 47, § 1; St. 1873, c. 273, § 1; Gen. St. c. 41, § 1. The great object of these provisions of the statutes has been that all the children shall be educated, not that they shall be educated in any particular way. To this end public schools are established, so that all children may be sent to them, unless other sufficient means of education are provided for them. If a child has in any manner already acquired the branches of learning required by law to be taught in the public schools, the law does not compel any further instruction. If he has not acquired them, the law requires that he be instructed in them for the specified time each year. Sending a child to a private day school approved by the school committee is enough to comply with the requirement of the law without further inquiry. Pub. St. c. 47, § 2, prescribes what private day schools may be so approved. But if the person having a child under his control, instead of sending him to a public school, or to a private day school approved by the school committee, prefers to have him instructed otherwise, it will be incumbent on him to show that the child has been instructed for the specified period in the required branches of learning, unless the child has already acquired them. This permits instruction in those branches in schools or academies situated in the same city or town or elsewhere, or instruction by a private tutor or governors, or by the parents themselves, provided it is given in good faith, and is sufficient in extent. If the school committee has not approved of a particular school, or has expressly refused to approve of it, then the person having control of a child, if he sends the child to that school, must take the responsibility of being able to prove that he has been sufficiently and properly instructed there. He has no such responsibility if he sends the child to a private day school approved by the school committee. The evidence which was excluded should have been admitted. Verdict set aside.

(159 Mass. 344)

**BARNES v. SMITH.**(Supreme Judicial Court of Massachusetts.  
Suffolk. June 21, 1893.)**GAMBLING CONTRACTS—DEALING IN STOCKS—PARTICIPATION OF BROKER.**

While a broker employed to buy and sell stocks under an agreement that no stock should be actually delivered, but that he should either make bargains to that effect with the other parties to the transactions, or should protect his principal from being called upon to accept or make actual deliveries, is a participant in an illegal contract, and cannot recover money advanced, yet a mere expectation on the part of the principal and broker that purchasers from the principal would be willing to adjust the transactions by paying or receiving differences, when there is no agreement to that effect, does not render the contract illegal.

Report from superior court, Suffolk county.

Action by Fred R. Barnes against Samuel A. Smith on two promissory notes. There was a judgment for defendant. On report to supreme judicial court. New trial granted.

Defendant, in his amended answer, alleged as follows: "And the defendant, further answering, says that if he made the notes mentioned in plaintiff's declaration the considerations for the same are illegal and void. And the defendant says the plaintiff is a broker engaged in the sale and purchase of stocks on margin, so called. And defendant says that he bought certain stocks on margin from the plaintiff; that the notes mentioned in plaintiff's declaration were given by the defendant to the plaintiff in payment of margins alleged to have been paid by plaintiff for defendant on stocks sold by plaintiff to defendant on margin. And the defendant says that at the time plaintiff sold him said stocks on margin, and at the time said margins were alleged to have been paid by plaintiff, for which said notes were given, the plaintiff was not the owner of said stocks, or certificates of stocks, or the assignee thereof, or authorized by the owner or assignee, or his agent, to sell said stocks, and that there was no intention on the part of the plaintiff to deliver the certificates of stock so purchased on margin as aforesaid, and no intention on the part of the defendant to receive the certificates of stock, or pay the price for the same; that there was a mutual understanding between the plaintiff and the defendant that no delivery or receipt of the stock was intended or expected, or any payment of the price of the stock to be made. The defendant further says that the contract, for the furtherance of which the notes mentioned in plaintiff's declaration were given, was a wagering contract, and illegal and void."

J. N. Marshall, M. L. Hamblet, and John C. Burke, for plaintiff. John J. Harvey, for defendant.

ALLEN, J. We are not certain that we correctly understand the grounds of defense set up in the amended answer, but it does not appear that the direction of the presiding justice to return a verdict for the plaintiff rested on the ground of variance between the answer and the evidence. *Kennedy v. Owen*, 181 Mass. 431. The only question, therefore, which we have considered, is whether the evidence of the defendant was sufficient to entitle him, under proper pleadings, to go to the jury. There is a great difficulty in understanding the defendant's case, because, to a large extent, the defendant's counsel, and the plaintiff, while he was testifying in his cross-examination as a witness, were at cross purposes. Throughout the cross-examination of the plaintiff the defendant's counsel proceeded on the assumption that the defendant had directed the plaintiff, as a broker, to buy for him certain railroad shares in the market, and it was assumed during a part of the cross-examination that when shares so bought rose in value

the defendant would lose money. The court intimated that these questions were immaterial to the issues raised on the pleadings, but the cross-examination proceeded at considerable length, with no intimation that the real transactions conducted by the plaintiff as broker for the defendant were sales of stock on account of the defendant, instead of purchases for him. When the defendant himself became a witness, his counsel assumed, and he testified, that the transactions were directly the reverse, namely, that the defendant had directed the plaintiff, as broker, to sell for him the same number of railroad shares that had before been spoken of as having been bought for him. Now, as between the plaintiff and the defendant, assuming the defendant's testimony to be true, the jury would have been well warranted in finding that they both understood that the defendant did not own the shares which he had ordered to be sold for him, and that he had no intention to perform his contract of sale by the actual delivery of the securities. But if the plaintiff acted as broker there was another party to the contract of sale, namely, the purchaser, and there was no evidence to show that he participated in the wagering intention. The defendant introduced no evidence upon this point. No inquiry was made to ascertain who the other party to the sales was. If there was one, his name was not disclosed, nor asked for, and it did not appear that either the defendant or the plaintiff had ever had any prior transactions with him. The whole question as to the purchaser's intention was left to conjecture. The contract of sale was not a wagering contract, as between seller and purchaser, unless both of them understood that no delivery was to be made of the shares sold. *Benj. Sales*, (6th Ed.) *Bennett's notes*, 503, 504. It may be conjectured that such was the fact in this case; but the defendant did not go far enough with his evidence to warrant a finding that the purchaser so understood. The sales were made, as we infer, by means of telegrams, which were not produced, nor their contents stated. In this respect the case resembles *Roundtree v. Smith*, 108 U. S. 269, 2 Sup. Ct. Rep. 630, where, for similar reasons, it was held that the evidence failed to show a wagering contract between the principals.

All that there is left, then, is the question whether the plaintiff is cut off from recovering on his notes by reason of his own agreement or understanding with the defendant. The rule of law upon this subject is as follows: If there was evidence sufficient to show that the defendant employed the plaintiff as a broker to make purchases or sales of shares for him, with the agreement or understanding on the part of both that no shares should be actually delivered, but that the plaintiff, as a broker, should either make bargains to that effect with the other party or parties to the transactions, or, at any rate, that he should protect the defendant from being called on to make or accept any actual deliveries of shares, then the plaintiff would properly be found to be a participant in an illegal contract, and would

be debarred from recovering for his commissions, or for moneys advanced by him for the furtherance of such illegal contract. But a mere expectation on the part of the plaintiff and of the defendant that the purchaser of shares would be willing to adjust the transactions on the basis of receiving or paying differences, when there was no agreement or understanding to that effect, or to the effect that the plaintiff should protect the defendant from being called on to make or accept any actual deliveries of shares, would not be sufficient to render the contract illegal; and the plaintiff's participation as a broker in making sales for the defendant under that expectation would not debar him from recovering for his commissions, or for moneys advanced by him for the defendant in aid of the transactions. *Harvey v. Merrill*, 150 Mass. 1, 22 N. E. Rep. 49, and cases there cited. The evidence of the plaintiff was sufficient to entitle him, under proper pleadings, to go to the jury upon this aspect of the case. Since it does not appear that the ruling was upon the ground of a variance, it seems to us that a new trial should be granted, at which leave to amend, if deemed necessary by the defendant, may be allowed or refused, in the discretion of the court. New trial granted.

(159 Mass. 333)

#### MARDEN v. BOSTON & A. R. CO.

(Supreme Judicial Court of Massachusetts.  
Suffolk. June 21, 1893.)

#### ACCIDENT AT RAILROAD CROSSING—CONTRIBUTORY NEGLIGENCE.

A child familiar with a railroad crossing, and in the habit of crossing it four times a day, and who is not shown to have had any occasion for haste, is guilty of contributory negligence in attempting to cross while the gates are down; and it is immaterial that a switching engine is standing near by, not in motion, for, several tracks being inclosed, she is not justified in supposing that the gates are down on account of such engine.

Report from superior court, Suffolk county; James R. Dunbar, Judge.

Action by James M. Marden, administrator of the estate of Anne Isabell Hartley, deceased, against the Boston & Albany Railroad Company, to recover damages for the killing of decedent by defendant. A verdict was directed for defendant, and the case reported to the supreme judicial court. Verdict ordered to stand.

Charles Allen Taber, for plaintiff. Samuel Hoar, for defendant.

BARKER, J. Although one count of the declaration is drawn under the provisions of Pub. St. c. 112, § 213, no proof was offered that the bell was not rung, or that the whistle was not sounded for the crossing, and the plaintiff did not ask to go to the jury on that ground. We discuss only the question whether the plaintiff's intestate was guilty of contributory negligence, because upon the other counts there was proof that the injury was occasioned by her fault. She was killed at a crossing of a railroad and a highway

under such circumstances that, but for the fact that she was a child, the case would be governed by that of *Granger v. Railroad Co.*, 146 Mass. 276, 15 N. E. Rep. 619. As was there held, the defendant had the right to the exclusive use of the crossing when its trains were passing; and if it had given a warning, which a traveler disregarded, if he attempted without sufficient excuse to cross, he did so at his own risk. The lowered gates were a sufficient warning, and, as several tracks were inclosed by them, no one had a right to suppose that the gates were down merely because of the switching engine, then not in motion; and it was negligence for a traveler to enter upon the tracks between the lowered gates when so warned that the exclusive use of the crossing was required for railroad purposes. This rule ought to be applied to the plaintiff's intestate, who was familiar with the place, usually crossing it four times a day, and who is not shown to have had any occasion for haste, or any special inducement or invitation at the time to disregard the warning and attempt the crossing when the gates were down. The only proper inference from the evidence is that she understood and took the risk. Verdict to stand.

(150 Mass. 353)

## CROWELL v. KEENE et al.

(Supreme Judicial Court of Massachusetts.  
Suffolk. June 21, 1893.)DEED—MORTGAGE OR ABSOLUTE CONVEYANCE—  
EVIDENCE.

Twenty years after a conveyance of land, and after the death of the grantor, the grantee—the grantor's stepson—testified that the conveyance was not intended as a mortgage, and that the consideration therefor was money which he had previously loaned the grantor. All the members of the grantor's family testified that they always understood, from what the grantor said, that the conveyance was an absolute one. After the execution of the deed the grantor executed mortgages, without mentioning the prior conveyance, and also sold a parcel of land embracing a part of the land previously conveyed. During the grantor's life the land was taxed to him, and afterwards to his heirs, but the taxes were paid, at least in part, by the grantee. Shortly before his death the grantor made a statement to perpetuate his testimony that the deed was made to secure advances by the grantee. *Held*, that a finding that the deed was an absolute conveyance was supported by the evidence.

Report from supreme judicial court, Suffolk county; Oliver W. Holmes, Jr., Judge.

Action by Horace S. Crowell against Samuel Keene and others. There was a decree for defendants, and the cause was reported to the full court. Bill dismissed.

H. W. Chaplin, for plaintiff. Joseph Bennett and Arthur Lord, for defendants.

LATHROP, J. This is a bill in equity, filed on May 16, 1891, and amended on October 24th of the same year, to have a conveyance executed by Michael Robinson to Samuel Keene on April 14, 1870, of six parcels of land in Wareham, declared a mortgage, on the ground that the conveyance, though absolute in form, was intended by the parties as security for certain advances

made and to be made to Robinson by Keene, and was understood by the parties to be a mortgage. The case was heard on its merits by a single justice of this court, who found that the deed set forth in the bill was an absolute deed, and ordered a decree for the defendants. At the request of the plaintiff the judge reported the case for our consideration on the pleadings, and a full report of the evidence. The plaintiff's title to maintain the suit is based upon an agreement made by him on August 21, 1890, with Michael Robinson, by the terms of which Robinson agreed to sell, and the plaintiff to buy, the land contained and referred to in the deed to Keene; "the validity of such deed being in dispute between myself and said Keene, and it being understood that this agreement to convey applies only when and to the extent that said obligation, by agreement, compromise, or otherwise, is decided in my favor; I hereby employing such attorney or attorneys as said Crowell may elect, but at his expense; I hereby giving said Crowell or his said attorney a lien upon my claims against said Keene to secure such advances as they may make." We need not consider whether this agreement gives the plaintiff any standing in court as against the defendants, nor whether the agreement is not void for champerty and maintenance, as we are of opinion, upon a review of the evidence, that the finding of the single justice must be affirmed. The controversy relates to a transaction which took place over 20 years ago. What the parties to it intended was known to them alone, and there is now no direct evidence of such intention, except the instrument which they executed, and the testimony of the defendant Samuel Keene, Michael Robinson having died before the bill was filed. Keene testified that there was no agreement whatever in regard to the deed being a mortgage; that there was not a word said to that effect; that Robinson made no claim that the deed was a mortgage until 1879 or 1880, after he had married again. Keene was a stepson of Robinson, his mother being Robinson's wife at the time of the execution of the deed. Keene allowed Robinson to live on the land conveyed in 1870, and testified that the consideration for the conveyance was money which he had previously lent Robinson at different times. He continued to lend him money afterwards, and to assist him in various ways. Keene was evidently the moneyed man of the family. If his testimony is true the plaintiff has no case; and his testimony is confirmed by all of the members of the Robinson family, who testify that they always understood, from what their father said, that the land belonged to Keene.

Forsome years before his death, Michael Robinson asserted that the deed was invalid because it contained, when delivered, only one parcel of land, and that the other parcels were fraudulently added; and this he repeated in September, 1890, in a statement made under Pub. St. c. 169, § 45, to perpetuate his testimony. It is true that this statement also sets forth that the deed was for the purpose of securing advances made and to be made. This state-

ment was put in evidence by the defendants, but, though it appears that the deposition of Michael Robinson was taken under the statute, it was not put in evidence by the plaintiff. It is not now contended that any alteration was made in the deed, and the bill does not proceed upon this theory. The plaintiff's chief reliance is upon certain facts which he contends are proved, and are inconsistent with the theory that the deed was intended as an absolute conveyance, and which are only consistent with his theory. The most important of these we will briefly consider: In July, 1870, Robinson executed a mortgage of one of the parcels conveyed to Keene, without mentioning the prior conveyance, and with full covenants of warranty. In October, 1878, he executed a mortgage of this parcel, and of another parcel, in the same manner. These acts are relied on as showing acts of dominion on the part of Robinson. But, if they are inconsistent with one theory, they were also inconsistent with the other theory. They repudiate the conveyance entirely. One of these mortgages was recorded prior to the recording of the deed to Keene, and was therefore a valid incumbrance upon the land. The other mortgage was recorded subsequently. Robinson also sold a parcel of land which was a part of the lots embraced in the two mortgages. Keene was present when the title was passed, paid the second mortgage, in whole or in part, and an assignment of this mortgage was made to his wife, through a third person, and this mortgage has since been foreclosed. The testimony tends to show acquiescence on his part at this time in Robinson's actions, or at least that he did not see fit to repudiate them. This settlement, however, was 10 years after the date of his deed, and what he then chose to do for the honor of the family has but a remote bearing upon the main question in issue.

The plaintiff further contends that the fact that Robinson was indebted to Keene in 1870 was of itself evidence that the deed was intended as a mortgage. No authority is cited in support of this proposition, and there is no presumption of law either way. As a matter of evidence the fact is of but slight importance.

It appears that the land was, during Robinson's life, taxed to him, and was afterwards taxed to his heirs. The taxes were, however,—at least in part,—paid by Keene. We do not see that the fact that Keene did not notify the assessors of the change of title has any tendency to show that the deed was a mortgage deed, instead of an absolute deed.

The plaintiff further relies on the fact that Robinson cut wood on the land from time to time during the 20 years before the hearing. Keene, however, testified that he gave him that liberty, that it was Robinson's means of support, and that it was done as "a family understanding."

Evidence was introduced of oral admissions made by Keene that he held the title or the benefit of Michael Robinson and his heirs; that he had advanced money from time to time, "and was holding the land for the debts." In May, 1880, Keene

wrote to Michael Robinson: "My only purpose is for your benefit, and have acted upon the advice of your friends in Wareham to let it remain as it is for the present, in order to save the farm for you." In February, 1880, also, Keene wrote to Robinson: "When you are in a position to pay my balance I will talk about a transfer. You say I can't have all. I only want my due, and if you can find any one to let you have money as cheap as I have in the past you are fortunate. It has not been my intention to deprive you [of] liberty of the farm, in the least." This last sentence, Keene testified, related to the fact that he gave Robinson the use of the farm. While these oral and written admissions have a strong tendency to support the plaintiff's theory, they are also consistent with the theory that the deed was intended as an absolute conveyance, and that Keene intended, when he was made whole, to reconvey the land, though under no obligation to do so.

Michael Robinson died November 15, 1880, and after his death, and before Keene knew of the agreement made by Robinson with Crowell, he procured releases from Robinson's widow and from his children of any interest they might have in the land. The plaintiff relies upon this fact as being consistent only with his theory of the case. It appears, however, that at this time there was an action pending against Keene in Plymouth county, brought by Michael Robinson, but promoted by the present plaintiff, relating to this property, though precisely what the action was is not disclosed, and that Keene acted under the advice of counsel in obtaining the release, for the purpose of controlling that case.

On the whole evidence, we cannot say that the finding of the single justice, who heard the witnesses, and who was better able to judge of their credibility, from their appearance and manner of testifying, than we can be, was wrong. *Chase v. Hubbard*, 153 Mass. 91, 28 N. E. Rep. 433, and cases cited; *Loud v. Barnes*, 154 Mass. 344, 28 N. E. Rep. 271. Bill dismissed.

(7 Ind. App. 172)

#### CHICAGO & E. R. CO. v. FIELD.

(Appellate Court of Indiana. June 10, 1893.)

RAILROAD COMPANIES — PASSENGER — WHAT CONSTITUTES — ACTION FOR WRONGFUL EJECTION — EXCESSIVE VIOLENCE.

1. A person who gets on the platform of an express car without having purchased a ticket, and remains thereon, in violation of the company's rules, for the purpose of being carried from one station to another, is not a passenger.

2. The fact that a brakeman of such train, on discovering such person, accepts from the latter the required fare from the station where he got on to his place of destination, does not constitute such person a passenger, since the former cannot waive the rules of the company.

3. Where, in an action against a railroad company for wrongfully ejecting plaintiff while a passenger, the gist of the complaint is the violation of the contract to carry, plaintiff cannot recover on the theory of the use of unnecessary violence in effecting a rightful ejection.

Appeal from circuit court, Lake county; William Johnston, Judge.

Action by A. Newton Field against the Chicago & Erie Railroad Company to recover damages for the wrongful ejection of plaintiff from defendant's train while he was a passenger thereon. From a judgment entered on the verdict of a jury in favor of plaintiff, defendant appeals. Reversed.

Otto Gresham and J. W. Yanche, for appellant. R. Gregory, for appellee.

REINHARD, J. The appellee instituted this action against the appellant, a common carrier of passengers, for failing to carry him as per contract from Auburn Park, Ill., to Hammond, Ind. Upon issues joined there was a trial by jury, resulting in a verdict and judgment in favor of the appellee. Among the errors assigned and discussed by appellant's counsel are those of the overruling of its motion for a judgment in its favor upon the special verdict of the jury, and the sustaining of the appellee's motion for judgment in his favor upon such verdict.

It appears from the facts found in the special verdict that on the 13th day of September, 1891, the appellant corporation was operating a railroad between Chicago, Ill., and Hammond, Ind. On that day, at about 8 o'clock P. M., the appellee was at Auburn Park, Ill., and desired to go to Hammond, Ind. The appellant's train No. 12, being then on its way from Chicago to Hammond, stopped at Auburn Park, but for what purpose is not disclosed. The appellee boarded an express car on said train, and stood upon the front platform thereof, in company with two companions, said car being the first one in the rear of the locomotive and in front of the passenger coaches, and continued to ride thereon until the happening of the alleged grievance. After the train had started on its way one of the trainmen of the appellant, wearing the uniform of the company, having the word "Erie" marked upon each side of his collar, and the word "Trainman" above the visor of his cap, presented himself to said parties, and demanded of them where they were going, and their fare. The appellee replied that he was going to Hammond, and handed the trainman 50 cents, which the latter accepted and placed in his pocket, and shortly afterwards left said platform. The regular fare from Auburn Park to Hammond was 40 cents. When the train reached State Line, the conductor came forward, and, discovering said persons on the platform, ordered them to leave the train, making threats of violence against them, and using abusive and profane language. The appellee left the train, and walked to Hammond, a distance of one mile, under some difficulty. The jury find that by the printed rules of said company passengers are not allowed to ride on the platform of express cars, and that upon the outside of the doors of each and every passenger car on said train a metallic strip was fastened, upon which was written: "Passengers are not allowed to stand on the platform while the cars are in motion."

The appellee did not have any actual knowledge of these regulations, nor did he know the position or authority of said trainman to whom he paid said 50 cents, and who, in point of fact, was a brakeman upon said train. The conductor also wore a uniform similar to that of the brakeman, differing only in the distinguishing marks of the respective positions held by the said conductor and brakeman.

To determine whether or not the appellee was wrongfully ejected from the train it is necessary to ascertain first whether the appellee sustained to the appellant the relation of passenger. The liability of the appellant is contractual, and if, therefore, there was no legally enforceable contract between said parties, constituting them carrier and passenger respectively, the appellee cannot recover. If, however, there was such contract, express or implied, a liability against appellant arises by virtue of the public duty raised by the law. "A passenger is a person whom a common carrier has contracted to carry from one place to another, and has in the course of the performance of that contract received under his care, either upon the means of conveyance or at the point of departure of that means of conveyance." 2 Amer. & Eng. Enc. Law, 742. There is no liability on the part of the appellant unless at some point upon the route the appellee was accepted as a passenger. It is not found in the special verdict that Auburn Park, where the appellee entered the train, was a place where the appellant's train was scheduled to stop to receive passengers, or that he had then paid his fare, or that he entered at the invitation of the appellant. A failure to find upon some fact or issue involved is equivalent to a finding against the party holding the affirmative upon such fact or issue. *Henderson v. Dickey*, 76 Ind. 264; *Johnson v. Putnam*, 95 Ind. 57; *Parmater v. State*, 102 Ind. 90, 3 N. E. Rep. 382; *Glantz v. City of South Bend*, 106 Ind. 305, 6 N. E. Rep. 632; *Railway Co. v. Hart*, 119 Ind. 273, 21 N. E. Rep. 753. It is affirmatively shown, upon the other hand, that the appellee entered one of the appellant's vehicles not set apart for passengers, without invitation, and against the express rules and regulations of the company, and remained upon the same until he was ejected. The relation of carrier and passenger does not arise until the traveler "puts himself in charge of the carrier for the purpose of being conveyed to his destination." *Busw. Pers. Inj.* § 114. It cannot be said that this has been done when the traveler takes a position on the train other than that set apart for the use of passengers. It is clear to us, therefore, that the appellee was not a passenger on appellant's train when he boarded the platform of the express car. Did he become such afterwards? If so, it must be because by the conduct of appellant's servant, the brakeman, the appellant is estopped to deny that the appellee occupied such position on the train. It is not within the power of any conductor, trainman, or other employe of a railroad to permit any person to ride upon a vehicle not intended for the conveyance of passengers, and if such person does so,



even upon invitation of such employe, and even though such person and others have continuously so ridden, the person thus traveling does not thereby become a passenger. *Filles v. Railroad Co.*, 149 Mass. 204, 21 N. E. Rep. 311. Railroad companies not only have the right, but it is their duty, to run their trains in accordance with established rules and regulations, and passengers must exercise reasonable diligence to acquaint themselves with the same; and where such regulations are reasonable it is the duty of passengers to comply with them. *Railway Co. v. Lightcap*, 34 N. E. Rep. 243, (at present term.) We do not wish to be understood as holding that persons desiring to travel upon railroad trains must inform themselves of every rule and regulation of the company in order to secure protection, but what we do decide is that they are not entitled to such protection when they act in open violation of the most common and best known of such regulations, among which is the one forbidding persons to ride upon platforms of cars. Common carriers of passengers are not required to notify every individual who may board their train that he must enter the passenger coach in order to become a passenger. It is the duty of the latter to inquire, upon entering the train, where the coach is in which he may be carried to a certain point, and it then becomes the duty of the carrier's servants to inform him. If he acts upon the information, the company thereby accepts him as a passenger, and he is entitled thereafter to all the privileges and immunities of such. But if, upon the other hand, he fails to make such inquiry, and, in violation of the company's rules, enters a vehicle not set apart for passengers, he becomes a trespasser. It was not within the scope or authority of the brakeman to collect fare, and, even if it had been, such brakeman would have no right to waive the established rules and regulations made for the running of the trains, and the appellee had no right to suppose that such employe could bind the company by such an arrangement. *Railway Co. v. Hatton*, 60 Ind. 12; *Railroad Co. v. Nuzum*, Id. 533. Appellee, therefore, acquired no rights as a passenger by the payment of money to the brakeman. Had he been in the passenger coach at the time he made such payment, a different question might be presented. As it was, he was a trespasser when he entered, and remained such throughout; and when the conductor discovered him upon the platform he had a right to eject him from the train. The appellee not being a passenger, the appellant owed him no duty of carriage, and he had, therefore, no cause of action.

It is contended, however, that the special findings show that appellee was ejected with unnecessary violence, and under aggravating circumstances. It is sufficient answer to this to say that the complaint is not drafted upon that theory. The gist of the complaint is the violation of the contract to carry. All other averments, as to aggravating circumstances, etc., are mere incidents to the failure to carry. If the principal fact were established, the jury might consider the incident

in measuring the damages. It is one thing, however, for the company to fail in the performance of its obligation to carry, and quite another for the servants of the company to eject a trespasser with unnecessary force and violence, or under circumstances that render the ejection itself a trespass. In either case, there might be a right of action against the company, but the injured party cannot count upon one and recover upon the other. *Railroad Co. v. Bills*, 118 Ind. 221, 20 N. E. Rep. 775. Our conclusion is that the appellant was entitled to judgment. Other questions presented by the appellant need not, therefore, be determined. Judgment reversed, with instructions to the court below to sustain appellant's motion for judgment in its favor upon the special verdict.

(7 Ind. App. 1)

PRICE v. BARNES et al.

(Appellate Court of Indiana. June 6, 1893.)

APPEAL—PARTIES—LIABILITY FOR COSTS—ESTOPPEL.

1. Where the record shows that one of the defendants appeared specially in the court below, and by answer admitted that he owed the money about which the other parties were litigating; that he paid the money into court; and had no notice of appeal from the judgment subsequently rendered,—such defendant is not a party in the appellate court, and no judgment can be rendered against him for costs, though his name appeared on the papers as a party.

2. The fact that certain attorneys appeared for defendant in the court below does not estop him to deny that they also appeared for him in the appeal.

Appeal from circuit court, Owen county. Action by Mary Price against Beverly P. Barnes and Electus H. Duling. Defendant Barnes had judgment, which was reversed on appeal, (31 N. E. Rep. 809,) and defendant Duling now petitions for a modification of the order therein. Petition granted.

Fowler & Pickens, for appellant. Beem & Hickam, for appellees.

REINHARD, J. Since the reversal of this cause, and the expiration of the time for filing a petition for rehearing, Electus H. Duling, one of the original defendants in the court below, and nominally an appellee in this court, filed a sworn petition for a modification of the mandate herein "by striking out his name therefrom, and so modifying said mandate as to relieve affiant from all liability for any part of the costs made upon the appeal." In his affidavit he sets forth that he has not now, and never has had, any interest whatever in the litigation between the appellant, Price, and the appellee Barnes; that all of the litigation, both in the court below and upon this appeal, has been between said Price and Barnes and that all the costs in both courts have been made by them in the litigation of their rights as between each other, and that affiant, with the exception of the filing of his interpleader, and the payment of the money in his hands into court, has made no costs in said cause whatever;

that, as shown by the complaint, he was only made a defendant that he might be ordered to pay the money then held by him, and in dispute between said Price and Barnes, into court, for the use of the party found entitled to receive the same; that at the first term of the court below after commencement of this suit he filed his interpleader, confessing the amount held by him, and offering to pay the same to whichever party the court might adjudge to be the owner thereof; that the court ordered him to pay the same into the hands of the clerk, and that he thereupon, without further delay or expense to the parties, paid the sum of \$93, being the full amount due by him, to the clerk of said court, and asked for an order of court relieving him from all costs in the case; that since that time he has never had any interest whatever in said litigation, and has made no costs in the same; that the issues were made up, and the cause tried between said parties, without any reference to this affiant,—no further claims being asserted by either party against him, and he claiming nothing against either of them; that he has never had any counsel employed in the cause, either in the court below or in this court,—the interpleader filed by him being voluntarily prepared by the counsel representing said Barnes in the court below, and at the instance of said Barnes, and that no one has had any further authority to represent him in either of said courts; that if any judgment has been rendered against him in the court below, it has been without any default of his, without any issues having been joined, or trial had, and is wholly irregular and void as to him; that he never had any notice of this appeal, and has made no appearance to the same, in person or by attorney, and that all that has been done by said parties has been wholly without participation on his part; that affiant is now informed that by some mistake or error this court has rendered judgment reversing the cause, and has also pronounced judgment against both Barnes and affiant, as though they had both been properly brought into this appeal, and that the clerk of this court, on the 6th day of January, 1893, issued an execution upon said judgment in favor of said appellant, and against said affiant and said Barnes, and placed the same in the hands of the sheriff of Owen county for collection. He asks to have the mandate modified, and the sheriff directed to return the execution, and for all other proper relief.

No counter affidavit has been filed, and the only objection made to the granting of the motion is contained in the brief of appellant's counsel upon the motion. The record shows that in the court below both defendants were ruled to answer, and in response to the rule filed separate demurrers to the complaint, which were overruled, and an exception reserved by both defendants. Thereupon each defendant filed his separate answer to the complaint. The answer of Duling confessed that he was indebted to Barnes upon a promissory note which was executed under the circumstances, substantially, as

alleged in the complaint, and that he was willing to pay said note to whoever might be adjudged to be the owner of the same, and entitled to the payment thereof when the same should become due. He asked that no judgment for costs be rendered against him. The record further shows that the plaintiff then filed a motion that defendant Duling be required to make his separate answer more specific; which motion was sustained. It is not shown that the defendant Duling ever paid the money into court, or was ordered to so pay it, nor does it appear that he had any further connection with the case. The court instructed the jury as follows, among other things: "Duling answers that there is due from him to Barnes, upon a note, the sum of \$93, which he is willing and ready to pay to any one to whom it may be adjudged to be owing, and he has paid said sum into court for the person entitled to receive the same. The disposition of that money is to be determined by the court." The verdict of the jury was as follows: "We, the jury, find for the defendant Beverly P. Barnes." In the subsequent proceedings the name of Duling is frequently used in the title of the action, and sometimes the word "defendants" is employed; but it is not shown that Duling had any further active connection with the case, except that he was used as a witness, and testified that he owed Barnes \$93 balance on a note, and that he had paid the same into court since the beginning of the action. The notice of appeal by the clerk of this court commands the sheriff to notify Beverly P. Barnes and Electus H. Duling, or their attorneys of record, Beem & Hickam, of the appeal. The return of the sheriff to said notice is as follows: "Served on the within named David E. Beem and Willis Hickam, attorneys for Barnes, by reading this notice to and within their hearing, and also by giving them a true and certified copy of this notice." The record of this cause further shows that on the 29th of March, 1892, the clerk issued a notice to the appellant "that on the 29th day of March, 1892, Beverly P. Barnes et al. filed in the clerk's office of said court their special appearance and motion to dismiss." The motion mentioned in said notice was filed March 29, 1892, and in the title of the cause contains the names of both Barnes and Duling as appellees; and in the body of the motion it is stated that "David E. Beem and Willis Hickam, attorneys for the appellees in the court below, and attorneys of this court, appearing specially," etc. The motion is signed, "Beem and Hickam," and contains no further statement as to whom they appear for. The appellees' brief in the cause was filed May 25, 1892, and in the title contains the names of both Barnes and Duling as appellees, but is signed by Beem & Hickam as "Attys. for Appellee." On the 25th day of May, 1892, a motion was filed for leave to assign cross errors, containing also a rejoinder to appellant's reply brief. The title to this motion contains the names of both Barnes and Duling as appellees, and is signed, "Beem & Hickam, Attys.

for Appellees." The last paper filed in the main cause by Beem and Hickam is the waiver of petition for rehearing. In this paper the name of Barnes alone appears as appellee, and it is signed by them as "Attys. for Appellee." It would seem that, as the allegations in the affidavit of Duling have not been contravened, the same must be taken as true, unless they are contradicted by the record. Duling swears that he never authorized Beem & Hickam to appear for him in the appeal. The mere signing of their names by Beem & Hickam, as attorneys for appellees, would not warrant the conclusion that they had authority from him to appear for him. The notice discloses, as we have seen, that Beem & Hickam were served by the sheriff as attorneys for Barnes alone. We think it is sufficiently shown that they did not appear in the court below as the attorneys for Duling generally. Their only authority was to appear and file the interpleader. It is not made manifest by the record that Duling had need for any attorneys after the filing of such plea. He admitted that he owed the money about which the other parties were litigating, and, though there is no specific entry to that effect, it abundantly appears that he paid the money into court. With this act it seems that Duling severed his connection with the case. With the ruling concerning the defendant Duling the appellant had no fault to find. She took no exception to any ruling made in favor of said Duling, and consequently could have taken no appeal therefrom. The entire litigation was between appellant and Barnes, and, even if Duling had been brought into the appeal by notice, it is difficult to see upon what ground any judgment for costs could have been justly rendered against him. We do not see what purpose he could accomplish by connecting himself in any way with the appeal, and this circumstance tends strongly to corroborate his claim that he had no connection whatever with the same. The fact that Beem & Hickam at one time appeared for him in the court below does not estop him from denying that they also appeared for him in the appeal. If it were shown by the record that Duling was served with notice of the appeal it might be claimed, with some degree of plausibility, that he should share in the payment of costs. The motion to modify the mandate as to costs was not made until after the expiration of the time for the filing of a petition for rehearing. If Duling was in court, he was compelled to file his motion to modify within that time, inasmuch as after that time the court loses jurisdiction over the case, and no motion to modify would have any binding force. Even as it is, we do not assume to make any order changing the mandate in the cause, as that would be clearly beyond our power at this stage of the proceeding. It will be observed, however, that the only mandate or order made by this court was the reversal of the judgment. Any order following that, if any such was made, was the work of the clerk. In his application of the law following upon the judg-

ment of reversal. Such order will be upheld only in so far as it is sustained by the law. Beyond that it will be a nullity. It must be manifest that no other result could properly follow. If the clerk were to enter judgment for costs against any person not properly in court, it could not be pretended that such judgment would be binding, though the court might, upon petition, on proper showing, order it revoked, to prevent confusion. Our conclusion is that Duling was not a party to the appeal, was not in court, and any order made or execution issued against him is void, and should be recalled by the clerk, if necessary, or the sheriff should be directed to disregard the same, as to Duling, and make the costs out of the property of the appellee Barnes.

It is so ordered.

#### AMERICAN FURNITURE CO. v. TOWN OF BATESVILLE.<sup>1</sup>

(Appellate Court of Indiana. June 6, 1893.)

##### APPELLATE JURISDICTION OF SUPREME COURT.

The supreme court has jurisdiction of the appeal in an action to abate a nuisance where the damages sought to be recovered are but incidental.

Appeal from circuit court, Ripley county.

Action between the town of Batesville and the American Furniture Company. From the judgment entered the company appeals. Transferred to the supreme court.

C. K. Bagot and A. Stockinger, for appellant. J. B. Reback and J. H. Connelly for appellee.

DAVIS, J. The gravamen of the action was the abatement of a nuisance. Incidentally the recovery of damages was sought. Jurisdiction is in the supreme court. The clerk is therefore directed to transfer the case to the docket of the supreme court.

(50 Ohio St. 417)

#### CARD FABRIQUE CO. v. STANAGE et al.

(Supreme Court of Ohio. June 13, 1893.)

##### REMEDY AGAINST SEPARATE ESTATE OF MARRIED WOMAN—SERVICE BY PUBLICATION.

1. Under sections 4906, 5319, Rev. St. (Act March 20, 1884; 81 Ohio Laws, 65,) the remedy against the separate estate of a married woman is the same as if she were unmarried.

2. Where a married woman, after the passage of the act of March 20, 1884, entered into a written contract with a manufacturing company, setting forth that, owning in her own right certain real and personal property, and desiring to aid her husband, she thereby agreed and became surety for him in the sum of \$15,000 on account of any indebtedness to that amount he might incur to the company as its agent or as a purchaser of its goods, the company accepting her as surety upon the faith and credit of her separate estate, *held* that, no specific lien having been created by the written contract upon the wife's separate estate, the remedy of the company was not by suit in equity to charge her separate estate, but by action at law against her, as against an unmarried woman.

<sup>1</sup> Transferred to Supreme Court, 35 N. E. 682. Superseded by opinion, 38 N. E. 408.

3. The wife being a nonresident of this state at the time of commencing the original action, the court could not acquire jurisdiction over her person through service by publication, under clause 4, § 5048, Rev. St.

(Syllabus by the Court.)

Error to superior court of Cincinnati. Action by the Card Fabrique Company against John L. Stanage and wife. Defendants had judgment, and plaintiff brings error. Affirmed.

The other facts fully appear in the following statement by DICKMAN, J.:

In the year 1886 the plaintiff in error, the Card Fabrique Company, was a firm located at Middletown, Ohio, engaged in the manufacture and sale of playing cards; and the defendants in error, John L. Stanage and Emma Stanage, who are husband and wife, were then, and at the time of commencing the original action, residents of the state of Missouri. The original petition was filed by the plaintiff in error in November, 1887, in the superior court of Cincinnati, making John L. Stanage, Emma Stanage, and Margaretta M. Frank and Augustus F. Frank, trustees under the will of Augustus W. Frank, defendants. Said petition is as follows: "The plaintiff alleges that it is a firm formed for the purpose of and doing business in and under the laws of Ohio. On April 11, 1885, it entered into a contract with said John L. Stanage, by which it sold to said John L. Stanage 900 gross of playing cards for \$8,916.75, and by which it appointed said John L. Stanage its agent to sell its goods, consisting of cards and other commodities. On March 9, 1886, a supplemental agreement was made between the plaintiff and said John L. Stanage, by which it sold to said John L. Stanage an additional amount of 1,000 gross of cards for \$15,541.33, and by which it continued the appointment of John L. Stanage its agent to sell its said goods. The debt from said John L. Stanage to the plaintiff for said goods has long since fallen due. Pursuant to said agency plaintiff furnished to said John L. Stanage goods from time to time, to be sold by him for plaintiff, amounting to \$——. Said contracts of agency gave to said John L. Stanage the right to sell the goods of plaintiff in certain specified territory of the United States, and to the extent of such sales said John L. Stanage became debtor to plaintiff therefor; and he was to be allowed a commission on such sales. That, after deducting such commissions and such expenses as he was entitled to, he became indebted to plaintiff for same in the sum of \$——. Said John L. Stanage has paid to the plaintiff on said goods sold directly to him, and on such goods as he sold under said agency, the sum of \$——, leaving a balance due and owing by him to plaintiff of the sum of \$11,458.83, and interest thereon. Plaintiff alleges that to induce the making of said second or supplemental agreement, and to induce the continuance of said agency, and the furnishing of said goods by plaintiff to said John L. Stanage, and for other valuable considerations, and as part of said supplemental agreement, said Emma Stanage, the wife of said John L. Stanage, repre-

sented to plaintiff that she was the owner of certain real estate and a life estate in her share of the estate of said Augustus W. Frank, sufficient to secure plaintiff in the amount of said indebtedness; and to secure said plaintiff the amount of said indebtedness of said John L. Stanage she did, on March 16, 1886, execute to plaintiff an agreement in writing, a copy of which is hereto attached, by which she agreed and promised and became surety for said John L. Stanage to plaintiff for said indebtedness, and agreed that her life estate and said estate of Augustus W. Frank should be liable therefor. Plaintiff said at the time she made said representations and entered into said agreement, said Emma Stanage was the owner, and seized in her own right, of a life estate in said estate, consisting of personalty and realty in Cincinnati, Hamilton county, Ohio, which she acquired by the will of said Augustus W. Frank, on its probate June 21, 1867, in the probate court of Hamilton county, Ohio, in which county said testator was a resident at the time of his death; and her said contract was made and entered into, and bears date, at Middletown, Ohio. Plaintiff is unable to state the amount of the interest held by her for life in said estate, but it alleges it to be more than sufficient to pay said debt. Said Margaretta M. Frank and Augustus F. Frank are now the duly appointed and qualified trustees of said estate of Augustus W. Frank, and hold said life estate in trust for said Emma Stanage. Plaintiff has demanded of said John L. Stanage the payment of said indebtedness, which he refused to pay, wherefore the plaintiff prays that the court may find and adjudge the amount due to it from said John L. Stanage, and may find the amount of the life interest of said Emma Stanage in said estate of Augustus W. Frank, and may order the same to be sold for the payment of said debt and interest, and the costs of this action, and for other proper relief."

Interrogatories, annexed to the petition, were propounded to Margaretta M. Frank and Augustus F. Frank, requesting them to state (1) what share or proportion Emma Stanage had in the estate of Augustus W. Frank; (2) of what property and assets the said estate consisted; and (3) at what date had the interest of Emma Stanage, coming to her by virtue of said life estate, been paid.

The following is a copy of the agreement executed to the plaintiff by Emma Stanage, to which reference is made in the petition: "This agreement, entered into between Emma Stanage of the first part, and the Card Fabrique Company, of the second part, witnesseth: Whereas, the party of the second part has appointed John L. Stanage, husband of the party of the first part, their agent, for the sale of articles of merchandise, and also sell to said John L. Stanage said articles of merchandise, whereby large sums of money and property will come into his possession and control as such agent, and the said John L. Stanage has and will become indebted to them in large sums by reason of sales made by him, which may

or will be evidenced by notes or acceptances, given to said party of the second part for the same, or portions of the same; and whereas, said party of the first part, owning in her own name certain real and personal property, and desiring to aid her said husband, John L. Stanage, by these presents agrees, in consideration of one dollar, paid to her by said party of the second part, and does become surety for said John L. Stanage in the sum of fifteen thousand dollars for the obligations aforesaid, and the faithful performance on the part of said John L. Stanage of his duties as such agent, and the accounting for and payment of all moneys and surrendering of all property which may come into his possession or control as such agent to said party of the second part when demanded, and the payment of indebtedness when due and required. It is understood and agreed that in no event shall said Emma F. Stanage be liable as surety aforesaid in a sum exceeding fifteen thousand dollars, and the said party of the second part accepts said Emma F. Stanage as surety aforesaid, upon the faith and credit of her separate estate. In witness whereof we have hereto set our hands and seals at Middletown, Ohio, on this 16th day of March, A. D. 1886. Emma F. Stanage. The Card Fabrique Co., by H. Anbly, Secretary. H. L. Hoffman, (Witness.) Minnie Bartell, (Witness.)"

The defendants John L. Stanage and Emma Stanage being nonresidents of Ohio, and residents of Missouri, the plaintiff filed an affidavit in the usual form, to obtain service by publication. Emma Stanage acknowledged service upon herself personally of a copy of the summons and petition at her residence in Missouri, and, without submitting herself to the jurisdiction, moved to set aside such service. The record shows that this motion was heard and granted, the alleged service, by stipulation of counsel for plaintiff and defendants, to have the same force and effect (and no more) as if service had been made by publication. Subsequently, on a motion for judgment filed by the plaintiff, the petition was dismissed. The judgment of dismissal was affirmed by the superior court in general term, and error is prosecuted to this court, on the ground that the court erred in setting aside said service, overruling the motion for judgment, and in dismissing the petition.

L. C. Black and Jordan & Jordan, for plaintiff in error. Roelker & Jelke, for defendants in error.

DICKMAN, J., (after stating the facts.) It is contended in behalf of the plaintiff that, under the statutes in force in the year 1886, an action was maintainable in equity to charge the separate estate of Mrs. Stanage, a nonresident of this state, upon her alleged liability under the written agreement entered into between herself and the plaintiff, and that the court acquired jurisdiction over her person through constructive service by publication. Manifestly, from the terms of the agreement, the wife, in becoming surety for her husband, intended to charge her

separate real and personal property, in the amount specified, for the payment of any future indebtedness he might incur to the company as a purchaser of or as an agent for the sale of its goods and merchandise. Whether there is, in fact, any indebtedness of the husband for which the wife's estate should be liable, is not an issue that has been reached; the only inquiry having been as to a remedy by equitable procedure, and the sufficiency of service by publication. If no personal judgment could be rendered against the wife, the obvious remedy of the plaintiff would be an appeal to the court, in the exercise of its equity powers, to lay hold of the wife's separate property, and apply it in payment of her equitable obligations. Although no specific lien was created on her separate property by the written contract, yet there would be an equitable charge upon her estate, and a liability of it to be taken in payment by decree, as a man's property may be taken on execution.

But by statutes in force when the written agreement in question was entered into, and when the original action was commenced, a married woman may now sue and be sued at law as if she were an unmarried woman; and any judgment rendered against her may be enforced as if she were unmarried, and her property may be taken on execution to satisfy such judgment, to the same extent that the property of her husband might be taken in satisfaction of a judgment against him. By section 3109 of the Revised Statutes, (Act April 14, 1884; 81 Ohio Laws, 209,) "the separate property of the wife shall be under her sole control, and shall not be taken by any process of law for the debts of her husband, or be in any manner conveyed or incumbered by him; and she may, in her own name, during coverture, contract to the same extent and in the same manner as if she were unmarried." By section 4996, (Act March 20, 1884; 81 Ohio Laws, 65,) "a married woman shall sue and be sued as if she were unmarried, and her husband shall be joined with her only when the cause of action is in favor of or against both her and her husband." And by section 5319, (Act March 20, 1884; 81 Ohio Laws, 65,) "when a married woman sues or is sued, like proceedings shall be had, and judgment rendered and enforced, as if she were unmarried, and her property and estate shall be liable for the judgment against her; but she shall be entitled to the benefits of all exemptions to heads of families." The established rule in equity is that a feme covert, acting with respect to her separate property, is competent to act in all respects as if she were a feme sole, though she is not so far a feme sole that a personal decree can be had against her. *Peacock v. Monk*, 2 Ves. Sr. 190; *Hulme v. Tenant*, 1 Brown, Ch. 19; *Clancy, Husb. & Wife*, (2 Amer. Ed., 1837.) 282, 331. But by the statutes of this state a new policy has been adopted, and a radical change effected, and a married woman has been placed upon the same footing with her husband in respect to the judgments or decrees that may be rendered against her, and as to the remedial

rights of creditors against her separate estate. It is urged, however, on the part of the plaintiff, that the legislature designed to give a twofold remedy, or to enlarge the remedy for and against married women, by authorizing an action at law; thus opening all forums as to her, and not only granting the creditor the right to sue at law, but leaving to him also his remedy by suit in equity, where, under the adjudications, that right exists. But the evident intention of the legislature was not to enlarge or increase the remedies or liabilities of the wife, but merely to change the form of remedy. If the husband were sued as surety for another, upon an agreement in writing substantially the same as that to which Mrs. Stanage became a party, it would not be claimed that by the terms of the agreement his estate might be subjected in equity by a proceeding in rem; and the remedy would be restricted to a personal judgment against him at law, to be followed by execution. Nor is it to be held that under the statutory provisions relieving the wife from the trammels of coverture, and placing her, as a feme sole, on the same plane with her husband in prosecuting and defending her property rights in the courts, she was to be burdened with enlarged remedies and liabilities, by not only authorizing against her, as against her husband, a personal judgment at law, but also subjecting her to the alternative remedy of having her separate estate, at the election of the creditor, charged in equity, though not incumbered by any specific lien.

Was the service by publication adequate to give the court jurisdiction over the person of the defendant Mrs. Stanage? In our judgment, the service was not sufficient. By section 5048 of the Revised Statutes, regulating constructive service, it is provided that service may be had by publication "(3) in actions in which it is sought by a provisional remedy to take or appropriate in any way the property of the defendant when the defendant is a foreign corporation, or a nonresident of the state, or the defendant's place of residence is unknown. (4) In actions which relate to, or the subject of which is, real or personal property in this state, when a defendant has or claims a lien thereon, or an actual or contingent interest therein, or the relief demanded consists wholly or partly in excluding him from any interest therein, and such defendant is a nonresident of the state, or a foreign corporation, or his place of residence cannot be ascertained." The plaintiff did not see fit to resort to the provisional remedy of attachment, with or without proceedings in garnishment. His service on the defendant, by publication, did not, therefore, avail him under clause 3 of the above-named section of the statutes. And, as to clause 4 of the section, if, in the original action, Mrs. Stanage was to be regarded in the light of a feme sole, against whom it was competent to render a personal judgment at law, the written contract into which she had entered might furnish ground upon which to base an action at law for the recovery of money only, with personal judgment against her, to be en-

forced as if she were unmarried. But we find no provision in the written contract that would entitle the plaintiff to maintain an action—within the meaning of clause 4—of which the subject might be real or personal property, and in which the relief demanded might consist in excluding the defendant from her interest in such property. Judgment affirmed.

(145 Ill. 253)

DOLL et al. v. PEOPLE, to Use of CLARK COUNTY.<sup>1</sup>

(Supreme Court of Illinois. April 3, 1893.)

COUNTY TREASURER—ACTION ON BOND—ESTOPPEL—EVIDENCE.

1. In an action against a county treasurer, and the sureties on his bond, for failure to pay over to his successor a balance shown by his official accounts and reports to have been in his hands, the sureties are estopped from showing that the reports and accounts erroneously represented that the treasurer had received certain money from his predecessor, which he had not in fact received, since the keeping of such accounts, and rendering of such reports, are part of the treasurer's official duties, for the due performance of which his bond is conditioned.

2. Where a receipt from the treasurer to his predecessor, claimed to have been found in the treasurer's office, is read in evidence in such action, the refusal to allow the defendants to show that the receipt was not delivered, and was not filed in the treasurer's office, is harmless error, where there is other evidence before the jury to show that the treasurer had acknowledged receiving the sum named in the receipt.

3. The admission in evidence of the report of an expert who had examined the treasurer's accounts is not error, where the expert testifies orally, at the request of the objecting party, to the facts stated in the report.

Appeal from appellate court, third district.

Action of debt, brought by the people of the state of Illinois, for the use of Clark county, against Daniel D. Doll, John Murton, A. H. Kester, William P. Griffith, and Aaron P. Cole upon an official bond. Plaintiffs obtained judgment, which was affirmed by the appellate court. Defendants appeal. Affirmed.

Golden & Hamill, for appellants. Graham & Tibbs, and T. L. Orndorff, State's Atty., for appellees.

CRAIG, J. This was an action for debt, in the name of the people, for the use of Clark county, on the official bond of Aaron P. Cole, as county treasurer. The bond was executed and approved for the official term of Aaron P. Cole, as county treasurer, beginning on the first Monday in December, 1886, and ending on the first Monday in December, 1890. The breach of duty alleged in the declaration was the failure of the treasurer to pay over to his successor the amounts of money, belonging to the county, in his hands at the expiration of his term of office. To the declaration the defendants, Cole and his sureties in the bond, pleaded *non est factum*, not sworn

<sup>1</sup>Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

to, and performed. In addition to the two pleas mentioned, John Martin, A. H. Kester, D. B. Doll, and William R. Griffith, four of the sureties on the official bond, filed three additional pleas, Nos. 3, 4, and 5. As these pleas are substantially alike, it will only be necessary to set out the first one,—No. 3. In this plea it is set up that “the several assignments of breaches in said declaration mentioned are for one and the same matter, namely, the failure of the said Aaron P. Cole, when he was succeeded in office by T. R. Cornwell, his duly-qualified successor in office, to pay over to the said T. R. Cornwell, the sum of, to wit, seven thousand dollars, shown by the books of the treasury to be due and payable to said T. R. Cornwell as successor in office. But these defendants, as to the sum aforesaid, being the balance shown by the treasurer’s books, to wit, the sum of seven thousand dollars, say that in truth and in fact said sum of seven thousand dollars, or any sum shown by said books to be due and payable to said T. R. Cornwell, successor in office, never in fact was received by the said Aaron P. Cole, or came into his hands, as treasurer of the county of Clark aforesaid, but was the balance of a defalcation of, to wit, twelve thousand dollars, due and payable from one Thomas W. Cole, and the securities upon his official bond as county treasurer for the term of office immediately prior to and as the predecessor in office of the said Aaron P. Cole; and these defendants say that such defalcation did not occur during the term of office of the said Aaron P. Cole, or while these defendants were his sureties, nor while the bond sued upon was in force, but that the said Thomas W. Cole was duly elected treasurer of the county of Clark in April, 1883, and duly qualified, and gave bond as such, and continued in office till December, 1886, when he was succeeded in office by the said Aaron P. Cole, and that the defalcation aforesaid occurred during the term of office of the said Thomas W. Cole, for which the official bond of the said Thomas W. Cole is alone liable; the said sum of money, being the sum sued for, being due and payable from the said Thomas W. Cole, the same never having been paid over in fact to the said Aaron P. Cole, his successor in office, nor was the said sum of money ever received by the said Aaron P. Cole as treasurer aforesaid; and this these defendants are ready to verify.” To the three pleas the court sustained a demurrer, and, the defendants electing to abide by the pleas, a trial was had on the issues formed, which resulted in a judgment of \$5,081.71 against the defendants, which on appeal was affirmed in the appellate court.

It appears from the record that, upon the expiration of one year from the time Cole became treasurer, he submitted to the county board of Clark county a report, under oath, showing the money which came into his hands from his predecessor, and from all other sources, during the year; amounts paid out, and the balance remaining in his hands. The report so made was audited and approved by the county board. The same course was pursued at the end of the second and third

years. At the expiration of the fourth year the treasurer made his final report, showing a balance in his hands of \$7,123.73, which was also audited and approved by the county board. It also appears from the record that Cole had in his office a book in which he kept a record of moneys received and disbursed during his four-year term of office. His account with the county, as contained in this record, corresponded with his account as shown by his four reports made to the county board. On the trial these four reports, together with the action of the county upon them, and the book containing a record of the transactions of the treasurer during his term of office, which he turned over to his successor, were all read in evidence by the plaintiff. For the purpose of overcoming the force and effect of this evidence the defendants, sureties on the bond of Cole, called certain witnesses, and undertook to impeach this record evidence, and prove that Cole did not in fact receive the money from his predecessor that he had reported; that the report was false, and his predecessor was a defaulter. But the courts held that the reports of the collector, and his official record, could not be impeached or contradicted by the offered evidence; and this ruling, and the decision of the court in sustaining a demurrer to the pleas, which, in substance, involves the same question, are the principal alleged errors relied upon to reverse the judgment of the appellate court.

Section 5, c. 36, p. 323, Hurd, St., provides that “every township treasurer shall keep proper books of account, in which he shall keep a regular, just, and true account of all moneys, revenues, and funds received by him, stating particularly the kinds of funds received,—whether in gold, silver, county orders, jury certificates, auditor’s warrants, or other funds authorized by law to be received as revenues; the time when, of whom, and on what account, each particular sum of money or other funds was received; and also of all moneys, revenues, and funds paid out by him agreeable to law, stating particularly the time when, to whom, and on what account, payment is made. Sec. 6. Said books of account shall be free to the inspection of all persons wishing to examine the same.” Section 10 provides that “the county treasurer of each county shall report to the county board, at each regular term thereof, the amount of money, county orders, jury certificates, and other funds he may have received, from every source, since his last accounting, stating by whom, on what account, and at what time paid into the treasury, and also the amount of all payments from the treasury, stating particularly to whom, on what account, and at what time, paid out; also, the amount of money, county orders, jury certificates, and other funds in his hands.” The bond which the sureties executed, in express terms, required the treasurer to perform all the duties which are or may be required by law to be performed by him as treasurer of the county. One of the duties, therefore, which the sureties agreed that the treasurer should perform, was to keep proper books of ac-



count. Another was that the treasurer shall report to the county board at each regular term thereof. These were duties that the sureties bound themselves that the treasurer should faithfully discharge. Shall the sureties who obligated themselves, by executing the bond, that the treasurer should keep proper books of account, and report to the county board the amount of money received and paid out, after the treasurer has performed these duties under oath, be permitted to impeach and falsify the books and reports of their principal? So far as the treasurer himself is concerned, he is concluded by the books and reports made to the county board; and in *City of Chicago v. Gage*, 95 Ill. 625, where the treasurer was his own successor, it was held that as respects balances in his hands at the close of the first term, if he entered them in his treasurer's books as actually come to his hands from his predecessor, and continued from time to time to return and report the same as in his hands, both he and his sureties would be concluded, in an action on his bond for the second term, from denying that these balances did actually come to his hands as treasurer. The same rule was also announced in *Morley v. Town of Metamora*, 78 Ill. 394, and followed in *Roper v. Sangamon Lodge*, 91 Ill. 518. The same question again arose in *Cawley v. People*, 95 Ill. 260, and in deciding the case it is said: "It is next insisted that the court erred in permitting the report of the treasurer to be read in evidence, and in refusing to permit appellants to show the money was not in the treasurer's hands during the time he acted as treasurer under the bond they had signed." In the case of *City of Chicago v. Gage*, supra, it was held that where the law requires a city treasurer to make and keep an account, and make statements thereof at specified times, under oath, as to receipts and disbursements, and balances on hand,—these acts being within his official duties, for the performance of which the conditions of his official bond provided,—in an action on the bond the sureties are concluded from showing that the amount so appearing as treasury balances in the hands of their principal was not actually in the treasury at the time. *Longan v. Taylor*, 180 Ill. 412, 22 N. E. Rep. 745, is also a case in point. There, in a suit on the official bond of a township treasurer of schools, the entries in his books of account of moneys in his hands at the date of the bond, and his report at the last day of his term of office, showing the amount of school moneys then in his hands, were held conclusive upon his sureties, and they were held estopped from showing such entries and report untrue. *Stern v. People*, 96 Ill. 475, has been cited by defendants as holding a different doctrine. This is a misapprehension of the scope of the decision in that case. Whether the records of a treasurer, and the reports made by him to a county board, were conclusive on the sureties, was not raised or decided in that case. Here the treasurer was not his own successor. He succeeded his father, Thomas W. Cole. But the principle which should govern us

as to the question involved, had Cole been his own successor, must control here. There may be some slight considerations, which may apply where the officer succeeds himself, which do not seem to be applicable when he succeeds another person; but we perceive no substantial ground upon which it can be held that the sureties in the one case should be precluded from impeaching the reports of the treasurer, and allowed the same right in the other case. The bond executed by the sureties in each case is the same, and the obligation imposed by the bond is the same, and, under such circumstances, upon what ground can one rule be adopted in one case, and a different rule in another? When the treasurer assumed the duties of the office, and entered upon the books of his office the receipt of a certain amount of money from his predecessor, or when he made his first report to the county board, which showed the amount received from his predecessor, if the money had not been received, and the entry in the record and report were false, these sureties were then at liberty to call upon the county board to examine the treasurer under oath, as provided by section 14. Had this course been pursued they might have been relieved from liability on the bond, but they took no action whatever. The record of the treasurer, and his reports, were open to public inspection, but no question was ever raised by their sureties in regard to the correctness of the treasurer's accounts, as shown by his official record and reports to the county board, until he had gone out of office, and they had been sued on his official bond. The attempt to challenge the official record and reports of the treasurer, made for the first time by the sureties when sued on the official bond of the treasurer, in our opinion, comes too late.

A few minor questions remain to be considered. The plaintiffs read in evidence a receipt for \$16,617.04, given by Aaron P. Cole to Thomas W. Cole, which purported to have been executed in December, 1886. The evidence tended to show that the receipt was found in the treasurer's office, with other papers pertaining to the office. The defendants offered to show that the receipt was not delivered; that it was not on the files of the treasurer's office; that its contents were not true, and the money was not paid. But the court refused to allow the evidence. We think the defendants had the right to show, if they could, that the receipt was never delivered, or on the files of the treasurer's office, but if the receipt had been impeached, and rejected as evidence, the result of the case, so far as any fact established by the receipt was concerned, would have been the same, as there was ample other evidence before the jury that the treasurer, Cole, had acknowledged the receipt from his predecessor of the same amount named in the receipt. The error, therefore, if error it was, did the defendants no harm. It is also claimed that the court erred in the admission in evidence of a statement or report of William Wilson and T. T. Price, experts who had ex-

amined the accounts of the treasurer, and made a report to the county board. Willson testified as a witness for the defendants, and in his evidence went over the whole ground embraced in his report; and whether his report was competent evidence, or not, was entirely immaterial, as defendants themselves had proven before the jury substantially all that it contained. The judgment of the appellate court will be affirmed.

(144 Ill. 373)

**CHENEY v. PATTON et al.<sup>1</sup>**

(Supreme Court of Illinois. Jan. 18, 1893.)

RES JUDICATA—FORECLOSURE.

Where a mortgagee assigns the note and mortgage for the purpose of having the mortgage foreclosed by his assignee, and regains title thereto after a decree has been rendered against his assignee in the foreclosure suit, such decree is conclusive against him as to all matters that were or that might have been litigated therein.

Appeal from circuit court, Sangamon county.

Bill by Prentiss D. Cheney against James W. Patton, Francine E. Patton, and others to foreclose two mortgages. The court dismissed the bill as to defendants James W. Patton and Francine E. Patton. Complainant appeals. Affirmed.

A full statement of the facts in this case will be found in the report of the former decision, 25 N. E. Rep. 792.

Thos. F. Ferns, John M. Palmer, John I. Rinaker, and John Mayo Palmer, for appellant. Jas. W. Patton, for appellees.

**WILKIN, J.** This case is before us a second time. On the former hearing it was remanded with directions to the circuit court to allow the parties to amend their pleadings if they so desired. See 134 Ill. 422, 25 N. E. Rep. 792. After the case was redocketed in the circuit court, complainant amended his bill, and to so much thereof as sought relief against the lands claimed by the defendants James W. and Francine E. Patton they filed an amended plea. To this plea a replication was filed by the complainant, and the cause went to a second hearing, as to these parties, on the issues thus formed. The circuit court again dismissed the bill as to said defendants, and the said land claimed by them, and the complainant appeals.

In the opinion reported in 134 Ill., at page 437, 25 N. E. Rep. 795, we said: "If, as a matter of fact, the Smith suit was prosecuted at the instance of plaintiff in error, and for his benefit, then the adjudication in that case is binding and conclusive upon him. *Cole v. Favorite*, 69 Ill. 457; *Bennitt v. Mining Co.*, 119 Ill. 9, 7 N. E. Rep. 498. So, also, if Smith, at the time of his suit, was owner of the notes and mortgages, and plaintiff in error has since been reinvested with the title, then he must necessarily have derived such title through Smith, and be in privity with Smith's title, and bound by the final

decree in the Smith Case. In either of the events above supposed the conclusiveness of the adjudication in the Smith Case will include, not only what was determined in that suit, but also all other matters properly involved, and which might have been raised, and determined in it. See *Bennitt v. Mining Co.*, supra, and authorities there cited." The plea upon which this hearing was had in the circuit court is the same as the one before us when the above decision was made, with the additional averment that before Smith filed his bill in the Macoupin circuit court Cheney assigned and transferred said notes and mortgages by indorsing his name thereon, and delivering the same, with said mortgages, to the said Henry J. Smith; that the legal title to said notes and mortgages was in said Henry J. Smith at the time of the filing of his said bill; that the complainant herein had notice of the pendency of said suit of Henry J. Smith, and the same was prosecuted with the knowledge and consent of the plaintiff, and in his interest, and for his benefit; that after the commencement of the same the complainant herein acquired from said Henry J. Smith, and was reinvested with, the legal title to said notes and mortgages, and was in privity with the title of said Henry J. Smith." It will be seen that this amendment by its allegations makes the decree in the Smith Case effectual as a bar to this action, within the language of the foregoing decision, on both of the grounds therein indicated, viz.: The legal title to said notes and mortgages was transferred to and held by Smith when that bill was filed, and afterwards complainant became reinvested with said title through Smith, and in privity with his title; also that the Smith suit was prosecuted with the knowledge and consent and in the interest and for the benefit of complainant. The only question, therefore, upon this branch of the case is, was one or both of these allegations of the plea supported by the evidence? If they were, then, unless what was said in the former decision of the case is wrong, appellees' defense under the plea of *res adjudicata* was complete, and all other questions raised on the record become unimportant. Counsel for appellant dispose of the question of proof on the first branch of the plea, without reference to the evidence, upon the ground that this court decided in *Patton v. Smith*, 113 Ill. 499, that Smith never had the title to said notes and mortgages, and therefore they say he could confer no title upon complainant, and there could be no privity of title between them. It will, however, be seen by reference to that case that whether the legal title to the notes and mortgages, as between Cheney and Smith, was ever in the latter, was neither before the court nor decided. It is there expressly said: "The notes purport to be assigned on the 23d day of May, 1877, by Cheney to Smith, and both of these parties testify that the notes were sold and assigned on that date." The controversy on this branch of the case, then, was whether Smith was a bona fide owner, and therefore not concluded by the Heaton decree,

<sup>1</sup>Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

as it was then conceded Cheney was. Patton did not then claim that there was not an assignment of the notes in fact, but he insisted, as he does now, that the assignment was a mere shift on the part of Cheney, aided by Smith, to escape the Heaton decree of foreclosure, to which he (Cheney) must have then thought he was a party. As before said, the decision was not that, as between Cheney and Smith, Smith did not hold the legal title, but, on the contrary, the fact of an assignment is there conceded, by which the legal title did pass. Nor do we understand it to be denied now that appellant did make such an assignment; but, whether that fact is denied or not, the proof establishes it beyond all question, and the testimony which proves that fact is also a part of the evidence which conclusively proves that the "Smith suit" was only so in name, and was in fact the suit of Cheney. No good purpose would be served by a review of that testimony. No one can read it without being forced to the conclusion that, from the filing of the bill to the final disposition of the case of Patton v. Smith, Smith was the merest figurehead, used by Cheney for the purpose of trying to avoid the Heaton foreclosure. No stronger case could be presented for the application of the just rule that the real party in interest to an action, whether so by name or not, is bound by the judgment. *Freem. Judgm. (2d Ed.)* §§ 174, 175; *Cheney v. Patton*, 134 Ill. 422, 25 N. E. Rep. 792, and cases there cited.

An attempt is made to limit this rule to cases in which "an open, actual, and acknowledged participation in the management, conduct, and control of a suit, with all the actual rights of a party," is shown; but we do not think any such qualification can be sustained, either upon principle or authority. The question in every such case must be, was the party sought to be concluded the real party in the action pleaded in bar? And, if he was, whether the action was openly so conducted, or his connection therewith concealed, is immaterial; otherwise he who uses the name of another in which to prosecute a suit, for the purpose of gaining some advantage over his adversary, would be given an advantage over one who, though not a party to a suit in name, is the party in interest openly, and for an honest purpose.

Again, it is insisted that at most the action set up in the plea is no bar to the complainant's right to recover upon this bill, because the only fact there decided was that Smith did not own the notes and mortgages at that time. As already shown, that is not the real scope of that decision; but, if it was, the position here contended for would be untenable. Complainant in this bill, being the real party in the one filed in the name of Smith, is concluded not merely by that which was actually decided there, but also by every other matter which might properly have been submitted for decision on that bill, and which the plea here shows were all the matters at issue between the parties in the present action. *Cheney v. Patton*,

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supra, and the authorities cited. Cases cited by counsel for appellant as holding the contrary are not in point.

We are very strongly of the opinion that, upon the whole record, appellant is shown to have been a party to the Heaton foreclosure, and concluded by that decree; but we have not deemed it necessary to place the affirmance of the decree below upon that ground. If, as is earnestly insisted by counsel for appellant, the decree of the circuit court works a grievous hardship upon him, he alone is responsible for that result. Even if he were not, plain and well-established rules of law cannot be disregarded in order to relieve him from that hardship. Under the law and the evidence the decree below is right, and it will be affirmed.

(145 Ill. 433)

# BRUSCHKE v. DER NORD CHICAGO SCHUETZEN VEREIN et al.<sup>1</sup>

(Supreme Court of Illinois. June 19, 1893.)

BILL OF REVIEW—PLEADING—EQUITY PRACTICE—CORPORATIONS—DECREE.

1. A bill of review which sets out in full the original bill, the summons issued thereon, the returns indorsed on the summons, the entry of defendant's appearance, the orders of default and reference, the master's report, and depositions thereto attached, and the final decree based on such report, is sufficient even though it does not set out in full certain exhibits referred to in the master's report, since it is not necessary to set out in a bill of review the evidence on which the decree was rendered.

2. The objection to a bill of review, that it does not show performance of the requirements of the decree, is waived by failure, upon defendant's first appearance, to move to strike the bill of review from the files, or to dismiss the suit.

3. A bill of review for errors apparent upon the face of the decree, filed within two months after entry of the decree, is in apt time.

4. Where a defendant elects to abide by his demurrer it is within the discretion of the court, on overruling the demurrer, to render a decree without ruling defendant to answer.

5. In a suit by a stockholder to set aside a conveyance of the corporate property the corporation is a necessary party, and a decree rendered therein without making it a party may be set aside on bill of review brought by the corporation.

6. A decree rendered against a defendant who has not been served with process, and for whom no attorney was authorized to appear, is void.

Error to circuit court, Cook county; M. F. Tuley, Judge.

Bill of review brought by Der Nord Chicago Schuetzen Verein and others against Charles J. Bruschke. Complainants obtained a decree. Defendant brings error. Affirmed.

The other facts fully appear in the following statement by MAGRUDER, J.:

This is a bill of review for errors apparent upon the face of the decree sought to be reviewed, and also seeking to impeach the decree for fraud. In the original cause in which the decree was rendered, the bill

<sup>1</sup> Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

filed by Bruschke, the present plaintiff in error, alleged that he and 103 others formed an Illinois corporation, not for pecuniary profit, called Der Nord Chicago Schuetzen Verein, which bought land, and executed a trust deed thereon to secure \$28,500, in bonds of \$250 each; that he owned one of said bonds; that buildings were erected upon said land, and its value increased; that he remained an active member, but the original members withdrew, and abandoned said society, and formed a new society, called the North Chicago Sharpshooters' Association; that the officers of the old society, on February 15, 1888, against his protest, made an agreement for the sale of the property to the new society for \$56,000,—for \$1 cash, the assumption of the debts, and the payment of the balance in 45 days; that the other members forfeited their right and title; that he was the only surviving member, and was in fact the corporation or old society, and sole owner of its property and franchises; that the new society was about to let, improve, and incur the premises; that the officers and members of the old and new societies were the same, and the contract of sale, therefore, void; that the premises were worth \$100,000; that in 1880 the old society procured a loan from its members of \$1,000, and issued certificates, of which he owns one, for \$10; that by the sale his certificate, membership, etc., would become worthless; that, if not owner of the entire corporation, he was entitled to a large share of its property, etc.; that no steps had been taken to wind up the old corporation; that certain named persons were directors and treasurer, and should account, and by reason of their abandonment their places were vacant; that certain officers induced old members to consent to said transfer by fraud, etc. The prayer is for a receiver; that Bruschke be decreed to be sole owner; that said contract be set aside; that an accounting be had; that the offices be declared vacant, and the records, books, and archives of Der Nord Chicago Schuetzen Verein, title papers, seal, vouchers, accounts, and property of every kind, be turned over to Bruschke, etc. Default was entered, reference made to the master, proofs were taken, master's report was filed, and decree was entered in accordance with the prayer of the bill.

The bill of review, as finally amended, after setting out the pleadings, decree, and other proceedings in the original suit, alleges that said decree was erroneous, in that the court had no jurisdiction over Der Nord Chicago Schuetzen Verein, and disposed of its property, and the interests of its members, to said Bruschke, without making them parties; in that the decree attempts to dissolve the old corporation, which had never been dissolved; in that the material allegations of the original bill were untrue, and the decree was obtained by the use of perjured evidence; because Der Nord Chicago Schuetzen Verein was not named in the summons, and was not a party defendant, and its appearance was not entered; because a demurrer was filed for defendants named in summons, but disappeared from the files, and default was

entered fraudulently, and without notice; because said decree was entered without notice, and upon the untrue statement of Bruschke to the judge that notice had been given, and it untruly recites that the old corporation had been served with process, etc. Bruschke answered the bill of review, denying its allegations, and praying the same benefit as if he had demurred specially. To portions of the bill, as amended, he filed a special demurrer, setting up special causes of demurrer, and to other portions thereof he filed an answer. The answer was allowed to stand as a demurrer to the amended bill, and the remainder of the answer considered as withdrawn. The court overruled the demurrer, ordered the bill to be taken as confessed, and finding that the court had no jurisdiction to render the decree, and that the same was contrary to equity, and obtained by fraud, decreed that the default and order of reference in the original cause be set aside, and that the decree therein entered should be set aside. From the decree thus entered upon the amended bill of review, as demurred to, the present writ of error is prosecuted.

Allan C. Story and Fred. W. Story, (Geo. F. Westover, of counsel,) for plaintiff in error. Lackner & Butz, (John Woodbridge, of counsel,) for defendants in error.

MAGRUDER, J., (after stating the facts.) It is claimed by the plaintiff in error that the demurrer to the amended bill of review was improperly overruled for several reasons:

1. It is said that the amended bill of review does not show all the evidence and other proceedings upon which the decree sought to be reviewed is based. The amended bill sets out in full the original bill, the summons issued thereon, the returns of service indorsed upon the summons, the entry of appearance for the defendants, the orders of default and reference, the master's report, and depositions thereto attached, and the final decree based upon said report. This is a sufficient compliance with the rule, as laid down in Story's Equity Pleadings, and as followed by this court in a number of cases, which is as follows: "In a bill of this nature it is necessary to state the former bill, and the proceedings therein, the decree, and the point in which the party exhibiting the bill of review conceives himself aggrieved by it." Story, Eq. Pl. § 420; *Aholtz v. Durfee*, 122 Ill. 286, 13 N. E. Rep. 645. Counsel complains that certain exhibits referred to by the master in his report made in the original cause are not set forth in full in the report as it appears in the amended bill of review. The absence of these exhibits cannot be regarded as a fatal defect on demurrer to the bill of review, because they are in the nature of evidence. It is well settled that it is not necessary to state, as a part of the proceedings in the original cause, "the evidence on which the court found the facts on which it proceeded to render the decree." *Turner v. Berry*, 8 Gilman, 54; *Aholtz v. Durfee*, supra; *Evans v. Clem-*

ent, 14 Ill. 206. As a general rule, the question, in bills of review, is not whether the facts found in the decree under review are in accordance with the evidence, but whether the court rendering such decree has correctly applied the law to the facts as found by it. *Ebert v. Gerding*, 116 Ill. 216, 5 N. E. Rep. 591.

2. It is objected that the bill of review does not show performance of the requirements of the original decree. The original decree directs the defendants therein to deliver up possession of the premises, and the improvements thereon, to the complainant, and to come to an accounting for the sinking fund and other property. It is said that the present complainants have not, as they should have done, attempted or offered to comply with these terms of the decree. The general rule is that the decree must be first obeyed and performed before a bill of review can be brought. *Story, Eq. Pl. 406; Griggs v. Gear*, 3 Gilman, 2; *Judson v. Stephens*, 75 Ill. 255; *Kuttner v. Haines*, 135 Ill. 332, 25 N. E. Rep. 752. But the performance of the decree is not necessary to the jurisdiction of the court. It is merely a personal right, which the defendant may insist upon if he urges it upon the attention of the court at the proper time. If he desires to raise the objection of nonperformance he should move to strike the bill of review from the files, or to dismiss the suit, upon his first appearance. He cannot go on, and treat the bill as if it had been regularly filed, by demurring to it or answering it, for by so doing he admits that it is properly in court. *Foreman v. Stickney*, 77 Ill. 575; *Griggs v. Gear*, supra. In the present case the defendant made no motion to dismiss the bill of review upon his first appearance, but answered and demurred to the bill, and also demurred to it after it was amended. The objection of nonperformance comes too late, and is not properly raised on demurrer.

3. It is charged that there has been laches in the filing of the bill. We do not think that this charge can be sustained, under the facts of the present case. The decree sought to be reviewed was entered on February 9, 1889, and the present bill was filed on April 4, 1889. The bill is of a double character: A bill of review for errors apparent upon the face of the decree; and an original bill, in the nature of a bill of review, to impeach the decree for fraud. Viewed in either aspect, it has been filed in time. It is a general rule that a bill of review for errors apparent upon the face of the record will be entertained if brought within the time allowed by the statute for the suing out of a writ of error, which in this state is five years. *Sloan v. Sloan*, 102 Ill. 581; *Story, Eq. Pl. § 410*. See, also, *McConnel v. Gibson*, 12 Ill. 128; *Boyden v. Reed*, 55 Ill. 458; *Harris v. Cornell*, 80 Ill. 54; *Howe v. Commissioners*, 119 Ill. 101, 7 N. E. Rep. 333.

4. It is assigned as error that the court below, upon overruling the demurrer to the bill, did not grant leave to answer over. The correct practice on overruling a demurrer to the bill is not to render a decree, but to make an order requiring

the defendant to answer, and, if he does not do so, to take the bill as confessed. We have held, however, that the question whether defendant should be ruled to answer was one of discretion, and would not be reviewed in this court. *Miller v. Davidson*, 3 Gilman, 518; *Roach v. Chapin*, 27 Ill. 194; *Wangelin v. Goe*, 50 Ill. 459. In the *Wangelin* Case it was said that there was no irregularity in proceeding to a decree upon overruling the demurrer to the bill, if the record showed that the defendant elected to abide by the demurrer. Such was the case here. Without attempting to discuss or analyze all the motions and rulings and counter motions and counter rulings in the record, it sufficiently appears that the defendant was allowed, at his own request, to withdraw such portions of his answer as were an answer to the amended bill, and to have the other portions stand as a demurrer to said bill, upon condition that in case the demurrer should be overruled no answer would be permitted, and that Bruschke accepted the condition, and thereby elected to stand by his demurrer. For the reasons hereinafter stated the decree sought to be reviewed was erroneous, for errors appearing upon its face; and where such is the case—that is to say, where a demurrer to a bill of review, grounded upon error, is overruled—the decree may be reversed without any further hearing. *Cook v. Bamfield*, 3 Swanst. 607; 2 Daniell, Ch. Pr. (4th Ed.) p. 1583.

Having disposed of these preliminary objections, we come now to the question of the validity of the original decree. We think that the decree was defective because the old society or corporation, Der Nord Chicago Schuetzen Verein, was not a party defendant to the bill in the proceeding in which the decree was rendered. According to the English practice, the substance of the pleadings was recited in the decree; and so, in bills of review for errors apparent on the face of the decree, the decree is understood to include, not only the final judgment of the court, but the pleadings, also, and in passing upon any such errors in bills of this character the court will look through the pleadings and prior proceedings. *Ebert v. Gerding*, 116 Ill. 216, 5 N. E. Rep. 591. Here the original bill was filed by Bruschke, a stockholder in Der Nord Chicago Schuetzen Verein, a corporation "not for pecuniary profit," against certain persons alleged to have been directors and officers of said corporation, and also against the North Chicago Sharpshooters' Association, a corporation for pecuniary profit. In the original bill, thus filed, Bruschke attacks and seeks to set aside a sale and transfer of the property and assets of the Verein, the old corporation, by its officers and the other stockholders besides himself, to the Sharpshooters' Association, a new corporation formed by said officers and other stockholders. He alleges that the rest of the members of the old society, besides himself, had abandoned it, and joined the new society; that by reason of such abandonment and sale the right and title of the other members had become forfeited; that he was himself

the only surviving member of the verein, and was "in fact the corporation of the whole society, and sole owner of its property and franchises;" that no steps had been taken to wind up the verein. The decree finds Bruschke to be entitled to all the property of the verein, and vacates the sale and conveyances of the property by the officers of the old society to the new society, and directs that all the property belonging to the verein be delivered up to Bruschke. By asserting that the old corporation had never been wound up, the bill admitted its continued existence, and upon the vacation of a sale of its property it would seem to be the natural result that the title to such property should be re-vested in it, the old corporation, and not in one of its stockholders. At any rate the old corporation ought to have been made a party to the proceeding, and given a chance to be heard upon the question whether its property should be retransferred to itself or not. We are satisfied, upon an examination of the bill and summons, and all the other proceedings, that the verein, the old corporation, was not a defendant to the bill, nor was its appearance entered in the cause. Its name is not mentioned in the summons issued upon the filing of the bill, nor in the returns thereon made by the sheriff. The bill recites, in its opening paragraph, that it is brought against the North Chicago Sharpshooters' Association alone. None of its phraseology can be construed to include as defendants other than said association, and certain named officials of the verein. Originally the rule was that where the directors or officers of a corporation fraudulently misappropriated the corporate property, in any manner, or committed any other breach of their fiduciary obligations towards the corporation, the corporation itself was the proper party to bring a suit as plaintiff against the wrongdoers. In order to prevent injustice, however, equity permits a stockholder, either individually, or on behalf of himself and other stockholders similarly situated, to maintain a suit in such cases against the wrongdoing directors or officers, where it appears and is averred that the corporation itself, either actually or virtually, refuses to begin the suit, or where the alleged facts show that the wrongdoing defendants constitute a majority of the managing body, or where there is disclosed by the plaintiff's pleading a state of things which renders it reasonably certain that a suit by the corporation would be impossible, and a demand therefor unavailing. But where such a suit is begun by a stockholder or stockholders the corporation is a necessary party, because the action is for the benefit of the corporation, and the final relief, when obtained, belongs to the corporation. 1 Mor. Priv. Corp. (7d Ed.) §§ 239, 241, 257; 3 Pom. Eq. Jur. §§ 1094, 1095, and notes; Greaves v. Gouge, 69 N. Y. 154; Cab Co. v. Yerkes, 141 Ill. 320, 30 N. E. Rep. 667; Chetlain v. Insurance Co., 86 Ill. 220. The rule is thus stated by Morawetz, (section 257:) "It is manifest that in a suit brought by a shareholder to protect his equitable interest in the affairs of a corporation the corporation is itself

an indispensable party. The legal title to the corporate property and rights is vested in the corporation, and each shareholder is beneficially interested only as a member of the company." In Greaves v. Gouge, supra, the supreme court of New York said: "There is no doubt that a stockholder has a remedy \* \* \* for the misapplication or waste of corporate funds and property by an officer of a corporation, but the weight of authority is in favor of the doctrine that an action for injuries caused by such misconduct must be brought in the name of the corporation, unless such corporation, or its officers, upon being applied to for such a purpose by a stockholder, refuse to bring such action. In that contingency, and then only, can a stockholder bring an action for the benefit of himself and others similarly situated, and in such an action the corporation must necessarily be made a party defendant." City of Chicago v. Cameron, 120 Ill. 447, 11 N. E. Rep. 899. If it could be maintained that the original bill makes the verein a party defendant, yet, as there was no service of process upon it, it could only have been in court by virtue of a solicitor's written entry of "appearance of the defendants in the above cause." The bill of review alleges that the solicitor so entering the appearance of the defendants had no authority to appear for the verein, and did not intend to do so, and the demurrer to the bill of review admits the truth of this allegation. Where an attorney entering the appearance of a defendant does so without authority, the judgment or decree based upon such act is void, and may be collaterally attacked. Griggs v. Gear, 3 Gilman, 2; Thompson v. Emmert, 15 Ill. 415; White v. Jones, 38 Ill. 159.

We deem it unnecessary to notice any of the other grounds upon which it is claimed that the decree sought to be reviewed should be set aside. Being void, as against Der Nord Chicago Schuetzen Verein, for want of jurisdiction over that corporation, it was properly vacated by the court below. The decree of the circuit court is accordingly affirmed.

(145 Ill. 279)

#### SUTTON v. PEOPLE.<sup>1</sup>

(Supreme Court of Illinois. April 3, 1893.)

CRIMINAL PRACTICE—CONTINUANCE—SEPARATION OF JURY—RAPE—EVIDENCE—INSTRUCTIONS.

1. An affidavit for a continuance on the ground of the absence of a material witness, which states that the witness was not in a fit condition to appear in public, but which does not show that the witness refused to attend, or that she could not attend, and which is not corroborated by any physician, is insufficient, as failing to show any legal excuse for the absence of the witness.

2. In a trial for a felony, not capital, it is not error to allow the jury to separate during the adjournments of court, before the case is submitted to them, even though the defendant, without giving any reason therefor, requests the judge to have the jury kept together.

3. Rev. St. 1891, c. 38, § 237, declares:

<sup>1</sup>Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

"Rape is the carnal knowledge of a female, forcibly and against her will. Every male person of the age of 16 years and upward, who shall have carnal knowledge of any female person under the age of 14 years, either with or without her consent, shall be adjudged guilty of the crime of rape: provided, that every male person of the age of 14 years and upward, who shall have carnal knowledge of a female, forcibly and against her will, shall be guilty of the crime of rape." *Held*, that an allegation in an indictment for rape that the accused was "of the age of 14 years and upward" was surplusage, and need not be proved, since the proviso in the statute applied only to the sentence immediately preceding it.

4. On trial for rape the evidence showed that one of the defendants had sexual intercourse with the prosecutrix at midnight, at a place six miles from town. The prosecutrix testified that the intercourse was against her will, was resisted by her, and was done with the assistance of the two other defendants. She was corroborated by two other witnesses, who testified that they heard her cry out, and plead to be let alone. She rode back to town with the defendants, and remained with them till morning, and did not disclose the crime till asked about it. She was an inexperienced country girl, only 16 years old. Defendant did not deny the fact of sexual intercourse. *Held*, that the evidence showed defendant's guilt so clearly that the court's refusal to instruct the jury to take into consideration the conduct of the prosecutrix in remaining with defendant after the alleged crime, and in failing to disclose the crime, was harmless error.

5. In such case a sentence of 20 years' imprisonment in the penitentiary is not excessive.

6. An instruction to the effect that if the jury believe, beyond a reasonable doubt, that the defendant had sexual intercourse with the prosecutrix, yet if they further believe from the evidence that she consented thereto, though reluctantly, then they should acquit the defendant, although objectionable, in permitting the inference that the prosecution was only required to prove the act of sexual intercourse beyond a reasonable doubt, is not misleading, when accompanied by another instruction to the effect that the jury should acquit the defendant if the prosecution failed to prove, beyond a reasonable doubt, not only the fact of sexual intercourse, but that such intercourse was forcible on defendant's part, and against the will of the prosecutrix.

Error to circuit court, Champaign county.

Frank Sutton was convicted of rape, and brings error. Affirmed.

J. S. Wolfe, for plaintiff in error. George Hunt, Atty. Gen., for the People.

WILKIN, J. At the September term, 1891, of the circuit court of Champaign county, an indictment was returned against plaintiff in error, Thomas Blakesly, and Clara Cunningham, charging that "on the 16th day of June, at and in the county of Champaign, and state of Illinois, [the defendants named] feloniously and forcibly did make an assault in and upon one Nellie Huhm, then and there being a female, and the said Frank Sutton, then and there being a male person of the age of fourteen years and upward, did then and there feloniously have carnal knowledge of the said Nellie Huhm, forcibly and against her will, and the said Thomas Blakesly and Clara Cunningham, then and there being present, stood by, and feloniously aided and abetted and assisted the said Frank Sutton in having said carnal

knowledge of the said Nellie Huhm, forcibly and against her will, as aforesaid." At the same term the parties were tried, and a verdict of guilty, fixing their term in the penitentiary at 20 years, returned against each of said defendants. A motion for a new trial was overruled, and judgment pronounced on the verdict. Frank Sutton alone excepted, and sued out this writ of error.

Several grounds of reversal are urged, and we will consider them in the order in which they most naturally arise.

When the case was called for trial the defendants made a motion for a continuance on account of the absence of a material witness, the motion being supported by the affidavit of one of their attorneys. The motion was overruled, and an exception taken. This ruling is assigned for error. If for no other reason, the ruling of the circuit court was proper, because the affidavit failed to show any legal excuse for the absence of the witness. There should have been at least the statement of a physician that she was physically unable to be present at the trial. Whether or not she was in a fit condition to appear in public was not for the attorney to state, as a matter of conclusion. There was nothing to show that the witness herself refused to attend, or that she could not have done so. There are other objections to the sufficiency of the affidavit, but, in the view here expressed, they become unimportant.

After the trial had been entered upon, but before the first adjournment of the court, counsel for the defendants privately requested the court to order the jury kept together during the progress of the trial. The court informed them that unless some reason for such an order was shown it would not be made, and, they declining to make any such showing, the jury was permitted to separate from time to time until it retired to consider of its verdict, when it was put in charge of a sworn officer, as required by the statute. The argument in support of the proposition that the court below erred in refusing said request proceeds upon the broad ground that in every trial of felony in this state it is error for the court to permit the jury to go at large during the adjournments, unless the defendant expressly consents thereto. 3 Whart. Crim. Law, § 3168, says: "In felonies, while the English practice is to refuse to permit such separation during recesses, in the United States the practice is to permit such separation in cases less than capital." And again, at section 3302, herepeats the statement by saying: "Even in felonies, less than capital, the jury are generally permitted to separate at the adjournments of the court, until the period when, at the close of the trial, the case is finally committed to their charge." Trials of criminal cases, in at least some of the circuit courts of this state, have been uniformly conducted in accordance with the practice here announced, and we see no good reason for disapproving it. Cases, both criminal and civil, may arise in which it will be proper to keep the jury away from the public while the trial is in progress, but they are the exception, and may



be safely left to the discretion of the judge trying the case.

It is contended with much earnestness that the verdict of the jury was not warranted by the evidence. The testimony of the prosecuting witness as to the commission of the crime by the plaintiff in error is positive, and, so far as we can see, unequivocal. It is wholly uncontradicted by direct testimony. She is strongly corroborated by two witnesses who swear that they heard her outcry, and pleading to be let alone, at the time she says the crime was committed, and these witnesses are also uncontradicted, and wholly unimpeached. Even in the argument of counsel the act of sexual intercourse is admitted, and it is not denied that the prosecuting witness did for a time refuse to consent thereto; but the argument is that, either freely or with reluctance, she finally consented. There is no evidence in the record upon which to base this position, unless it be in the conduct of the prosecutrix after the act, as shown by her cross examination; and that, as we shall hereafter see, was wholly insufficient to overcome her direct testimony, and that of the two corroborating witnesses, to the effect that the intercourse was forcible, and against her will. We think the evidence clearly justified the jury in returning a verdict of guilty, at least as to this plaintiff in error. Under this branch of the argument it is insisted, with a great deal of ingenuity, that under our present statute the allegation in the indictment that plaintiff in error was, at the time of the commission of the crime, "of the age of fourteen years and upward," is a material averment, and necessary to be established by proof, in order to warrant a conviction. It is conceded there is no such proof in the record. The statute is as follows: "Rape is the carnal knowledge of a female, forcibly and against her will. Every male person of the age of sixteen years and upward, who shall have carnal knowledge of any female person under the age of fourteen years, either with or without her consent, shall be adjudged guilty of the crime of rape: provided, that every male person of the age of fourteen years and upward, who shall have carnal knowledge of a female forcibly and against her will, shall be guilty of the crime of rape." Rev. St. 1891, c. 38, § 237. Counsel construe this language, taken as a whole, as defining the crime of rape to be "the carnal knowledge of a female, forcibly and against her will, by a male person of the age of fourteen years and upward." That the statute is somewhat awkwardly drawn is conceded, but we do not think it is susceptible of the construction placed upon it. In the first sentence we have a complete definition of the crime. 2 Bish Crim. Law, § 935, note 2. It is the same definition used in our statute before the amendment, when the offense was committed without the consent of the female. That definition remains in this statute, unaffected by that which follows it. It is a familiar rule of construction that "a proviso in a statute is intended to qualify what is affirmed in the body of the act, section, or paragraph preceding it." *Boon v. Juliet*, 1 Scam. 258.

In *Huddleston v. Francis*, 124 Ill. 195, 16 N. E. Rep. 243, we quoted and approved the following language from a note on page 118 of *Potter's Dwarries on Statutes*: "The office of a proviso generally is either to except something from the enacting clause, to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it extending to cases not intended to be brought within its purview." See, also, *City of Chicago v. Phoenix Ins. Co.*, 126 Ill. 280, 18 N. E. Rep. 668. Applying these well-settled rules of interpretation to the statute in question, the proviso must be held to apply to the sentence immediately preceding it, and nothing more. Without it, that sentence might be construed to mean that a boy under 16 years of age could not be guilty of the crime by having carnal knowledge of a girl under fourteen, even though the act was committed without her consent. The proviso makes it clear that no such construction was intended by the legislature, and that is its only purpose. At common law a boy under fourteen years of age was conclusively presumed incapable of committing a rape, and that strictness is adhered to in some jurisdictions in this country; but it has never been held that in charging the crime, as defined at common law, it was necessary to aver that the accused was at the time of the age of 14 years or upward. 2 Whart. Crim. Law, § 1453; *Com. v. Sugland*, 4 Gray, 7; *Com. v. Scannel*, 11 Cush. 547; *Word v. State*, 12 Tex. App. 174; *Cornelius v. State*, 13 Tex. App. 349; *People v. Ah Yek*, 29 Cal. 575. This indictment would therefore have been good under the first definition of the statute above quoted, without the averment as to the age of the plaintiff in error, and hence that averment might have been stricken out as surplusage. 1 Whart. Crim. Law, § 622; *Mobley v. State*, 46 Miss. 501; *Durham v. People*, 4 Scam. 172. That an averment being surplusage, the people were not bound to prove it. *Durham v. People*, supra. If the defendant was in fact under 14 years of age, and wished to avail himself of that defense, he was bound to prove it. The question would then have arisen as to whether he knew right from wrong, and perhaps as to his physical ability to commit the crime. The prosecution was not called upon, in the first instance, to introduce any proof whatever as to his age.

In charging the jury the court gave the instructions asked by the prosecution, but refused all those submitted by counsel for the defendants, and of its own motion gave seven others. This course was pursued, no doubt, because the instructions asked by defendants' counsel were very numerous, and some of them, at least, objectionable. The fifth of those given by the court of its own motion was in the following language: "The court instructs you, the jury, that if you believe from the evidence, beyond a reasonable doubt, that the defendant Sutton had sexual intercourse with Nellie Huhm, yet if you further believe from the evidence that she consented thereto, though reluctantly, or if she refused to have sexual intercourse with Sutton, and that such refusal was not in

earnest, but feigned, and that she consented to such sexual intercourse, or if at first she refused, and for a time in earnest and good faith, to have sexual intercourse with Sutton, but that notwithstanding that she was coaxed and persuaded to have such sexual intercourse, without being forced to do the act of sexual intercourse, that then, and in either case, the defendant Sutton is not guilty of committing the crime of rape, as charged in the indictment, and in such case it is your duty, as jurors, under the law, and under your oaths, to acquit all of the defendants." It is insisted that this instruction was calculated to mislead the jury to the prejudice of the plaintiff in error. We cannot say the instruction is free from objection. It is susceptible of the construction that the prosecution was only required to prove one element of the crime beyond a reasonable doubt, viz. sexual intercourse, making it incumbent upon the defendants to show that the act was with the consent of the prosecutrix, and, so understood, it would be clearly erroneous and misleading. Want of consent on the part of the female is of the essence of the crime of rape, and must, of course, be proved by the prosecution beyond a reasonable doubt, before there can be a legal conviction for that crime. It was not, therefore, necessary in this case that the jury should affirmatively believe from the evidence that Nellie Huhm consented to the act in order to entitle Sutton to a verdict of not guilty. If they entertained a reasonable doubt on the subject, it was their duty to return a verdict for the defendants. Manifestly, the purpose of the instruction was to impress upon the minds of the jury, not that consent to the sexual act would entitle the defendants to an acquittal, but that reluctance in giving consent, or a mere pretended refusal, etc., would not, in a legal sense, amount to a refusal, and so we think a jury would be most likely to understand it. But conceding that, standing alone, it might not be so construed, when considered in connection with the first of the same series of the instructions it could not have misled the jury. That instruction tells them, expressly, that "if the prosecution have failed to prove, beyond a reasonable doubt, not only that Sutton had sexual intercourse with Nellie Huhm, but that said sexual intercourse was forcible on the part of Sutton, and against the will of Nellie Huhm, then it is the duty of the jury, under the law, and under their oaths, to acquit the defendants." Taking these two instructions together, no injury could have resulted to the defendants by the giving of the fifth.

It is also urged, with greater force of reason, that the trial court erred by refusing to instruct the jury that it was their duty to take into consideration the conduct of the prosecuting witness, as shown by the evidence, subsequent to the alleged crime; such as remaining with the defendants after reaching the company of others, failing to disclose the commission of the crime, etc. Such instructions were asked by counsel, and refused, and none given in their stead. It is undoubtedly true

that such evidence is competent, and should be considered, in determining the guilt or innocence of the accused, in prosecutions of this kind. 3 Greenl. Ev. 212. We would have been better satisfied with this record if it appeared that the jury had been instructed to that effect. It does not follow that the judgment of conviction should be reversed because it was not done. Evidence of such subsequent conduct is only admissible for the purpose of corroborating or contradicting the prosecutrix. Its weight must therefore always depend upon the facts and circumstances relied upon to prove the crime. For instance, if the crime be proved by direct and positive testimony, the conduct of the outraged female after its commission is wholly immaterial. Through shame or fear she may conceal, or even deny, that the act was committed. Even where the proof of the crime depends upon her own testimony, inconsistent conduct on her part afterwards may be of little or no importance, depending upon her age, experience, and intelligence. In this case the crime was committed, as sworn to by the girl,—corroborated, as we have seen, by two witnesses,—about midnight, some six miles from Champaign city, where the parties separated. Nellie Huhm was then less than 15 years of age. If she is to be believed,—and no reason is shown why she should not be, especially since she is corroborated, and no one denies her statements,—she found herself, at midnight, in a strange neighborhood, betrayed, not only by Sutton and Blakesley, his associate, but by the woman in whom she had confided. That she did then cry out, and plead to be spared, is as clearly proved as a fact of that kind can be, but it availed her nothing. The evidence in this record that sexual intercourse was then and there had with her, and against her will, is to our minds clear and convincing. As before said, the fact of sexual intercourse is not denied. It was admitted by Sutton, in terms too indecent to be repeated. The only contention is that it is not shown that she did not consent. She swears she did not, and to the same effect is the evidence of the witnesses who heard her crying and pleading, "For God's sake, let me alone." But it seems to be argued that, although she did for a time refuse, she finally consented; that her refusal was only feigned; that she did not refuse in good faith. And the fifth instruction supra proceeds upon the theory that there was some such evidence before the jury, but we have failed to find it. Who swears that she finally consented? Can it be possible that a girl—little more than a child—was feigning a refusal when her outcry and pleading was heard a quarter of a mile away, by both Florence and McCormick? It is true she rode back to town with the defendants, and remained with them until morning; that she did not disclose the crime until interrogated about it, on information which came to others, from said two witnesses. It is true that she could have escaped from the defendants' company after they brought her back to Champaign, and have put herself under the protection of others, but she was a country

girl, comparatively unacquainted in the city, without experience. And so we say, the evidence of her subsequent conduct, under all the circumstances, would be of no weight with a jury, in deciding upon the guilt of the defendants. We cannot doubt that any intelligent jury would, upon the evidence in this record, find the defendant Sutton guilty, however forcibly the subsequent conduct of the girl might be pressed upon their attention, and hence we hold there was no reversible error in refusing said instruction.

It is finally urged that the punishment is excessive. The crime of rape is punishable under our statute by imprisonment in the penitentiary, and the term may extend to the natural life of the accused. There is no more heinous crime known to the law. As we have already indicated, there are circumstances proven by this record of the most aggravating character, and we are of the opinion that the plaintiff in error has no just grounds of complaint on account of the severity of his sentence. There are perhaps other points in the argument, urged as grounds of reversal, but we have noticed the substantial ones, and are convinced that the judgment of the court below should be affirmed.

(146 Ill. 50)

**MYERS v. FIELD et al.<sup>1</sup>**

(Supreme Court of Illinois. June 19, 1893.)

**HUSBAND AND WIFE—WIFE'S SEPARATE ESTATE—LIABILITY FOR FAMILY DEBTS.**

A personal judgment against a married woman for family expenses, for which she is rendered personally liable by Rev. St. 1891, c. 68, § 15, may be enforced by seizure of property acquired by her while the married women's act of 1861, which exempted the separate property of married women from execution for the debts of their husbands, was in force.

Appeal from appellate court, first district.

Creditors' bill by Marshall Field & Co. against Sarah D. Myers and Eugene B. Myers. Complainants obtained a decree, which was affirmed by the appellate court. Defendant Sarah D. Myers appeals. Affirmed.

G. W. & J. T. Kretsinger, for appellant. Wilson, Moore & McIlvaine, for appellees.

**MAGRUDER, J.** This is a creditors' bill, filed in the circuit court of Cook county by the appellees as partners against the appellant and her husband, Eugene B. Myers. The judgment was recovered against the appellant alone in the superior court of Cook county, at the August term, 1888, and the execution issued thereon was duly returned "No property found." Answers and replications were filed, and the case was heard upon an agreed state of facts. The first count of the declaration in the suit in which the judgment was rendered declares for goods sold to the defendants, as husband and wife, which "were and became matter of the expenses of the family." The other

counts are the ordinary common counts. It appears from the statement of facts as agreed to that not later than January, 1866, Eugene B. Myers purchased and paid for in cash a lot, which he caused at that date to be conveyed to his wife, Sarah D. Myers, the present appellant, he being at that time solvent and out of debt, and making the purchase and payment in good faith; that they continued to occupy said lot as a homestead from that date until April 19, 1887, when it was disposed of, and said appellant, Sarah D. Myers, received therefor in value more than \$5,000, which she still holds in securities; that said Eugene does not hold any property or securities, as trustee, or in his own name, or otherwise, for said Sarah, or in which she has any interest; that said premises so purchased for appellant and deeded to her in January, 1866, were disposed of by her before the entry of said judgment, and were not so disposed of for the purpose of defrauding the complainants below, the appellees here. The circuit court, in its decree, found that the defendant Sarah D. Myers owned and had in her possession, when the bill was filed, money or securities more than sufficient to pay said judgment, all of which were derived by her from the proceeds of the sale of real estate owned by her before the passage of the law making the husband and wife liable for the expenses of the family, and that the same were liable in her hands to be applied to the satisfaction of said judgment, and ordered that she immediately pay the amount due on said judgment, with costs, etc. This decree has been affirmed by the appellate court, and is brought here for review by appeal from the latter court.

Section 1 of the act of 1861, entitled "Married Women," provided, (Gross' St. 1869, p. 439:) "All the property, both real and personal, belonging to any married woman as her sole and separate property, or which any woman hereafter married owns at the time of her marriage, or which any married woman, during coverture, acquires in good faith from any person other than her husband, by descent, devise, or otherwise, together with all the rents, issues, increase, and profits thereof, shall, notwithstanding marriage, be and remain during coverture her sole and separate property, under her sole control, and be held, owned, possessed, and enjoyed by her the same as though she was sole and unmarried, and shall not be subject to the disposal, control or interference of her husband, and shall be exempt from execution or attachment for the debts of her husband." In 1874, section 15 of the present law, (Rev. St. 1891, c. 68,) entitled "Husband and Wife," was enacted, which provides: "The expenses of the family and of the education of the children shall be chargeable upon the property of both the husband and wife, or either of them, in favor of the creditors thereof; and in relation thereto they may be sued jointly or separately." The question which is alleged to arise out of the application of these statutes to the facts above recited is this: If a married

<sup>1</sup>Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

woman owned property while the act of 1861 was in force, and which, by the terms of that act, was exempt from execution for the debts of her husband, can the subsequent act of 1874 be so far enforced against such property, or the proceeds of its sale, as to subject it to the payment of a judgment rendered against the wife for the expenses of the family? It is contended that the right of the wife, under the act of 1861, to have the property belonging to her as her sole and separate property exempt from execution for the debts of her husband, was a vested right, which she could not be deprived of by subsequent legislation. If this were true, it cannot be said that there is an attempt here to subject the wife's property to her husband's debt. The effort is to make it liable for her own debt. Section 15 of the act of 1874, as above quoted, was adopted from the Iowa statute, and we concur in the interpretation which the supreme court of Iowa has given to it. That court said, in reference to this section, in *Frost v. Parker*, 65 Iowa, 178, 21 N. W. Rep. 507: "Here a right is created and a liability declared, but no remedy is provided or pointed out. The right declared is that the creditor of the husband or wife for family expenses may have a remedy against both. The liability created is that both shall be liable for family expenses. \* \* \* It has been held that, under this provision, each is personally liable,"—referring to *Smedley v. Felt*, 41 Iowa, 588, and other cases. The judgment is against Mrs. Myers alone, and not against her husband, or against her husband and herself. If it is allowable or necessary to go behind the judgment, and examine the declaration, the assumption that the judgment was necessarily rendered for the cause of action set out in the first count, to wit, "expenses of the family," rather than for some other cause of action embraced in the general consolidated counts, can make no difference as to the personal liability of the appellant. The judgment, being against her alone, and for a cause of action which was her personal liability, ought to be enforceable against her own property. The act of 1861 did not exempt the wife's property from execution for her own debts. On the contrary, it provided that her property should be under her sole control, and should be held and owned by her the same as though she was sole and unmarried. It is an incident of ownership that property should be liable for its owner's debts. *Stew. Husb. & Wife*, §§ 204, 206. Where a feme covert is the sole and exclusive owner of property, she holds it with all the incidents of property, the right of selling, giving, or charging it with the payment of debts. *Clark v. Valentine*, 41 Ga. 143.

It seems, however, to be claimed by counsel for appellant that before the act of 1874 the husband was liable for the expenses of the family; that by that act the wife was made to share the liability of the husband; and that the act cannot have the effect of charging such newly-created liability upon property owned by the wife before its passage without giving to it a

retrospective operation. It is conceded that the debt for which the judgment in this case was rendered accrued after the act of 1874 was passed. The first section of the act provides that a married woman may in all cases sue and be sued without joining her husband with her, to the same extent as if she were unmarried; and an attachment or judgment in such action may be enforced by or against her as if she were a single woman. Whatever is a legitimate expense of the family is for her benefit, as she is a part of the family. We see no reason why the legislature has not the power to say that she or her property shall be liable for a debt incurred by her or for her benefit. Debtors have no vested right not to pay their debts. What they have and what they acquire the state may subject to legal process for the satisfaction of creditors. *Harris v. Glenn*, 56 Ga. 94. The exemption of the wife's separate property from liability for the expenses of the family under the act of 1861 was a privilege. It is well settled that the citizen has no vested right in statutory privileges and exemptions where no element of contract or grant arises out of the statute. Such privileges and exemptions rest upon reasons of public policy, and may be recalled or changed by the legislative branch of the government. Among them are exemptions of property from being seized on attachment or execution or for the payment of taxes. *Cooley, Const. Lim.* (6th Ed.) p. 471; *Richardson v. Akin*, 87 Ill. 138; *Dobbins v. Bank*, 112 Ill. 553; *Henson v. Moore*, 104 Ill. 403; *Weidenger v. Spruance*, 101 Ill. 278; 7 Amer. & Eng. Enc. Law, p. 133; *Stew. Husb. & Wife*, § 321. It has been held that a homestead exemption is a matter of grace, a privilege, and not a vested right, and that the legislature may remove or diminish the exemption. In *Bull v. Conroe*, 13 Wis. 233, it was said that the privileges extended to debtors by the existing homestead laws of the state were not, as to particular property which might come within their protection, to be considered as vested rights, or as partaking so much of the character of such right that the legislature could not, by future enactments, change or modify the laws so as to deprive debtors of a portion of the property held by them as exempt. In *Harris v. Glenn*, 56 Ga. 94, it was said: "Exemption of property from levy and sale for the payment of debts is but a privilege for the time being, mere grace and favor, dependent on the will of the state. An exemption which exists by statute may be reduced or withdrawn by statute." The right to the homestead, as against the debt, must stand according to the law at the time the exemption is claimed. *Henson v. Moore*, *supra*; *Sparger v. Cumpton*, 54 Ga. 355. So far as the facts of the present case are concerned, the act of 1874 is not retrospective by an application of its provisions to any debt created or existing before its passage. It is prospective in that it is here made to apply only to a debt created by the wife, or for her benefit, after its passage. For the reasons here stated we think that the money or securities in the hands of the appellant were prop-

erly subjected to the payment of the judgment. The decree of the circuit court and the judgment of the appellate court are accordingly affirmed.

(145 Ill. 451)

GREGSTEN et al. v. CITY OF CHICAGO.<sup>1</sup>

(Supreme Court of Illinois. June 19, 1893.)

MUNICIPAL CORPORATIONS—LICENSE—CONTRACT—  
VAULT UNDER ALLEY.

1. A permit given by a city to a lot owner to construct, maintain, and use a vault under the alley in rear of his lot, and a bond given by him, conditioned upon his saving the city harmless from loss on account of such vault, and keeping the alley above it in good repair, constitute a contract, irrevocable by the city, so long as its revocation is not demanded by the public interest or convenience.

2. Where such permit has been issued by the city board of public works under authority, given by the charter, "to regulate the placing or building of vaults under the streets, alleys, and sidewalks," and the lot owner has occupied the vault, and kept the alley in repair, for nearly 20 years, the approval of the permit by the city council may be inferred from its acquiescence in his occupation of the vault.

3. The provision in the bond for keeping the alley in repair is a sufficient consideration for the permit.

Appeal from appellate court, first district.

Bill by Samuel Gregsten and others against the city of Chicago. Defendant obtained a decree, which was affirmed by the appellate court. Complainants appeal. Reversed.

The other facts fully appear in the following statement by SHOPE, J.:

This was a bill by appellants, in the circuit court of Cook county, representing that, in 1870, appellant Gregsten was the owner of a leasehold interest in lot 16, block 142, School Section addition to Chicago, expiring on the 1st day of April, 1880; that there was on the 12th day of May, 1870, a building upon said lot, under the control of, and owned by, Gregsten; that said lot fronts on Dearborn street, in said city, and in its rear was a 15-foot alley, dedicated to the public; that under the act of the legislature of 1863, amendatory of the charter of said city, power and authority were given to the board of public works, of said city, to authorize the use of space underneath the surface of alleys, etc., in said city, upon such terms and conditions as said board might determine, and require the taking of bond from the occupant to pay damages, etc., that might accrue by reason of such occupancy; that on the 12th day of May, 1870, Gregsten applied to the board of public works of said city for a permit to occupy all the space underneath the alley in the rear of said premises; that in pursuance of such application said board of public works issued a permit, which is set out in the amended bill, and required said Gregsten to give a bond, in the penal sum of \$10,000, to save and keep harmless, etc., the city, and to perform the covenants and conditions thereof. The permit, dated

May 12, 1870, provides: "Permission and authority is hereby given by the board of public works of the city of Chicago to Samuel Gregsten, of said city, to excavate for and construct a vault under the alley running north and south through block 142," etc., "and in the rear of, and adjoining, lot 16 of said block, and maintain and use said vault in connection with the building erected or to be erected upon said lot 16," etc.; "this permit being subject to all restrictions, limitations, and conditions of a certain bond relative to said vault, of even date herewith, and executed by the said Samuel Gregsten, in favor of the city of Chicago, by order of the board of public works." A copy of the bond is attached to the bill, and made part thereof, the conditions whereof, so far as necessary to an understanding of the questions presented, are as follows: "And the said Samuel Gregsten has bargained, covenanted, and agreed to and with the said city of Chicago, and hereby, for himself, his heirs, executors, administrators, and assigns, does bargain, covenant, and agree to and with the said city of Chicago, that they will indemnify and save harmless the said city of Chicago and its officers, each and every one of them, from any and all loss, damage, and expense whatever, for which it or they, or any of them, may become liable, or which may at any time be awarded or adjudged against said city or its officers by reason of, or in consequence of, said excavation or vault, or by reason of, or in consequence of, any act or thing whatever by said Samuel Gregsten, or any of his agents, servants, contractors, or workmen, done, permitted, or suffered to be done, in making, excavating, constructing, using, maintaining, opening, covering, closing, or doing any other act or thing in, upon, or about said vault, or by reason of, or in consequence of, the failure of said Samuel Gregsten, or any of his successors, representatives, or assigns, to keep and perform all of his undertakings and agreements herein written; that said Samuel Gregsten will cause said vault to be strongly and firmly covered, and in any manner which may be directed by said board of public works, and will forever keep it so covered, so as in no manner to interfere with the use of said alley, or any portion thereof, as a public highway, and so as to make the same safe for persons, carriages, teams, and all animals and vehicles, to pass and repass over and upon the same, upon the established grade, and will forever after keep that part of the said alley so covered and in good repair, and will grade, repair, and renew the same when and as often as ordered by the common council of said city, or by the board of public works, and will indemnify said city against any and all loss by reason of said alley, so covered, being out of repair; \* \* \* that he will construct approaches of easy slope to those parts of the alleys so filled or covered by the said S. Gregsten; that, in the management and use of said vault, he will be governed by, and will conform to, any ordinance which now exists, or which may hereafter be made by said common council, or any rules which are now, or which

<sup>1</sup>Reported by Louis Boiesot, Jr., Esq., of the Chicago bar.

may be hereafter, adopted by the said board of public works, relative to similar vaults under alley: provided, always, however, that said Samuel Gregaten shall not be subject to any tax or assessment upon the same, as rent, beyond what shall be charged for similar vaults; that said vaults, and those parts of said alley so occupied by said vault and its walls, shall be forever free and open for the building or laying, using, repairing, and maintaining of all sewers, water pipes, and gas pipes ordered by said city, or by said board of public works, to be built or laid or used or repaired or maintained, so that such sewers and gas or water pipes shall be within said vault, above or below the floor, or in any part of the space occupied by said vault or its walls, as shall be directed by said city, or by said board of public works; and that those parts of the said alley to be occupied by said vault and its walls shall be as free and open for the construction of, or laying or using or repairing or maintaining of, such sewers, gas, and water pipes and their fixtures and connections, as if the said vault and its walls had never been built." The condition of the bond also provides for the entry of the city, or any officer, person, or company on its behalf, for the purpose of constructing, repairing, etc., sewers, gas pipes, etc., at will. The bill alleges that said Gregaten proceeded at once undersaid permit, and caused the alley space in rear of said lot to be excavated, walled, and planked, at an expense of \$2,000; that the fire of October of 1871 destroyed the building on the premises; that the same was immediately rebuilt, and the occupation of the alley space for the same purpose, and under the same condition, was continued, with the knowledge of the authorities of the city; that on the 8th day of May, 1880, said Gregaten leased said lot 16 from the city of Chicago for the term of 50 years, and that on the 15th day of June, 1888, he obtained another lease therefor from said city, extending said term to the 8th day of May, 1885; that Gregaten has occupied, and now occupies, the alley space excavated, with his boilers and other necessary apparatus used in conducting the hotel business carried on on said lot 16 and adjoining buildings; that he has no means of accommodating his building therewith, if he should be deprived of said alley. The bill then sets up in full an ordinance of the city passed April 17, 1885, the first section of which provides that every alley space or court now open, or hereafter to be opened, in that portion of the south division of the city, (giving boundaries which includes the alley in question,) whenever the same shall hereafter be ordered or permitted to be improved, either by order of the city council, or by permission of the commissioner of public works, granted to private individuals, as hereinafter provided, shall be paved with granite block pavement, and constructed under the direction and supervision of the department of public works, etc. The second section provides that whenever any person or persons shall desire to permanently improve such alley, etc., they shall prepare and deliver to the commis-

sioner of public works, for his approval, plans and specifications showing the desired improvement, etc., and, if approved, authorizing a permit, under certain conditions. The third section provides that the commissioner of public works shall furnish the proper grades for all work done under this ordinance, and all improvements so made shall be done under the direction of said officer, and as he shall direct, and in no other manner, etc. The bill then alleges that by virtue of said ordinance the commissioner of public works has assumed to grant to one McVicker a permit to occupy one-half of such alley space, thereby intending to deprive complainants of the use and benefit of such alley space; and denies the authority of such officer to grant such permit, and alleges that the grant to said Gregaten, with the bond before mentioned, constituted, between Gregaten and the city of Chicago, a contract, irrevocable, except as therein provided; that Gregaten has kept said alley in repair continuously from May 17, 1870, at great expense; that he has performed and kept each and every of the covenants in said bond contained; that said permit granted the perpetual use of said alley space or vault until the public interests should demand the use of the same; that the public interests have not demanded, and do not demand, the use of said vault or space under the alley, and the common council of the city of Chicago has never directed the complainants to remove or fill up said vault, or any part thereof. The bill then alleges that the commissioner of public works, August 4, 1890, served upon complainants a notice to vacate said excavation or vault, and to remove all property therefrom; that this was done in order that the said McVicker might use, occupy, and improve the east one-half of said alley, in pursuance of the ordinance of April 17, 1885, for which a permit had been issued to her; that the city of Chicago does not require said alley space for its use, but complainants are required to surrender possession of the same so as to give McVicker possession thereof for her private use. The prayer of the bill is for injunction, enjoining the city and its officers from bringing suits to recover possession of said one-half of said alley space, and from evicting complainants therefrom.

The answer of the city insists that the permit, if any was issued to the complainant by the board of public works, as alleged, was and is revocable by the board, or other proper authority of said city, and, further, that if any such permit was granted, to occupy underneath said alley, in whole or in part, such permit was granted to said Gregaten solely upon the condition that he would keep the surface of the alley in good repair, and safe condition. It is then averred that he has not so kept the surface of said alley in repair, but has permitted the same to become broken and unsafe; and that at the present time the surface thereof is broken through into the excavation made by said Gregaten, thereby causing dangerous pitfalls, etc., and that the surface covering is thin and weak, and that in consequence any horse or wagon passing over said alley is in peril of falling

through into said excavation, wherefore he has forfeited any rights under said permit, by reason of his permitting said alley to become out of repair, etc.; that the work was done in and about said excavation in a cheap and careless manner; and that said alley, by reason, etc., is in a dangerous and unsafe condition. Admits that the city officials knew of occupation of Gregsten with boilers and other apparatus for the purpose of conducting the business as in the bill alleged, and denies that he has no other means to accommodate his building for the purposes for which this alley is used. Admits the passage of the ordinance set up in the bill of April 17, 1885. Admits the granting of permit to use one-half of such alley to McVicker, as alleged in the bill, and avers that the permit so issued was confirmed by an order of the city council of the city, of date December 16, 1889, which is set out, and which provides that "the commissioner of public works is hereby directed to render to Harriet G. McVicker all necessary assistance in making the improvement of said alley." Denies that the alley has been kept, or is now, in the repair, as in the bill alleged. Admits the service of the notice by the commissioner of public works to remove obstructions in the vault under the alley, and avers that such notice was served because of the dangerous condition of the alley, as it then existed, and that such notice was served with a view to the improvement of the alley, and for no other purpose. Admits that under said notice it was intended for said McVicker to improve and occupy the east half of said alley under said ordinance of April 17, 1885, for which she had received permit as aforesaid, and avers that the complainants could also have availed themselves of the benefits of said ordinance of April 17, 1885, and, further answering, admits "that they intend to permit the said Harriet G. McVicker to occupy and improve the east half of said alley, in accordance with her permit, hereinbefore mentioned." A preliminary injunction having been granted, the cause came on for hearing upon motion to dissolve. By agreement the motion was set down for hearing on the bill, answer, and affidavits filed on such motion. The motion was sustained, and the bill dismissed. On appeal to the appellate court this decree was affirmed, and that court having granted a certificate of importance, under the statute, this further appeal is prosecuted by the complainants.

Knight & Brown, for appellants. John S. Miller and Condee & Rose, for appellee.

SHOPE, J., (after stating the facts.) By the amendment to the charter of the city of Chicago, passed in 1863, the board of public works was given the power "to regulate the placing or building of vaults under the streets, alleys, and sidewalks, and requires such compensation for the privilege as they shall deem reasonable and just, subject to the approval of the common council." Under the authority thus conferred, as well as in execution of the power of exclusive control over the streets and

alleys of the city, by the city authorities, the board of public works executed a permit to appellant Gregsten to excavate for and construct a vault under the alley running north and south through block 142, School Section addition to said city, in the rear of and adjoining lot 16, in said block, and to maintain and use such vault "in connection with the building erected, or to be erected, upon said lot," etc. As will be seen from the foregoing statement, said permit is, by its terms, subject to all the restrictions, limitations, and conditions of the bond of said Gregsten, of even date, executed to the city. The question sharply presented in this record is whether the permit, construed in connection with the bond, so far as it relates to matters not affecting the public use of the alley, constitutes a contract irrevocable by the city at will. "It is the general doctrine that municipalities, under the power of exclusive control of their streets, may allow any use of them consistent with the public objects for which they are held." *Nelson v. Godfrey*, 12 Ill. 20; *City of Quincy v. Bull*, 106 Ill. 337; *Girdley v. Bloomington*, 68 Ill. 47; *Chicago & N. W. Ry. Co. v. People*, 91 Ill. 251; *Chicago, etc., Fuel Co. v. Town of Lake*, 180 Ill. 42, 22 N. E. Rep. 616; *Dill. Mun. Corp.* 541-551. In this case, however, special power had been conferred, by the act amendatory of the charter, to make the grant, upon such consideration as the city authorities might deem reasonable and just. Section 12, Act 1863. Upon looking into the bond it is seen that appellant was required, as part consideration for the grant, to so construct his vault, and cover the same, that the alley should, at the grade established by the city, be at all times open, and in safe repair and condition for the passage over it of all persons, animals, and vehicles. Beneath the surface the city reserved the right of entry at all times, for all purposes affecting the public interest. The water, gas, and sewer pipes, etc., of the city, might be constructed, enlarged, and repaired at all times, through and under said vault and the walls thereof, in the discretion of the city authorities. The permit, it is apparent, relates solely to such use of the alley as was in no wise inconsistent with its full enjoyment for all public uses and purposes. Moreover, as will be seen, it is expressly stipulated that whenever the public interests shall demand it the rights under the permit shall cease. The city, through its constituted authorities, in granting the permit upon the covenants, conditions, and limitations contained in the bond taken by the city from Gregsten, was therefore acting in its private corporate capacity, as distinguished from its public and political or governmental capacity, and the doctrine applicable to the exercise of its public political powers does not apply. *Bailey v. Mayor*, 3 Hill, 539; *De Voss v. City of Richmond*, 18 Grat. 338; *City of Quincy v. Bull*, supra. The public, except in so far as it might be benefited, had no interest in the subject-matter of the grant.

It is insisted, however, that the permit was void because no approval thereof by the city council is shown. It is alleged and proved that, upon receiving the



permit, Gregsten excavated the vault, built and covered it, as required by the condition of his bond, at large expense to himself; that he entered into occupancy of it, placing therein boilers and apparatus, using it as appurtenant to his building located on said lot 16; that the building having been destroyed by the great fire of October, 1871, he rebuilt upon said lot, and again, putting said alleyway in like condition as before, maintained the vault as an appurtenance to his said building, to the filing of this bill,—a period of practically 20 years. During all that time, with knowledge of the construction and use of the vault by the city authorities, as admitted in the answer, he kept the alley in repair; and for this time the city was saved all expense of the maintenance and repair of the surface of the alley in the rear of, and abutting, said lot 16. In *Gridley v. Bloomington*, *supra*, we said: "Although no license from the city to make the vault is shown, on the other hand, no objection by the city is shown, either to the making of the vault, the mode of its construction, or the state of repair in which it has been kept; and situated as it is, under the sidewalk in a public street, and for so great a length of time, we cannot presume that those having charge of the streets were ignorant of its existence, or of the respective rights and duties of the city and the owners of the property in relation to it. We regard this acquiescence as a sufficient recognition by the city authorities to construct and maintain the vault in a prudent and careful manner." So, in the previous case of *Nelson v. Godfrey*, *supra*, it is held that as the privilege of excavating under sidewalks, etc., for vaults, is of great convenience, and may, with proper care, be exercised with little or no inconvenience to the public, authority to make the same will be inferred, in the absence of any action of the corporate authorities to the contrary, they having knowledge of the progress of the work. See, also, *Dill. Mun. Corp.* § 554. So, in this case, the approval of the city council may be inferred from its long acquiescence in the use of the alley for the purposes for which the permit was granted; and especially will this be so, when it is shown, as it is here, that the occupancy, under the permit, inured to the benefit of the city, and which it received with knowledge of the right claimed by complainants.

As we have seen, the city authorities were authorized to regulate the placing of vaults under sidewalks, streets, and alleys of the city, and require compensation for the same. A reference to the condition of the bond will show that the consideration fixed and agreed upon between Gregsten and the city was that he should bring the alley to the grade established by the city, make approaches of easy slope thereto, covering the vault so as to render it safe and secure as a way for public use and travel, and to forever keep and maintain said alley in such condition and repair. The said Gregsten was required to covenant, for himself, his heirs, executors, administrators, and assigns, to forever keep and maintain said alley in said condition, and to renew and repair the

same whenever required so to do by the city authorities. By the express terms of the permit he is granted the right to build, maintain, and use the vault in connection with his buildings erected, or to be erected, on said lot 16. It seems clear that the parties had in contemplation, at the time of entering into the arrangement, that Gregsten, his heirs and assigns, should have the right to build and maintain a vault under said alley, as appurtenant to the building upon lot 16, and be bound to maintain the same in suitable repair and condition for the public use and convenience, perpetually, unless the public convenience or necessity required the removal of the vault from the alley. He and his representatives are required to forever keep and maintain said alley in repair, and to save and keep harmless the city from all loss or damage by reason of its, at any time, being out of repair. It was also in contemplation of the parties that in addition to the liability of the grantee in the permit, his heirs and assigns, to keep said alley in repair, and thereby save the city the cost and expense of paving, maintaining, and repairing the same, and from all loss by reason of its being out of repair, he or they might be subject to a further tax as rent, as the city, in the exercise of reasonable discretion, might determine. It is expressly stipulated in the bond "that said Samuel Gregsten shall not be subject to any tax upon the same, [the vault,] as rent, beyond what shall be charged for similar vaults." The objection, therefore, that the contract was without consideration, is without merit. By the arrangement thus made, the municipality, in its private corporate capacity, made the grant upon a sufficient consideration, securing rights mutually advantageous to the parties, and in no wise conflicting with, or infringing upon, any public interest; and, the permit having been granted upon the express condition and stipulations to be kept and performed by Gregsten, the two instruments constituted a contract mutually binding upon the parties. 15 *Amer. & Eng. Enc. Law*, 1108, note 3. The city, when acting in its private capacity, as contradistinguished from its governmental capacity, is bound by its contracts, and may be estopped by the conduct of its proper officers, when acting within the scope of their lawful power. *Railway Co. v. Joliet*, 79 Ill. 39; *Logan Co. v. Lincoln*, 81 Ill. 156; *Martel v. East St. Louis*, 94 Ill. 67; *City of Chicago v. Sexton*, 115 Ill. 230, 2 N. E. Rep. 263.

We are of opinion that the permit and bond, forming parts of the same transaction, constituted a contract between the parties, not revocable by the city unless the public interest or convenience demanded it, or for some other cause for which the contract, by its terms, might be revoked. By the terms of the bond the city reserved the right to revoke the permit, and re-enter, whenever the public interest should require it; and also, upon the failure of Gregsten, his heirs, executors, or assigns, to keep and perform the covenants and conditions in the condition of his bond mentioned, and upon the termination of the permit, it was stipulated

that Gregsten should remove and fill up the vault, thereby restoring the alley to its former condition. It is not pretended that the interests of the public demand, or its convenience requires, the removal by Gregsten of the vault, or its abandonment, and a resumption by the city of absolute control over the alley. We have already seen that, for all public purposes, the municipal authorities had and retained, under the contract, absolute control of the same. In addition, by reference to the conditions of the bond, it will be seen that Gregsten, his representatives and assigns, were bound to remove and repair the surface of the alley whenever, and in such manner, as should be ordered by the city council, or board of public works of the city. It is admitted in the answer—and, if it were not, it is abundantly shown—that the attempt to oust the present occupants of the vault is not demanded in the public interest, or to serve a public purpose, but is solely to enable the abutting owner, upon the east of the alley, to occupy one-half of the alley space in the rear of said lot 16 for private uses. The answer admits that a permit had been given to one McVicker to occupy and improve the east half of that part of said alley abutting on complainants' lot, and that it is the intent and purpose to put said McVicker in possession of such right, under said permit. No such right is reserved in and by the contract, and such purpose is therefore unlawful. The city is without power to deprive the complainants of their rights, under its contract with Gregsten, for the benefit of private individuals, or to subserve private purposes and ends.

The bill alleges, and the proof sustains the allegation, as we think, that the grantee in the permit put the surface of the alley in the condition required by the contract, and kept and maintained the same in safe repair and condition for the passage and travel, over and across the same, of all persons, animals, and vehicles, as required in and by his bond. It is true the answer sets up that the surface of said alley over said vault had been permitted to become out of repair, and was in a dangerous condition, etc., and that there was therefore a right of revocation of the permit, under the terms of the contract; and there is some evidence tending to show that the surface was depressed in the middle of the alley, and that some boards were broken. That the alley over the vault was in a dangerous condition, or unsafe or insecure for the passage of all persons or vehicles, is clearly rebutted. The beams holding the covering were of oak, and sound, on which there was first laid three-inch planks, and on top of these a layer of two-inch planks, which had been renewed, practically, within two years. Up to the filing of this bill, it would seem that no complaint had been made, knowledge of which was carried home to complainants, at least, that the surface of the alley was in any wise out of repair. Mr. Hirsch, of the engineering department of the city, upon his examination of it, shortly before the service of notice upon complainants to remove from the vault,

is shown to have pronounced it safe, etc. We are not unmindful that the commissioner of public works says, in effect, that he gave the notice, and was proceeding against complainants, because the surface of the alley was in a dangerous condition. Without criticism of this statement it may be said that it is abundantly shown that such was not its condition, and that as early as December, 1889, without any complaint that the alley was out of repair, and without any notice to complainants, a permit to occupy the east half of the alley, then in possession of the complainants, was given to McVicker. There is not a scintilla of evidence tending to show that the alley was then in any way out of repair; and the avowed purpose of the city and commissioner of public works, in their answers, is, as we have seen, to permit McVicker to occupy under the permit to her. Moreover, it appears, and is not controverted, that immediately upon receiving notice that it was claimed that the alley was out of repair, etc., and being the first notice complainants had of any intention on the part of the city, or its officers, to require them to give up the alley, or any part of it, complainants went to the commissioner of public works, and demanded of him that, if he claimed said alley was not properly planked or paved, he give them specifications showing in what manner, and with what material, it was required they should plank or pave the same, and then offered, if the commissioner required it, "to put iron beams across said alley space, and to place over the same concrete stone blocks, wood blocks, or any other kind of pavement said commissioner might require," and practically the same offer is made in and by complainants' bill. By an ordinance of the city, passed April 17, 1885, in reference to the improvement of alleys in the district of the city in which this alley is located, it is (section 3) provided that "the commissioner of public works shall furnish the proper grades for all work done under this ordinance, and all improvements so made shall be done under the direction of said officer, and as he shall direct, and in no other manner." It is shown that the commissioner, although repeatedly requested so to do, declined to give complainants any direction whatever in respect of the manner in which the alley should be repaired or improved, or to direct them in respect thereof. If the alley was out of repair, and the public interest alone was to be considered, every duty to the public would have been subserved by the performance of the duty required by said ordinance of said commissioner. It is clear from this record that the complainants were not only ready, able, and willing, but offered, to put the surface of said alley in such condition, and repair, and use such material, as said commissioner might require. It is impossible to consider this record, as it seems to us, and not find that the decided preponderance of the evidence is against the contention, not only that the surface of the alley was out of repair, but also that the proceedings against the complainants were instituted for that reason. It is true that

there is, and must necessarily be, vested in city authorities, a large discretion to determine when the public streets and alleys of the city were in suitable repair to insure safety to the public. If the commissioner of public works had condemned the covering to the vault, and required its renewal, or had deemed it necessary, for the public convenience or safety, that the vault should be more securely covered, or differently paved, and complainants had neglected or refused to keep their covenant, and repair or renew, a different question would have been presented by the record, which it is unnecessary for us here to discuss or determine. We are of opinion that the court erred in sustaining the motion to dissolve the injunction, and in dismissing the bill. The decree and the judgment of the appellate court, affirming the same, are reversed, and the cause remanded to the circuit court for further proceedings not inconsistent with this opinion.

(145 Ill. 614)

McCHESNEY et al. v. PEOPLE ex rel. KERN, County Treasurer.<sup>1</sup>

(Supreme Court of Illinois. June 19, 1893.)  
PUBLICATION OF LEGAL NOTICE—SUNDAY—SPECIAL ASSESSMENT—JURISDICTION.

1. Under Rev. St. 1891, c. 100, § 1, which declares that publication of legal notices in newspapers may be proved by the certificate of the publisher stating the number of times the same has been published, and giving the dates of the first and last papers containing the notice, a certificate stating that a notice "has been published five successive days in the Chicago Mail, a daily newspaper," sufficiently states the number of times the notice was published.

2. Where a legal notice is required to be published "five successive days," it is proper in computing the days to consider Monday as successive to Saturday, since Sunday is not a judicial day.

3. Where a publisher's certificate of the publication of notice of a special assessment is dated two days before the alleged date of the last publication, and there is no evidence explaining the certificate, or tending to show mistake in its date, and there is no evidence of the publication except the certificate, the court has no jurisdiction to confirm the assessment, since, in order to obtain jurisdiction, it is necessary to comply strictly with Rev. St. 1891, c. 24, art. 9, § 27, which requires publication of notice of special assessments.

Appeal from Cook county court; Frank Scales, Judge.

This was an application by the county treasurer of Cook county for judgment for delinquent taxes. A. B. McChesney and others filed objections, which were overruled, and they appeal. Reversed.

F. W. Becker, for appellants. F. W. C. Hayes and J. S. Miller, Corp. Counsel, for appellee.

SHOPE, J. This is an appeal from a judgment of the county court of Cook county against the lands of appellants for the amount of a special assessment returned delinquent, and which was levied in a proceeding by the city of Chicago to

assess benefits to said lands, among others, by the opening of Madison avenue, and to pay compensation and damages awarded in condemnation proceeding for the opening of said avenue. The amount returned by commissioners against appellants' land was \$640, and, appellants failing to appear in the assessment proceeding, judgment of confirmation was rendered therein.

The objections interposed in the county court go to the jurisdiction of the court rendering the judgment of confirmation. By section 28, art. 9, c. 24, Rev. St., the commissioners appointed to make the assessment are required to make and return an assessment roll which shall contain a description of each lot, block, tract, or parcel of land, the amount assessed as special benefits, and the names of the owners so far as known. The next section requires the commissioners to give notice of the time at which a final hearing will be had upon such roll. They are required to mail each owner of premises assessed, where name and place are known to them, a notice thereof, the substantial form of which is given in the statute. Second, they shall cause at least 10 days' notice to be given by posting notices in at least four public places in the neighborhood of the proposed improvement, and, when a daily paper is published in such city or village, by publishing the same at least five successive days in such daily newspaper; the form of which, to be substantially followed, is also prescribed. The next section requires that one or more of the commissioners, on or before the final hearing, file an affidavit that the notices were sent by mail, as required in the preceding section, and also an affidavit of the person who posted the notices that they were posted as required therein, and that a certificate of the publication of said notice be filed, in like manner as required in other cases. By referring to section 1, c. 100, of the statutes, we find it provides that when any notice shall be required by law to be published in any newspaper, and no other mode of proving the same is provided, the certificate of the publisher, with a written or printed copy of such notice annexed, stating the number of times the same has been published, and giving the dates of the first and last papers containing the same, shall be evidence of the publication therein set forth.

Appellants entered a special appearance in the county court, and objected to the entry of judgment against their lands for the delinquent special assessments for the reason that the court rendering judgment of confirmation was without jurisdiction to enter the same. That the mailing, posting, and publication of the notice required by the statute are necessary to confer jurisdiction upon the court to render judgment of confirmation in cases of special assessment is unquestioned. The commissioners filed, in attempted compliance with the statute, the following certificate of publication of notice: "State of Illinois, Cook County—ss.: This certifies that a notice, of which the annexed notice is a true copy, has been

<sup>1</sup>Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

published five successive days in the Chicago Mail, a daily newspaper printed and published in the city of Chicago, in said county, and that the date of the first paper containing the said published notice was the 5th day of Feb., A. D. 1892, and that the date of the last paper containing the same was the 10th day of Feb., A. D. 1892. \* \* \* In witness whereof Joseph R. Dnnlop, publisher of said Chicago Mail, has signed this certificate this 8th day of February, 1892. Joseph R. Dunlop, Publisher."

The first objection is that the notice does not state the number of times the same was published, as required by section 1, c. 100, Rev. St. *Beygeh v. City of Chicago*, 65 Ill. 189. The statute requires in cases of this kind, where there is a daily newspaper published in the city or village, that the notice shall be published "at least five successive days in such daily newspaper," and a certificate thereof by the publisher, filed in like manner as required in other cases of publication of notice, is made sufficient evidence of the fact of publication. Here the certificate by the publisher is that the notice "has been published five successive days in the Chicago Mail, a daily newspaper," etc., and giving the date of the first and last papers containing the notice, as provided in and by said section 1, c. 100, Rev. St., before referred to. We are of opinion that this was a compliance with the statute.

It is also objected that, as it was shown by the evidence that the 7th day of February, 1892, was Sunday, and that no publication was had on that day, the notice was not published "five successive days," unless Sunday is to be treated as dies non juridicus. The contention is that it cannot be so regarded. This question arose directly in *Scammon v. City of Chicago*, 40 Ill. 148. It was there necessary to include a publication on Sunday to render the notice of filing an assessment roll valid, and it was held to be invalid. It is there said: "If the service of civil process would be invalid on Sunday, it necessarily follows that a publication of this notice on Sunday, if the law required but a single publication, would be equally invalid, and the same rule must be applied to the present case, in which the Sunday publication must be counted to make out the requisite number. The notice stands in place of process, and it must be given on those days of the week which the law recognizes as appropriate to business of this character. To permit it to be given on Sunday is against the spirit and policy of our law." The cases of *Langabier v. Railroad Co.*, 64 Ill. 243; *Kingsbury v. Buckner*, 70 Ill. 514; and *Richmond v. Moore*, 107 Ill. 429,—are cited by counsel for appellants as announcing a different rule. We do not so understand the cases. The first related to the issue of an injunction to prevent irreparable injury to property, and where the prompt interposition of a court of chancery was necessary to prevent the threatened harm. The case in 70 Ill. arose out of the contract of the parties, and the publication on Sunday was sustained upon that ground; and *Scammon v. City of Chicago* was expressly distinguished

by the court from that case. *Richmond v. Moore* has no application here. It was there held merely that a contract entered into on Sunday was not necessarily void. We are of opinion that this objection is not well taken. It will be observed that the certificate shows that the date of the first paper containing the published notice was the 5th day of February, 1892, and the date of the last paper containing the same was the 10th day of February, 1892, making five successive days, excluding Sunday as dies non juridicus, as was proper to be done. It, however, appears affirmatively that the certificate was made by the publisher on the 8th day of February, 1892, and is attested by him as having been made on that day. No evidence was offered tending to show mistake in the date of the certificate, or explanatory of it. The certificate of the publisher is the only evidence in the record as to when it was made, or as to the publication of the notice. It cannot be said, we think, that the date solemnly given under the hand of the publisher can be excluded or ignored with any greater reason than can the dates given in the body of the certificate itself. It was impossible for the publisher to certify on the 8th day of February that the notice was published in his newspaper on the 9th and 10th days of the same month. The court could not know whether the error was in the date of the certificate or in the date of the last publication. To obtain jurisdiction by means of publication, it must affirmatively appear that the statute has been strictly pursued and its provisions complied with. We are of opinion that the court rendering the judgment of condemnation was without jurisdiction to render the same, and the judgment of the county court against appellants' lands for such alleged delinquent special assessment was erroneously entered, and must be reversed.

(146 Ill. 384)

#### THOMAS ON *v.* WILSON.<sup>1</sup>

(Supreme Court of Illinois. June 19, 1893.)

FORCIBLE DETAINER—EVIDENCE—WAIVER OF OBJECTIONS—ASSIGNEE OF LANDLORD.

1. In forcible detainer by a landlord the defendant objected to proof of the notice of termination of the lease, because the tenant was not a party to the suit, and, on this objection being overruled, the notice was introduced in evidence without further objection. *Held*, that the defendant had waived preliminary proof of the execution of the notice.

2. Under Rev. St. 1891, c. 80, § 14, which gives the lessor's grantee the same right of entry by action or otherwise as is given to the lessor, it is not necessary in an action of forcible detainer by a grantee of the lessor to prove that the lessee attorned to the grantee.

3. Under Rev. St. 1891, c. 57, § 2, which provides that an action of forcible entry and detainer may be brought "when a peaceable entry is made, and the possession unlawfully withheld," such action may be brought by a landlord against one who, under a distinct claim of title, and without collusion with the tenant, obtains peaceable possession of the demised premises during the continuance of the

<sup>1</sup>Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

term, and retains such possession after the lease has been terminated and a demand of possession has been made on him by the landlord.

Appeal from appellate court, first district.

Action of forcible detainer, brought by Harriet B. Wilson against Rufus J. Thomasson. Judgment for plaintiff. Defendant appeals. Affirmed.

I. K. Boyesen and Swift, Campbell, Jones & Martin, for appellant.

A person entering land peaceably under lease, without knowledge of another's title, cannot be ousted by forcible entry and detinue proceedings. *Ballance v. Curtenius*, 3 Gilman, 449; *Clark v. Barker*, 44 Ill. 349; *Doty v. Burdick*, 83 Ill. 475.

Thornton & Chancellor, for appellee.

SHOPE, J. This was an action of forcible detainer, which was tried in the circuit court of Cook county, on appeal, by the court without a jury, and resulted in a judgment for plaintiff, appellee here. On appeal to the appellate court this judgment was affirmed, and the defendant below prosecuted this appeal.

On the trial in the circuit court the defendant submitted, and asked the court to hold, as the law of the case, the following propositions, which were refused: "(1) The plaintiff cannot, as the devisee or grantee of the lessor of Annestine Laddness, maintain this action without showing an attornment from said lessee, Annestine Laddness, to said plaintiff. (2) That if the defendant, Thomasson, came into possession of said premises peaceably and without force or fraud, the plaintiff cannot maintain this action against the said defendant. (3) That if the said Thomasson, the defendant, entered upon the possession of said premises peaceably, and without force or fraud, through a lease from one Clark, claiming title to said premises in good faith, plaintiff cannot recover in this action."

On the 1st day of April, 1886, Julia Wilson, then claiming to be the owner of the premises in controversy, made a lease of the premises to Mrs. Annestine Laddness, for a term of six years, at an annual rental of \$25, payable half-yearly. Mrs. Laddness had been in possession under Wilson, or her grantor, previously to the making of this lease, and continued in possession under the lease until the 9th day of June, 1890. Some time after the possession commenced under said lease, the family of one Bell, a son of Mrs. Laddness, moved into the house with her, and occupied under her until the last-mentioned date. The trial and appellate courts have found, as they were justified in doing, that the occupancy of Bell, the son, and his family, was under Mrs. Laddness, and subordinate to her right. Mrs. Laddness worked out and away from the house portions of the time, returning to the premises from time to time as her home. On the 9th of June, 1890, Bell, during the absence of Mrs. Laddness, moved out of the house, and appellant, Thomasson, immediately moved in; his goods

arriving early in the morning, before Bell had his goods out of the house. Thomasson claimed to enter and hold under one Clark. Appellee is the remote grantee of the title of Julia Wilson in said premises, and whom Mrs. Laddness recognized as her landlord. Rent remaining due and unpaid from Mrs. Laddness under her lease, notice was given under the ninth section of the landlord and tenant act terminating the lease, and a demand for possession served both upon Mrs. Laddness and appellant. Possession not having been surrendered, this suit was brought.

It is objected that there was no evidence of the issuing or service of the notice terminating the tenancy, or of the demand for possession. The notice admitted in evidence was signed by appellee, by one Thornton, her agent, and it is said that the record fails to show that Thornton was authorized to act for or on behalf of appellee. It is also said that there was no sufficient proof of service of the notice. If it could be conceded that appellant was in position to raise these questions on this record, (which cannot be,) appellant waived such preliminary proof. Appellee produced the notice, and was proceeding to prove service of it, when appellant objected to such proof of service upon Mrs. Laddness, because she was not a party to the suit. Upon the court holding, in effect, that the evidence was competent, counsel said to the court, "The lease to Mrs. Laddness was terminated by this notice," whereupon the notice was admitted in evidence without further preliminary proof. When the written demands were offered in evidence, counsel for appellant said: "Same objection, as immaterial, to the introduction of this paper. I just make a formal objection." The proof shows that service was in fact made of all these writings. Under the circumstances, the conduct of appellant's counsel having induced appellee's counsel and the court to act upon the assumption that further preliminary proof was waived, appellant cannot be heard to complain of the failure to make preliminary proof of the execution of said notice and demand. It is said, however, that, although counsel admitted that the notice terminated the tenancy of Mrs. Laddness, he did not admit that it was thus terminated before the suit was brought. The contention cannot prevail. Proof of its service had been made, when counsel interrupted, and made the admission upon which court and counsel acted, without objection by counsel for appellant. It is, we think, clear that the admission was made for the purpose of the trial, and counsel for appellee and the court were justified in acting thereon. Appellant and his counsel, having sat by, with full knowledge that it was being treated by the court as an admission that the tenancy had been terminated by the notice, before suit brought, ought not now be permitted to gainsay it.

The court determined correctly in refusing to hold the first proposition submitted to be held as the law of the case, for the reason that the same right of entry

by action or otherwise is given by the statute to the grantee of the lessor as the lessor might have had. Section 14, c. 80, Rev. St. It is undoubtedly true that the entry was made upon the possession of the tenant, and the right of action for forcible entry and detainer became complete in her at the moment of entry by appellant. *Dudley v. Lee*, 39 Ill. 339. But the same right to terminate the tenancy and upon its termination to proceed for the unlawful detention of the premises existed in the grantee as the original landlord might have exercised. *Fisher v. Smith*, 48 Ill. 184; *Allen v. Webster*, 56 Ill. 393; *Gazzolo v. Chambers*, 73 Ill. 56; *Dudley v. Lee*, supra. The right of immediate possession being in the tenant, the action for the forcible entry must be brought by her; but that by no means interferes with the right of the landlord to bring the action of forcible detainer, upon the determination of the tenancy, for any of the causes for which that action will lie under the statute.

A somewhat more difficult question arises upon the ruling of the court refusing the second and third propositions. These propositions may be considered together. It is to be regarded as settled that Mrs. Laddness was in possession of the premises as the tenant of appellee, and that her tenancy was not terminated until after appellant intruded into possession, but was terminated by the notice before mentioned, and by demand both upon her and appellant, made in writing, before the beginning of this suit. There are many circumstances, as well as proof of admission by appellant, tending to show that appellant got possession by collusion with Bell, who was in, as we have seen, under Mrs. Laddness. This is denied both by Bell and appellant, and it perhaps cannot be said, as the decision does not seem to have been placed upon that ground, that the weight of evidence shows such collusive entry. It would require no argument or citation of authority to sustain the right of appellee, upon the termination of the tenancy, to maintain forcible detainer against the tenant, or any person in possession by, through, or under her, who might hold over after the termination of the tenancy. It is urged that the entry by appellant was peaceable and without force, and under a claim of right to the premises; and, as it is everywhere held the title cannot be tried in this proceeding, the action cannot be maintained. The evidence shows that appellant had a lease from Clark, who claimed the title; that on the morning of the 9th of June, 1890, he took his household goods to the premises, and found Bell moving out of the house. Mrs. Laddness was absent. He waited until Bell had taken his goods from the house, and immediately moved into it. The question, sharply presented, is whether, conceding that the entry of appellant was under a distinct claim of title, and without collusion with the tenant, or those holding under her, the right of action is given by the statute to maintain this proceeding against appellant. By the act of 1845 the right to maintain forcible detainer was given against any person will-

fully and without force holding over land, tenements, or other possession after the determination of the time for which the same were let to him, or to the person under whom he claimed, after demand made in writing, etc.; and the decisions referred to by counsel were mainly made in pursuance of that act. By the act of 1874 (chapter 57, § 2, Rev. St.) the cases in which forcible detainer will lie were much enlarged. The second clause of section 2 of that act provides that persons entitled to the possession of lands or tenements may be restored thereto in the manner prescribed by the act,—"when a peaceable entry is made, and the possession unlawfully withheld." That this does not apply to tenants holding over after the determination of the lease under which they entered is made apparent by a consideration of the subsequent clause. The third clause authorizes the action where the entry is made into vacant or unoccupied lands without right or title; the fourth relates to the holding over by a lessee of lands or tenements, or by any person under him, after the termination of the tenancy by its own limitation, "or by notice to quit or otherwise;" the fifth, to the relation of vendor and vendee; and the sixth, to cases where land has been conveyed or sold under decree or judgment, etc. By the fourth clause, every right given by the former statute to maintain forcible detainer, where the relation of landlord and tenant existed, is retained in the present statute. In the fifth and sixth clauses the right is given where specified contractual relations exist, or the title has passed by deed or by operation of law. It cannot, therefore, be said that it could have been within the legislative contemplation that the relation of landlord and tenant or other contractual relation should exist to authorize restoration to possession of the party entitled to it under the second clause. The right is given for unlawfully withholding the possession from the person entitled to the same, where the entry has been peaceable. The purpose of the provision is to protect possessory rights in lands and tenements from invasion without force, and the detention of the premises from the person possessing such rights, and to compel resort to legal proceedings to obtain possession of lands or tenements in possession of another, although peaceable entry might be made. It is no answer to say that a detention of the premises by appellant, after demand in writing to surrender them up, was not unlawful because he entered under and held by virtue of a superior title. What may be proved may be disproved, and if defendant be permitted to show that he entered under superior title the plaintiff may by evidence overcome such proof, and thus the title be invalid. This, as we have seen, cannot be done in forcible detainer proceeding. In such cases, the right of possession only is in controversy. Every detention of the premises after demand duly made by a person who has intruded into the possession of another becomes an unlawful detention within the meaning of this statute, however peaceably the entry may have been made. The possession of Mrs.

Laddness, in law and in fact, was the possession of her landlord, the appellee. Technically, the right to recover damages from trespassers, not affecting the reversion, was in the tenant; and undoubtedly an action of forcible entry and detainer, for the invasion of her right of possession, and the unlawful entry upon the premises by appellant, could have been maintained by her; and it is true, as suggested, that a right of action by appellee for the detention of the property would not accrue until her right of entry unto the premises arose upon determination of the lease. But upon termination of the tenancy the landlord's right of restoration to his possession of the demised premises becomes complete, and after demand for possession upon the intruder the detention by him becomes unlawful, and the right of action accrues under this clause of the statute for the unlawful detention. It is well settled that no right can be acquired to the possession by open violence, or by intrigue with those who take possession from the landlord. All such stand in the shoes of the tenant. *Ballance v. Fortier*, 3 Gilman, 291; *McCartney v. Hunt*, 16 Ill. 76; *Wall v. Goodenough*, Id. 415. And in view of this statute it cannot be that the right of the landlord to possession must depend upon whether the tenant will bring forcible entry and detainer against the party intruding into the possession, and, if he fail or refuse to do so, the landlord be driven to his remedy by ejectment, thereby, in effect, losing his possessory right. We are of opinion that when appellant refused and neglected to surrender possession of the premises to appellee, after demand in writing, the detention was unlawful. If he has title to the property, he cannot be permitted to assert it in this form of action, but must restore the possession wrongfully taken from the tenant of appellee, place her in statu quo, and then in some appropriate proceeding assert his title. *Reeder v. Purdy*, 41 Ill. 279; *Huftalin v. Misner*, 70 Ill. 205; *Doty v. Burdick*, 83 Ill. 473; *Slate v. Eisenmeyer*, 94 Ill. 96; *Kepley v. Luke*, 106 Ill. 395; *Pederson v. Cline*, 27 Ill. App. 250; *People v. Leonard*, 11 Johns. 509; *People v. Nelson*, 13 Johns. 343. We think the court did not err in its rulings, and the judgment of the appellate court will be affirmed.

(50 Ohio St. 440)

HANSON v. LUCE, County Treasurer.

MONAGHAN v. SAME.

(Supreme Court of Ohio. June 13, 1893.)

INTOXICATING LIQUORS—LICENSE—RIGHT OF LICENSEE TO STORE LIQUORS IN SEPARATE BUILDING.

One who traffics in spirituous, vinous, malt, or intoxicating liquors, at a regular place of business, and pays the assessment of \$250 therefor, as required by section 8092, subd. 8, Rev. St., known as the "Dow Law," has the right to store all or a part of his liquors in a cooler or building separate and apart from his regular place of business, without paying a second assessment on account of such cooler or building, provided no purchases or sales of

such liquors be made at such building or cooler.

(Syllabus by the Court.)

Error to circuit court, Ashtabula county.

Two actions, one by John Hanson against one Luce, as treasurer, for an injunction, and the other by Patrick Monaghan against same defendant for the same purpose. Defendant had judgment in each case, and plaintiffs bring error. Reversed.

Statement by the court:

Plaintiff in each of these cases filed a petition in the court of common pleas to enjoin the treasurer from collecting an assessment of what is known as the "Dow Tax on Traffic in Spirituous Liquors," under section 8092, subd. 8, Rev. St. Plaintiff was successful in each case in the common pleas court, and each case was appealed to the circuit court, and tried in that court, and a finding of facts made in each case. Defendant was successful in the circuit court, and the cases are brought here by plaintiffs on petition in error to reverse the judgments of the circuit court.

In the Hanson Case the findings of fact and law are as follows: "First. That the plaintiff, John Hanson, is the owner of a building situated on a lot of land owned by him on Pacific street, in the village of Ashtabula, and at the Harbor; that said building fronts towards Pacific street; that said plaintiff lives in the upper part of said building, and for nine or ten years has kept saloon in the lower part thereof, in which saloon he has, during all of said time, sold beer and other liquors at retail; and that he was so selling there during the entire time, and during the whole of the year 1889, and was also doing business during said time as a wholesale dealer in beer. Second. That said John Hanson also owned a small building on the opposite side of Pacific street from his saloon, and one hundred and fifty-five feet distant from said saloon, in a line drawn diagonally across from one to the other. This building was built two years ago; and the back part of it is used only for the storage of beer, and ice is taken in and placed on the heads of the kegs of beer to keep the beer cool. The front room—a room twelve by fourteen feet—is used as a shoe shop. Third. That since the building of said cooler said plaintiff has, in addition to retailing at his saloon, carried on the business of wholesaling beer; that upon the receipt of beer it is unloaded by plaintiff from the cars, and taken directly to said cooler, where (except what plaintiff takes therefrom to his saloon, to retail therein) it remains in said cooler until disposed of to the various customers who buy it; that said plaintiff, during said two years, and during the year 1889, kept a hired man, whose business it was to drive a delivery wagon, and each morning load onto said wagon, direct from said cooler, the beer to be delivered to plaintiff's customers, and to deliver the same; at the same time to sell to all who wished to buy and pay for all such quantities of beer as such purchasers might desire to purchase at wholesale. But no beer was sold at said cooler. Fourth.



That said John Hanson was in due time regularly assessed upon the business of trafficking in spirituous, malt, and vinous liquors at his said premises at Ashtabula Harbor, in said county of Ashtabula, and as being carried on at one place only; that subsequently the deputy county treasurer called upon said plaintiff, and informed him he was liable to an additional assessment on account of said wholesale business carried on at and in connection with said cooler, and assessed the plaintiff upon the business of trafficking in spirituous, vinous, and malt liquors, as being carried on at and from said cooler, in addition to said former assessment. If said plaintiff was, by reason of the facts aforesaid, under the statutes of Ohio, liable to assessment as carrying on the business of trafficking in spirituous, vinous, and malt liquors for each of said two places, then said second assessment was duly and regularly made, and if, under the statutes of Ohio, he should be assessed, by reason of said facts, upon the business of trafficking in spirituous, vinous, and malt liquors, as carried on by or for him at one place only, then the plaintiff is, by said second assessment, wrongfully assessed. Fifth. That afterwards, and in due time, said plaintiff paid into the county treasury the sum of \$125, as the semiannual payment of his tax for the business carried on at the saloon, and also \$125 for the semiannual tax on his business carried on in connection with said cooler, which last payment was made under written protest. And as conclusions of law the court find that said plaintiff was, at the time designated in his petition, carrying on his said business of trafficking in spirituous, vinous, and malt liquors at two different places, to wit, at his said saloon, as one place, and at his said cooler, as the other place, and that each of said assessments made against him was legal, and made in accordance with law, and should be paid, and that said petition should be, and the same is hereby, dismissed, at the costs of said plaintiff.

In the Monaghan Case, the first and second findings of fact are as follows: "First. That the plaintiff, Patrick Monaghan, is the owner of a building situated on a lot of land owned by him at the corner of High and Market streets, in the village of Ashtabula, at the Harbor; that said building faces and fronts towards High street; that said plaintiff lives in the upper part of said building, and for nine or more years has kept saloon in the lower part thereof, in which saloon he has, during all of said time, sold beer and other liquors at retail; and that he was so selling there during the entire year of A. D. 1889. Second. That four years ago plaintiff erected in the rear of said saloon building a new building, called a refrigerator or cooler, which cooler is situated four feet six inches distant from said saloon, but is connected therewith by a covered way four and one-half feet wide; and plaintiff's kitchen also is connected with it on the south; that said cooler is sixteen by twenty feet in extent, and six feet high between floors where beer is stored; that but one window opens into this room,

and but one door; that the space above said room is occupied by large quantities of ice, stored there for the purpose of keeping the beer cool." The 3d, 4th, and 5th findings of fact, and the conclusions of law, in the Monaghan Case, are the same as in the Hanson Case. Exceptions were duly taken to the conclusions of law in each case.

Edward H. Fitch, R. W. Calvin, and Theodore Hall, for plaintiffs in error. Northway & Williams and Charles Lawyer, Jr., for defendant in error.

PER CURIAM. From the facts found by the circuit court it appears that upon the receipt of beer by plaintiff it was put from the cars into the cooler, where it remained until delivered by the driver of the beer wagon to customers, but no beer was sold at said cooler. It thus appears that beer was neither bought nor sold at the cooler, but that all the business of buying and selling was done at the saloon, and that the cooler was a mere place of storage, and not a place of business, and that no traffic whatever was carried on at the cooler,—no buying, no selling. From these facts so found the court finds, as a conclusion of law, that the plaintiff was carrying on his business at "two different places, to wit, at his said saloon, as one place, and at his said cooler, as the other place." It is difficult of comprehension how the business of trafficking in an article can be said to be carried on at a place where such article is neither bought, sold, nor bartered. The traffic contemplated by the statute consists in the purchase and sale or barter of the liquors named therein, and the place of the traffic is the place where such purchase, sale, or barter is had, and not the place where the liquors are stored for cooling or safe-keeping. The sales of beer, made by the driver of the beer wagon, must be referred to the place where his employer carried on the traffic, and not to the place of storage. The conclusion of law is not warranted by the facts found, and in such case the facts must control. It is therefore clear that the circuit court erred in its conclusions of law, and that its judgments should be reversed, and that judgment should be rendered for plaintiff in each case, as prayed for, with costs.

Judgment accordingly.

(50 Ohio St. 320)

KING et al. v. CLEVELAND SHIP-BLDG. CO.

(Supreme Court of Ohio. May 9, 1893.)

MECHANICS' LIENS—HOW PERFECTED—LABOR GRATUITOUSLY PERFORMED.

1. It is essential to the validity of a lien for machinery furnished for a manufactory or other building, as provided in section 3184 of the Revised Statutes, that the affidavit required by section 3185 be filed within the time therein prescribed.

2. Under a contract by the terms of which one of the parties agrees to make certain machinery for the other, and furnish it "f. o. b. cars" at a designated place, for a stipulated price, the machinery is furnished, within the meaning of the statute, when it is delivered, in

accordance with the contract, on board the cars at the place named, without expense to the purchaser, and to obtain a lien therefor the necessary affidavit must be filed within four months from that time.

3. The time for so perfecting the lien cannot be extended by the performance of labor under another contract, or gratuitously, in placing the machinery in position in the manufactory or building.

4. Separate contracts cannot be tacked together so as to enlarge the time for taking the lien under either, nor can a lien be obtained, under the statute, for labor gratuitously performed.

(Syllabus by the Court.)

Error to circuit court, Meigs county.

Action by Simon Curtis against the Standard Nail & Iron Company and others, and cross actions by the Cleveland Ship-Building Company. From a judgment for plaintiff in the cross action, defendants King, Gilbert & Warner bring error. Reversed.

The other facts fully appear in the following statement by WILLIAMS, J.:

The original action was brought in the court of common pleas of Meigs county, by Simon Curtis, against the Standard Nail & Iron Company and others. In the action the Cleveland Ship-Building Company sought, by cross petition, to enforce a mechanic's lien against the property involved, and which was formerly owned by the nail and iron company, for a balance of \$4,450, and interest from April 14, 1887, of the purchase price of an engine alleged to have been furnished by the former to the latter company in the construction of its steel plant and nail mill at Middleport, Ohio. The ship-building company alleges in its cross petition "that the work of furnishing and setting up the engine was completed on the 14th of April, 1887, and that within four months thereafter, to wit, on the 18th of August, 1887, it filed with the recorder of said county of Meigs an affidavit containing an itemized statement of the amount and value of said materials and work and machinery, with all credits and offsets thereon, and a description of said land, on which the said steel plant and nail mill stands, according to the requirements of the statute in such case made and provided, and which was recorded in volume No. 2, and on page 259, of the Records of Liens of said Meigs county, Ohio, whereby this defendant's said claim became a lien on said steel plant and nail mill, and the said lots of land on which they stand, from the said 14th day of April, 1887." The plaintiffs in error, King, Gilbert & Warner, who were parties defendant in the action below, answering the cross petition above referred to, say that on the 2d day of August, 1887, they became the owners of the steel plant and nail mill, and the several lots and parcels of land on which they stand, and of all the estate and title that the nail and iron company theretofore had therein. Their answer also denies that the engine was furnished at the time alleged in the cross petition, or that the ship-building company, within four months after it was furnished, filed its affidavit for a lien, as alleged; and avers that the engine was furnished under a written contract made between the nail

and iron company and the Cuyahoga Steam-Furnace Company, December 17, 1886, which was assigned to the ship-building company, by the furnace company, March 9, 1887, and that it was furnished more than four months before the ship-building company filed its affidavit for the lien, and was so furnished partly by it, and partly by the furnace company. It is further alleged, in an amendment to the answer, that the ship-building company took the negotiable promissory notes of the nail and iron company in payment of the balance due on the engine, and afterwards negotiated them, whereby, it is claimed, its right of lien was waived. The allegations of the amendment, but not of the original answer, were controverted by reply. The cause was tried on appeal in the circuit court, which found for the ship-building company, and rendered judgment in its favor. A motion for a new trial by King, Gilbert & Warner was overruled, and a bill of exceptions, embodying all the evidence and the proceedings of the court, was duly allowed and filed, and they now prosecute error here to reverse the judgment of the circuit court. Such further statement of the facts, appearing upon the record, as is necessary to a correct understanding of the question upon which the case is reported, will be found in the opinion.

Harrison, Olds & Marsh, for plaintiffs in error. W. H. Lasley, for defendant in error.

WILLIAMS, J., (after stating the facts.) The validity of the lien asserted by the ship-building company is contested upon the various grounds, one of which is that it was not perfected in time. That is the only one we deem it necessary to consider in disposing of the case. By the provisions of our statutes, in force when the engine was furnished, and the affidavit for the lien filed, a person who performs labor, or furnishes machinery or material, for constructing a mill or manufactory, by virtue of a contract with the owner, is entitled to have a lien to secure payment for the same, upon the building and the material or machinery so furnished, and upon the interest of the owner in the lot or land on which the building then stands, or to which it may be removed. In order to obtain such lien the person performing the labor, or furnishing the machinery or material, is required, within four months from the time it is performed or furnished, to file with the recorder of the county where it is performed or furnished an affidavit containing an itemized statement of the amount and value of such labor, machinery, or material; a copy of the contract, if it is in writing; a statement of the amount to be paid thereunder, and the times when the payments are to be made; and a description of the land on which the building stands. Rev. St. §§ 3184, 3185. As the lien has no existence except by force of the statute, it is essential to its validity that it be taken and perfected within the time allowed by the statute; that is, that the affidavit required be filed within four months from the time the labor is per-

formed, or the machinery or material is furnished. The affidavit of the defendant in error for the lien it claims was filed with the recorder of the county where the property is situated on the 13th day of August, 1887. It contains a statement of the account of the defendant in error against the Standard Nail & Iron Company, which consists of a single item, bearing the date of April 14, 1887, for "building and setting up one vertical, direct, blowing engine, as per contract made December 17, 1886, with Cuyahoga Steam Company, \$8,900.00." There is a credit of \$2,000, of the date of December 27, 1886, and one of \$2,460, dated March 5, 1887, leaving a balance due of \$4,450. The affidavit also states that the labor was performed and machinery furnished, "under and by virtue of a written contract between the said the Cuyahoga Steam-Furnace Company and the said the Standard Nail & Iron Company, dated December 17, 1886, and afterwards, on the 9th day of March, 1887, assigned and transferred to the said the Cleveland Ship-Building Company." A copy of the contract and of the assignment are attached to the affidavit. The contract, which consists of a proposition, in writing, made by the furnace company to the nail and iron company, and its acceptance by the latter company, is as follows:

"Cleveland, Ohio, Dec. 17, 1886. Standard Nail & Iron Co., Middleport, Ohio—Gentlemen: This company will build and furnish you one vertical, direct-acting, blowing engine, having steam cylinder 38 inches bore, 54 inches stroke, on heavy bedplate and columns, being of the general style of the engine built by us for the Roane Iron Co., f. o. b. cars in Cleveland, for the sum of eighty-nine hundred dollars, (\$8,900.00,) payments to be made as follows: Two thousand dollars (\$2,000.00) cash, twenty-four hundred and fifty dollars (\$2,450.00) on shipment of engine, and forty-four hundred and fifty dollars (\$4,450.00) four months from shipment, with interest at six per cent. Engine to be delivered on or before February 15, 1887. Cuyahoga Steam-Furnace Co. By J. F. Holloway, Prest. Accepted: Standard Nail & Iron Co. By Chas. H. Greene, Prest." The assignment of the contract to the defendant in error is indorsed upon it, and is in the following language: "In pursuance of the terms of written contract this day executed between this company and the Cleveland Ship-Building Company, the within contract is hereby assigned to said company, it assuming all our obligations therein. March 9, 1887. Cuyahoga Steam-Furnace Co. By J. F. Holloway, Prest." The engine was delivered on board the cars at Cleveland, ready for shipment, and actually shipped to the purchaser, according to its directions, as early as March 5, 1887; and it was received by the purchaser, at Middleport, not later than March 14, 1887. The evidence shows that the defendant in error sent one of its employees to Middleport to superintend the work of setting up the engine, and that work was not finally completed, and the engine tested, until the 13th day of April, 1887. The question of law which is here presented for decision is, when, under

the contract, was the engine furnished, within the meaning of the statute, which makes it necessary to the perfecting of the lien that the affidavit therefor shall be filed within four months from the time the machinery or material is furnished? Was it when the engine was delivered on the cars, ready for shipment, or not until it was set up in the mill of the purchaser? If at the last-mentioned time, the affidavit for the lien, which was filed on the 13th day of August, 1887, was within the period allowed by the statute, and the lien is a valid one; but, if at the time first mentioned, the affidavit was filed too late, and no lien was obtained.

In contracts for the sale and delivery of personal property the abbreviation, "f. o. b.," is frequently employed, and means that the property is to be delivered on board the designated vessel or vehicle of transportation without expense to the buyer; so that the obligation of the furnace company, and of its assignee, the defendant in error, under the written contract with the nail and iron company, was to construct, and deliver free of expense to the latter company, on board the cars at Cleveland, an engine of the kind therein described, and it imposed no other obligation upon either. When that was done the contract was fully performed on the part of the furnace company and defendant in error. The title to the engine at once vested in the purchasing company, which then became bound for the payment of the whole purchase price, as stipulated in the contract. As the only obligation of the defendant in error, or of the company from which it took the contract by assignment, was to "furnish" on board the cars an engine of the description called for by the contract, when the delivery on the cars was complete the engine was furnished in compliance with the contract, and within the meaning of the statute. It is contended, however, that there was a verbal understanding between the selling and purchasing companies that the former should put the engine in good working order, in the latter's mill, before the latter company was bound to accept or pay for it; and evidence tending to prove such an understanding was given, over the objection of the plaintiffs in error, on the trial. Such understanding is at variance with the terms of the written contract, and, as all negotiations between the parties prior to, or contemporaneously with, the execution of the contract, were merged in it, the evidence was inadmissible, unless it tended to prove a subsequent and separate agreement; and, though the plaintiffs in error were not parties to the written contract, they acquired, as the record shows, by purchase at judicial sale, the property against which the lien was being asserted, and we see no reason why they might not, for the protection of their rights, insist upon the proper application of the rules of evidence, and that the operation of the contract should be in accordance with its terms and legal effect. If the verbal agreement was subsequent to, and independent of, the written contract, labor performed under it could not enlarge the time for taking a lien

for the engine. We entertain no doubt that when, by the same contract, a person binds himself to furnish machinery for a building, and also to place it in position, he may have a lien both for the machinery furnished and the labor performed, and perfect it, by filing the necessary affidavit, containing the required statement of the amount and value of both, within four months after the completion of his contract. In such case the furnishing of the machinery is not complete until it is placed in position according to the contract. But where the contract is only for furnishing machinery, as in this case, and labor is performed in placing it in position, or otherwise in the construction of the building, under a separate agreement, or gratuitously, the lien for the machinery must be taken within the time limited by the statute, after the contract under which it was furnished has been performed. Separate contracts cannot be tacked together so as to extend the time for taking the lien under either. To create a valid lien for what is done under each contract the necessary affidavit must be filed within the period limited by the statute, after performance of that contract. Nor can a lien be obtained for labor gratuitously performed. It must, in the language of the statute, be performed "by virtue of a contract with the owner" of the building. The lien claimed by the defendant in error does not include any item for labor in setting the engine up, and it appears no charge was made for superintending that work. The lien is claimed only for the balance due on the purchase price of the engine, and is based, as appears from the affidavit, solely upon the written contract. That, we think, was fully performed, and the engine furnished under it, when it was delivered on board the cars at Cleveland, ready for shipment, which was more than four months before the affidavit for the lien was filed. The defendant in error, by its own delay, has failed to secure the benefit of the statute authorizing it to acquire the lien, and the court is without authority to enlarge its provisions. Judgment reversed.

(134 Ind. 600)

## BARDEN et al. v. OVERMEYER.

(Supreme Court of Indiana. June 9, 1893.)

## DEED—CONSTRUCTION—ACTION TO QUIET TITLE—ESTOPPEL.

1. Where a deed was to a husband and wife "in joint tenancy, and to the survivor of them," a further provision that "in case of the death of" the wife, "her children are to inherit her interest," presupposes that the husband will die before the wife.

2. In an action to quiet title the issue was whether a married man, through whom plaintiff claimed, took a tract of land, of which the land in issue was a part, by survivorship, or whether it went to his wife's heirs. It appeared that the husband permitted his wife's heirs to occupy a part of the tract; that he bought out the alleged interest of one of the heirs, and partitioned a portion of the tract among others; that one of defendants, relying on the construction placed on the deed by plaintiff's grantor, bought a portion of the tract, but not the land in issue.

*Held*, that an equitable estoppel did not arise, since there was no fraud or misrepresentation, and defendants knew the facts as well as plaintiff's grantor.

Appeal from circuit court, Fulton county; A. C. Capron, Judge.

Action to quiet title by Frank Overmeyer against Alfred Barden and others. Judgment for plaintiff. Defendants appeal. Affirmed.

Essick & Montgomery, for appellants. Rowley & Baker, for appellee.

HACKNEY, J. A deed of conveyance to Joseph and Susannah Bumbarger, husband and wife, contained a recital as follows: "It is expressly declared and understood that this deed is made to the grantees in joint tenancy, and to the survivor of them. It is further understood that, in case of the death of Susannah Bumbarger, her children are to inherit her interest." The deed was executed in 1864, and said Susannah died in 1872, leaving her said husband, her sons, John and William, her daughter, Lucinda Barden, and her granddaughter, Jane Hill, surviving as her heirs at law. In 1881 said Joseph died testate, and by his will devised all of his property to said sons, John and William. Both of said grantees died, owning whatever interest in the 40-acre tract of said land now in question was conveyed by said deed, and the appellee claims said tract through conveyances from said John and William. The appellee sued the appellants to quiet his title, his complaint being in the ordinary form. The appellants answered in general denial, and by cross complaint claimed the ownership of the undivided 5-36 part in value of said tract, which they sought to have set off to them in partition. The issue upon the cross complaint was by general denial, and the cause was tried by the court, resulting in a finding and decree in favor of the appellee.

It is contended on behalf of the appellants that the deed conveyed the lands to Joseph and wife in moieties, and that the moiety of the wife, under the recital in the deed, vested in her children, or, under the laws of descent, passed to said Joseph and the children of said Susannah. On behalf of the appellee it is insisted that the recital quoted from the deed does not take the case out of the rule in estates held by entirety, and that upon the death of Susannah the entire property vested in Joseph, to the exclusion of the children of Susannah. In *Chandler v. Cheney*, 37 Ind. 396, it is said: "The same difference which existed at common law between joint tenants and tenants by entirety continues to exist under our statute. In both the title and estate are joint, and each has the quality of survivorship, but the marked difference between the two consists in this: that in a joint tenancy either tenant may convey his share to a cotenant, or even to a stranger, who thereby becomes tenant in common with the other cotenant; while neither tenant by the entirety can convey his or her interest so as to affect their joint use of the property during their joint lives, or to defeat the right of survivorship upon the

death of either of the cotenants; and there may be partition between the joint tenants, while there can be none between tenants by entireties." See, also, *Bevins v. Cline's Adm'r*, 21 Ind. 37; *Cox's Adm'r v. Wood*, 20 Ind. 54; *Jones v. Chandler*, 40 Ind. 588. All of the elements of difference between a joint tenancy and a tenancy by entirety have been obviated by the continued unity of estate and unity of possession until the death of the wife, and the operation of the element of survivorship in behalf of the husband; that element which, under a joint tenancy or a tenancy by entirety, would confer upon him the entire estate. It is unimportant to inquire which of the two definitions shall be given to the tenancy created by the deed in question when by either the effect is the same. *Lash v. Lash*, 58 Ind. 526, is a case in point. The deed was to a husband and wife "as joint tenants, the survivor taking the whole." The grantees were divorced, and the husband died, when his children sought partition. This court held that by the death of the husband and the rule of survivorship the entire property vested in the surviving joint tenant. To deny the application of the rule here suggested in the case before us would be to strike from the deed the provision for survivorship, and to set at naught the proposition for which appellants contend, namely, that this deed creates a joint tenancy. Is this conclusion defeated by the provision that, "in case of the death of Susannah Bumbarger, her children are to inherit her interest?" If this provision had relation to her death during the lifetime of Joseph, it would conflict with and defeat the previous condition of survivorship in behalf of Joseph, and it would defeat the application of the rule in joint tenancies and in entireties that the survivor takes the whole estate. If the provision had relation to her death after the death of Joseph, it would present no such inconsistency. It is sufficient to say that the intention of the parties must be held to be evinced by that construction which is reasonable and consistent, and not by that which necessarily leads to inconsistencies and absurdities.

It is further contended by the appellants that the appellee is precluded from asserting title to the lands in question because of a supposed equitable estoppel against his grantors John and William, and their devisee, Joseph Bumbarger. This equitable estoppel is claimed to exist in permitting the use and occupancy by the appellants, and for their benefit, of portions of the 200-acre tract originally conveyed to said Joseph and wife, and of which the tract in question is a part, and in the purchase by said Joseph of an interest in said 200-acre tract from one of his grandchildren, and the partition by deeds of other portions of said lands to certain of his children, which conduct indicated a construction of the deed in question by said Joseph different from that we have given it, and in accordance with the contention of the appellants; that, relying upon such construction, one of the appellants purchased a portion of said 200-acre tract, which portion is not

of the tract involved in this case. Not deeming it important to inquire whether this defense was available without affirmative pleading, we are unwilling to adopt the contention that the acts urged constitute an estoppel. An equitable estoppel never arises without proof that a wrong has been done, or is threatened on the one side and injury suffered or reasonably apprehended on the other. This doctrine is elementary. Here no interest in the land in suit was held or claimed by the appellants by the investment of any sum. No possession was ever taken or held upon any contract, express or implied. No improvements were made, no obligation was created, and nothing but benefit to the appellants ever attached from the conduct of said parties under whom appellee claims. No fact is claimed to have existed of which appellants were not as fully advised as appellee's grantors. No misrepresentation is shown; no fraud is apparent. But it is urged that to now deny the title upon which the appellants relied without legal or equitable right, and to confer it upon the appellee, would be such a hardship upon the appellants as to constitute a fraud. One is never precluded by acts of mere leniency, indulgence, or charity towards another. To discontinue such acts may work disappointment, or may induce hardships otherwise unknown; but their discontinuance is not a wrong nor the fraud which creates an estoppel. *Herman*, in his *Law of Estoppel*, (page 339,) says: "Equitable estoppels are, in a great degree, designed to prevent circuity of action by preventing injuries by which redress would have to be sought by suit, and cannot arise unless the evidence discloses some default or fraud for which compensation might be awarded by equity or law." The matters urged as an estoppel would certainly furnish but slight foundation upon which to have predicated an action in appellants' behalf to quiet title. The principal weakness of the appellants' contention is in the proposition that the injury necessary to an estoppel exists in the denial of that which they claim without legal right, and which they have enjoyed only by the sufferance of those whom they would estop. We find no error in the record, and the judgment of the circuit court is fully affirmed.

(134 Ind. 672)

WAYNE PIKE CO. et al. v. STATE ex rel. WHITAKER, Prosecuting Attorney.

(Supreme Court of Indiana. June 6, 1893.)

RECEIVERS—ACTIONS BY AND AGAINST—LEAVE OF COURT.

A receiver can neither sue nor be sued without leave of the court which appointed him.

Appeal from circuit court, Jay county; D. D. Heller, Judge.

Action by the state, on the relation of George T. Whitaker, prosecuting attorney, against the Wayne Pike Company and others, to declare the charter of the company forfeited. A demurrer to the

complaint was overruled, and defendants appeal. Reversed.

Richard H. Hartford, Jaqua & Jaqua, and Elliott & Elliott, for appellants. Geo. T. Whitaker, and Headington & La Follette, for appellee.

**COFFEY, J.** This was an action brought by the appellee, in the Jay circuit court, against the appellants, to obtain a judgment and decree forfeiting the franchises and property of the appellant the Wayne Pike Company, a corporation duly organized under the laws of the state for the purpose of constructing a toll road. It appears from the complaint that at the time of the commencement of the action the property of the corporation was in the hands of the appellant Fleming, as a duly appointed and qualified receiver. The action was brought without leave of the court. The court overruled a demurrer to the complaint. In overruling a demurrer to the complaint the court, in our opinion, committed an error. It seems to be settled that a receiver, as a general rule, can neither sue nor be sued without leave of the court making the appointment is first obtained. *High, Rec. § 254; Barton v. Barbour, 104 U. S. 126; Keen v. Breckenridge, 96 Ind. 69; Garver v. Kent, 70 Ind. 428; Moriarity v. Kent, 71 Ind. 691; Herron v. Vance, 17 Ind. 595; Car-Works Co. v. Ellis, 113 Ind. 215, 15 N. E. Rep. 249; Davis v. Creamery Co., 128 Ind. 222, 27 N. E. Rep. 494.* There are other questions presented by the record, and discussed by the appellants, but as we are not favored with a brief on behalf of the appellee, and as the action cannot be maintained without first obtaining leave of the court to sue its receiver, we deem it unnecessary to examine them. Judgment reversed, with directions to the circuit court to sustain the demurrers to the complaint in this cause.

(134 Ind. 614)

**ECKERT et al. v. BINKLEY et al.**

(Supreme Court of Indiana. June 6, 1893.)

**PLEA OF FORMER ADJUDICATION—FILING PLEA AFTER REMAND.**

Though a plea of a former adjudication, based on a judgment which was rendered after a trial and judgment in the case in which the plea is filed, might, if presented on appeal, have been entertained by the supreme court, and tried for the first time, still it was not too late when filed in the trial court after the case was remanded for retrial.

On rehearing.

For former report, see 33 N. E. Rep. 619.

**HOWARD, J.** We do not think that the opinion in this case is susceptible of the interpretation given it by appellee, to the effect that the court holds that an answer to an assignment of errors might not be filed in the supreme court, setting up facts occurring after the judgment and appeal, and supporting such answer by written, and even oral, evidence. While this court could consider and decide issues of fact so tendered, and while it has done so in rare instances, yet, as the opinion says, "such certainly has not been the

practice." The spirit of the statute, and the very nature of this court as a court of errors and appeals, tend to confine its attention to questions of law, and to require that questions of fact be tried in the courts of original jurisdiction. Such being the prevailing and proper practice, it would be manifestly inequitable to hold that appellee was too late in filing his answer of prior adjudication in the trial court after the return of the case from the former appeal. Granting that this court might have entertained that plea had it been here presented, as appellee claims it should have been, yet it was not too late when filed on the taking up of the case for retrial. The purpose of the opinion was not to decide anything further than this on that question.

Appellee also contends that we did not decide the claim made by him that the answer, while professing to answer the whole complaint, answered only a part of it, and hence that his demurrer to the answer was properly sustained. Appellee admits that a plea of former adjudication, when well made, is a bar to the further maintenance of the action. How, then, can it be said that it was not error to sustain the demurrer to this answer? We have given careful attention to the able and earnest petition and brief of counsel for a rehearing of this case, but we can find in it no reason for changing the conclusion formerly reached by us. The petition for a rehearing is overruled.

(134 Ind. 657)

### BAKER v. STATE.

(Supreme Court of Indiana. June 8, 1893.)

**ASSAULT WITH INTENT TO COMMIT MURDER IN THE SECOND DEGREE—SUFFICIENCY OF INDICTMENT.**

1. Since Rev. St. 1881, § 1746, provides that an indictment for murder in the second degree need not set forth the manner in which or the means by which death was caused, an indictment for an assault with intent to commit murder in the second degree need not set forth the manner or means.

2. An objection that an indictment for an assault with intent to commit murder in the second degree fails to allege that the attempt to kill was without premeditation is not available, when raised for the first time in the supreme court by an assignment of error.

Appeal from circuit court, Jackson county; S. B. Voyles, Judge.

William Baker was convicted of an assault with intent to commit murder in the second degree, and appeals. Affirmed.

O. H. Montgomery, for appellant. A. G. Smith, for the State.

**COFFEY, J.** On the 20th day of November, 1891, the grand jury of Jackson county returned the following indictment: "State of Indiana vs. William Baker. The grand jurors for the county of Jackson, in the state of Indiana, upon their oaths present that William Baker, on the 15th day of November, 1891, at said county, did unlawfully and feloniously touch Thomas Smith in a rude, insolent, and angry manner, with intent then and there, and thereby, feloniously, willfully, purposely, and maliciously, to kill and murder him, the

said Thomas Smith,\* etc. A trial of the cause by the court resulted in finding the appellant guilty of assault and battery, with the intent to commit the crime of murder in the second degree, upon which he was sentenced to imprisonment in the state's prison for the period of two years. The assignment of error calls in question the sufficiency of the indictment, as well as the ruling of the court in overruling the appellant's motion for a new trial. The sufficiency of the indictment was not questioned in the circuit court.

There are many defects in pleading, both in civil and criminal cases, which would be fatal on demurrer, or on motion to quash, which are not available on motion in arrest of judgment, or assignment of error in this court, to the effect that the complaint does not state a cause of action, or that the indictment or information does not state a public offense. Where an indictment or an information contains all the essential elements of a public offense, but is defective by reason of uncertainty and imperfection in the manner of describing the offense charged, such indictment or information will be held good after verdict, though it might have been quashed on motion. *Nichols v. State*, 127 Ind. 406, 26 N. E. Rep. 839.

The objections urged against this indictment are—First, that it does not set out the manner and the means by which the appellant attempted to commit the felony charged; second, that it is bad because it does not allege that the attempted felony was without premeditation.

We need not inquire whether these objections would have been available on a motion to quash, inasmuch as no such motion was interposed. The charge in the indictment is that the assault and battery therein charged was made with the intent to commit murder in the second degree. In such a charge we do not think it is necessary to allege the manner or means by which the accused attempted to commit the felony. Section 1746, Rev. St. 1881, provides that "in an indictment or information for murder in the second degree, or for manslaughter, it shall not be necessary to set forth the manner in which, or the means by which, the death was caused." No greater certainty or particularity should be required in describing a felony which an accused attempts to commit than is required in case the felony had been actually committed.

We do not think the second objection urged against this indictment, when presented for the first time by an assignment of error in this court, is available. While it would have been better to allege that the appellant attempted to kill Smith without premeditation, yet if he had killed him feloniously, willfully, purposely, and maliciously, we think he would have been guilty of murder in the second degree. It is not always necessary to follow the exact words of the statute. It is generally sufficient to allege all of the elements of the crime charged; the rule being that if the facts well pleaded supply grounds for the necessary legal conclusion the conclusion will be made by the court, and the failure of the pleader to state the conclu-

sion will not vitiate the indictment. *Henning v. State*, 106 Ind. 386, 6 N. E. Rep. 803, and 7 N. E. Rep. 4; *Dennis v. State*, 103 Ind. 142, 2 N. E. Rep. 349; *West v. State*, 48 Ind. 433.

We think the indictment in this case is sufficient to withstand the attack made upon it for the first time in this court, by an assignment to the effect that it does not state a public offense. It is conceded by the appellant that it contains a good charge of assault and battery. We think the evidence in the cause sustains the finding of the circuit court. It fully establishes the facts that the appellant, a young man in the prime and vigor of life, made an unprovoked assault upon a boy 16 years of age, with a large and dangerous knife, cutting his clothing in several places. His attempted explanation, that he only intended to frighten the boy, was one which the court was justified in disbelieving. There is no error in the record for which the judgment should be reversed.

Judgment affirmed.

(135 Ind. 15)

#### GARARD v. GARARD.<sup>1</sup>

(Supreme Court of Indiana. June 8, 1893.)

INDEFINITE COMPLAINT—REMEDY—CONVERSION BY TRUSTEE—COMPLAINT—NECESSARY ALLEGATION—DEMAND—NEW TRIAL.

1. Where a complaint is indefinite the proper remedy is by motion to make more definite, and not by demurrer.

2. In an action to declare an alleged trust in the proceeds of the sale of real estate, for an accounting, and for damages for the conversion of such proceeds, the complaint need not allege a demand.

3. A motion for a new trial, in a case of equitable jurisdiction, because the issues were submitted to a jury, is premature, when made after the return of a general verdict by the jury, but before the court has made its findings in the case.

Appeal from circuit court, Hamilton county; J. A. Abbott, Special Judge.

Action by David Garard against Tunis Garard to declare a trust in the proceeds of the sale of certain real estate, for accounting, and for damages for the conversion of such proceeds. Judgment for plaintiff. Defendant appeals. Affirmed.

J. A. Roberts and Stephenson & Fertig, for appellant. Shirts & Vestal, for appellee.

HOWARD, J. This was an action to declare a trust in the proceeds of the sale of real estate; also, for an accounting, and for damages for the conversion of such proceeds. The complaint was in three paragraphs. The first paragraph was for an accounting for value of land sold; also, rents, profits, and interest, and for money had and received. The third paragraph was similar to the first. The second paragraph alleged that in the year 1883, and prior thereto, appellee was the owner of certain land described in the complaint, situated in Shelby county, in this state; that in October of that year one David Talbert became the purchaser of said land for the sum of \$4,000, for which sum he executed his notes to appellee, due in five

<sup>1</sup> For opinion on rehearing, see 34 N. E. Rep. 808.



years from date, and secured by mortgage on said real estate; that it was at the same time agreed between said Talbert and appellee that, in lieu of interest, said Talbert should pay to appellee \$240 rent, and pay all taxes, and that if, at the end of said five years, he should not desire to pay said purchase price, he was to deed back said land to appellee, or to any person appellee should direct, and appellee should surrender said notes and mortgage; that, a short time after said sale, appellee emigrated to the state of Missouri, where he continued to reside until November, 1889; that appellee appointed appellant, who is his son, as his agent to collect the rents and remit the same to him; that afterwards in February, 1884, appellant represented to appellee that if he could exchange said Shelby county lands for lands in Hamilton county, where appellant then resided, as much rent could be realized, and it could be more conveniently collected, and with less expense; that, pursuant to said request, appellee transferred said notes and mortgage to appellant in February, 1884; that as appellee was then a citizen of Missouri, and intended to continue his residence in that state, as a matter of convenience, said lands were to be conveyed to appellant, as trustee for appellee, in order that appellant could control business connected therewith with more convenience, and, in the event of sale or exchange for other lands, could execute conveyance therefor without sending papers to appellee, in a distant state; that on March 8, 1884, appellant surrendered to said Talbert said notes and mortgage, and received a deed for said land, executed to himself; that appellant held said title for said lands until August 30, 1886, when he exchanged said lands for other lands in Hamilton county, the title to which last lands appellant had also executed in his name, without the knowledge or consent of appellee; that appellant continued to send parts of the rent to appellee after said conveyance, and appellee had no knowledge that appellant had taken said last-named conveyance to himself until November, 1889, when appellee removed from Missouri to said county of Hamilton for the purpose of taking possession and occupying said lands, at which time he first learned that appellant had taken the conveyance of said lands in his own name, and claimed to be the owner thereof, and refused to surrender the same to appellee; that said Shelby county lands belonged to appellee; that appellant had no interest in them, whatsoever; that the deed executed to appellant was executed to him as the trustee of appellee, and for no other or different purpose; that said lands were of the value of \$4,000; that appellant sold and conveyed said lands, received the consideration therefor, and converted the same to his own use, and has hitherto refused, and still refuses, to pay the same over to appellee, with the fraudulent intent and purpose of cheating, defrauding, and wronging appellee out of his just rights. Demanding judgment, and filing a bill of particulars.

Appellant, in his argument for the demurrer to this paragraph of complaint,

contends that the paragraph is indefinite and uncertain, in this: that it is not possible to tell from it whether the suit was for the conversion of the notes and mortgage, or the conversion of the Shelby county lands, or for the conversion of the lands in Hamilton county. If the complaint were indeed indefinite in this or any other respect, the proper remedy would have been a motion to make more specific. It is true that the paragraph is not so definite as would be desirable, but there was no motion to make it more definite, and that defect is cured by the finding. Neither does the demurrer lie by reason of there being no demand shown in the paragraph. It is the law that when a conversion by a trustee is alleged no demand is necessary. *Hon v. Hon*, 70 Ind. 135.

More serious questions arise in considering the reasons given in the motion for a new trial. One of these reasons is that the court overruled appellant's motion to submit the issues joined in the second paragraph of the complaint to the court for trial without a jury. Appellant contends that these issues were of purely equitable jurisdiction, and we are inclined to agree with him. Yet while section 409, Rev. St. 1881, provides that issues of law and issues of fact, in causes that prior to the 18th day of June, 1852, were of exclusive equitable jurisdiction, shall be tried by the court, the same section also provides that in all such cases the court, in its discretion, for its information, may cause any question of fact to be tried by a jury. But as such trial by the jury is simply for the information of the court it may be wholly disregarded by the court, and, whether regarded or not, it is necessary in such cases that the court make its own finding, in so much that, were all the jury proceedings stricken from the record, there would still be a complete trial, finding, and judgment of the court left. This is what the court seems to have done in this case. The verdict of the jury is treated as advisory, and as a source of information, but the court is careful to make its own finding: "And the court, being advised of and concerning the verdict of the jury in this cause, does now find for the plaintiff, and that the plaintiff recover of the defendant," etc. In *Ikerd v. Beavers*, 106 Ind. 483, 7 N. E. Rep. 326, Judge Mitchell said: "In *Evans v. Nealis*, 87 Ind. 262, this court, in speaking of *Hendricks v. Frank*, 86 Ind. 278, said: 'If the court, instead of rendering judgment upon the verdict, had only treated it as advisory, and made its own finding. \* \* \* there would have been no error in thus submitting the facts to the jury, there being no conclusiveness in the verdict.' \* \* \* Where the court, in a case of equitable jurisdiction, over objection, submits the issues to a jury, as in a law case, and renders judgment upon the verdict, without making its own finding, it is error. *Lake v. Lake*, 99 Ind. 339, and cases cited. Where, however, as in this case, the issues are submitted to the court, and a jury is called to inform the court as to the facts merely, if without objection the court takes the advice of a jury by means of a general verdict, making its own finding,

treating such verdict as advisory merely, it is not reversible error. *Bank v. Butterfield*, 100 Ind. 229; *Evans v. Neale*, supra." See, also, *Platter v. Elkhart Co.*, 103 Ind. 360, 2 N. E. Rep. 544. In the case at bar the court took the advice of the jury by means of a general verdict, making its own finding, and treating such verdict as advisory merely. But if the verdict of the jury was merely advisory, the case being of equity jurisdiction, and the court made its own finding, upon which finding alone the judgment rests, it would appear that the trial of the cause was not ended until after the finding of the court was made. But the motion for a new trial was made before the finding of the court, and hence came too soon, for there can be no motion for a new trial until the first trial is ended. "The trial has not ended until the court has made its finding upon the issues on trial. It is not necessary for the court to state its finding, except generally, for the plaintiff or defendant, unless one of the parties request the court to state the facts in writing, and the conclusions of law thereon." There was no error in overruling the motion for a new trial. Whether any grounds for a new trial existed, and were stated in the motion, we do not examine. The motion was made before there had been any findings by the court. *Pence v. Garrison*, 93 Ind. 345. "As the motion for a new trial, the overruling of which is assigned as error here, was made before the court made its finding, it presents no question for our consideration." *Ikerd v. Beavers*, cited above. Following these authorities, we must hold that the overruling of the motion for a new trial in the case at bar presents no question for consideration. Yet, as some apparent irregularities occurred in the pleadings and on the trial, we have carefully gone over the reasons given by appellant in his motion for a new trial, and we find nothing that would have justified the court in granting the prayer of the motion, had it been made at the proper time. Appellant is certainly mistaken in claiming that there was not sufficient evidence to support the finding. While there is some contradiction in parts of appellee's testimony, yet there is sufficient explicit testimony to sustain the issues in favor of appellee. The evidence shows that appellant held the title to the Shelby county lands as trustee for appellee, and that this trust was disavowed after appellant exchanged this trust estate for the Hamilton county lands, and took the deed for the latter in his own name, and when he ceased to remit rent to appellee; that a trust resulted in favor of appellee, and against appellant, as soon as the latter took the deed for the Shelby county lands. See *Prow v. Prow*, 32 N. E. Rep. 1121, (decided by this court at last term.)

The instructions seem to have been full and fair statements of the law applicable to the case; part of them being given by the court on its own motion, part on appellee's motion, and part on appellant's motion. Instruction seven, given by the court, may be subject to criticism for the reasons given by appellant, but it could do him no harm, for the earliest date when

the disavowal of the trust could have taken place was in 1886, when he took the Hamilton county lands in his own name, and that was less than four years before suit was brought; so that the statute of limitations had over two years to run after suit was brought. The modification of appellant's first instruction, by inserting the words, "in the absence of other evidence as to the intent," did not make that instruction incorrect, even if the instruction would have been correct without those words.

Neither have we found any ruling on the evidence which would justify a reversal of the judgment, on the theory that the motion for a new trial was well made. We think the evidence clearly shows that there was in this case an attempt on the part of appellant to deprive appellee of the value of his Shelby county farm, by exchanging it for the Hamilton county land, and taking the deed for the latter in his own name. Whatever irregularities may exist in the record, or may have occurred on the trial, cannot obscure this conversion of the value of appellee's land by appellant to his own use; and to no case can the provisions of section 658, Rev. St. 1881, better apply than they do to this,—that no "judgment shall be stayed or reversed, in whole or in part, where it shall appear to the court that the merits of the case have been fairly tried and determined in the court below." We find no available error for which the judgment should be reversed. Judgment affirmed.

(133 Ind. 94)

**CUMMINGS et al. v. STARK et al.<sup>1</sup>**

(Supreme Court of Indiana. June 6, 1893.)

**TAXATION—REVIEW OF ASSESSMENTS—JURISDICTION OF STATE BOARD OF TAX COMMISSIONERS.**

Act March 6, 1891, § 114, provides that the county board of review shall have power to hear the complaint of owners of any personal property, except certain railroad property, and correct the assessments. Section 125 provides for appeals from the county board of review to the state board of tax commissioners, and for a review of the proceedings. Section 120 makes it the duty of the state board of tax commissioners "to construe the tax and revenue laws of the state; \* \* \* to see that all assessments of property in this state are made according to law." *Held*, that the state board of tax commissioners have no original jurisdiction to revise the assessment of personal property, other than railroad property, which has been approved by the county board of review.

Appeal from circuit court, Parke county; A. B. Anderson, Special Judge.

Action by Alfred K. Stark and others against Norval W. Cummings and others to restrain the collection of certain taxes. Plaintiffs had judgment, and defendants appeal. Affirmed.

Maxwell & Maxwell, for appellants. Hunt & Hadley, for appellees.

McCABE, J. Appellees brought suit against appellants to enjoin the collection of certain taxes. The court overruled a separate demurrer of each of the appellants to the complaint for want of sufficient facts, and, appellants refusing to

<sup>1</sup> Rehearing denied.

plead further, and electing to stand on their demurrer, judgment was rendered upon said demurrer enjoining the tax. The errors assigned separately and jointly are that the court erred in overruling each of said demurrers.

The complaint, after the title, is as follows: "That plaintiffs are a firm, and have an office as such, doing a banking business with a view to profit at Rockville, in Adams township, in Parke county, state of Indiana, in the name and style of the Parke Bank, and that they were so engaged at said place and in said name on the 1st day of April, 1891, and that they were then, and still are, residents of said county and township. That defendant Norval W. Cummings is the duly-qualified and acting treasurer of said county. That on said 1st day of April, 1891, plaintiffs, as such firm, and in said firm name of Parke Bank, were the owners of property of the kind and value, namely: United States treasury notes, \$11,446; United States bond, \$600; other moneys, \$2,242; deposits in other banks, \$56,651; notes and bills receivable, \$51,842; stock in Rockville B. L. F. & S. A., \$1,134.65; stock in Edgar Co. Nat. Bk., \$4,000; stock in Rockville Opera House Co., \$750; office furniture and fixtures, \$1,000; real estate in Parke county, \$6,090; and that as such firm, in said name, owned no other property. That on said 1st day of April, 1891, they, as such firm, were indebted to their depositors for deposits in their said bank in the sum of \$119,465. That on the — day of April, 1891, they, as such firm, made out and furnished to the assessor of said township a verified list and statement of all of the above personal property liable for taxation in said county, and also a statement of said indebtedness. That in said statement and list of property returned for taxation they returned their said deposits in other banks the said sum of \$56,651 as credits, with their other credits \$51,842, the total amounting to \$108,493; and off-set the same by their said indebtedness of \$119,465 to their depositors, leaving nothing in the way of credits for taxation. That such list and statement was accepted by said assessor without making any change therein, and was returned by him to the auditor of said county, when the same was passed on by the county assessor and the county board of review of said county, without adding to or taking anything therefrom, and finally approved by them as listed by plaintiffs, and no change was ever made therein, other than as herein-after stated. That afterwards the state board of tax commissioners, upon notice to plaintiffs, and over their objections, added \$55,651 of said deposits in other banks, to wit, of the \$56,651 which plaintiffs had returned as credits, to their assessment, and thereupon notified the auditor of said county to add said sum to their list and place the same, to wit, said \$55,651, upon the tax duplicate against plaintiffs, firm in their said name, which he did without other notice, in their absence, and without their knowledge or consent, and extended the same on the tax duplicate of said county for said year of 1891, and thereupon assessed and carried

forward against plaintiffs and their property on said duplicate the sum of \$1,046.24 as taxes on said sum of \$55,651, and afterwards made out and transmitted to the treasurer of said county a duplicate of said assessments with said taxes assessed, and that such duplicate is now in the hands of said treasurer for the purpose of collecting the taxes assessed thereon for said county. That plaintiffs have paid to said treasurer all the taxes due upon all the property owned by them, of every description whatever, except the taxes added upon the \$55,651 of said deposits of \$56,651, aforesaid, and that said treasurer is threatening to and will collect said taxes by distress and sale of plaintiffs' property unless he is enjoined from so doing; and plaintiffs further aver that said taxes are a cloud upon the title to their property, and should be removed, and said treasurer perpetually enjoined from collecting or attempting to collect the same, for the reasons, namely: First, The said assessment, made pursuant to the order of said board of tax commissioners, was without authority of law. Second, The said assessment against plaintiff by said auditor was without any lawful notice or authority of law. Third, That on the 1st day of April, 1891, said deposits of \$56,651 were not moneys belonging to them, but were credits to their bank on the books of other banks, where such deposits had been made in their usual course of business as bankers, and for banking purposes, and that no part thereof was on special deposits, and that all of their said deposits with said banks, amounting to \$56,651, and all their other credits of \$51,842, did not equal their indebtedness of \$119,465, aforesaid. Wherefore plaintiffs pray judgment that the adding of said sum of \$55,651 to plaintiffs' taxables and assessing of \$1,046.24 taxes thereon was without authority of law; that the said deposits were credits from which debts should be deducted; and that the said \$55,651 was not liable to taxation; and that the defendants and their successors in office be forever and perpetually enjoined from collecting or attempting to collect said taxes assessed on said \$55,651; and for all other and proper orders, judgments, and decrees in the matter."

The first question presented is whether the order of the state board of tax commissioners complained of was valid. The powers of such board being purely statutory, that question must depend upon a proper interpretation of the tax law approved March 6, 1891, (Acts 1891, p. 199.) It is conceded on both sides that section 114 of that act confers jurisdiction and plenary power on the "county board of review," not only to bear complaints of any owner of personal property except "railroad track" and "rolling stock," and to equalize the valuation of property and taxables made subsequent to the 1st day of April, and to correct any list of valuation, but also to equalize the valuation made by the assessor, either by adding to or deducting therefrom such sums as are necessary to fix the true cash value. But it is contended by the appellants that original jurisdiction to do these same acts is

conferred also on the state board of tax commissioners by sections 120 and 129, and other sections of that act. By sections 120 and 125 the power to do these things on appeal is conferred on the state board of tax commissioners. In support of this contention appellants cite *Railway Co. v. Backus*, 83 N. E. 421, (at last term.) This court in that case said: "As to property other than that denominated by the law as 'railroad track' and 'rolling stock,' including all property, real and personal, of individuals, the law provides for its assessment by assessors, and it creates county boards of review in the several counties of the state; and by section 114, from which we have hereinbefore quoted, it is provided that such county boards 'shall pass upon each valuation, and may, on sufficient cause being shown, or on its own motion, correct the assessment or valuation of any property in such manner as will, in its judgment, make the valuation just and equal.' This section, while it may not give the county boards the right to change individual assessments of parties not legally before the board, evidently contemplates and gives the right to parties whose property has been wrongfully or erroneously assessed to voluntarily appear before such county board, and show that the assessment made against any property is erroneous, and have it corrected; and it vests in such county boards the power, on such showing being made, or on their own motion, to make corrections and change the valuation; and from a decision against a party who is before such county board it gives an appeal to the state board of tax commissioners, whose decision upon the question shall be final. By section 129 of the statute from which we have heretofore quoted this same right to be heard, given to all property owners, and the power vested in the county boards of review to correct and change assessments by section 114, are ingrafted into and made a part of the law governing the proceedings before the state board as to valuations and assessments over which such state board has jurisdiction and control, for by section 129, *supra*, it is declared that the state board is hereby given all the powers given to county boards of review. The right of parties to be heard, and the right of county boards to hear showings as to assessments, and to correct and change assessments and valuations, are a part of the powers vested in the county boards, and all their power is transferred and invested in the state board; so that, if there is any power in the county boards to hear grievances and make corrections in relation to property and assessments over which they have jurisdiction, then the state board has the same power in relation to property and assessments over which it has jurisdiction." This language clearly recognizes the appellees' contention that the powers of the state board as to assessments and corrections of tax lists is by appeal, and not original, as appellants contend; indeed, no part of the decision lends any support to appellants' contention. Appellants contend that section 120, (subdivision 2,) providing that the state

board shall have power "to construe the tax and revenue laws of the state," (subdivision 3,) "to see that all assessments of property in this state are made according to law," and (subdivision 5) "to see that all taxes due the state are collected," confers original jurisdiction on the state board, if it cares to exercise it, along with other taxing officers, of all property, and differing from the other taxing officers only in that its decision is final. Had such a contention been a tenable one, it would have afforded a happy and much easier solution of the grave constitutional questions than the one reached, and saved this court much labor and trouble. If that construction of the provision quoted were correct, then there was no constitutional question involved in that case, because in that event all property and all property owners would alike be subject to the original power and jurisdiction of the state board to make assessments and valuations of all kinds of property of all kinds of owners, and corrections thereof by adding thereto or deducting therefrom, so as to equalize, etc.; and the complaint of the appellants in that case would have been without any foundation as to a denial of the equal protection of the law.

There is another reason why such a construction is inadmissible, and that is, section 142, authorizing the county auditor to add omitted property, with the valuation thereof, and the amount of tax thereon, to the duplicate, requires him, in case the owner lives in the county, to give him written notice of his intention to add such property, requiring such person to appear before him at his office at a specified time within five days after giving such notice, to show cause, if any, why such property should not be added, etc. There is no provision we have been able to find authorizing the state board to issue or serve a notice on a property owner of their intention to add property to his list, and charge him with its tax, or in any other way to increase the amount of his taxes. The general scope and spirit of the act contemplates that notice would be essential before such an act could be validly done where, as here, the owner lived in the county. Indeed, it expressly provides for notice as a condition precedent to the exercise of such a power by the county auditor, the only officer outside of the county board it expressly authorizes to do such an act. The legislature was careful not to leave even so small an exercise of power by the state board as the issue of a subpoena for witnesses to inference, but expressly provided for it in section 128. Therefore it seems a reasonable inference, if the state board was to be authorized to issue such a notice, it would have been so provided. It is not even contended by appellant that it was intended by the legislature that the state board should exercise this power without notice, and the state board even gave the notice. But the giving a notice unauthorized by law is not a legal notice. *Kuntz v. Sampson*, 117 Ind. 1, 19 N. E. Rep. 474. Another reason why that power was not intended to be exercised by the state board is its impracticability, and the great hardship and

injustice to property owners to be required to attend at the state capital to have a cow properly appraised and valued for taxation that could be as well, if not better, done at their county seat. The construction contended for is at war with the principles of construction laid down in the case referred to. It is there said by this court: "Courts will presume that the legislature intended its acts to be reasonable, constitutional, and just, and, when possible, consistently with any fair rendering of the words, will so construe them as not to make them otherwise. If the legislature manifests an intention to create a system for the government of any subject, it is the duty of the court to effectuate that intention by such a construction as will make the system consistent in all its parts, and uniform in its operation." We therefore conclude that the state board had no original jurisdiction to revise individual tax lists other than "railroad property," and the equalization of assessments of real estate. Hence they had no power to order any part of the \$56,651 to be added to the appellees' assessment, and they had no power to legally notify appellees of their intention so to do, or notify the auditor of Parke county to make such addition; and said auditor had no power to make such addition without giving appellees notice in writing of his intention so to do, and hence his act in making such addition was without authority of law, and void.

We are asked to go on, and determine whether section 59 of the act is not unconstitutional, which requires unincorporated banking associations to return their deposits in other banks subject to draft, not as credits, but as money from which their indebtedness to their depositors cannot be deducted, while other taxpayers, as is contended, are authorized by the act to return their deposits as credits, and to deduct therefrom their indebtedness. While the courts ought not to shun the consideration of the question of the constitutionality of a statute, they ought not to go out of their way to find or decide such questions unnecessarily. They ought not to seek to draw such momentous questions into their adjudication collaterally, nor on trivial occasions. It is both more proper and respectful to a co-ordinate department of the state government to discuss and pass on the constitutionality of a statute only where that is the thing involved in the litigation, and where it is necessary to the determination. Thus presented and determined, the decision carries a weight with it which cannot be long to an extra judicial determination. *Hoover v. Wood*, 9 Ind. 286; 3 Amer. & Eng. Enc. Law, 676, and authorities there cited. From our conclusions before reaching the constitutional question it is apparent that the judgment below awarding all the relief asked must be affirmed. It is therefore wholly unnecessary to the relief asked by either party in this court to pass on the constitutional question. While the board of commissioners was not a necessary party, yet, as they represented the county, whose interest alone was involved, more than the treasurer did,

they were proper parties. The court below committed no error in overruling either of the demurrers.

The judgment is affirmed.

(7 Ind. App. 537)

LAKE ERIE & W. R. CO. v. LOWDER.<sup>1</sup>

(Appellate Court of Indiana. June 6, 1893.)

CHANGE OF VENUE—PAYMENT OF COSTS—APPEARANCE—NEGLIGENCE—INSTRUCTIONS.

1. Under Rev. St. 1881, § 413, providing that where a party fails to pay the costs of a change of venue within the time prescribed by the court he shall not be entitled to the change, a court to which a change of venue has been taken properly remands the case where the costs are not paid in such time.

2. Where the subject-matter of an action is within the jurisdiction of a court, the appearance of the parties thereto without objection gives the court jurisdiction.

3. A complaint which alleged that defendant negligently ran its train filled with oil over its track, which was defective, and at a rate of speed forbidden by ordinance, and that the train was wrecked thereby, and the oil flowed onto plaintiff's premises and caught fire, and destroyed her property, states a cause of action against defendant.

4. In such action the court properly refused to charge that plaintiff must show that defendant was guilty of some act of willful negligence in firing the oil, or that its management was such as would naturally result in such injury.

Appeal from circuit court, Howard county; L. J. Kirkpatrick, Judge.

Action by Rebecca A. Lowder against the Lake Erie & Western Railroad Company to recover for injuries caused by negligence. Judgment for plaintiff. Defendant appeals. Affirmed.

Hackedorn & Foote and Jas. O'Brien, for appellant. Blackledge, Shirley & Moon, for appellee.

DAVIS, J. In the trial court appellee recovered judgment for \$1,110. The errors assigned are: (1) The Howard circuit court did not have jurisdiction to hear and determine this cause at the time said cause was heard and determined in said court. (2) The appellant says that the Clinton circuit court erred in sustaining the motion of appellee to return this cause to the Howard circuit court, and in returning this cause to the Howard circuit court. (3) The Howard circuit court erred in overruling the demurrer of the appellant to the complaint of the appellee filed in this cause. (4) The Howard circuit court erred in overruling the motion of the appellant for a new trial, made in this cause. Seven other errors are assigned in relation to instructions given and refused.

It has been so often decided that reasons for a new trial cannot be made the basis for independent assignments of error that the citation of authorities is unnecessary. The errors 5 to 11, inclusive, are properly assigned as causes for a new trial, and will be considered under fourth assignment. The first and second may be considered together. It appears that on the 8th of April, 1890, appellant filed in Howard circuit court an application for a change of

<sup>1</sup> For opinion on rehearing, see 34 N. E. Rep. 747.

venue, which was granted on the 12th, and the cause sent to the Clinton circuit court on payment of costs of change within 15 days. Prior to that time, pursuant to certain condemnation proceedings, a sum in excess of \$100 had been paid into the office of said clerk for appellant. Nothing was said to the clerk in regard to the change of venue, and no steps were taken to perfect the same, until the 28th, when, pursuant to the request of one of the attorneys, and pursuant to his promise to be responsible for the fee, the clerk made and forwarded to the Clinton circuit court the transcript and papers on change of venue. On the 27th of May, 1890, appellee appeared in the last-named court, and made application to remand the cause to the Howard circuit court, because the costs of change had not been paid and the change perfected within the time allowed therefor. This motion, over objection of appellant, was sustained, and the cause remanded. We cannot agree with counsel for appellant that the only penalty for failure to pay the costs of the change should be the payment of the costs accrued to the time of taking the change, or the fact that the clerk may have in his hands money to which the party asking for the change is entitled should, of itself, be construed as a payment of such costs, or that the court to which the change of venue was granted had no jurisdiction to order the case returned to the court granting the change on an application showing the failure to pay the costs and perfect the change within the time fixed, or that a change granted on the 12th of April, 1890, can be said to be perfected within 15 days by the payment of the costs on the 28th. The record which comes to us discloses without contradiction that the order granting the change was made on the 12th. We should not presume, because this may have been on Saturday, that the record was not in fact read and signed until Monday, the 14th, for the purpose of allowing 15 days from that date in which to perfect the change. We quote from the statute as follows: "If the party fail to pay the costs of the change within the time prescribed by the court, he shall be taxed with all the costs made in the case up to the time of such failure, and shall not be entitled to a change of venue from the county." Rev. St. 1881, § 413. The failure to pay the costs within the time so fixed destroys the right to the change. *Railway Co. v. Grubb*, 88 Ind. 85. There was no error in the action of the Clinton circuit court, on the uncontroverted facts, in remanding the cause to the Howard circuit court. *Railway Co. v. Wright*, 68 Ind. 586. This ruling is not assigned as one of the causes for a new trial, and it is doubtful whether the question is properly presented by an independent assignment of error. *Sidener v. Davis*, 87 Ind. 342; *Berlin v. Oglesbee*, 65 Ind. 308; *Walker v. Heller*, 73 Ind. 46; *Bane v. Ward*, 77 Ind. 153; *Knarr v. Conaway*, 53 Ind. 120. However, it clearly appears that no question was raised in the Howard circuit court as to the jurisdiction of that court. The appellant appeared and proceeded therein without objection. *Cox v. Pruitt*, 25 Ind.

90; *Hamrick v. Gravel Road Co.*, 32 Ind. 347; *Railway Co. v. Lockridge*, 93 Ind. 191; *Shirts v. Iron*, 47 Ind. 445. The subject-matter of the action was within the jurisdiction of the Howard circuit court, and the full appearance of the parties therein without objection, under the authorities cited, gave that court jurisdiction.

In our investigation we have examined many other cases, and find they are not in all respects harmonious, but, whatever construction may be given any of them, the inconsistencies are not such as to affect the question here under consideration. Granting that the agreement of the attorney to become responsible for the costs was a sufficient payment, such payment was not made within the time fixed for perfecting the change. If, because of the failure to perfect the change within the prescribed time, the jurisdiction of the case remained in the Howard circuit court, then the order made by the Clinton circuit court was nugatory and harmless. If, on the contrary, the Clinton circuit court acquired jurisdiction, its action in remanding the cause to the Howard circuit court because of the failure of appellant to perfect the change within the time fixed therefor was right and proper. If appellee had appeared in the Clinton circuit court without objection, she could not afterwards have raised the question that said court had no jurisdiction, on the ground that the change of venue had not been perfected in time. Such an appearance would have been a waiver of the objection. It is not necessary to prolong the discussion, as our conclusion is that, in any event, there is no available error shown by the record and presented by the errors assigned growing out of the ruling of the Clinton circuit court in remanding the cause to the Howard circuit court.

The next error discussed is the third. It is alleged, in substance, in the complaint that appellee was, on and previous to October 25, 1889, the owner of a tract of land and the stone quarry, fixtures, tools, and machinery thereon situated, in the southern part of the city of Kokomo, contiguous and adjacent to the line of railway owned and operated by appellant; that at the point where the wreck hereinafter mentioned occurred the company at one time put in a side track, which had not been used for some time, and which had been abandoned previous to the above date; that at said place the ties used in the track of said railroad were old, and many of them much rotten, and the connection between the side track and the main line of road was insecure and unsafe; that at a point about 100 rods south of the place where the wreck occurred the appellant's railroad crosses the track of the Kokomo Belt Railroad Company; that on said day a freight train going north, and which consisted of an engine, tender, 3 or 4 merchandise cars, 13 oil tanks filled with oil, about 6 cars of coal, and a caboose, which train was owned by appellant, and was then three hours late, and was run, managed, and controlled by appellant, through its employees, was passing over said track at the high and dangerous rate of speed of 35 miles per hour, through the part of

the city of Kokomo adjacent to appellee's land, and without stopping or slackening its speed in crossing the track of said Belt Railroad. It is further charged that the act last mentioned was in violation of the statute of the state, and that such rate of speed was dangerous to adjoining property, and that by reason of said high rate of speed and the defective condition of said track and said switch connection the said engine, in passing over the track about the place where said switch intersected the track of appellant's main line of railroad, jumped from said track, and caused the wrecking of said train. The complaint then proceeds: "The great momentum and force of said train threw the engine over to the west side of said track, and threw the merchandise cars off the track, and wrecked the same, with their contents, and threw nearly all the said cars of oil off the track, and crowded them into one great mass. Said throwing together of the cars composing said train burst the tanks of oil which were carried by said train, and much of the oil therefrom run down upon and over the land and stone quarry owned by the plaintiff. Some of said oil was by the wrecking of said train thrown over upon the fire in the engine of said train, and said oil thrown thereon took fire from the fire in said engine, and a great fire was thereby caused, which extended, with said oil, from where said wreck occurred for a distance of 40 rods or more to the west thereof, where said oil from said wreck run. Said fire, which was thus started solely by the negligence of the defendant, was by the defendant negligently permitted to escape from the defendant's right of way, and to burn over the plaintiff's land, where said oil then was running, said fire being communicated by said burning oil to the plaintiff's property." It is further charged that the fire and burning oil ran down upon and over the land of the appellee, and burned and destroyed her property, heretofore described, all of which is fully and specifically set forth, all of which it is alleged occurred by reason of the negligence of appellant in running said train at said high, unlawful, and dangerous rate of speed over said defective track, thereby causing said wreck and fire, and by the negligence of appellant in permitting said fire to escape from its right of way, and without any fault or negligence on the part of appellee, etc. It is earnestly urged that no acts constituting negligence are specifically averred in the complaint; that the averments constituting the alleged negligence are not sufficient, in the absence of a charge that appellant neglected to keep employed and in the line of duty competent employees; that, in addition to the facts stated in the complaint, there should be a charge of omission of duty on the part of the employer in the examination and keeping the track in good repair; that the negligence charged, if any, is simply passive negligence; that the injuries sustained by appellee were not the natural or proximate result of the negligence charged in the complaint; and that, giving the allegations the fullest scope, the damages sought to be recovered were

the result of an accident. To attempt to cite, discuss, and analyze the authorities relied on by counsel for appellant in support of their argument as to the insufficiency of the complaint would unduly extend the limits of this opinion. We have, on careful consideration, reached the conclusion that the complaint states a good cause of action. *Railroad Co. v. Williams*, (Ind. Sup.) 30 N. E. Rep. 696; *Railway Co. v. Nitsche*, 126 Ind. 229, 26 N. E. Rep. 51; *Railroad Co. v. Barnes*, 2 Ind. App. 213, 28 N. E. Rep. 328; *Railroad Co. v. Smith*, (Ind. App.) 33 N. E. Rep. 241; *Railway Co. v. Smock*, (Ind. Sup.) 33 N. E. Rep. 108; *Railroad Co. v. Spilker*, Id. 280.

It is next earnestly insisted by counsel for appellant that there is absolutely no evidence upon which the jury could possibly find for appellee, even by inference. In our investigation of the questions discussed, we have read all of the evidence; and while there is, on some points, strong contradiction, there is in the record ample evidence tending to sustain the verdict of the jury. We have been unable to find anything in the rulings of the trial court of which complaint is made, in relation to the admission or exclusion of evidence, which could be presumed or construed as prejudicial error against appellant. *City of La Fayette v. Ashby*, (Ind. App.) 34 N. E. Rep. 238.

Appellant asked the court to instruct the jury that, in order to entitle appellee to recover, she was required to prove by a preponderance of the evidence that appellant had been guilty of some act of willful negligence in setting fire to said oil, or that the system of management of appellant was such as would necessarily result in said injuries. There was no error in refusing to give this instruction. In the first place, it was not responsive to any issue in the case. Moreover, we are not able to see upon what theory it could be construed as a correct statement of the law. The instructions of the court, when taken and considered all together, as an entirety, fully, fairly, and clearly state the law applicable to the case. The court instructed the jury that, if appellee's property was destroyed by fire caused by an accident to appellant's train, arising from a defect in its road, the law would presume negligence. In another instruction the court said that the burden of proof was on appellant to show that the wreck was caused by the act of vandals. In connection with the other instructions given, these instructions were, on the facts, and under the issues, correct and pertinent. *Mullen v. St. John*, 57 N. Y. 567; *Railroad Co. v. Williams*, 74 Ind. 462; *Railway Co. v. Newell*, 75 Ind. 542; *Railroad Co. v. Rainbolt*, 99 Ind. 557; *Railway Co. v. Newell*, 104 Ind. 264, 3 N. E. Rep. 836; *Railway Co. v. Thompson*, 107 Ind. 442, 8 N. E. Rep. 18, and 9 N. E. Rep. 357. It is true that a railway company owes a higher duty to passengers than to landowners along the line of its road. The distinction, however, which exists between the two classes of cases does not change the rule, applicable to this case, as to the presumption of negligence arising on account of the wreck as the result of a defect in the road, referred to in the in-



struction, or as to the burden of proof on the question as to whether the wreck was occasioned by the act of vandals. It is the duty of a railway company, so far as the rights of an adjacent property owner is concerned, to exercise such care and prudence in the maintenance of its track and the running of its trains as are usually exercised by prudent and careful persons in similar cases. Such care and skill should be commensurate with the hazards of the undertaking. Great care should be taken in the transportation through towns and cities in the nighttime of heavy freight trains consisting largely of tanks of oil, which, in the event of accident, will probably take fire, explode, run on and over adjoining property, destroying the same, and endangering human life. It is true that, when adjacent property is damaged as the result of mere accident, there can be no recovery. In order to create liability on the part of the company in such case, the injury must be the natural and proximate result of the negligence; or, in other words, of the want of care and skill on the part of its agents or employees. The instruction in this case relative to the high degree of care and prudence which the company was required to exercise for the safety of adjoining property may be, in some respects, as the statement of a general rule, subject to criticism; but, if this was conceded, it does not necessarily follow that the judgment of the trial court should be reversed because of an inaccurate expression or erroneous statement in an instruction. Error, if probably prejudicial or influential against the complaining party, is ordinarily cause for reversal. The instructions as a whole, in substance, correctly state the law applicable to the evidence and pertinent to the issue, and, in view of all the facts and circumstances connected with the case, we have not been able to discover any error in the instructions which was probably prejudicial to appellant. The theory on which the case was tried in the court below was correct, so far as we can determine. The trial appears to have been fair and impartial, and we have not found any reversible error in the record. *City of La Fayette v. Ashby*, supra.

Judgment affirmed.

(7 Ind. App. 12)

SHAVER v. PHILIPS et al.

(Appellate Court of Indiana. June 10, 1893.)

**INJURY TO TENANT'S POSSESSION — ACTION FOR DAMAGES — EVIDENCE — ADMISSIBILITY — HARMLESS ERROR.**

In an action by a tenant for damages caused by undermining the building, defendants, by their answer, made the issue as to whether their acts were done in a careful manner, and such issue was treated as material by the court and counsel. Neither the issue thus made, nor the evidence supporting it, was withdrawn from the jury. *Held*, that defendants could not insist, on appeal from a judgment in their favor, that evidence by one of them that he instructed his foreman to be careful about injuring the property was harmless, especially where the verdict is supported by very slight evidence. *Lotz, J.*, dissenting.

On rehearing. Petition overruled.

For report of decision on appeal, see 32 N. E. Rep. 1181.

GAVIN, C. J. Appellees have filed a petition for rehearing, based upon the claim that the introduction of the evidence by reason of which a reversal was ordered was not prejudicial to appellant. Appellees' answer of justification was held bad by the court until they had added an allegation that they only did what was necessary to do to take the gravel so assessed and paid for by them, and did this, also, in a careful manner. The exercise of proper care was evidently deemed by the court and counsel a material fact to enable them to sustain their answer. Neither the issue made by this answer, nor the evidence introduced, were, by any instructions, withdrawn from the jury. The evidence complained of, while not legally competent, was of such a character as would, when received with the approval of the court, be regarded by the jury as bearing upon the question of proper care, as presented by the issues in the cause, and counsel for the appellees, in their original brief in this cause, argued the propriety of its admission upon this ground. They state it to have been "evidence given by one of the appellees concerning what he did in regard to exercising care in taking out gravel." They also say, "We think this was proper," and then proceed to assert it to have been directly within the issues in the cause. We think it late for counsel to urge that the evidence was harmless. We may add what we did not deem it necessary to say in the original opinion,—that the damages assessed are too small, as shown by an overwhelming preponderance of the evidence, and there is, in fact, hardly sufficient evidence to sustain the finding under even the liberal rule applicable in support of verdicts. Where it is manifest that something other than the evidence properly admissible has guided the jury in assessing the damages, we are of opinion that it is safe to charge the wrong result to the admission of improper evidence. The petition for rehearing is therefore overruled.

LOTZ, J., (dissenting.) The action made by the complaint is one to recover damages for a simple trespass upon real estate. There is no charge in the complaint that the trespass was maliciously committed. The appellees answered (1) in denial; and (2) by way of confession and avoidance. The entry upon the lands was a conceded fact, both in the pleadings, and upon the trial of the case. Appellees, however, sought to defeat a recovery by showing that the appellant had estopped himself, in standing by and permitting appellees, with his knowledge and consent and acquiescence, to pay all the damages to the lands and crops to the owner of the fee. After the entry was admitted the only controverted questions were the estoppel, and the amount of the damages. The motives that actuated the appellees, and the manner in which the entry and removal of the gravel were done, were wholly immaterial. The extent of the acts done, and the injury

flowing from them, were the material questions. The sole ground for the reversal, as stated in the former opinion, is that the court improperly permitted one of the appellees to testify to a statement and direction given by his foreman concerning the manner in which he desired the work to be done. The witness stated "that he was frequently at the farm where the plaintiff lived while the men were taking gravel therefrom," and that he directed his foreman to be careful about the property,—particularly about the house. The record before us shows that before this testimony was offered the appellant and several other witnesses had testified fully as to the manner and extent of the trespass, and the injury done to the growing crops and tenancy. This testimony was given by the appellant on his own motion, and it was before the jury at the time the evidence of which complaint is made was offered. The ultimate fact or act itself was given in evidence by the appellant on his own motion. Under the circumstances of this case it is inconceivable to me how a declaration concerning a fact can be deemed hurtful when the fact itself remains in evidence. Appellant voluntarily gave the substance, and now complains of the shadow. I think the petition for a rehearing should be granted.

(9 Ind. App. 189)

CURRIE FERTILIZER CO. v. BYFIELD  
et al.<sup>1</sup>

(Appellate Court of Indiana. June 7, 1893.)

ACCEPTANCE OF GUARANTY—EVIDENCE.

In an action for the value of three car loads of goods on a written guaranty by defendants that S. & D., who were agents for the sale of plaintiff's goods, and had received them, would fulfill their agreements, there was evidence that plaintiff refused to deliver any goods to S. & D. to fill their orders unless they gave a guaranty; that when the guaranty, signed by defendants, was handed plaintiff's officer, he did not express his satisfaction with it, but said that he would investigate, and that "your three cars are loaded and stand on the switch," and that the company would ship them immediately; that defendants refused to indorse notes of S. & D. for goods ordered, and plaintiff refused to make any more shipments. In a previous action on the notes, plaintiff's officers testified that they shipped the three cars in reliance on a verbal agreement of S. & D. to secure indorsers on the notes. *Held*, that there was evidence from which the jury could find that plaintiff never accepted the guaranty or acted upon it.

Appeal from circuit court, Jennings county; T. C. Batchelor, Judge.

Action by the Currie Fertilizer Company against John C. Byfield and John M. Dixon on a written guaranty. Judgment for defendants, and plaintiff appeals. Affirmed.

Korby & Ford, for appellant. Overmyer & Little, for appellees.

GAVIN, C. J. This was a suit against appellees upon the following instrument: "Sept. 8th, 1888. For and in consideration of one dollar, to us in hand paid, the receipt of which is hereby acknowledged, we do hereby guaranty the performance

and acknowledge ourselves personally bound for the faithful performance and fulfillment of all agreements between the Currie Fertilizer Company of Louisville, Ky., and Spencer and Dodge, of Paris Crossing, Ind. John C. Byfield. John M. Dixon." Appellant had, prior thereto, contracted with Spencer & Dodd to handle only its goods, and to thoroughly canvass the territory given them; goods to be settled for by notes, no security being required. After Spencer & Dodd had thoroughly canvassed their territory, and sold or contracted for some eight car loads of the fertilizer, they commenced, in September, to order goods. After some delays and excuse for nonshipment, appellant finally refused to ship any goods without being made safe. After considerable correspondence, appellant wrote Spencer & Dodd that they wanted "a written statement from one or more responsible men to the effect that they will be responsible for what debts you contract in dealing with us. We shall not ship you any goods until our request is complied with, and we have investigated the standing of your sureties." Upon the 9th or 10th of September Spencer took the instrument sued on and delivered it to appellant, who shipped three car loads, and sent notes therefor, dated September 10th, which Spencer and Dodd signed and returned. Immediately upon receiving them appellant set up a claim for their indorsement by appellees. This was refused by Spencer & Dodd as not required by any contract or agreement made by them. Appellant asserted that by some arrangement made subsequent to the original contract it was entitled to indorsers, and announced its determination to ship no more goods unless it received them; and, the indorsement not being forthcoming, it filled no more orders. This suit is to recover the price of the three car loads shipped. Upon the trial the jury found for the defendants. Appellant made a motion for new trial, which was overruled, with an exception, and this ruling is assigned for error. The sole question presented is as to the sufficiency of the evidence.

Appellant's counsel have, in a very clear and logical brief, presented various legal questions as to the proper character of the contract sued on. In these they would appear to be correct, but we are unable to agree with the counsel that these legal propositions are determinative of the cause.

There still remain to be passed upon the questions of fact presented by the pleadings as to whether appellant ever accepted and acted upon this guaranty. If it did not, no liability can exist in its favor against appellees. While there is a large portion of the evidence pointing in this direction, there are some facts and circumstances which might justify a different conclusion. The only purpose of the execution of this guaranty upon the part of appellees was to procure the delivery, not of part, but of all, of the fertilizer sold by Spencer & Dodd. When the guaranty was delivered to appellant, its officer did not, according to Spencer's evidence, express his satisfaction with it, nor his acceptance of it. He merely took it, and said he

<sup>1</sup> Rehearing denied, 36 N. E. 432.

would investigate it, at the same time stating unconditionally that "your three cars are loaded, and stand on the switch," and that it would ship them immediately. The invoices were made out on the 10th, and the notes inclosed dated upon that day; the three cars being received a few days later. Immediately upon the return of the notes signed by Spencer & Dodd, appellant demanded that they be indorsed by appellees, claiming that this was the contract with Spencer & Dodd, which they denied. Upon failing to obtain these indorsers, appellant refused to carry out the contract. In the suit upon the notes, in answer to Spencer & Dodd's counterclaim for damages resulting from appellant's failure to deliver the remainder of the goods, appellant set up that it shipped these three car loads upon Spencer & Dodd's verbal agreement to give indorsers, and sought to justify its refusal to carry out the contract by Spencer & Dodd's failure to comply with this agreement for indorsers. From the failure of appellant to ever express its acceptance of the guaranty either to Spencer & Dodd or to the appellees, coupled with its statement that the cars were already loaded, and would be shipped immediately, and their subsequent assertions that the cars were shipped in reliance upon an agreement for indorsers, which this contract of guaranty certainly was not, from its immediate demand for something more than this guaranty contract gave it, and from its repudiation of any fulfillment of the contract for want of the indorsement, the jury evidently found that appellant never did accept and act upon this guaranty. In this view of the evidence, we cannot say they were wrong, keeping in mind the oft-repeated rule that it is the province of the jury to determine conflicts of evidence. Appellant's continued demand for something more than this guaranty gave it, and its immediate refusal to rely upon the guaranty and perform the contract, do not seem to be consistent with its bona fide acceptance of the guaranty, and its reliance thereon. In the presentation of the evidence and facts in this case we have not undertaken to do more than set out sufficient of those most favorable to appellees to show that the jury were not without some evidence, direct or circumstantial, upon which to base their verdict. This being the case, we are not permitted to weigh the evidence, but must yield to the finding of fact made by the jury. *Coon v. Cronk*, 131 Ind. 44, 30 N. E. Rep. 882.

Judgment affirmed.

(7 Ind. App. 157)

**SPECTER v. KIMBELL & COBB STONE CO.**

(Appellate Court of Indiana. June 7, 1893.)

**MECHANIC'S LIEN—NOTICE TO OWNER—REPEAL OF LAW BY IMPLICATION.**

Act March 6, 1883, § 5, providing for notice by a material man or a mechanic to an owner at or before furnishing materials to a contractor, or performing labor for him, is not repealed, by implication, by Act March 9, 1889. *Taylor v. Dahn*, (Ind. App.) 34 N. E. Rep. 121, followed.

Appeal from circuit court, Lake county; N. L. Agnew, Judge.

Action by the Kimbell & Cobb Stone Company against Isaac Specter to enforce a material man's lien. Judgment for plaintiff, and defendant appeals. Reversed.

T. S. Fancher, for appellant. W. B. Reading, for appellee.

**REINHARD, J.** Action by the appellee against the appellant for the enforcement of a material man's lien. Specter erected a building upon his land, and employed one Johnson as contractor for the construction thereof. Johnson, who was to furnish the material and do the work, purchased materials of the appellee, and used them in the building. After the sale and delivery of the materials for Specter, Johnson filed a notice in the recorder's office of his intention to hold a lien on said building and real estate, but did not, at or before the delivery of said materials, give any notice thereof to the appellant. This appeal was taken to settle the question whether section 5 of the act of March 6, 1883, (Acts 1883, p. 140, § 5,) which requires such notice to be given before a lien can be acquired by the material man on the building, has been repealed by the act of 1889, upon the subject of mechanics' liens, (Acts 1889, p. 257.) The question is presented by exceptions to the conclusions of law upon the special findings. The trial court decided that the section requiring such notice had been repealed by said act of 1889, and the appellant insists that this was error. This exact question was passed upon by this court at a previous sitting, at the present term. *Taylor v. Dahn*, (decided May 23, 1893,) 34 N. E. Rep. 121. We there held that the amendatory act of 1889, above cited, did not repeal, directly or by implication, section 5 of the law of 1883, requiring actual notice, but that the section had been expressly repealed by the act of 1891, (Acts 1891, p. 28.) The questions here submitted are not affected by the act of 1891. In the present case the appellee contends that the legislative intent to do away with the necessity for actual notice to the owner is apparent from the fact that mechanics and material men are, by the act of 1889, placed upon the same footing, and that section 3 of the latter act gives a lien to each alike by the filing of the notice of intention to hold a lien in the recorder's office, without making any provision for actual notice on the part of material men. But a sufficient answer to this argument, it seems to us, may be found in the fact that precisely the same thing may be said of the law of 1883. Section 1 of that act, like section 1 of the act of 1889, provides for a lien to mechanics and material men, alike, to the extent that each may have performed labor or furnished materials. Section 3 of both the original and the amended act prescribes the steps necessary to acquire such lien, and in neither of such sections is there any provision for actual notice to the owners of property by material men who have furnished materials to a contractor. Were it not for section

5 of the original act, there would be no provision in either law requiring such material men to give any other notice than that which is to be filed with the recorder of intention to hold a lien. In the absence of section 5 the right to hold a lien in either case is complete, whether the lienholder be a mechanic or material man dealing with a contractor. That section, however, makes it necessary for one furnishing materials to a contractor to take an additional step besides that of filing in the recorder's office the notice of intention to hold a lien before he can become a lienholder. He must, under the provisions of that section, serve actual notice upon the owner of the building he seeks to take the lien upon. That section stands unrepealed, in terms, by the act of 1889, and, as it was essential to give such actual notice by the law of 1883, the necessity still exists, for aught that appears in any of the sections of the law of 1889. There is no reference whatever in the latter act to the subject of actual notice by material men to owners whose property it is sought to charge for the price of the materials furnished in its construction, when the materials were furnished to the contractor, and not to the owner. We do not understand, therefore, how it can be said that the entire subject-matter of the old law is covered by the provisions of the new. In the case cited we said: "It is only where the sections, as amended, contain such new matter as to cover the subjects embraced in all the old sections, including those not amended, and where such sections, as amended, are positively repugnant to the provisions in the sections not amended, and the entire new act is evidently intended to supersede and take the place of the old one, that the latter repeals the former." It is apparent that no portion of the later law will be destroyed by continuing in force the provisions of section 5 of the act of 1883, and there is no irreconcilable repugnancy between the two enactments upon the subject of notice to the owners of property sought to be charged with a lien. Under these circumstances it would be difficult to conceive a reason why the two laws could not well stand together, as being in *pari materia*. We are therefore of the opinion that the court erred in holding that the law of 1889 repealed section 5 of the act of 1883, either expressly or by implication. Judgment reversed, with directions to the court below to restate its conclusions, and for further proceedings not inconsistent with this opinion.

(7 Ind. App. 108)

**RISSING et al. v. CITY OF FT. WAYNE.**<sup>1</sup>  
(Appellate Court of Indiana. June 7, 1893.)

**APPEAL TO APPELLATE COURT — WHEN WILL LIE  
—PROCEEDING TO WIDEN STREET.**

The appellate court has no jurisdiction of an appeal from the judgment of the circuit court in a proceeding to widen a street, commenced before a city council, and taken by appeal to such circuit court.

Appeal from superior court, Allen county.

<sup>1</sup> Transferred to Supreme Court. See 37 N. E. 323.

Proceedings commenced before the city council by the city of Ft. Wayne to widen a certain street, and taken by appeal from the damages and benefits assessed to the circuit court. From the judgment of the circuit court, John H. Rissing and others appeal. Transferred to supreme court.

Walpole G. Colerick, for appellants. W. H. Shambaugh, for appellee.

**PER CURIAM.** This was a proceeding commenced before the appellee's city council to widen a street. The city commissioners assessed benefits and damages, and the common council approved their report. From this action an appeal was taken to the circuit court, and from the judgment there rendered the cause was appealed to this court. It is our opinion that the case belongs in the supreme court. This is not an action for the enforcement of a statutory lien by the contractor, but the appeal is from the original proceedings before the city council, and no jurisdiction in such cases has been conferred upon the appellate court. The case should be transferred to the docket of the supreme court. It is so ordered.

(7 Ind. App. 196)

**VALENTINE et al. v. DUFF et al.**

(Appellate Court of Indiana. June 8, 1893.)

**CONVERSION—WHAT CONSTITUTES.**

The mere purchase of goods from one who does not own them, and has no right to sell them, does not constitute conversion, unless the buyer afterwards refuses to return them to the owner on demand, or has converted them to his own use, so that he cannot return them if requested.

On petition for rehearing.

For former report, see 33 N. E. Rep. 529.

**ROSS, J.** The appellants seek a rehearing, and ask to withdraw a part of their original brief, insisting that the court is in error in its views of their contention. Whether or not we have placed the wrong construction upon the argument of counsel need not be decided, as the original opinion states the law so far as applicable to the rights of the appellees Fulmer, Schaff, and Duff in this case are concerned. The only question to be considered now is, do the facts found by the court entitle the appellants to a judgment against the appellee Caffyn? We think not. The complaint alleges a wrongful taking of the property by the appellee Walls, and a sale thereof to the appellee Caffyn, but the facts found do not show a demand upon Caffyn for the wheat, or his refusal to deliver up the same. The mere fact that he purchased the wheat, and took possession thereof, does not create a liability, unless he afterwards failed or refused to deliver it up on demand, or it was shown that he had converted it to his own use, so that he could not have delivered it, even though a demand had been made. The facts in this case fall short of showing a conversion by the appellee Caffyn.

Petition overruled.

(7 Ind. App. 125)

**TOWN OF MONTICELLO v. KENARD.**

(Appellate Court of Indiana. June 9, 1893.)

**COMPLAINT TO REVIEW—REVERSAL OF JUDGMENT  
— MUNICIPAL CORPORATIONS — OBSTRUCTION IN  
STREET—NOTICE.**

1. Where a demurrer to a complaint was improperly overruled, and the complaint can be amended so as to cure the defects, the court, on a complaint to review, may reverse a judgment for defendant on the findings in the original action, and is not bound to affirm the judgment because of the defective complaint.

2. The presence for three days of a heap of brush two feet high, and occupying eight feet of ground, in a principal street of a town, within one and a half blocks of the courthouse, and within about one block of the business center, imposes upon the town the duty of ascertaining its presence.

**Appeal from circuit court, Cass county;  
E. P. Hammond, Special Judge.**

Thomas R. Kenard brought an action against the town of Monticello for damages due to an obstruction in a street. A judgment was rendered for defendant, and plaintiff filed a complaint to review. The judgment was reversed, and the town appeals. Affirmed.

**Hartman & Hamelle, for appellant. Mc-  
Connell & Jenkins, for appellee.**

**GAVIN, C. J.** This suit was originally commenced by appellee in the White circuit court, going on change of venue to Cass county. A demurrer to the complaint was overruled, with an exception. An answer of general denial was then filed, and the cause tried by a jury, which returned a special verdict, upon which judgment was rendered in favor of appellant, over appellee's objection and exception. The appellee afterwards began this action to review the judgment thus rendered, counting upon error of the court in rendering judgment upon the special findings in favor of appellant, instead of in his own favor. A demurrer to this complaint was overruled, with an exception. Answers were filed, consisting of the general denial, and special answers setting up error in the former trial in overruling the demurrer to the complaint in the original cause. Upon the trial the court found, in favor of appellee, that the former judgment ought to be reversed, and also found that the demurrer to the original complaint ought to be sustained, with leave to amend. It was so adjudged, and from this judgment appellant appeals.

The principal error presented and discussed here is that the court erred in overruling appellant's demurrer to the complaint to review. Appellant's position is that the finding of facts is insufficient to sustain a judgment for appellee, and also that, even if it be sufficient, his complaint was bad on demurrer, and the judgment should therefore stand; relying for this latter proposition upon cases holding that where the complaint fails to state a cause of action, and this failure is raised by demurrer, and assigned as cross error, any subsequent errors may be disregarded, and the judgment affirmed; referring to *Palmer v. Railroad Co.*, 108 Ind. 137, 8 N. E. Rep. 905, and to *Ice v. Ball*, 102 Ind. 42,

1 N. E. Rep. 66. To this general rule, as asserted by these cases, there exists a well-recognized exception. "Where the complaint can be amended so as to cure defects the court may reverse the judgment, at the costs of the appellant, and is not bound to affirm the judgment because of the defective complaint." *Elliott, App. Proc.* § 416; *McCole v. Loehr*, 79 Ind. 430; *Goodman v. Niblack*, 102 U. S. 556; *Kelley v. Adams*, 120 Ind. 340, 22 N. E. Rep. 317. Appellee takes the position that the appellant cannot be heard to complain in this court, because the judgment below is to be regarded as having been sought by him; the idea being that the demurrer to the complaint should be sustained, as appellant asked in its answer. We do not regard this position as tenable. Appellant was manifestly willing to abide the first judgment. It sought no relief therefrom. The answers of error in ruling upon the sufficiency of the complaint was plainly presented, primarily, to save and uphold the judgment, if possible, and secondly, doubtless, to save costs if appellee should obtain a reversal on the facts.

This leaves for determination, then, the question of the sufficiency of the findings to sustain a judgment for appellee. If they were sufficient, we are of opinion that he was, in fairness, entitled to a reversal, even though his complaint was defective, because it would be easily amendable. Where the facts show a party entitled to relief, he should not be debarred therefrom by any undue technicality. In considering the right of a plaintiff to judgment upon the facts, many defects in the complaint will be regarded as cured by the evidence and facts found. *Steinke v. Bentley*, (Ind. App.) 34 N. E. Rep. 97; *Graves v. State*, 121 Ind. 357, 23 N. E. Rep. 155; *Child v. Swain*, 69 Ind. 230; *Hydraulic Co. v. Boyer*, 67 Ind. 236.

The facts found are substantially as follows: Defendant was a duly-incorporated town, with a board of five trustees, and a town marshal, on June 18, 1889, but no street commissioner. Illinois street, one of the four principal streets in said town, and the principal residence street therein, was 66 feet wide. On June 15, 1889, some one, without the authority of said town, placed in said street a lot of brush from a tree, covering a space of about eight feet, and about two feet high, within one and one-half squares of the courthouse, and about one square from the business center of the town. The pile of brush remained there, in that condition, until June 19, 1889. On the evening of June 18, 1889, the appellee, who lived in the county, drove to Monticello, with his wife and child, in a top buggy, with a gentle horse, arriving there about 8 o'clock. The evening was dark and rainy, and as he entered Illinois street it was so dark and rainy that he could not see anything in the street, and there were no lamps or lights burning. He drove along on Illinois street, to the east side thereof, for the purpose of keeping out of the way of teams that might be coming from the opposite direction, with his horse in a walk. He had no knowledge or notice of the existence or location of said pile of brush,

and while thus driving his horse carefully, in a walk, the wheels and wagon ran upon this brush heap, which caused his wagon to upset, and threw its occupants over into the gutter. The place where said accident occurred was a public street, traveled at all hours by citizens of Monticello and others. It was also found that the appellant had notice, before the accident, of the existence of such obstruction, and that the same was dangerous to persons traveling the street in a dark night with a horse and buggy; that appellee was unable to see the obstruction, by reason of darkness and rain, and had no knowledge of it until the buggy was overturned. The jury also found "that the plaintiff was without fault, and that the defendant was guilty of negligence in allowing the obstruction to remain as aforesaid." There was also a finding as to the damages. A municipal corporation is not an insurer of the safety of its streets, but it is bound to exercise reasonable care and diligence to keep them in a reasonably safe condition for use. *Higert v. City of Greencastle*, 43 Ind. 574; *City of Richmond v. Mulholland*, 116 Ind. 173, 18 N. E. Rep. 832; *City of Franklin v. Harter*, 127 Ind. 446, 26 N. E. Rep. 882. The duty of keeping streets in repair includes the duty to keep them free from dangerous obstructions, and a corporation is liable for negligence in allowing such obstructions to continue after notice thereof may be imputed to it. *2 Beach, Pub. Corp. § 1510*. The corporation is also entitled to notice of the defect, and to a reasonable time in which to remove it, where it has been caused by some third person. *Turner v. City of Indianapolis*, 96 Ind. 51; *City of Huntington v. Breen*, 77 Ind. 29; *Town of Spiceland v. Aller*, 98 Ind. 467; *City of Ft. Wayne v. Patterson*, 8 Ind. App. 34, 29 N. E. Rep. 167; *Elliot, Roads & S.* 460; *Dillon, Mun. Corp. § 790*. This notice, however, may be either actual or constructive. Whenever the defect has existed such a length of time as, when its character and location, and the other attendant circumstances, are considered, the corporation, by the exercise of reasonable diligence, ought to have discovered and removed the defect, then it will be held liable for damages occasioned thereby to one himself without fault. *City of Evansville v. Wilter*, 86 Ind. 414; *City of Indianapolis v. Murphy*, 91 Ind. 382; *City of Aurora v. Bitner*, 100 Ind. 396; *City of Ft. Wayne v. Patterson*, 3 Ind. App. 34, 29 N. E. Rep. 167; *Town of Rose-dale v. Ferguson*, (Ind. App.) 30 N. E. Rep. 156; *Elliot, Roads & S.* 461. When these general principles are applied to the case in hand, we think there are sufficient facts found to sustain a judgment for the appellee in this case. The finding of actual notice is insufficient, in that it does not find the length of the notice, which may have been not more than one minute, or five, before the happening of the accident. *Railway Co. v. Stupak*, 123 Ind. 210, 23 N. E. Rep. 246. The character of the obstruction, two feet high, occupying eight feet of ground out in a public principal street, within one and one-half blocks of the courthouse, and within about one block of the business center of the town, was

such as imposed upon the town the duty of ascertaining its presence, and causing its removal, during the three days prior to the accident. The jury found the obstruction to be a dangerous one, and we are unable to concur with counsel as to its innocent character, as an inoffensive bundle of "twigs," merely. It impresses us as being directly calculated to produce the very result which it did cause. It stood out in the road, plain and visible. That it was manifestly out of place could be determined at the first glance. Its removal would have required but little time. The corporation was bound to use active diligence to discover defects in its streets. *City of Ft. Wayne v. Patterson*, supra; *City of Evansville v. Wilter*, supra. As to the length of time required to impose constructive notice upon a corporation, very much must necessarily depend upon the character of the defect or obstruction. It is plain that a much shorter period of time would be required where the obstruction is, as here, prominently plain and visible, in a much-frequented and public place, than if it were some slight defect, half hidden from view, and readily and easily overlooked both by the authorities and passers-by. In *City of Logansport v. Justice*, 74 Ind. 378, the court indicated that the existence of a defect in a bridge for two weeks would warrant the inference of knowledge by the authorities. In *Todd v. City of Troy*, 61 N. Y. 506, it was held that an accumulation of ice for "several days'" time must be regarded by the city. In *Kunz v. City of Troy*, 104 N. Y. 344, 10 N. E. Rep. 442, four days' time was held long enough to impose upon the city notice of the presence of a counter on a sidewalk, together with the duty of removal. In *Harriman v. City of Boston*, 114 Mass. 241, the court decided that, where a coal hole upon a much-traveled street was left open for less than 24 hours, the question of reasonable notice to the city was proper to be submitted to a jury. In *Grand Rapids v. Wyman*, 46 Mich. 516, 9 N. W. Rep. 833, a horse stepped into a hole in a street, which had been there for 10 days. The city was held liable. In *Nichols v. City of Minneapolis*, 33 Minn. 430, 23 N. W. Rep. 868, telephone wires were left on the ground eight days. The time was held amply sufficient to indicate negligence upon the part of the city. We are of the opinion that a correct result was reached in the court below, and the judgment is affirmed.

ROSS, J., did not participate in this decision.

(159 Mass. 388)

#### BOURGET v. CITY OF CAMBRIDGE.

(Supreme Judicial Court of Massachusetts.  
Middlesex. June 21, 1893.)

MUNICIPAL CORPORATIONS—DEFECTIVE STREETS—  
NOTICE—LIABILITY—INSTRUCTIONS.

1. In an action against a city for personal injuries caused by a defect in a street there was evidence that plaintiff was hurt by a discharge of electricity from a loose wire which he took hold of to remove from the street; that the wire was an acoustic one, and was used without electricity, but that it touched an elec-

tric wire which had lost its insulation at the point of contact; that the acoustic wire had been hanging loose for three weeks in such a position that the wind might bring it against the electric wire; and that the want of insulation could be seen from the street. *Held*, that there was evidence from which the jury could find that the likelihood of the defect coming into existence should have been obvious to defendant's inspectors of wire during the three weeks, and therefore that the city ought to have known of the defect within a time after it came into existence so short that it might fairly be presumed to have elapsed when the accident happened.

2. A request to charge that, if the negligence of the respective owners of the electric and the acoustic wires contributed to the accident without which plaintiff would not have been injured he could not recover, was properly refused, since the only way in which the owners could have contributed to the accident was by helping to create the defect, and the liability of the town was for not abating it.

Exceptions from superior court, Middlesex county; John W. Hammond, Judge.

Action of tort by Pierre Bourget against the city of Cambridge for personal injuries caused by a defect in a street. The defendant, at the close of the testimony, requested the court to rule that "the condition having been such that there was no apparent danger or defect, the defendant having no actual knowledge of such, it cannot be held to have had notice, nor that, with the exercise of proper care and diligence, it might have had notice." "From the fact that a small acoustic wire hangs down and onto the sidewalk there is no presumption that it is charged by electricity. There must either be actual notice to the city that it is so charged, or the fact must have been so apparent that the city should have known it, by the exercise of proper care and diligence, in time to have prevented the accident." "If the negligence of the electric light company, or of the Hews Pottery Company, or of both, contributed to the accident, without which the plaintiff would not have been injured, he cannot recover." These instructions were refused, and defendant excepted. Exceptions overruled.

D. E. Ware and James Hewins, for plaintiff. C. J. McIntire, for defendant.

HOLMES, J. This is an action of tort for personal injuries caused by a defect in the highway. It has been before this court once, (156 Mass. 391, 31 N. E. Rep. 390,) and now comes here for a second time on exceptions. The first question is whether there was any evidence for the jury that the defendant ought to have known of the defect. The plaintiff's evidence was as follows: The plaintiff was hurt by a discharge of electricity from a loose wire which he took hold of with the intention of removing it from the highway. The wire was an acoustic wire, used without electricity, but it touched an electric wire which had lost its insulation at the point of contact. It had been hanging loose for three weeks in such a position that the wind might bring it against the electric wire. At the time of the accident it was caught on a glass insulator, so as to be kept in contact with the electric wire. The want of insulation of the lat-

ter could be seen from the street. We presume that the jury might have found that it was caused gradually by friction, or they might have believed the suggestion of the defendant's experts that the insulation was burned off on some wet day by the contact of the other wire. The defect was shown to have existed before the moment of the accident by proof of another accident a few minutes earlier, and, as we have shown, the conditions of danger were permanent, because the loose wire was caught.

The jury may have considered that the danger from the defect after it came into existence was very great; that to expert eyes, such as those of the defendant's inspectors of wires, the likelihood of the defect coming into existence would have been obvious at any time during the past three weeks, and therefore that the city ought to have known of the defect within a time after it came into existence so short that it fairly might be presumed to have elapsed when the accident happened. *Olson v. Worcester*, 142 Mass. 536, 8 N. E. Rep. 441.

The second instruction requested was given in substance. The third was properly refused. The only way in which the negligence of the electric light company or of the Hews Pottery Company could have contributed to the accident was by creating or helping to create a defect in the highway. The liability of the town is for not abating the defect, by whomsoever created.

Exceptions overruled.

(159 Mass. 337)

#### LINCOLN v. BOSTON MARINE INS. CO.

(Supreme Judicial Court of Massachusetts.

Suffolk. June 21, 1893.)

#### MARINE INSURANCE—LOSS OF FREIGHT—CHARTER OUTSTANDING AT TIME OF LOSS.

1. A policy insured "Freight, under deck, on board or not on board \* \* \* at and from New York via Philadelphia to Seattle and at and thence \* \* \* to ports discharge and / or loading West Coast South America and at and thence to ports of advice & / or discharge in Europe or Atlantic United States and 15 days on vessel in port after arrival." It was provided that it should cover, in event of deviation, for not exceeding 18 months from date of policy, at tariff rates of premium; and it was agreed that voyage policies on freight on board or not on board should attach at the first port specified as soon as the inward cargo was landed, and no sooner, whether the vessel was under charter or not, and should terminate at the port or ports of destination with the landing of cargo. "Time risks on freight shall attach and terminate in the same manner, applying to each cargo, (or voyage, if in ballast and not chartered) successively, or to each charter successively in case vessel be chartered." *Held*, that while the vessel was unloading the policy covered only the freight of the voyage then ending, and did not insure any part of the freight of the next succeeding voyage, although there was a charter party outstanding.

2. The vessel, instead of sailing to the west coast of South America from Tacoma, having gone to Sydney, and, after her arrival there, been chartered for a voyage to Manila, the policy was indorsed as follows: "Having deviated from Seattle & Tacoma to Sydney N. S. W. this policy now attaches at & thence via Philippine Islands to port of advice and / or



discharge in Atlantic United States & 15 days on vessel in port after arrival." *Held*, that the words "now attaches" did not make the policy attach at once to the Manila freight, while the inward freight was unloading.

Action by William H. Lincoln against the Boston Marine Insurance Company. On agreed statement of facts. Judgment for plaintiff.

L. S. Dabney and F. Cunningham, for plaintiff. Eugene P. Carver and Edward F. Blodgett, for defendant.

HOLMES, J. The policy originally insured "\$5,000 on freight, under deck, on board or not on board said vessel at and from New York via Philadelphia to Seattle and at and thence, privilege lumber port, to ports discharge and/or loading West Coast South America and at and thence to port of advice &/or discharge in Europe or Atlantic United States and fifteen days on vessel in port after arrival." Then was added: "Held covered in event of deviation or change of voyage, for not exceeding eighteen months from date of this policy, at tariff rates of premium." The freight was valued at \$15,000.

The doctrine of *Thwing v. Insurance Co.*, 10 Gray, 443, 453, 454, and of the supreme court of the United States, with regard to policies very like the present, is that "the insurance was upon the freight of each successive voyage, and is to be applied to the freight at risk at any time, whether on the outward or homeward voyage, to the amount of the valuation." *Insurance Co. v. Mordecai*, 22 How. 111, 118; *Hugg v. Banking Co.*, 7 How. 595, 610. It is true that it does not appear, as it seems to have done in the former Massachusetts case, what proportion the valuation bore to the freight actually earned, or expected to be earned, under the successive charters of the vessel. But it is enough that nothing is shown to contradict or render improbable the above interpretation. In one respect, indeed, this case is stronger than those cited. The clause giving liberty to deviate makes the policy more nearly a time policy, and so subject to a provision which we shall quote in a moment; the space limits being inserted only for the purpose of fixing the length of the time, and the cases in which a further premium must be paid. We are of opinion that the cases cited apply.

But it is argued that even if our construction of the policy be adopted, when the vessel was unloading, as fast as the policy became unnecessary for the protection of the freight of a discharging cargo, the freight of the next cargo should be held to succeed to the protection, so as to keep up a constant insurance of \$5,000 upon freight valued at \$15,000. The implication of the decisions to which we have referred is the other way, and the conclusion is strengthened by another provision of the policy. The policy is a general form used for both vessels and freight, and containing clauses applicable to different classes of risks. Among them is the following: "It is also further agreed that voyage policies on freight on board or not on board shall attach at the first port specified, as soon as the inward cargo is

landed, and no sooner, whether the vessel be under charter or not, and shall terminate at port or ports of destination with the landing of cargo, in proportion as amount hereby insured bears to full amount of freight or charter for the whole voyage insured." Possibly this does not apply to an insurance like the present, or at any rate to an intermediate port. But it goes on: "Time risks on freight shall attach and terminate in the same manner, applying to each cargo, (or voyage, if in ballast and not chartered) successively, or to each charter successively in case vessel be chartered." If these words do not apply literally to the case at bar, at least they furnish a striking analogy, and go far to confirm the implication of the rule laid down in the decisions. Apart from the question remaining to be considered, we are of opinion that, while the vessel was unloading, the policy covered only the freight of the voyage then ending, and did not insure any part of the freight of the next succeeding voyage, although there was a charter party outstanding, and although we assume that the plaintiff had an insurable interest. No doubt the distinction is arbitrary between the positions immediately before and immediately after unloading the cargo. But contracts always are arbitrary in what they do or do not undertake. There is nothing irrational, however, in a contract of insurance on successive voyages, keeping each distinct; and the policy shows the defendant's habit and intent, in cases at least closely resembling this, to make that kind of policy. We refer to the clause which we have quoted as to time risks.

If the case stopped here, we understand it to be agreed that by our construction the defendant would not be liable for freight. The freight on the cargo which was unloading at the time of the loss was all paid. But the vessel, instead of sailing to the west coast of South America from Tacoma, had gone to Sydney, (where the loss occurred,) and after her arrival there had been chartered for a voyage to Manila. On December 12, 1891, the defendant, being informed of the facts, made the following indorsement on the policy: "Dec. 12th, 1891. Having deviated from Seattle & Tacoma to Sydney N. S. W. this policy now attaches at & thence via Philippine Islands to port of advice &/or discharge in Atlantic United States & 15 days on vessel in port after arrival. Add prem 2½% \$421. Fuller Pst." It is argued that the words "now attaches" made the policy attach at once to the Manila freight, and that otherwise the indorsement was unnecessary. But we think this is straining the word "now" too far. "Now" seems to us merely to mark the antithesis between the former and the present description of the voyage, and to accept the new description henceforth. It means "after and in view of the deviation mentioned." The indorsement may not have been absolutely necessary, considering the clause which we have quoted as to deviation, but it fixed specifically the additional premium which by the terms of the original policy was to be paid, and gave the insured the

advantage of an express assent to the very things done and intended, instead of a general permission which included them only by construction.

By the terms of the agreed statement the plaintiff is entitled to judgment for \$293.48, admitted to be due from the defendant as a general average charge on freight, but for nothing more.

Judgment for plaintiff for \$293.48.

(159 Mass. 375)

**COMMONWEALTH v. MORGAN.**

(Supreme Judicial Court of Massachusetts.  
Suffolk. June 21, 1893.)

**LARCENY—PHOTOGRAPH AS EVIDENCE—VERIFICATION BY TRIAL JUDGE.**

1. On a trial for larceny a witness testified that at the time of the commission of the crime defendant had side whiskers and a mustache, while certain witnesses for defendant testified that they had known defendant since the spring of 1887, and that he had never worn side whiskers. *Held*, that it was proper to admit in evidence a photograph of defendant to show that when it was taken, in July, 1887, he wore side whiskers.

2. Whether the photograph was sufficiently verified was a question for the presiding judge, and his decision is not subject to exception.

Exceptions from superior court, Suffolk county; Franklin G. Fessenden, Judge.

James Morgan, otherwise called Shang Campbell, was convicted of stealing certain notes, orders, etc., and he excepts. Exceptions overruled.

G. C. Travis, First Asst. Atty. Gen., for the Commonwealth. P. J. Casey, for defendant.

**MORTON, J.** The defendant was identified by Mr. Wright and another witness for the government as the man who stepped up to him in the bank and engaged him in conversation and simultaneously with whose departure Mr. Wright discovered that the notes, orders, and book were gone. The jury was not bound to believe the testimony as to the alibi. It was for the jury to say upon all the evidence whether the defendant was in the bank at the time the witnesses for the government said he was, and whether he took or had a hand in taking the notes and order which he was accused of stealing.

One of the government witnesses said that the defendant had at the time side whiskers and a mustache. As bearing on the question of identity, certain witnesses for the defendant testified that they had known him since the spring of 1887, and that he had never worn side whiskers. The photograph was properly admitted for the purpose of showing that when it was taken, which was in July, 1887, the defendant wore side whiskers, and thus of contradicting the witness who had testified to the contrary. *Com. v. Campbell*, (Mass.) 30 N. E. Rep. 72; *Com. v. Goodnow*, 154 Mass. 487, 28 N. E. Rep. 677; *Randall v. Chase*, 133 Mass. 210; *Blair v. Pelham*, 118 Mass. 420. Whether it was sufficiently verified was for the presiding justice, and his decision is not subject to exception. *Blair v. Pelham*, *supra*.

The defendant has argued other points, upon which he does not appear to have taken any exceptions or asked any ruling, and which cannot be raised here for the first time. Exceptions overruled.

(159 Mass. 378)

**DAIGLE v. LAWRENCE MANUF'G CO.**

(Supreme Judicial Court of Massachusetts.  
Suffolk. June 21, 1893.)

**MASTER AND SERVANT—ASSUMPTION OF RISK—NEGLIGENCE.**

1. In an action against a mill company for injuries to plaintiff while removing waste from the inside of a slowly-revolving cylinder, it appeared that the usual way to remove waste was while the cylinder was so revolving; that plaintiff had been doing the work 15 months, and had been fully instructed; and that when a door on the cylinder was open it was light, so that revolving arms might be seen inside, one of which had occasioned the injury. *Held*, that plaintiff had assumed the risk of his employment.

2. The fact that the door was not provided with a secure fastening did not show negligence on the part of defendant, as the same must necessarily have been open at the time of the accident, to enable plaintiff to thrust in his hand.

Exceptions from superior court, Suffolk county; James R. Dunbar, Judge.

Action by Modiste Daigle against the Lawrence Manufacturing Company to recover damages for the loss of an arm sustained while at work removing waste from the inside of a cylinder in defendant's mill. A verdict was directed for defendant, and plaintiff excepted. Exceptions overruled.

C. Cowley, for plaintiff. L. S. Dabney, for defendant.

**ALLEN, J.** The work which the plaintiff undertook to do was to remove the waste as it accumulated inside of the cylinder. The only negligence on the part of the defendant, which the plaintiff's counsel complains of at the argument in this court, is that the sliding door was not properly secured; but this had nothing to do with the accident to the plaintiff, who could not have put his hand into the cylinder to remove the waste unless the door had been open. If not already open, he would have had to open it.

From the plaintiff's own testimony, and that introduced by him, it appeared that it was usual to remove the waste while the cylinder was revolving; that he had been doing that work for about 15 months; that he had received full instructions as to the manner of performing it; that the cylinder revolved slowly,—not more than two or three times in a minute; that at the time of the accident it was not revolving faster than usual; that when the sliding door was open it was light, so that the revolving arms on the inside of the cylinder could be seen; that he put in his hand to remove the waste that was gathering, as he very often had done before, but this time he did not take it out soon enough, and it was caught between one of the revolving arms and a stationary crossbar. Not only was there no negligence on the part of the defendant, but it

is plain that the plaintiff understood and appreciated and assumed the risk of such danger as there was in doing the work which he undertook to do. *O'Maley v. Gas-Light Co.*, 157 Mass. —, 32 N. E. Rep. 1119, and cases cited; *Foley v. Machine Works*, 149 Mass. 294, 21 N. E. Rep. 304. Exceptions overruled.

(159 Mass. 317)

**CITY OF LOWELL v. GLIDDEN.**

(Supreme Judicial Court of Massachusetts.  
Middlesex. June 21, 1893.)

**DEFECTIVE STREETS—INJURY TO TRAVELER—REMEDY OF CITY AGAINST ABUTTING OWNER.**

Defendant's building abutted on a public street. Before it was an area way extending somewhat into the street, and constructed for the purpose of lighting defendant's cellar, but whether by a former owner of the building, or by the city under a mistaken belief as to the location of the boundary between the street and defendant's land, did not appear. The area was not on defendant's land. *Held*, that the city could not maintain an action against defendant for damages which it had been obliged to pay to one who had fallen into the area.

Report from superior court, Middlesex county; John Hopkins, Judge.

Action by the city of Lowell against Lucy Emma Glidden for amount of a judgment recovered by Charles F. Hamilton against the city on account of personal injuries. The injuries were sustained by falling into an area way placed in front of defendant's premises, and extending into the street some eight-tenths of a foot. Defendant had judgment, and the cause was, at plaintiff's request, reported for determination to this court. Judgment for defendant.

John J. Hogan, for plaintiff. J. N. Marshall, M. L. Hamblet, and John C. Burke, for defendant.

**LATHROP, J.** It must be conceded in favor of the plaintiff that, if a person has created a nuisance in a public street, and a city is, in consequence thereof, obliged to pay damages to a traveler on the street, the fact that the city is in fault in not removing the nuisance does not make it in pari delicto with the creator of the nuisance, and prevent recovery against him. *Lowell v. Railroad Co.*, 23 Pick. 24; *Lowell v. Short*, 4 Cush. 275; *West Boylston v. Mason*, 102 Mass. 341; *Swansey v. Chace*, 16 Gray. 303; *Woburn v. Railroad Co.*, 109 Mass. 283; *Campbell v. Somerville*, 114 Mass. 334; *Westfield v. Mayo*, 122 Mass. 100. See, also, *Churchill v. Holt*, 127 Mass. 165, and 181 Mass. 67; *Railroad Co. v. Slaven*, 148 Mass. 363, 19 N. E. Rep. 372. For the purposes of the case we may assume, without deciding, that the responsibility of the defendant is the same as if the premises at the time she purchased them had not been in the possession of a tenant at will of her grantor, and she had then let them to a tenant at will, without making any contract as to repairs. See *Delay v. Savage*, 145 Mass. 38, 12 N. E. Rep. 841, and cases cited; *Clifford v. Cotton Mills*, 146 Mass. 47, 15 N. E. Rep. 84; *Lufkin v. Zane*, 137 Mass.

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117, 31 N. E. Rep. 757. The difficulty in the plaintiff's case lies deeper. The judge who tried the case in the court below has found no fact which is so conclusive against the defendant that we can say, as matter of law, that judgment ought to be entered for the plaintiff. The sunken area is not on the land of the defendant. It was made by some person other than the defendant, and she did nothing to maintain it. Whether it was made by a former owner of the house is not found. The report states that the well and the sidewalk were not built until after the erection of the building, but whether they were built by the then owner of the building or by the city does not appear. Although the judge finds that the bricks which line the sunken area abut against the foundation wall of the defendant's building, and are united to it by cement, and that the area was constructed for the purpose of lighting the cellar of the defendant's building, it cannot be said that these facts are conclusive in favor of the plaintiff. There is nothing to show that all this was not done by the agents or servants of the city when the sidewalk was built, under a mistaken belief as to the location of the boundary line between the street and the adjoining land.

Judgment for the defendant.

(159 Mass. 320)

**HUBBARD v. BOSTON & A. R. CO.**

(Supreme Judicial Court of Massachusetts.  
Berkshire. June, 1893.)

**RAILROAD COMPANIES—ACCIDENTS AT CROSSINGS—FAILURE TO SIGNAL APPROACH—BURDEN OF PROOF.**

1. In an action against a railroad company for the wrongful death of plaintiff's intestate at a public highway crossing, the burden of proving that defendant did not ring the bell continuously, or alternately with the sounding of the whistle, for 80 rods from, and until the train has passed, the crossing, as required by statute, is upon plaintiff.

2. In such action plaintiff relied on the testimony of two men working near the crossing. One of the men testified that he did not hear any bell, and then added that he noticed nothing about the bell at the time. The other testified that he did not hear any bell at the time. *Held*, that the evidence failed to sustain the burden on plaintiff, to show that there was not a continuous ringing of the bell.

Exceptions from superior court, Berkshire county; Robert R. Bishop, Judge.

Action by Caroline M. Hubbard, as administratrix of William L. Hubbard, against the Boston & Albany Railroad Company, for the wrongful death of plaintiff's intestate. Judgment for plaintiff. Defendant excepts. Exceptions sustained.

A. J. Waterman and J. F. Noxon, for plaintiff. M. Wilcox, for defendant.

**MORTON, J.** The case was submitted to the jury by the presiding justice on two questions: First, was the bell rung continuously, or alternately with the sounding of the whistle, for 80 rods from, and until the engine passed, the crossing? And, secondly, was the plaintiff's intestate guilty of gross or willful negligence? The

burden was on the plaintiff to show that the bell was not rung continuously, or alternately with the sounding of the whistle. If we assume, in favor of the plaintiff, what the defendant appears to concede,—that, though the whistle may have been blown at the whistling post, it was not sounded continuously till the crossing was reached,—that does not settle matters in his favor. The statute requires the whistle to be blown, or the bell to be rung, continuously or alternately. The only testimony on which the plaintiff relies to show that the bell was not rung continuously is the testimony of two men working near the crossing, one of whom testified that he did not hear any bell, and then immediately added that he never noticed anything at all about the bell at the time, and the other of whom testified that he did not hear any bell rung at the time of the accident. Neither says it was not rung. If their situation and occupation had been such that naturally they would have observed whether the bell was or was not rung, then the fact that one or both of them said he did not hear it rung would be evidence tending to show that it was not rung. But the testimony does not disclose such a state of things. On the contrary, both witnesses had their attention engrossed by the building of the fence, and neither was interested, for any reason, in the approach of the train. To say that one did not hear, when there was not only no reason why he should hear, but, from his occupation, reason why he should not hear, is very little, if at all, stronger than to say one does not remember to have heard. We think the plaintiff has failed to sustain the burden of proof that was upon her, to show that the bell was not rung continuously. *Menard v. Railroad Co.*, 150 Mass. 387, 23 N. E. Rep. 214; *Tully v. Railroad Co.*, 134 Mass. 499; *Johanson v. Railroad Co.*, 153 Mass. 57, 26 N. E. Rep. 426; *Hillyer v. Dickinson*, 154 Mass. 502, 28 N. E. Rep. 905.

Exceptions sustained.

(159 Mass. 381)

**WILL M. KINNARD CO. v. CUTTER  
TOWER CO.**

(Supreme Judicial Court of Massachusetts.  
Suffolk. June 21, 1893.)

**ACTION ON CONTRACT—PAROL EVIDENCE—ADMISSIBILITY.**

In an action on a written contract for the sale of goods, which purports to contain the entire agreement between the parties, and to be absolute, evidence of a conversation which tends to show that if on trial the goods were not satisfactory the buyer was not to be liable, is not admissible, since it varies the terms of the written contract.

Exceptions from superior court, Suffolk county; Caleb Blodgett, Judge.

Action by the Will M. Kinnard Company against the Cutter Tower Company for the price of goods sold. Judgment for plaintiff. Defendant excepts. Exceptions overruled.

At the trial, without a jury, the plaintiff introduced in evidence the contract, the execution of which was admitted by

the defendant; and, it being further admitted by the defendant that goods such as were mentioned in the contract had been delivered by the plaintiff to the defendant, the plaintiff rested his case. Defendant then offered to prove that before the contract was drawn up the plaintiff's agent called at the defendant's place of business, had an interview with the president of defendant company, and asked him to purchase some of his goods, exhibiting at the same time one of the articles referred to, attached to a large account book,—that being the use to which said articles were designed to be put; that the president replied that his company had a patented account book binding which it was manufacturing and selling, and if the article referred to would go with his binding he thought he could use it, but otherwise it would be of no use to him, and he did not want it; that the plaintiff's agent then said that it would go with that binding, and would be found fit for the defendant's use; that thereupon the plaintiff's agent produced a printed blank, which he filled out, signed himself, and handed it to said president, who wrote under the word "Accepted" at the foot of the paper, his company's name, and delivered it to the said agent; that whether said article was fit for its use the defendant's president could not ascertain by inspection of the sample shown by said agent but only by actual experiment by a practical binder, which the president was not; that as soon as he could, after said articles arrived, they were attempted to be adapted to the defendant's use by a practical binder of long experience, employed by the defendant for that purpose, but were found by such binder unfit for the defendant's use; and that thereupon the defendant notified the plaintiff of that fact, and that the goods were held subject to its order, and that they were subsequently and before the bringing of this action shipped to the plaintiff, but that the plaintiff refused to receive them. The court ruled that the testimony offered could not be admitted, as tending to vary the terms of a written contract, and found for the plaintiff.

William I. Monroe, for plaintiff. Charles H. Drew, for defendant.

**MORTON, J.** We are unable fairly to construe, as a condition precedent to the taking effect of the contract, the talk between the plaintiff's agent and the defendant's president. The contract purports on its face to contain the entire agreement between the parties, and to be an absolute one. The evidence offered tended in effect to show that, if the defendant's president found on trying the article that it would not go with their account book, then the defendant was not to be liable on the contract. Assuming that the talk was not seller's talk, such an arrangement was executory in its character, and constituted a part of the agreement as made, and should have been embraced in the written contract. To admit evidence of it now would be to vary materially by oral testimony the written contract. *Lillenthal v. Brewing Co.*, 164 Mass. 188, 28 N. E. Rep.

151; *Black v. Batchelder*, 120 Mass. 171; *Fitz v. Comey*, 118 Mass. 100.  
 Exceptions overruled.

(159 Mass. 313)

**TOY v. UNITED STATES CARTRIDGE CO.**

(Supreme Judicial Court of Massachusetts.  
 Middlesex. June 21, 1893.)

**INJURY TO SERVANT—DEFECTS—NEGLIGENCE—  
 QUESTIONS FOR JURY.**

1. In an action for personal injuries by the breaking of a punch in a machine on which plaintiff was at work, plaintiff testified that she found the machine out of order, and informed the foreman, who had new dies and a new punch put in, and that she was then told to start the machine. The second time the punch went down it broke, causing the injury complained of. *Held*, that whether there was a defect, and, if so, whether it was sufficient to have caused the injury, was for the jury.

2. It was also for the jury whether failure to discover the defect, if any there was, was due to defendant's negligence.

Exceptions from superior court, Middlesex county; John Hopkins, Judge.

Action by Kate Toy against the United States Cartridge Company to recover for personal injuries due to the breaking of a punch in a machine on which plaintiff was at work. The court directed a verdict for defendant. Plaintiff excepted. Exceptions sustained.

P. J. Hoar, for plaintiff. J. N. Marshall, M. L. Hamblet, and John C. Burke, for defendant.

MORTON, J. There is no doubt that there was evidence for the jury on the question of the plaintiff's due care. Indeed, the defendant does not argue that there was not. The real question is whether there was any evidence of negligence on the part of the defendant. It was the duty of the defendant, in the exercise of reasonable care, to see that the machine on which the plaintiff was set to work was in a safe condition, and was suitable for the purpose for which it was used. This obligation applied to all its parts. The punch formed a part of it. *Rice v. King Philip Mills*, 144 Mass. 229, 11 N. E. Rep. 101. It was fitted to, and inserted in, it, was necessary to its use, and was furnished by the defendant for use in it, and as a part of it. A machine may be so constructed, and its operation may be such, as to call for a frequent replacement of one or more of its constituent parts. Such parts, when adjusted in the machine, become as much a part of it as if included in the original construction, and a defect in one of them is a defect in the machine. The duty of seeing that such parts are not defective is one incumbent on the master. It is not a matter of ordinary repair from day to day, which may be intrusted to a servant. The defendant could not, therefore, avoid responsibility by delegating this duty to persons whom it believed to be competent, and who were in fact competent, to perform it. If the injury to the plaintiff was due to a defect in the punch, which might have been discovered by the exercise of reasonable care on their part,

but was not, the defendant is liable for their negligence. *Moynihan v. Hills Co.*, 146 Mass. 592, 16 N. E. Rep. 574, and cases cited.

The plaintiff testified that she was required to examine the shells from time to time to see if they were scratching, and that on the day of the accident she found that they were scratching, and informed the foreman of it, and he sent for one McParland, the second hand, to look after the machine. McParland took out the dies and punch, and put in new dies and a new punch, and then told the plaintiff to start the machine by a signal, which she did. The first time the punch went down through the plate and dies all right, there being no shell, but the second time it broke, and caused the injury complained of. The plaintiff further testified that before she started the machine she saw a small black mark extending half way round the punch, about in the middle of the punch, and, in further description of it, said "that she didn't know what this black mark meant, but that it looked like a knitting needle that had gone rusty and black." There was also testimony tending to show that the punch broke in the middle, and some of the witnesses said that they never knew before of a punch breaking in the middle, but that they usually bent or broke at the point. It also appeared that after the accident the broken punch was examined by the foreman and McParland; that the former passed it to one Devine, who was the agent and superintendent, who examined it, and passed it back to the foreman, who threw it away; and that the only other person who appeared to have seen it was a woman who worked on a machine near the plaintiff, and who testified that "she could see that it [the punch] was broken in one place, in the middle," but that "she did not know what the condition of the broken surfaces were, as the foreman sent her to her work." We think it would have been competent, on this evidence, for the jury to find that there was a defect in the punch, in the middle, and that the break in the middle was due to it. It is true that the foreman and McParland, who were called as witnesses by the defendant, testified that they saw nothing the matter with the punch, and that Devine, who was called by the plaintiff, testified that though he found, on examining it with a microscope, there was a flaw in it, the flaw did not extend to the outside, and that he did not think it was possible to have discovered the defect which he saw on the inside of the punch, and that in his judgment the flaw which he found was not sufficient to have caused the defect. He also testified that bad punches were usually thrown away. But the weight to be given to all this evidence was clearly for the jury. We cannot say that there was no evidence of a defect in the punch, or that, if there was one, that there was no evidence that the accident was not caused by it.

It was also a question for the jury, under all the circumstances, whether the failure to discover the defect, if there was one, was due to negligence on the part of the defendant, or of those charged by it with

the duty of making and examining the punches. The material from which, the manner in which, the punches were made, and the system of inspection adopted by defendant, were all before the jury; and it was for them to say whether they were all that reasonable care required, or whether a more careful inspection should have been made, and whether, if it had been made, the defect would have been discovered. There was testimony that if there was a crack on the outside it might be filled up in polishing, or in turning down, the punch. It was for the jury to say, also, whether the defect, if there was one, was such that failure to discover it afforded evidence of negligence on the part of the person or persons charged with the duty of making or inspecting the punch.

The testimony as to what Devine said at the former trial was rightly excluded on the ground on which, evidently, it was offered. *Richstain v. Washington Mills Co.*, (Mass.) 82 N. E. Rep. 908. A majority of the court is of opinion that the entry must be, exceptions sustained, and it is so ordered.

(159 Mass. 293)

#### HANSON v. GLOBE NEWSPAPER CO.

(Supreme Judicial Court of Massachusetts.  
Suffolk. June 21, 1893.)

##### **LIBEL—INTENT—MISTAKE IN NAME.**

In an action against a newspaper for libel it appeared that plaintiff was a real-estate and insurance broker of South Boston, and that, in an article giving an account of a person who was fined in a police court, the paper described the prisoner as "H. P. Hanson, a real-estate and insurance broker of South Boston," while the name of the prisoner was A. P. H. Hanson, also a real-estate and insurance broker of South Boston, and that the intention was to describe the proper person, and that plaintiff's name was used by mistake. *Held*, that plaintiff could not recover, for the reason that, while his name was used in the article, there was no intention to refer to him, and that in order to prove the libel it was not sufficient to show that plaintiff's name was used in the article, but it must be further shown that he was the person whom the article was intended to describe. *Holmes, Morton, and Barker, JJ.*, dissenting.

Report from superior court, Suffolk county; Charles F. Thompson, Judge.

Action by Hadley P. Hanson against the Globe Newspaper Company to recover damages for libel. On findings by the court without a jury, the case was reported for determination. Judgment on findings ordered.

Moulton, Loring & Loring, for plaintiff.  
Grant M. Palmer, for defendant.

**KNOWLTON, J.** The defendant published in its newspaper an article describing the conduct of a prisoner brought before the municipal court of Boston, and the proceedings of the court in the case, designating him as "H. P. Hanson, a real-estate and insurance broker of South Boston." He was in fact a real-estate and insurance broker of South Boston, and the article was substantially true, except that he should have been called A. P. H. Hanson, instead of H. P. Hanson.

The plaintiff, H. P. Hanson, is also a real-estate and insurance broker in South Boston, and in writing the article the reporter used his name by mistake. The justice of the superior court, before whom the case was tried without a jury, "found as a fact that the alleged libel declared on by the plaintiff was not published by the defendant of and concerning the plaintiff;" and the only question in the case is whether this finding was erroneous, as a matter of law.

In a suit for libel or slander it is always necessary for the plaintiff to allege and prove that the words were spoken or written of and concerning the plaintiff. In *Baldwin v. Hildreth*, 14 Gray, 221, the declaration was adjudged bad on demurrer because this allegation was wanting. The rule is reaffirmed, and authorities are cited, in *McCallum v. Lamble*, 145 Mass. 234, 13 N. E. Rep. 899. The form of declaration prescribed by the practice act, in slander, uses the phrase, "words spoken of the plaintiff," and in libel, "false and malicious libel concerning the plaintiff." Pub. St. c. 167, § 94. It has often been held that it is a question of fact for the jury whether the words were or were not spoken or written of and concerning the plaintiff. *Van Vechten v. Hopkins*, 5 Johns. 211, 221; *Gibson v. Williams*, 4 Wend. 320; *Smart v. Blanchard*, 42 N. H. 137; *De Armond v. Armstrong*, 37 Ind. 35; *Goodrich v. Davis*, 11 Metc. (Mass.) 473, 480, 481, 484; *Miller v. Butler*, 6 Cush. 71. The defendant's meaning in regard both to the person to whom the words should be applied, and the imputations against him, is always to be ascertained. In *Smart v. Blanchard*, *ubi supra*, it is said that "the meaning in this respect [as to the person to whom the libel applies] is undoubtedly a question of fact for the jury." It is also said that when the meaning is ambiguous it is incumbent on the plaintiff "to show that the defendant intended to apply his remarks to the plaintiff." In *De Fann v. Malcomson*, 1 H. L. Cas. 637, which was an action for libel, brought by copartners, the lord chancellor assumes that the plaintiffs must prove "that the party writing the libel did intend to allude to them." In Pub. St. c. 167, § 94, the rule is laid down, as applicable "in actions for written and printed as well as oral slander," that if the meaning is not clear there must be innuendoes to make the words intelligible, "in the same sense in which they were spoken." *Chenery v. Goodrich*, 98 Mass. 224, 229, assumes that it must appear that the plaintiff was referred to in the publication; and *Young v. Cook*, 144 Mass. 38, 10 N. E. Rep. 719, is of similar import. *Odgers on Libel and Slander* (at page 127) discusses the topic, "Certainty as to the Person Defamed." In *Com. v. Kneeland*, 20 Pick. 206, 216, Chief Justice Shaw says that in actions of libel and slander it is the general rule that "the language shall be construed in the sense in which the writer or speaker intended it." In *Smith v. Ashley*, 11 Metc. (Mass.) 367, the necessity of proving the defendant's actual intention in regard to the person referred to was affirmed much

more strongly than there is any occasion to affirm it, and perhaps more strongly than we should be prepared to affirm it, in the present case. It was held that the publisher of a newspaper, containing an article which he believed to be a fictitious narrative or mere fancy sketch, was not liable to the plaintiff, although the article was libelous, and was intended by the writer to be applied to the plaintiff. The court said that in such a case the writer alone was responsible. In every action of this kind the fundamental question is, what is the meaning of the author of the alleged libel or slander, conveyed by the words used, interpreted in the light of all the circumstances? The reason of this is obvious. Defamatory language is harmful only as it purports to be the expression of the thought of him who uses it. In determining the effect of a slander the questions involved are: What is the thought intended to be expressed? and how much credit should be given to him who expresses it? The essence of the wrong is the expression of what purports to be the knowledge or opinion of him who utters the defamatory words, or of some one else, whose language he repeats. His meaning, to be ascertained in a proper way, is what gives character to his act, and makes it innocent or wrongful. The damages depend chiefly upon the weight which is to be given to his expression of his meaning, and all the questions relate back to the ascertainment of his meaning.

In the present case we are concerned only with the meaning of the defendant in regard to the person to whom the language of the published article was to be applied, and the question to be decided is, how may his meaning legitimately be ascertained? Obviously, in the first place, from the language used; and, in construing and applying the language, the circumstances under which it was written, and the facts to which it relates, are to be considered, so far as they can readily be ascertained by those who read the words, and who attempt to find out the meaning of the author in regard to the person of whom they were written. It has often been said that the meaning of the language is not necessarily that which it may seem to have to those who read it as strangers, without knowledge of facts and circumstances which give it color and aid in its interpretation, but that which it has when read in the light of events which have relation to the utterance or publication of it. For the purposes of this case it may be assumed, in favor of the plaintiff, that if the language used in a particular case, interpreted in the light of such events and circumstances attending the publication of it as could readily be ascertained by the public, is free from ambiguity in regard to the person referred to, and points clearly to a well-known person, it would be held to have been published concerning that person, although the defendant should show that, through some mistake of fact, not easily discoverable by the public, he had designated in his publication a person other than the one whom he intended to designate. It

may well be held that where the language, read in connection with all the facts and circumstances which can be used in its interpretation, is free from ambiguity, the defendant will not be permitted to show that through ignorance or mistake he said something, either by way of designating the person, or making assertions about him, different from that which he intended to say; but his true meaning should be ascertained, if it can be, with the aid of such facts and circumstances of the publication as may easily be known by those of the public who wish to discover it. Whether the defendant should ever be permitted to state his undisclosed intention in regard to the person of whom the words are used may be doubtful. If language purporting to be used of only one person would refer equally to either of two different persons of the same name, and if there were nothing to indicate that one was meant, rather than the other, there is good reason for holding that the defendant's testimony in regard to his secret intention might be received, but perhaps such a case is hardly supposable. Odgers, in his book on Libel and Slander, (at page 129,) says: "So, if the words spoken or written, though plain in themselves, apply equally well to more persons than one, evidence may be given of both the cause and occasion of publication, and of all the surrounding circumstances affecting the relation between the parties, and also any statement or declaration made by the defendant as to the person referred to." In *Reg. v. Barnard*, 43 J. P. 127, when it was uncertain whether the libel referred to the complainant, or not, and when the language was applicable to him, Lord Chief Justice Cockburn held the affidavit of the writer, that he did not mean him, but some one else, to be a sufficient reason for refusing process. In *De Armond v. Armstrong*, 37 Ind. 35, evidence was received of what the witnesses understood in regard to the person referred to. In *Smart v. Blanchard*, 42 N. H. 137, it is stated that extrinsic evidence is to be received "to show that the defendant intended to apply his remarks to the plaintiff," when his meaning is doubtful. *Goodrich v. Davis*, 11 Metc. (Mass.) 473, 480, 481, 484, and *Miller v. Butler*, 6 Cush. 71, are of similar purport. See, also, *Barwell v. Adkins*, 1 Man. & G. 807; *Knapp v. Fuller*, 55 Vt. 311; *Com. v. Morgan*, 107 Mass. 199, 201.

If the defendant's article had contained anything libelous against A. P. H. Hanson, there can be no doubt that he could have maintained an action against the defendant for this publication. The name used is not conclusive in determining the meaning of the libel in respect to the person referred to. It is but one fact to be considered with other facts upon that subject. Fictitious names are often used in libels, and names similar to that of the person intended, but differing somewhat from it. A. P. H. Hanson could have shown that the description of him by name, residence, and occupation was perfect, except the use of the initials "H. P." instead of "A. P. H.;" that the article referred to an occasion on which he was present, and gave a



description of conduct of a prisoner, and of proceedings in court, which was correct in its application to him, and no one else. The internal evidence, when applied to facts well known to the public, would have been ample to show that the language referred to him, and not to the person whose name was used. So, in the present suit, the court had no occasion to rely on the testimony of the writer as to the person to whom the language was intended to apply. The language itself, in connection with the publicly known circumstances under which it was written, showed at once that the article referred to A. P. H. Hanson, and that the name "H. P. Hanson" was used by mistake. As the evidence showed that the words were published of and concerning A. P. H. Hanson, the finding that they were not published of the plaintiff followed, of necessity. The article was of such a kind that it referred, and could refer, to one person only. When that person was ascertained it might appear that the publication, as against him, was or was not libelous; and his rights, if he brought a suit, would depend upon the finding in respect to that. No one else would have a cause of action, even if, by reason of identity of name with that used in the publication, he might suffer some harm. For illustration, suppose a libel is written concerning a person described as "John Smith, of Springfield." Suppose there are five persons in Springfield of that name. The language refers to but one. When we ascertain, by legitimate evidence, to which one the words are intended to apply, he can maintain an action. The other persons of the same name cannot recover damages for a libel merely because of their misfortune in having a name like that of the person libeled. Or, if the defendant can justify by proving that the words were true, and published without malice, he is not guilty of a libel, even if, written of other persons of the same name, of whose existence, very likely, he was ignorant, the words would be libelous; otherwise, one who has published that which, by its terms, can refer to but one person, and be a libel on him only, might be responsible for half a dozen libels on as many different persons, and one who has justifiably published the truth of a person might be liable to several persons of the same name, of whom the language would be untrue. The law of libel has never been extended, and should not be extended, to include such cases.

Whether there should be a liability founded on negligence in any case where the truth is published of one to whom the words, interpreted in the light of accompanying circumstances, easily ascertainable by those who read them, plainly apply, and when, by reason of identity of names, or similarity of names and description, a part of the public might think them applicable to another person, of whom they would be libelous, is a question which does not arise on the pleadings in this case. So far as we are aware, no action for such a cause has ever been maintained. It is ordinarily to be presumed, although it may not always be the fact, that those

who are enough interested in a person to be affected by what is said about him will ascertain, if they easily can, whether libelous words, which purport to refer to one of his name, were intended to be applied to him or to some one else.

The question in this case—whether the words were published of and concerning the plaintiff—was one of fact, on all the evidence. Unless it appears that the matters stated in the report would not warrant a finding for the defendant, there must be judgment for him, even if the finding of fact might have been the other way. We are of opinion that the finding was well warranted, and there must be judgment on the finding.

HOLMES, J., (dissenting.) I am unable to agree with the decision of the majority of the court, and, as the question is of some importance, in its bearing on legal principles, and as I am not alone in my views, I think it proper to state the considerations which have occurred to me.

The first thing to determine is what question is presented. If we were to stop with the words in which the conclusion of the report is couched, there would be no question at all. "The court found as a fact that the alleged libel declared on by the plaintiff was not published by the defendant or concerning the plaintiff." But it is not to be supposed that a justice of the superior court would send a report to this court in which he did not intend to present a question of law. The so-called finding either is a ruling on the effect of the facts previously found, or, at least, putting it in the most favorable way for the defendant, is a conclusion drawn from those facts alone. Whether the conclusion be one of fact or law, the question is whether it is justified by the facts set forth, without other facts or evidence.

The facts are that libelous matter was published in an article by the defendant about "H. P. Hanson, a real-estate and insurance broker of South Boston;" that the plaintiff bore that name and description, and, so far as appears, that no one else did; but that the defendant did not know of his existence, and intended to state some facts about one Andrew P. H. Hanson, also a real-estate and insurance broker of South Boston, concerning whom the article was substantially true.

The article described the subject of it as a prisoner in the criminal dock, and states that he was fined, and this makes it possible to speak of the article as one describing the conduct of a prisoner. But this mode of characterization seems to us misleading. In form it describes the plight and conduct of "H. P. Hanson, a real-estate and insurance broker of South Boston." In order to give it any different subject, or to give the subject any further qualifications or description, you have to resort to the predicate, to the very libelous matter itself. It is not necessary to say that this never can be done, but it must be done with great caution. The very substance of the libel complained of is the statement that the plaintiff was a prisoner in the criminal dock, and was fined. The object of the article, which is a newspaper crim-

inal court report, is to make that statement. The rest of it amounts to nothing, and is merely an attempt to make the statement amusing. If an article should allege falsely that A. murdered B. with a knife, it would not be a satisfactory answer to an action by A. that it was a description of the conduct of the murderer of B., and was true concerning him. The public, or all except the few who may have been in court on the day in question, or who consult the criminal records, have no way of telling who was the prisoner, except by what is stated in the article; and the article states that it was "H. P. Hanson, a real-estate and insurance broker of South Boston."

If we are right so far, the words last quoted, and those words alone, describe the subject of the allegation, in substance as well as in form. Those words also describe the plaintiff, and no one else. The only ground, then, on which the matters alleged of and concerning that subject can be found not to be alleged of and concerning the plaintiff, is that the defendant did not intend them to apply to him; and the question is narrowed to whether such a want of intention is enough to warrant the finding, or to constitute a defense, when the inevitable consequence of the defendant's acts is that the public, or that part of it which knows the plaintiff, will suppose that the defendant did use its language about him.

On general principles of tort the private intent of the defendant would not exonerate it. It knew that it was publishing statements purporting to be serious, which would be hurtful to a man, if applied to him. It knew that it was using, as the subject of those statements, words which purported to designate a particular man, and would be understood by its readers to designate one. In fact, the words purported to designate, and would be understood by its readers to designate, the plaintiff. If the defendant had supposed that there was no such person, and had intended simply to write an amusing fiction, that would not be a defense; at least, unless its belief was justifiable. Without special reason it would have no right to assume that there was no one within the sphere of its influence to whom the description answered. The case would be very like firing a gun into a street, and, when a man falls, setting up that no one was known to be there. *Com. v. Pierce*, 138 Mass. 165, 178; *Hall's Case*, J. Kel. 40; *Rex v. Burton*, 1 Strange, 481; *Rigmaidon's Case*, 1 Lev. Cr. Cas. 180; *Reg. v. Desmond*, 11 Cox, Crim. Cas. 146. So, when the description which points out the plaintiff is supposed by the defendant to point out another man, whom in fact it does not describe, the defendant is equally liable as when the description is supposed to point out nobody. On the general principles of tort the publication is so manifestly detrimental that the defendant publishes it at the peril of being able to justify it, in the sense in which the public will understand it.

But, in view of the unfortunate use of the word "malice" in connection with libel and slander, a doubt may be felt whether

actions for these causes are governed by general principles. The earliest forms of the common law known to me treat slander like any other tort, and say nothing about malice. 4 Seld. Soc. Pub. 40, 48, 61. Probably the word was borrowed at a later, but still early, date, from the "malitia" of the canon law. By the canon law, one who maliciously charged another with a grave sin incurred excommunication, *ipso facto*. *Lynd. Prov. Lib. 5, tit. 17*, (*De Sent. Excomm. c. 1, Auctoritate Dei*;) *Ought. Ordo Jud. tit. 261*. Naturally, "malitia" was defined as "cogitatio malae mentis." *Lynd. Prov. ubi supra, note 1*. Naturally, also, for a time, the common law followed its leader. Three centuries ago it seems to have regarded the malice alleged in slander and libel as meaning the malice of ethics and the spiritual law.

In the famous case where a parson in a sermon repeated out of Fox's Book of Martyrs the story "that one Greenwood, being a perjured person, and a great persecutor, had great plagues inflicted upon him, and was killed by the hand of God, whereas in truth he never was so plagued, and was himself present at that sermon," and afterwards sued the parson for the slander, Chief Justice Wray instructed the jury "that it being delivered but as a story, and not with any malice or intention to slander any, he was not guilty of the words maliciously, and so was found not guilty." *Greenwood v. Prick*, stated in *Brook v. Montague*, Cro. Jac. 90, 91. See, also, *Crawford v. Middleton*, 1 Lev. 82, ad fin.

But that case is no longer law. *Hearne v. Stowell*, 12 Adol. & E. 719, 726. The law constantly is tending towards consistency of theory. For a long time it has been held that the malice alleged in an action of libel means no more than it does in other actions of tort. *Com. v. York*, 9 Metc. (Mass.) 93, 104, 105; *Gassett v. Gilbert*, 6 Gray, 94, 97; *Abrath v. Railway Co.*, L. R. 11 App. Cas. 247, 253, 254. See *Com. v. Pierce*, 133 Mass. 165, 175, et seq.; *White v. Duggan*, 140 Mass. 18, 20, 2 N. E. Rep. 110. Indeed, one of the earliest cases to state modern views was a case of libel. *Bromage v. Prosser*, 4 Barn. & C. 247, 255. Accordingly, it recently was laid down by this court that the liability was the usual liability in tort for the natural consequences of a manifestly injurious act. *Burt v. Newspaper Co.*, 154 Mass. 238, 245, 28 N. E. Rep. 1. A man may be liable civilly, and formerly, at least, by the common law of England, even criminally, for publishing a libel without knowing it, (*Curtis v. Mussey*, 6 Gray, 281; *Com. v. Morgan*, 107 Mass. 199; *Dunn v. Hall*, 1 Ind. 344; *Rex v. Walter*, 3 Esp. 21; *Rex v. Gutch*, *Moody & M.* 433. See, also, *Rex v. Cuthell*, 27 State Tr. 642;) and, it seems, might be liable civilly for publishing it by mistake, intending to publish another paper, (*Mayne v. Fletcher*, 4 Mau. & R. 312, note; *Odg. Libel & S.* [2d Ed.] 5.) So when, by mistake, the name of the plaintiff's firm was inserted under the head, "First Meetings under the Bankruptcy Act," instead of under "Dissolution of Partnership." *Shepherd v. Whitaker*, L. R. 10 C. P. 502. So a man will be liable for

a slander spoken in jest, if the bystanders reasonably understand it to be a serious charge. *Donoghue v. Hayes*, *Hayes*, 265. Of course it does not matter that the defendant did not intend to injure the plaintiff, if that was the manifest tendency of his words. *Curtis v. Mussey*, 6 Gray, 261, 273; *Haire v. Wilson*, 9 Barn. & C. 643. And, to prove a publication concerning the plaintiff, it lies upon him "only to show that that construction which they've put upon the paper is such as the generality of readers must take it in, according to the obvious and natural sense of it." *Rex v. Clerk*, 1 Barnard, 304, 305. See, further, *Fox v. Broderick*, 14 Ir. C. L. 453; *Odg. Libel & S.* (2d Ed.) 155, 269, 435, 638. In *Smith v. Ashley*, 11 Metc. (Mass.) 367, the jury were instructed that the publisher of a newspaper article written by another, and supposed and still asserted by the defendant to be a fiction, was not liable, if he believed it to be so. Under the circumstances of the case, "believed" meant "reasonably believed." Even so qualified, it is questioned by Mr. Odgers if the ruling would be followed in England. *Odg. Libel & S.* (1st Ed.) 387, (2d Ed.) 638. But it has no application to this case, as here the defendant's agent wrote the article, and there is no evidence that he or the defendant has any reason to believe that "H. P. Hanson" meant any one but the plaintiff.

The foregoing decisions show that slander and libel now, as in the beginning, are governed by the general principles of the law of tort, and if that be so the defendant's ignorance that the words which it published identified the plaintiff is no more an excuse than ignorance of any other fact about which the defendant has been put on inquiry. To hold that a man publishes such words at his peril when they are supposed to describe a different man is hardly a severer application of the law than when they are uttered about a man believed, on the strongest grounds, to be dead, and thus not capable of being the subject of a tort. It has been seen that by the common law of England such a belief would not be an excuse. *Hearne v. Stowell*, 12 Adol. & E. 719, 726, denying *Parson Prick's Case*, Cro. Jac. 91.

I feel some difficulty in putting my finger on the precise point of difference between the minority and majority of the court. I understand, however, that a somewhat unwilling assent is yielded to the general views which I have endeavored to justify; and I should gather that the exact issue was to be found in the statement that the article was one describing the conduct of a prisoner brought before the municipal court of Boston, coupled with the later statement that the language, taken in connection with the publicly known circumstances under which it was written, showed at once that the article referred to A. P. H. Hanson, and that the name of H. P. Hanson was used by mistake. I have shown why it seems to me that these

statements are misleading. I only will add, on this point, that I do not know what the publicly known circumstances are. I think it is a mistake of fact to suppose that the public generally know who was before the municipal criminal court on a given day. I think it a mistake of law to say that because a small part of the public have that knowledge the plaintiff cannot recover for the harm done him in the eyes of the greater part of the public, probably including all his acquaintances, who are ignorant about the matter; and I think it, also, no sufficient answer to say that they might consult the criminal records, and find out that probably there was some error. *Blake v. Stevens*, 4 Fost. & F. 232, 240. If the case should proceed further on the facts, it might appear that in view of the plaintiff's character and circumstances his acquaintances would assume that there was a mistake, that the harm to him was merely nominal, and that he had been too hasty in resorting to an action to vindicate himself. But that question is not before us.

With reference to the suggestion that if the article, in addition to what was true concerning A. P. H. Hanson, had contained matter which was false and libelous as to him, he might have maintained an action, it is unnecessary to express an opinion. I think the proposition less obvious than that the plaintiff can maintain one. If an article should describe the subject of its statements by two sets of marks, one of which identified one man, and one of which identified another, and a part of the public naturally and reasonably were led by the one set to apply the statements to one plaintiff, and another part was led in the same way, by the other set, to apply them to another, I see no absurdity in allowing two actions to be maintained. But that is not this case.

Even if the plaintiff and A. P. H. Hanson had borne the same name, and the article identified its subject only by a proper name, very possibly that would not be enough to raise the question, for, as every one knows, a proper name always purports to designate one person, and no other, and although, through the imperfection of our system of naming, the same combination of letters and sounds may be applied to two or more, the name of each, in theory of law, is distinct, although there is no way of finding out which person was named, but by inquiring which was meant. "*Licet idem sit nomen tamen diversum est propter diversitatem personarum.*" *Bract*. 190a; *Com. v. Bacon*, 135 Mass. 521, 525; *Cocker v. Crompton*, 1 Barn. & C. 489; *In re Cooper*, 20 Ch. Div. 611; *Mead v. Insurance Co.*, (Mass.) 32 N. E. Rep. 945; *Kyle v. Kavanagh*, 103 Mass. 356; *Raffles v. Wichelhaus*, 2 Hurl. & C. 906.

MORTON and BARKER, JJ., agree with this opinion.

(145 Ill. 497)

**CRERAR et al. v. WILLIAMS et al.<sup>1</sup>**

(Supreme Court of Illinois. June 19, 1893.)

**CHARITIES—PUBLIC LIBRARY—CONSTRUCTION OF WILL—EQUITY PRACTICE—DESCENT.**

1. Where a bill to contest the validity of a will alleges that the testator died seized of land in other states, without alleging what the laws of those states are, it is no ground for overruling a demurrer to the bill that the effect of sustaining the demurrer will be to prevent the complainant from proving the laws of such other states.

2. Where a will directs the conversion of all the testator's property into money for the purpose of carrying out the provisions of the will, and contains a valid residuary bequest, the heirs have no standing to contest the validity of specific legacies, since the annulling of such legacies could not benefit the heirs, but would merely increase the residuary bequest. 44 Ill. App. 497, affirmed.

3. Rev. St. 1891, c. 39, § 12, which declares that "all such estate, both real and personal, as is not devised or bequeathed in the last will and testament of any person, shall be distributed in the same manner as the estate of an intestate," has no application to void legacies in a will containing a valid residuary bequest. 44 Ill. App. 497, affirmed.

4. The statute of 43 Eliz., in regard to charitable uses, is in force in Illinois.

5. A bequest "for the erection, creation, maintenance, and endowment of a free public library" in a large city is a charitable bequest, and therefore not subject to the rule against perpetuities. 44 Ill. App. 497, affirmed.

6. A bequest to trustees, of all the testator's residuary estate, to sell the same for the establishment of a free public library, followed by a direction to them to organize a corporation to manage the library, does not constitute an executory devise, since the vesting of the bequest is not conditional upon the formation of the corporation. 44 Ill. App. 497, affirmed.

7. The insertion in the will of a clause authorizing the trustees to set apart such part of the estate as they may deem proper, and to pay from the income of such part all costs, charges, and expenses of carrying out the provisions of the will, does not invalidate the residuary bequest, by rendering it uncertain, since the trustees are not thereby authorized to act arbitrarily or unreasonably in fixing the sum to be so set apart. 44 Ill. App. 497, affirmed.

8. Nor does such clause authorize the trustees to use part of the trust fund for noncharitable purposes.

**Appeal from appellate court, first district.**

Bill by Donald Crerar, Peter Crerar, Mary Crerar, Catherine Cramb, Elizabeth McGregor, Duncan Stewart, Alexander Stewart, Peter Stewart, Margaret Crerar, Elizabeth Menzies, Catherine Forsythe, and Elizabeth McIntosh against Norman Williams and Huntington W. Jackson, individually, and as executors of, and trustees under, the last will of John Crerar, deceased, the trustees of the Second Presbyterian Church of Chicago, the Second Presbyterian Church of Chicago, and the Chicago Literary Club, to have certain bequests in said will declared void. The bill was dismissed on demurrer, and the appellate court affirmed the decree. Complainants appeal. Affirmed.

F. A. Stirtan, (A. W. Browne, A. B. Jenks, and W. A. Cunnea, of counsel,) for

appellants. James L. High, Williams, Holt & Wheeler, and Lyman & Jackson, (John H. Mulkey, of counsel,) for appellees.

**WILKIN, J.** This was a bill in chancery, by appellants against appellees, praying that certain clauses in the last will of John Crerar, deceased, be declared void, and the bequests therein named decreed to them, as heirs at law. The circuit court of Cook county sustained a general demurrer to the bill, and entered a decree dismissing it at the costs of the complainants. This is an appeal from the judgment of the appellate court, affirming that decree. 44 Ill. App. 497.

A copy of the will, consisting of 52 paragraphs or clauses, was filed with, and made a part of, the bill. The validity of the instrument as a whole is not questioned, but eight of the bequests therein named are alleged to be void for the reason that the language used by the testator is insufficient, in law, to make valid testamentary gifts. Those bequests are as follows: "23d. The silverware now at Tiffany's, and the books, pictures, ware, and furniture belonging to me, I direct to be distributed among my personal friends by my executors and trustees, in such manner as they shall deem best." "25th. I give and bequeath to the trustees of the Second Presbyterian Church of Chicago, for and on account of said church, so long as said church preserves and maintains the principles of the Presbyterian faith, the sum of one hundred thousand dollars, (\$100,000.)" "26. I give and bequeath to the trustees of the Second Presbyterian Church of Chicago, for and on account of the mission schools of said church in Chicago, the sum of one hundred thousand dollars, (\$100,000.00;) and it is my desire that the income derived from said sum of one hundred thousand dollars (\$100,000.00) shall be employed by said trustees in such manner as shall seem to them best and prudent for the promotion and continuance of the mission schools of said church." "33d. I give and bequeath to the Chicago Bible Society the sum of twenty-five thousand dollars, (\$25,000.)" "39th. I give and bequeath to Norman Williams and Huntington W. Jackson, in trust, for and on account of the Chicago Literary Club, the sum of ten thousand dollars, (\$10,000.)" "44th. I give and bequeath to Norman Williams and Huntington W. Jackson the sum of one hundred thousand dollars, (\$100,000,) to be expended by them in the erection of a colossal statue of Abraham Lincoln; such statue to be upon and within appropriate designs of stone, iron, bronze, or other metal; the treatment of the subject and the location of the statue to be determined by said Norman Williams and Huntington W. Jackson." "49th. I hereby authorize and empower my executors and trustees to set apart so much of my estate or invest such a sum of money as in their judgment may seem necessary and proper, and to pay from the income thereof all costs, charges, and expenses, including the payment mentioned in item second, arising from, or in the course of, the execution and administration of this will and its trusts. Any

<sup>1</sup>Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

surplus income shall yearly be paid over and devoted to the purposes set forth in item 50th, and when, in the judgment of my said executors and trustees, it is proper, the principal sum herein provided for shall be paid over and devoted to the purposes set forth in item 50th. Fiftieth. Recognizing the fact that I have been a resident of Chicago since 1862, and that the greater part of my fortune has been accumulated here, and acknowledging with hearty gratitude the kindness which has always been extended to me by my many friends, and by my business and social acquaintances and associates, I give, devise, and bequeath all the rest, remainder, and residue of my estate, both real and personal, for the erection, creation, maintenance, and endowment of a free public library, to be called 'The John Crerar Library,' and to be located in the city of Chicago, Illinois,—a preference being given to the south division of the city, inasmuch as the Newberry library will be located in the north division. I direct that my executors and trustees cause an act of incorporation under the laws of Illinois to be procured to carry out the purposes of this bequest, and I request that Norman Williams be made the first president thereof, and that, in addition to my executors and trustees, the following named friends of mine will act as the first board of directors in such corporation, and aid and assist my executors and trustees therein, namely: Marshall Field, E. W. Blatchford, T. B. Blackstone, Robert T. Lincoln, Henry W. Bishop, Edward G. Mason, Albert Keep, Edson Keith, Simon J. McPherson, John M. Clark, and George A. Armour, or their survivors. I desire the building to be tasteful, substantial, and fireproof, and that a sufficient fund be reserved over and above the cost of its construction to provide, maintain, and support a library for all time. I desire the books and periodicals selected with a view to create and sustain a healthy moral and Christian sentiment in the community, and that all nastiness and immorality be excluded. I do not mean by this that there shall not be anything but hymnbooks and sermons, but I mean that dirty French novels, and all skeptical trash, and works of questionable moral tone, shall never be found in this library. I want its atmosphere that of Christian refinement, and its aim and object the building up of character, and I rest content that the friends that I have named will carry out my wishes in these particulars."

The first four clauses of the will (more particularly the fourth) are pertinent to the questions raised in argument, and they are as follows: "First. I hereby make, constitute, and appoint my friends Norman Williams and Huntington Wolcott Jackson, both of Chicago, Illinois, executors of this, my last will and testament, and trustees of my estate, and the survivor of them, or their appointed successors, to have and to hold the same upon the trusts, and subject to the conditions and limitations, hereinafter mentioned. Second. I hereby waive, as I have a right to do, under the statutes in such case made and provided, the giving

of bonds or security by my said executors and trustees. As they have been true friends in life, so they will be when I am gone, and I intrust the management of my estate to their joint care. It is my wish that my executors and trustees shall only be accountable for what they receive, and not be charged with any loss unless it happen by their careless neglect or faulty attention; and I will and direct that they shall be paid for the execution of this trust reasonable fees and compensation, together with all costs and expenses incurred. Third. I direct that in case of the death, incapability, or refusal to act of either of the foregoing executors and trustees, or their appointed successor, that the survivor shall appoint such executor and trustee within thirty days after said death, incapability, or refusal to act of said executor and trustee, or the appointed successor, which appointment shall be approved of, in writing, by one of the judges of the United States circuit or United States district courts for the northern district of Illinois. Fourth. I give, devise, and bequeath unto my said executors and trustees all of my property and estate, of whatever name or nature, real, personal, and mixed, and wherever situated, in trust nevertheless, that is to say, upon the following trusts and conditions: To sell and dispose of all of my said property and estate, except as may be hereinafter specified, and convert the same into cash, at such time or times, and upon such terms and conditions, as to my said executors and trustees shall seem meet, and to make, execute, and deliver all deeds of conveyance and other instruments in writing as may be necessary and proper for that purpose; to exchange, invest, and reinvest all or any of my property; compromise debts due my estate; and to do all things in the same manner as I might do if living, and as shall seem expedient and best to them, to enable them to carry out the purposes and intents of this, my last will and testament."

The first ground of reversal is that the circuit court erred in not overruling the demurrer to the bill, that the complainants might prove the laws of the states of New York, Iowa, and Texas applicable to the construction of said will, it being alleged in the bill that the testator died seized of real estate situated in those states. Waiving all other answers to this point, it is sufficient to say the bill fails to allege what the laws of those states are in that regard, and they were not, therefore, the subject of proof. The demurrer admitted all facts well pleaded, but nothing more. It will scarcely be contended that a demurrer to a pleading should be overruled in order to allow a party to make proof of facts not alleged therein. The first point is clearly untenable.

It is not denied that there is an attempt, by the provisions of the fiftieth clause of the will, to make a general residuary bequest of all the testator's estate. Each of the other paragraphs called in question are express gifts of personality, all except the first being in money. This naturally follows from the provi-

sions made in the fourth paragraph, which requires the executors to convert the entire estate, except a few articles of personal property afterwards named, into cash. The legacies throughout the will are therefore of personal property, and the will must be so construed. Bisp. Eq. 307. As was said by Caton, J., in *Baker v. Copenbarger*, 15 Ill. 104: "Here was a devise of real estate, which, by the provisions of the will, was to be converted into money, and that money distributed among the devisees. This, it is admitted on all hands, must be treated as a devise of money, and not of land." See, also, *Jennings v. Smith*, 29 Ill. 116; *Rankin v. Rankin*, 36 Ill. 203. It is true that the directions to convert all of the property into money are stated to be for the purpose of carrying out the provisions of the will, but it does not therefore follow, as contended by counsel for appellants, that if, by reason of the illegality of the residuary or other clauses of the will, the gift or gifts therein fail, the purposes of the conversion will cease. The conversion directed by the testator is not for the payment of the residuary bequest only, or any particular legacy, and therefore the purposes of the conversion will not be accomplished until at least the legacies which are admitted to be valid are paid. But to say that the gifts made by the will are not gifts of personalty, and the will is not to be so construed because the bill questions the validity of those gifts, is to beg the whole question.

The case of *Haward v. Peavey*, 128 Ill. 430, 21 N. E. Rep. 503, in no way conflicts with what is here said. It was there held that under the will of James Haward the executors were given a power to sell real estate, but that no imperative duty to do so was imposed upon them, and therefore there was no equitable conversion of the land into money. By the fourth clause of this will the duty to convert all property into money is imperative. Not a single bequest can be found in this will which can be satisfied without the payment of money, except the thirty-second, and that is to be paid in specific articles of personal property. It is the well-settled rule that all lapsed or void gifts of personal property fall into a general residuary bequest, instead of being treated as intestate estate descending to the heir at law, unless a contrary intention on the part of the testator clearly appears. The rule, and reason for it, are clearly stated in *Cambridge v. Rous*, 8 Ves. 12, and substantially adopted in *Taylor v. Lucas*, 11 N. C. 215, as follows: "No rule is better established, as to personal estate, though it is otherwise as to real, than that a residuary clause carries, not only everything not disposed of, but everything that in the event turns out not to be disposed of, as by lapse, and the other means specified in the cases. *Ellison v. Cookson*, 1 Ves. Jr. 109, 110; *Humphrey v. Tayleur*, 1 Amb. 188; *Cambridge v. Rous*, 8 Ves. 25; *Shanley v. Baker*, 4 Ves. 732; *Bengough v. Walker*, 15 Ves. 509. The law raises a presumption in favor of the residuary legatee, against every one except the particular legatee." This rule has been recognized and ap-

proved by the court in *Mills v. Newberry*, 112 Ill. 123, and *Society v. Mead*, 131 Ill. 338, 23 N. E. Rep. 603.

But it is insisted on behalf of appellants that our statute has changed the rule as it existed at common law, and in support of that position section 12, c. 39, Rev. St., entitled "Descent," is cited and relied upon. That section is as follows: "Sec. 12. All such estate, both real and personal, as is not devised or bequeathed in the last will and testament of any person, shall be distributed in the same manner as the estate of an intestate; but in all such cases the executor or executors, administrator or administrators, with the will annexed, shall have the preference in administering on the same." The above-cited decisions of this court are irreconcilable with the contention that this statute has changed the rule as it formerly existed, but it is clear that the statute was intended to have no such effect. It does not purport to change or modify any of the rules of law applicable to the construction of wills, but only provides, as the title of the chapter in which it is found indicates, how property shall descend which is not devised or bequeathed in the last will and testament of any person. If, by the law governing the construction of wills, property is testate estate, the statute of descent has nothing to do with its distribution. It is disposed of by the will. There is nothing whatever in the will before us indicating an intention on the part of the testator that any part of his estate should, under any circumstances, be treated as intestate. On the contrary he has attempted to dispose of all of his property, of every description, by his last will, executed in conformity with the provisions of law; and if he has succeeded in making a legal and valid bequest of all the "rest, remainder, and residue" of his estate the law casts into that residuum all of his property not otherwise disposed of by the will. How, then, can it be said that any part of his estate is "not devised or bequeathed" in his last will and testament? Clearly, the statute has no proper application to lapsed or void legacies in a will containing a valid general residuary bequest. If, therefore, the fiftieth clause of this will is valid, appellants can take nothing by their bill, even though each of the other legacies questioned by them should be held void; any such void legacies going to swell the general residuary estate, and not to the heirs at law of the testator. Having reached the conclusion that said residuary clause is valid, and should be given effect, the remainder of this opinion will be devoted to that question alone.

As before said, the intention of the testator to dispose of all the remainder of his estate by said clause is therein unequivocally expressed. That wills must be sustained, and the intention of the testator given effect, by courts, whenever it can be done without violating established rules of law, or some public policy, is a saying so often repeated that it has become trite; but nevertheless it expresses a rule applicable to the construction of every will, when its validity, or that of any part of it,

is called in question. All parties concede that in order to sustain the clause in question it must be treated as an attempt on the part of the testator to make a bequest to charity; and, while counsel for appellants do not consent that it is such, we do not understand them to seriously controvert it. A comprehensive legal definition of a charity or charitable use is given by Gray, J., in *Jackson v. Phillips*, 14 Allen, 556, (approved by Perry in his work on Trusts, volume 2, § 697,) as follows: "A charity, in a legal sense, may be more fully defined as a gift to be applied, consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education, religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself if it is so described as to show that it is charitable in its nature." That a gift "for the erection, creation, maintenance, and endowment of a free public library," in a city like Chicago, falls within that definition, cannot be seriously questioned. All the cases to which our attention has been called, which recognize the statute of 43 Eliz. as in force, hold that such gifts are to a charitable use: *Drury v. Natick*, 10 Allen, 176; *Dascomb v. Marston*, 80 Me. 223, 13 Atl. Rep. 888; *Donohugh's Appeal*, 86 Pa. St. 306. *Heuser v. Harris*, 42 Ill. 425, and other cases decided by this court, are to the same effect.

But it is said the statute of charitable uses is not in force in this state. It is conceded that this court has repeatedly held that it is, but it is insisted that those decisions were made without the attention of the court being called to certain acts of the legislature passed from time to time since 1833; that now in force being chapter 23, Rev. St., (1 Starr & C. St. 422,) which provides for the regulation and maintenance of state charitable institutions. These statutes, counsel say, "operate to repeal any other statute of charitable uses whatever, and none but charities whose title is vested in the state were intended to be or are embraced within it, and that consequently none but the state charities can come within the province of any charitable use act." This position is unsupported by the citation of a single authority, or the suggestion of any legal principles upon which it can rest, and we think is wholly untenable. Certainly, the acts referred to do not expressly repeal any other law of charitable uses in force in this state, nor is there, so far as we are able to discover, the slightest inconsistency between any of them and the law which they are claimed to repeal. It cannot therefore be held that there is a repeal by implication. Nor do we find anything in the opinions rendered in the cases holding the statute of 43 Eliz. in force here which justifies the assumption that the laws of this state in force when they were rendered were not duly considered. On the contrary, in *Heuser v. Harris*, supra,

which was decided in 1867, it was said: "There being no statute in this state prohibiting such bequests, it is not a fair inference the lawmaking power of this state has not regarded them as impolitic;" thus showing that the statutes then in force were taken into consideration. The same reasons which have hitherto influenced the court to hold the statute of uses in force in Illinois still exist. Presumably, this will, disposing of a large estate, most of which is given to charity, was made with reference to those decisions; and to now overrule them, thereby defeating the clearly-expressed intention of the testator, could only be justified upon the ground that some overpowering reason demanded it. No reason whatever for so doing is shown, or can be conceived.

The statute of charitable uses, then, being in full force in this state, and the bequest of the residuary estate of the testator being an attempt to make a bequest to charity, is that bequest valid? The principal objection urged against it in this court is that it is violative of the "rule against perpetuities." The argument on this point is somewhat extended, but the controversy between counsel for the respective parties arises rather from the different constructions placed upon the will than from conflicting views of the law. It is insisted on behalf of appellants that, while it is generally said by text writers and courts that the law against perpetuities does not apply to conveyances or bequests to charity, all that is meant by that language is "that after property once legally gets to a charity the charity can thereafter hold it for all time, i. e. in perpetuity, but does not apply to property before it gets to the charity;" and the argument proceeds upon the theory that, under the qualification of the general rule thus stated, gifts to charity, before they become vested, are subject to the rule against perpetuities, the same as are gifts to individuals. The authorities cited in support of this position do not sustain it. We think the quotation made by the learned counsel from Perry on Trusts (volume 2, § 736) announces a correct rule, viz.: "If a testator ties up his property for a time, by possibility, longer than a life or lives in being and twenty-one years and nine months, and then gives it over to a charity, the gift to charity is void, because of the perpetuity in the first taker." The rule thus stated does not, however, bear the construction placed upon it by the language itself, as well as that which immediately follows it, where the author says: "But a gift may be made to a charity not in esse at the time, to come into existence at some uncertain time in the future, provided there is no gift of the property in the first instance, or perpetuity in a prior taker. So where property was given to one charity, to go over to another in a certain event, it was allowed to go over to the second charity after a lapse of two hundred years, on the ground that it was no more a perpetuity in one charity than another." Bispham, in his *Principles of Equity*, (section 132,) after stating that a charitable use is not subject to the ordinary rules prohibiting the creation of per-



petuities, also says: "If, however, the charitable trust is not to vest until after the determination of a prior gift, and that prior gift may, by possibility, last longer than the time allowed by law, the gift over to charity will be void because of the perpetuity in the first taker." See, also, 18 Amer. & Eng. Enc. Law, pp. 363, 364. It will thus be seen that in order to bring a gift to charity, which is to vest in the future, within the law against perpetuities, under the rule cited, there must be a "prior gift,"—a "first taker." In the gift under consideration there is no bequest to a person or corporation other than the charity therein named. In other words, there is, by the terms of this will, no prior gift or first taker. In *Andrews v. Andrews*, 110 Ill. 230, this court said: "It is urged that this clause creates an estate in the nature of a perpetuity, which the law prohibits; that the law will not permit estates in land to be tied up longer than for a life or lives in being and twenty-one years, and, in case of a posthumous birth, nine months more, after the termination of the life estate, and, as this clause prohibits the sale of the land for twenty-five years after the death of the last surviving tenant for life, the devise falls within the prohibition of the rule. This would seem to be true, unless it falls within the exception in favor of conveyances and devises to charitable uses. In the case of *Henser v. Harris*, 42 Ill. 425, it was held that the statute of 43 Ill. c. 4, is in force in this state, and it operates to exclude conveyances and devises for such uses from the operation of the rule against perpetuities. This we regard the law of this jurisdiction, and the rule conforms to the adjudged cases in England, under that statute, and those of various states of the Union where that statute is in force."

By another branch of the argument of counsel for appellants, in support of the contention that this gift is in violation of the law of perpetuities, it is insisted that it is in the nature of an executory devise, and it is said that "the testator intended to limit a contingent future interest in the nature of an executory devise, the contingency depending upon the creation of a corporation by the legislature capable of taking for the purposes expressed in the will, and in perpetuity;" "that the creation of the corporation, with capacity to take, for the purposes declared and limited in the will, is a condition precedent to the vesting of the gift." And it is contended, upon the authority of *Chamberlayne v. Brockett*, L. R. 8 Ch. App. 206, and other authorities cited: "If the gift in trust for charity is itself conditional upon a future and uncertain event, it is subject, in our judgment, to the same rules and principles as any other estate, depending for its coming into existence upon a condition precedent. If the condition is never fulfilled, the estate never arises. If it is so remote and indefinite as to transgress the limits of time prescribed by the rules of law against perpetuities, the gift falls ab initio." The answer to this position is, the gift in question is neither conditional, nor upon a future and uncertain event. The organization of the corporation men-

tioned in the will is not a condition precedent to the vesting of the gift. The argument of counsel for appellants upon this branch of the case proceeds throughout upon the unwarranted assumption that the bequest to the John Crerar Library is a gift in futuro. When the fourth clause of the will is considered in connection with the fiftieth, it is clearly shown that the residuary bequest made by the fiftieth is in no sense executory. By the fourth clause the testator says: "I give, devise, and bequeath unto my said executors and trustees all of my property and estate, of whatever name or nature, real, personal, and mixed, and wherever situated, in trust nevertheless," etc., "to sell," etc., "to enable them to carry out the purposes and intents of this, my last will and testament." Here is a present gift in trust to carry out the provisions of the will. One of those provisions is: "I give, devise, and bequeath all the rest, remainder, and residue of my estate for the erection, creation, maintenance, and endowment of a free public library, to be called the 'John Crerar Library,' and to be located in the city of Chicago, Illinois." If the gift is one to charity at all, it is in present. The language is susceptible of no other meaning. The donee is not, as is assumed, a corporation to be created in the future. The object of the testator's bounty is not the corporation to be created for the purpose of giving effect to the gift, but the public. Here is "a gift to the general public use, which extends to the poor as well as the rich," and that is a gift to charity. In other words, as we shall hereinafter see, the gift to charity is complete without reference to any of the suggestions or directions of the testator as to how the bequest shall be carried into effect, and therefore the fact that the time within which the corporation is to be organized is not limited, and it may not come into existence within the period allowed for the vesting of future estates, in no way affects the validity of the gift. The corporation may never be created, and still, the gift being to a charitable use, it will be upheld. See *Jones v. Habersham*, 107 U. S. 174, 2 Sup. Ct. Rep. 338. In *Gray on Perpetuities* (section 607) it is said: "But if the court can see an intention to make an unconditional gift to charity, (and the court is very keen-sighted to discover this intention,) then the gift will be regarded as immediate, not subject to any condition precedent, and therefore not within the scope of the rule against perpetuities." We have given the argument of counsel in support of their contention that the bequest of the residuum of the estate under this will is void, under the rules of law against perpetuities, a patient consideration, and carefully examined the authorities cited in support thereof; and we are unable to discover any satisfactory reason, or sound principle of law, upon which their contention can be sustained.

It is earnestly contended in the brief and argument in the appellate court, relied here, that the bequest named in the fiftieth clause is void for uncertainty as to

the subject-matter of the gift, and because the executors and trustees are authorized, as is said, to expend a portion of the residuary estate for purposes "noncharitable." These contentions are both based upon the theory that the forty-ninth clause, directing the executors and trustees to set apart a fund to raise an income out of which to pay all costs, charges, etc., arising in the administration of the estate and executing the will, gives the executors and trustees the power to fix arbitrarily the amount of that fund, and, in their own unlimited discretion, say when it shall go to the "rest, remainder, and residue" of the estate, and also that the fund to be so provided can be expended by the trustees for purposes other than the charity named in the fiftieth clause, and therefore for purposes "noncharitable." If the forty-ninth clause is susceptible of the construction thus placed upon it, it should doubtless be pronounced void, but we are unable to see why even then the fiftieth clause should fall with it. The latter is, in and of itself, a complete residuary bequest of all the estate of the testator. If the directions set forth in the forty-ninth clause should be stricken out entirely, the residuary bequest would be unaffected, except that the costs and expenses of administration and carrying out the trusts mentioned in the will would be paid out of the principal of the residuum, instead of from the income of a portion of it. But the construction placed upon the forty-ninth clause cannot, in our opinion, be maintained. It is to be construed together with the fiftieth clause, and read as though it were a part of it,—as was said in the opinion by Judge Tuley, adopted by the appellate court, as though it had followed that clause, instead of preceding it. In either way, without changing the legal effect of the provisions of the will, the intention of the testator is made clear that any fund set apart under the forty-ninth clause should be regarded and treated as a part of the estate bequeathed by the fiftieth clause.

Neither are we able to concur in the view that the two clauses, taken together, are arbitrary powers to the executors and trustees to fix the amount of the principal fund to be set apart under the forty-ninth clause, or to say when it shall be paid over to the residuum. They are authorized to set aside a proper amount to raise an income to pay certain charges and expenses, all of which are either fixed by law, or, by the terms of the will, must be reasonable. A court of chancery could unquestionably restrain any attempt on the part of the executors or trustees to act arbitrarily or unreasonably in exercising the authority thus conferred upon them. 2 Story, Eq. Jur. § 1191; *Happy v. Morton*, 83 Ill. 398. That clause, as we understand it, gives the executors and trustees no greater power than they would have had without it. It only authorizes them to exercise the power given them by the law in a particular way. The testator having directed that the trustees named in his will should be paid "reasonable fees and compensation," such

fees and compensation become a legal charge against his estate, and, together with the costs and charges of administration, and carrying out the provisions of the will, would be payable out of the rest, remainder, and residue of the estate, under the supervision and direction of a court of chancery, without the forty-ninth clause, or any other specific directions to that effect. A court of chancery would, in the absence of any such provision, compel the payment thereof, at the same time protecting the estate against all unreasonable or illegal charges. It will do the same, if necessary, by way of enforcing the provisions of clause 49.

It is still more difficult to perceive upon what legal principle it can be said that under the directions of this clause the executors are authorized to expend any part of the residuary estate for purposes "noncharitable," within the meaning of what was said in *Mills v. Newberry*, 112 Ill. 123, or in *Taylor v. Keep*, 2 Ill. App. 368, viz.: "If the language of the gift or devise leaves to the trustee a discretion to expend the fund for a purpose noncharitable, or for purposes partly charitable and partly noncharitable, it will not be upheld." Will it be seriously contended that, because the executors and trustees are authorized to pay the legal costs and charges against the estate out of the residuum, therefore they have a discretion to expend a part of the charitable gift for purposes noncharitable? If so, in every case where a testator directs his executors to pay all costs and expenses of administration, and carrying into effect his will, and bequeaths the residuum of his estate to charity, the gift to charity would be void, whereas, if he gave no express directions as to such costs and charges, the gift would be valid, although the residuum of his estate would be chargeable with such costs and expenses. It will be observed that this will, by a plan adopted by the testator, protects the whole of the principal of the residue of his estate from the payment of costs and expenses. Even any surplus of the income out of which costs, etc., are to be paid is appropriated to charity. It is difficult to see how an intention could be more clearly expressed that all the rest, remainder, and residue of an estate should be expended for a charitable use than is here shown.

The further contention that said bequest is void because, as is said, the corporation provided for in the fiftieth clause cannot be legally organized, is, we think, without force. As already said, the gift "for the erection, creation, and maintenance, and endowment of a free public library" is a good gift to charity, whether the corporation is organized or not. We entertain no doubt that the directions of the testator as to the manner of carrying out that bequest can be given practical effect under the laws of this state, but, whether they can or not, the gift itself is nevertheless valid. If anything is settled in this state touching the law of charitable bequests, it is established by the decisions of this court that all that part of said fiftieth clause which provides the manner of putting the John Crerar Library into practical

operation may be held to be impossible of execution, and the bequest still sustained and carried into effect by a court of equity.

No good purpose would be served by extending this opinion in discussing the question as to when the doctrine of cyprus can be properly applied, in order to give effect to conveyances or bequests to charitable uses. It is sufficient for the purposes of this decision to know that in this state a court of chancery will consider charity as the substance, and, if the mode pointed out in the conveyance or will for carrying it into effect fails, will provide another mode by which the charity may take effect. *Heuser v. Harris*, 42 Ill. 434, and authorities cited; *Andrews v. Andrews*, 110 Ill. 223; *Hunt v. Fowler*, 121 Ill. 276, 12 N. E. Rep. 331, and 17 N. E. Rep. 491. These decisions are also full to the point that it is the fixed policy of the law to uphold charitable bequests, and that "courts incline strongly in favor of charitable gifts, and take special care to enforce them." No greater wrong could be done the giver of this magnificent bequest than to defeat his clearly-expressed wish that the greater part of his estate, amply sufficient for the purpose, should be expended in the erection, creation, maintenance, and endowment of a free public library in a great city, to bear his name, because, forsooth, in an effort to direct the means of carrying out the purposes of that bequest, he may have misconceived the practicability of some of those means, or failed to prescribe with exactness when and how those means shall be put into operation. Our conclusion is that the residuary bequest in this will is a good and valid gift to a charitable use. It follows that in our opinion the decree of the circuit court, dismissing appellants' bill, was right, and that it was properly affirmed by the judgment of the appellate court.

**Affirmed.**

(146 Ill. 158)

**PARKER v. CATHOLIC BISHOP OF CHI-  
CAGO et al.<sup>1</sup>**

(Supreme Court of Illinois. June 19, 1893.)

**MUNICIPAL CORPORATIONS — VACATION OF ALLEY  
—INJUNCTION—DAMAGES—ORDINANCE.**

1. The power given by Rev. St. 1891, c. 24, § 62, to city councils, to vacate streets and alleys, may be exercised whenever the public interests require it, regardless of the effect of such vacation upon the fee of the street or alley vacated, since the fact that the use of the vacated land may pass to a private person or corporation does not necessarily render the vacation an exercise of power for private benefit.

2. Rev. St. 1891, c. 145, § 1, which provides that when property is damaged by the vacation of any street or alley the same shall be ascertained and paid as provided by law, does not require the ascertainment and payment of damages as a condition precedent to the vacation of an alley by the city council, where the council determine that no damage results from such vacation, since the persons claiming to be injured thereby may collect

their damages by an action therefor. 41 Ill. App. 74, affirmed.

3. A property owner, whose only injury, resulting from a vacation of an alley, is the making access to the rear of his lot less convenient, has no ground for enjoining the vacation, since his injury differs from that of the general public only in degree.

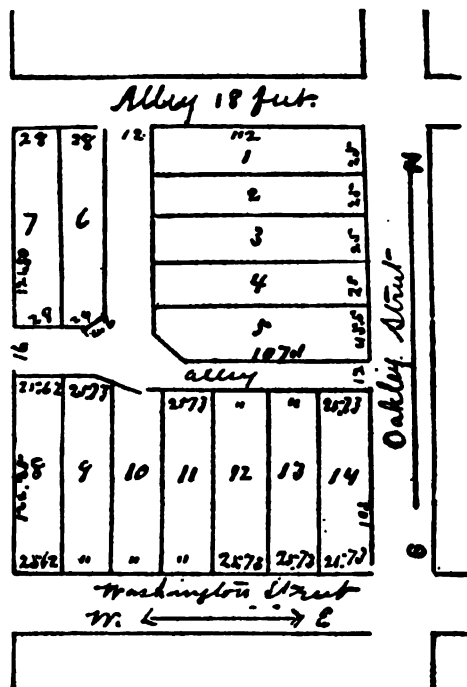
4. It is not sufficient ground for declaring invalid an ordinance vacating an alley that it was passed in a batch of 10 or more without consideration by the council, where it does not appear that these facts are shown by the record of the council, or that the vote thereon was not taken by ayes and nays, duly entered upon the records, or that the ordinance did not receive a due number of votes.

**Appeal from appellate court, first district.**

**Bill by Inez L. Parker against the Catholic bishop of Chicago and the city of Chicago to have a city ordinance declared void, and a plat made by the bishop canceled. Defendants obtained a decree, which was affirmed by the appellate court. Complainant appeals. Affirmed.**

The other facts fully appear in the following statement by SHOPE, J.:

John F. Starr, owning a tract of land bounded on the north by an 18-foot alley, on the east by Oakley street, on the south by Washington street, in the city of Chicago, November 4, 1858, subdivided said tract into 14 lots, numbered from 1 to 14 inclusive, acknowledged a plat of said subdivision, and filed the same for record. By the plat an alley was dedicated east and west through said tract, south of lots 5, 6, and 7, and also an alley running from the last-named, north, to the 18-foot alley before mentioned, as shown in the accompanying plat; the figures, other than the numbers of the lots, representing feet and fractions of a foot:



<sup>1</sup>Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

In July, 1890, the city council of the city of Chicago passed an ordinance vacating all that part of said east and west alley through said tract that lay east of the east line of said north and south alley, upon condition that the owners of property lying east of said north and south alley should acknowledge and record a plat dedicating 6 feet additional to said north and south alley, etc., which was done, making said alley 18 feet, instead of 12 feet, as shown in the above plat, across said lot 5. Appellant filed her bill, setting up the foregoing facts, and alleging that she was owner of lot 8 and part of lot 9, fronting on Washington street, and abutting on the west end of said alley, and that said Catholic bishop was the owner of lots 10, 11, 12, 13, 14, and 5. The bill charges that 64 aldermen voted for said ordinance, and that no votes were recorded in the negative, but that said ordinance was not considered by a committee of the council, or by the council, and was passed in a batch of 10 or more ordinances, there being but one roll call for all of said ordinances; that the council did not deliberate on it or consider it, or know what they were doing when they voted therefor. It is further charged that the ordinance is void because it did not provide for ascertaining and paying damages to complainant's property. The bill sets forth the right to pass through said alley onto Oakley street, and alleges it to be a valid and valuable property right, constituting an easement in favor of her lots, and further alleges that appellee the Catholic bishop has caused a pretended plat or subdivision of said premises to be acknowledged and filed for record, showing the said eastern portion of said alley closed up, and a widening of said north and south alley, as required by the ordinance. It is alleged that said change in the north and south alley is no benefit to the complainant or her premises, and does not compensate her for the loss of the use of the alley opening into Oakley street. It is also alleged that said Catholic bishop has entered upon said alley, obstructing the same, and is threatening to build thereon, etc. The prayer is, that the ordinance be declared void; that the plat of said bishop be set aside and canceled as a cloud on complainant's easement in said alley; that he be required to remove the obstruction therein; that he be enjoined from closing up said alley, or interfering with complainant's right of passage through the same. General demurrers were filed and sustained, and the bill dismissed, from which complainant appealed to the appellate court, where the decree was affirmed, and complainant prosecutes this further appeal.

Kerr & Barr, for appellant. Smith & Harlan, (John S. Miller, of counsel,) for appellees.

SHOPE, J., (after stating the facts.) It is urged as ground of reversal that the facts alleged in the bill show that the city council was without power to vacate that portion of the alley lying between lot 5 and lots 10, 11, 12, 13, and 14, as shown in

the plat of Starr's subdivision, and that as a condition precedent to the vacation of the same it was necessary that the damages to complainant's lots be ascertained and paid. The municipality holds the streets and alleys of the city in trust for the general public, and by the statute is given power to vacate the same whenever the public interest or convenience, in the exercise of a reasonable discretion, shall seem to such authority to require it. Section 62, c. 24, Rev. St.

The argument sought to be based upon the reversion of the fee of the street or alley to the dedicator or abutting lot owner is without force. It can make no difference, as to the power of the municipality, whether the fee remains in the city, reverts to the original dedicator, or passes by operation of law to the adjoining owners. Nor will the fact that the use of the alley or street passes to a private individual or corporation necessarily render it an exercise of power for a private, and not for a public, purpose.

A question of more difficulty arises upon the second contention made. It is insisted and alleged in the bill that the vacation of the alley deprived the complainant of a valuable property right, which she would otherwise enjoy as appurtenant to her lots, and that if said alley was vacated for a public use or purpose it damaged her property, and she was therefore entitled to compensation. While private property cannot be taken by public authority for private use, it may be taken or damaged for a public use upon payment of just compensation, to be ascertained by a jury in the mode prescribed by law. Const. art. 2, § 18. It seems to be well settled in this state that where no part of the land or property of the complaining owner is physically taken for or in making the proposed public improvement, and the damages claimed to result are therefore consequential only, this provision of the constitution does not require the ascertainment and payment of such damages as a condition precedent to the exercise of the right or power. *Stetson v. Railroad Co.*, 76 Ill. 76; *Patterson v. Railroad Co.*, Id. 558; *Railroad Co. v. Schertz*, 84 Ill. 135; *Insurance Co. v. Heiss*, 141 Ill. 85, 81 N. E. Rep. 138. It seems to be sufficient to answer the constitutional requirement that a remedy is provided for the recovery of such damages; and the same construction was given, in the *Stetson Case*, supra, to the word "damaged," as employed in the act to provide for the exercise of eminent domain. It was there held, and it has been repeatedly since followed, that the damages there referred to, were direct and physical, resulting from a taking of a portion of the land, and that where no portion of the land was taken the damages suffered are consequential, and that condemnation proceedings were not required to be instituted to ascertain the same.

It is, however, insisted that, although no portion of complainant's property was physically taken, by section 1, c. 145, Rev. St., the city council were required to ascertain and pay to complainant the damages to her property, resulting from the

vacation of the alley, and, not having done so, the ordinance is void. That section is as follows: "That no city council of any city, \* \* \* whether incorporated by special act or under any general law, shall have power to vacate or close any street or alley, or any portion of the same, except upon a three-fourths majority of all the aldermen of the city \* \* \* authorized by law to be elected; such vote to be taken by ayes and noes, and entered on the records of the council. And when property is damaged by the vacation or closing of any street or alley the same shall be ascertained and paid as provided by law." It is urged that the latter clause requires, as a condition to the vacation or closing of a street or alley, that damages be ascertained and paid. It cannot be, however, that the legislature intended that in all cases there should be a judicial determination as to whether all the property lying adjacent to, or that might in a remote degree be affected by the closing of, the street or alley, was damaged or not. It is only "when property is damaged by the vacation or closing of any street or alley" that the same is to be ascertained as provided by law. It is apparent, we think, that discretion is vested in the municipal authorities to determine in the first instance whether property will or will not be damaged by the proposed vacation or closing of the street or alley. If they, in the exercise of a reasonable discretion, find that property will be specially damaged by the proposed vacation or closing, they should proceed to ascertain and pay the same, as was done in *Meyer v. Village of Teutopolis*, 131 Ill. 552, 23 N. E. Rep. 851. If, on the other hand, they determine that no injury will inure to the property by their proposed action, they may, by ordinance passed in conformity with the statute, vacate or close such street or alley. Any other construction of the statute would require the municipality to summon into court every person whose property, however remotely, might be injured by the proposed vacation, and would render the ordinance void, if the contention of appellant be correct, if it should afterwards turn out that a single owner, whose property had been damaged, had been omitted. The presumption is that the city council, being clothed with governmental functions, will discharge its duty as required by law, and that, where property is damaged by the proposed vacation or closing of any of the streets or alleys of the city, they will ascertain and pay the damages as required; and this presumption will obtain until the property owner has, in an appropriate action, established his right to damages. And the property owner will, where no proceedings have been instituted by the municipality to ascertain his damages, be remitted to his remedy at law for recovery of the same. The determination of the city authorities cannot, however, be conclusive upon the property owner. He will be entitled to his day in court to recover, in an appropriate action at law, all such

special damages to his property, as contradistinguished from damages he suffers in common with the public, as will be occasioned by the proposed vacation. *City of Chicago v. Union Bld'g Ass'n*, 102 Ill. 379; *City of East St. Louis v. O'Flynn*, 119 Ill. 200, 10 N. E. Rep. 395, and cases cited; *Rigney v. City of Chicago*, 102 Ill. 64; *McDonald v. English*, 85 Ill. 236.

Moreover, while the bill alleges that the complainant had an easement in the alley vacated, there are no allegations showing special damages, or injury peculiar to her lots, or that are in kind different from those sustained by the general public. Such special injury or damage, differing in kind from those affecting the general public, is the gist of the right of private action, and to give the complainant any standing, either in equity or at law, must be alleged and shown. It is apparent, we think,—taking the allegations of the bill as true, as must be done,—the damages resulting to complainant are of the same kind as those sustained by the general public, and differ only in degree, as the convenience afforded by use of the alley would be greater or less to her than to others of the general public. *McDonald v. English*, supra; *City of East St. Louis v. O'Flynn*, supra; *Chicago v. Union Bld'g Ass'n*, supra, and cases cited page 393. Complainant is not deprived of access to the rear of her lots, but is inconvenienced, doubtless, by having to go a few feet further to gain access thereto from the adjacent street. But as said in the *O'Flynn Case*, supra, that "is the 'same kind' of damage that will be sustained by all other persons in the city that might have occasion to go that way; and, although the inconvenience he may suffer may be greater in degree than to any other person, that fact would not give him a right of action." It may be that special damages have been sustained, not alleged; if so, the complainant may recover in the appropriate form of action.

It is also insisted that the demurrer was improperly sustained because it is alleged in the bill that the ordinance vacating said alley was passed in a batch of 10 or more, and without consideration by the council. It is not pretended that any such facts are shown by the record of the city council, or that the vacating ordinance did not receive a "three-fourths majority of all the aldermen of the city" authorized by law to be elected, or that said vote was not taken by ayes and noes, and duly entered upon the records of the city council, as required by the section of the statute before quoted. It is not necessary to determine whether the record might be attacked for fraud, and it be shown that the ordinance was not in fact legally passed. It is not alleged or pretended that the records of the city council do not show the facts requisite to a valid passage of the ordinance, or that the same was corruptly or fraudulently made. We are of opinion that the decree dismissing the bill was properly entered, and the judgment of the appellate court should be affirmed.

(145 Ill. 238)

**WILLIAMS v. VANDERBILT.<sup>1</sup>**

(Supreme Court of Illinois. June 19, 1893.)

**MECHANIC'S LIEN—LANDLORD AND TENANT—FORFEITURE—WAIVER—EQUITABLE LIEN.**

1. Under Rev. St. 1891, c. 82, §§ 1, 2, which give a lien to mechanics for buildings erected under contract "with the owner of any lot or piece of land," such lien to "extend to an estate in fee for life, for years, or any other estate which such owner may have," a mechanic who does work on a building under contract with the lessee, whose lease is forfeitable on nonpayment of rent, has no lien as against the lessor after the lease has been so forfeited, since a lien on the leasehold estate is subject to all the conditions of the lease. 40 Ill. App. 298, affirmed.

2. Where a lessor declares forfeited for nonpayment of rent a lease given to three lessees, the fact that one of the lessees is willing to give up the lease does not render the transaction a voluntary surrender.

3. A delay of 23 days in declaring a lease forfeited for nonpayment of rent does not constitute a waiver of the right of forfeiture.

4. A mechanic who makes improvements on leased land under a contract with the lessee has no right to an equitable lien on the lessor's estate where the lessor has entered into no express or implied agreement to pay for such improvements. 40 Ill. App. 298, affirmed.

Appeal from appellate court, first district.

Bill by Charles B. Williams against William K. Vanderbilt to foreclose a mechanic's lien. Complainant obtained a decree, which was reversed by the appellate court. Complainant appeals. Affirmed.

The other facts fully appear in the following statement by MAGRUDER, J.:

This is a bill filed on September 23, 1889, by the appellant against the appellee in the superior court of Cook county, to enforce a lien for work done and materials furnished upon a lot and building in Chicago. The superior court rendered a decree on August 11, 1890, finding that the complainant, Williams, was entitled to a lien upon said lot and building for the amount due, and directing that, in default of payment within 30 days, said premises should be sold by the master. Upon appeal to the appellate court the latter court reversed the decree of the superior court, and remanded the cause with directions to dismiss the bill. From such judgment of the appellate court the present appeal is prosecuted by Williams. On July 6, 1889, the defendant, Vanderbilt, being the holder of the legal title to the property, executed a written lease of the same to Lewis Bartels, James Crelly, and Florence E. Smith for five years from July 21, 1889, to July 21, 1894, at a rent payable in monthly installments, each in advance upon the 21st day of each month during the term. The lease provided that, if default should be made in the payment of the rent, or any part thereof, it should be lawful for the lessor, on his election, "without notice, to declare said term ended, and to re-enter said demised premises," etc. The rent for the first month, from July 21st to August 21st, was paid, and the lessees entered into possession. On

August 2, 1889, a written contract was entered into between Bartels, one of the lessees, and complainant, Williams, by which the latter agreed to make certain alterations and repairs upon the building. The installment of rent falling due on August 21, 1889, was not paid. The lease was declared forfeited for the nonpayment of said rent, and the appellee, through his agent, re-entered and took possession of the premises on September 13, 1889. It sufficiently appears from the evidence that the lessees were and are insolvent. It also appears that the appellant had no money to pay the rent due, either before or after the forfeiture, and that, after the re-entry by the landlord, he asked for time to raise money to pay the rent demanded. The evidence also tends to show that appellant expected to reimburse himself by a sale or assignment or pledge as security to some third person of such new lease as he might obtain after the forfeiture, or by making a sale of the premises to some third person at a figure which the landlord would accept.

Oliver & Showalter, for appellant. W. E. Foster and Robert Mather, for appellee.

MAGRUDER, J., (after stating the facts.) Appellant's contract for doing the work and furnishing the material in altering and repairing the building was with the lessee or lessees of the premises; therefore, whatever lien he had under the contract extended to the leasehold interest only. Section 1 of the lien law (Rev. St. 1891, c. 82) provides "that any person who shall by contract \* \* \* with the owner of any lot or piece of land furnish labor or materials \* \* \* in building, altering, repairing, or ornamenting any house or other building or appurtenance thereto on such lot \* \* \* shall have a lien upon the whole of such tract of land or lot, and upon such house or building and appurtenance, for the amount due to him for such labor, material, or services." Section 2 provides that said lien "shall extend to an estate in fee for life, for years, or any other estate, or any right of redemption or other interest which such owner may have in the lot or land at the time of making the contract." 2 Starr & C. Ann. St. pp. 1512-1515, c. 82. The party with whom the contract is made by the person furnishing the labor or materials is only regarded as owner, within the meaning of the law, to the extent of the interest which he owns. It is that interest which is subjected to the lien. *Hickox v. Greenwood*, 94 Ill. 266. A tenant for life or years cannot, by contract, create a lien upon the fee. He may, by contract, create a lien to the extent of his right and interest in the premises, but no further. *McCarthy v. Carter*, 49 Ill. 53; *Judson v. Stephens*, 75 Ill. 255. As appellant's lien extended to the leasehold estate only, it did not take effect upon appellee's legal title. The statute which gives a mechanic a lien is in derogation of the common law, and must receive a strict construction. *Belanger v. Hersey*, 90 Ill. 70. It will not be applied by the court to cases which do not fall within its provisions. If those provisions

<sup>1</sup>Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

are not broad enough, it is the province of the legislature to extend them. *Stephens v. Holmes*, 64 Ill. 336; *Huntingdon v. Barton*, Id. 502. A mechanic's lien which attaches to a leasehold estate is subject to all the conditions of the lease. *Phil. Mech. Liens*, § 192; 2 *Jones, Liens*, § 1273; 15 *Amer. & Eng. Enc. Law*, p. 21. Here one of the conditions of the lease was that, in case of default in the payment of the rent, the landlord could, without notice, declare the term ended, and re-enter the premises. A forfeiture will not be implied, nor is it favored by the rules of law. 2 *Jones, Liens*, § 1273. But in the present case there seems to be no question as to the right of the appellee to forfeit the lease under its terms, nor do we see that there can be any question as to the effectiveness of the forfeiture which actually took place. The month's rent which was payable in advance on August 21, 1889, was not paid. When Bartels, one of the lessees, was called upon to pay the rent in the early part of September, 1889, he stated to appellee's agent that he could not pay it, and that his colessees, Creilly and Smith, were irresponsible, and unable to pay. Appellant knew that Bartels had nothing but a lease of the premises before he did any work upon the building. He also knew, early in September, that default had been made by the lessees in the payment of the rent due on August 21st. He and the architect who was superintending his work had an interview with appellant's agent on September 10th, in which it was conceded that the lessees were unable to pay either the rent or the amount due for said work. Appellant was then informed by the agent that the lease would be canceled or forfeited within a few days on account of the nonpayment of the rent due, but he made no offer to pay the rent, so as to keep the lease alive, and made no opposition to the threatened forfeiture of the lease. The appellee re-entered the premises, in pursuance of the terms of the lease, on September 18th, and took possession of the same, and at once notified appellant that he had done so. On September 14th appellant had another interview with appellee's agent, but made no tender of the rent due, nor any offer to pay it, nor any complaint that the forfeiture of the lease had not been regular and valid. If the lease has been forfeited, the holder of the lien must pay all arrears of rent to the lessor before he can acquire the rights of the lessee thereunder, even by purchase. 2 *Jones, Liens*, § 1273; *Rothe v. Bellingrath*, 71 Ala. 55.

Counsel for appellant invokes the doctrine that, where the landlord elects to accept a surrender of the lease, he takes back the premises subject to liens existing at the time against the estate of the lessee. It was said by this court in *Dobschuets v. Holliday*, 82 Ill. 371, that the voluntary surrender of the lease to the owner of the fee cannot affect the lien upon the estate of the lessee which attached during the existence of the lease, and that the merger of the estate of the lessee with that of the owners of the fee would not destroy the previous lien. *Gaskill v. Trainer*, 3 Cal. 384; *Phil. Mech. Liens*, § 192; 2 *Jones, Liens*, § 1273; 15 *Amer. & Eng. Enc. Law*,

p. 21. But in the case at bar there was a forfeiture of the lease, and not a voluntary surrender of it. It is true that Bartels, one of the lessees, expressed his willingness to have the lease canceled in order to get rid of Creilly and Smith, and have a new lease, in which he should have an interest, made out to the appellant; and the latter desired a new lease to himself when the old one should be forfeited. There may be a parol surrender of a written lease. *Baker v. Pratt*, 15 Ill. 568. There may be a surrender by an abandonment of the premises by the tenant and an entry into them by the landlord. 2 *Wood, Land. & Ten.* pp. 1169-1173, § 494. An executed agreement to surrender may be operative as a surrender. Id. p. 1169. Execution of a new lease, with the tenant's consent, to another person, who enters thereunder and pays rent, will amount to a surrender. *Stobie v. Dills*, 62 Ill. 432. An agreement, either express or inferable from the conduct of the parties, to release the original lessee and accept a new tenant, may operate as a surrender. *Fry v. Patridge*, 73 Ill. 51. An actual and continued change of possession by the mutual consent of the parties will amount to a surrender by operation of law. *Dills v. Stobie*, 81 Ill. 202. But we do not think that an application of these definitions to the conduct of the parties herein will establish a voluntary surrender of the demised premises. Creilly and Smith were regarded as being averse to a forfeiture of the lease, and were not spoken to or consulted about it. Indeed, it was feared that a suit might be necessary to extinguish their interest. Even if Bartel's willingness to have the lease forfeited could be construed as a surrender on his part, this would not affect the right of Creilly and Smith. One lessee cannot destroy the rights of his colessees, nor extinguish their title, by conveying to his lessor. *Baker v. Pratt*, supra.

It is furthermore claimed on behalf of appellant that the appellee waived his right to forfeit the lease. It is said that after appellee's right to forfeit the lease accrued on August 21, 1889, he waited until the 18th day of September thereafter before taking any steps towards forfeiture, and in the mean time permitted appellant to do work upon the building. At common law, where a lease contained a condition for re-entry for nonpayment of rent, the law required a demand of the precise amount of the rent due, and that it be made upon precisely the day when due and payable by the terms of the lease. Under this strict rule, it may be that the appellee, in order to work a forfeiture of the lease, would have been obliged to make a demand for the rent on the 21st day of August. But we have held in a number of cases that the common-law rule making it necessary to demand the rent on the day it falls due in order to cause a forfeiture was abrogated by section 2 of the act of 1865, which is now section 9 of the act in regard to landlord and tenant. 2 *Starr & C. Ann. St.* p. 1494, c. 80; *Chadwick v. Parker*, 44 Ill. 326; *Dodge v. Wright*, 48 Ill. 382; *Chapman v. Kirby*, 49 Ill. 211; *Leary v. Pattison*, 66 Ill. 203; *Burt v. French*, 70 Ill. 254; *Woodward v.*



Cone, 73 Ill. 241. The mere fact that the landlord did not forfeit the lease on the very day on which the monthly installment of rent fell due did not deprive him of the right to declare a forfeiture on some subsequent day. But it is said the appellee knew that the lessees were making repairs and improvements upon the property during the period from August 21st to September 13th, and that by suffering them to do so without attempting to forfeit the lease there was thereby a waiver of his right of forfeiture as against appellant. A statute which confers a lien upon the leasehold interest must be construed with reference to the common-law rule that the burden of repairs is cast upon the tenant, and that the landlord is under no implied obligation to make them. 2 Jones, Liens, § 1276. The estate of the lessor cannot be subjected to a lien for work done or material furnished under a contract with the lessee, unless the agreement or consent of the lessor is shown, or unless he has done some act to make his estate liable. 15 Amer. & Eng. Enc. Law, p. 19, and cases cited in notes; 2 Jones, Liens, § 1276. Where a lessor agrees to pay to the lessee a gross sum towards the erection of a house on the demised premises, the estate of the lessor is bound by the mechanic's lien. *Leiby v. Wilson*, 40 Pa. St. 63; *Boteler v. Aspen*, 99 Pa. St. 313. We have recently held, in *Renderson v. Connelly*, 123 Ill. 98, 14 N. E. Rep. 1, that where a contract of sale of land did not authorize or in any manner empower the purchaser to erect a building on the premises, or to incur any liability for the improvement thereof, and the vendor was in no manner connected with the building the purchaser erected on the premises, but merely sold the lot, leaving the purchaser to improve it or not, as he pleased, under such circumstances the lien of the mechanic would only attach to such title as the purchaser had; but that, if the vendor in the contract authorizes and empowers the purchaser to erect a building on the premises, and advances money to aid him in the improvement, the mechanic who has furnished labor and materials before the termination of the contract by notice will be entitled to subject the vendor's legal title to the lien. In the present case the lease does not provide for making any improvements, and contains no provisions which connect the lessor in any way with any improvements to be made by the lessees. Nor does the lease show that the lessor gave his consent to the making of any improvements, or agreed to make or to aid in making them. The proof is not clear that the appellee had knowledge of the labor and materials furnished by appellant during the progress of the work. Appellee's agent, who negotiated the lease and received payment of the first installment of the rent, was absent from the city of Chicago from August 8th until the 7th or 8th day of September. The general rule is that "any act done by a landlord, knowing of a cause of forfeiture by his tenant, affirming the existence of the lease, and recognizing the lessee as his tenant, is a waiver of such forfeiture." *Webster v. Nichols*, 104 Ill. 160. We fail to discover

any such act done by the appellee between August 21st and the forfeiture of the lease on September 13th. Beyond the mere fact that the second installment of rent was not promptly paid, there is no evidence that appellee had any knowledge, until a few days before his re-entry, of the inability of the lessees to pay for the repairs ordered by them. Although a lessor may be aware that the premises are undergoing repairs under the direction of the lessee, yet, if he has no reason to believe that such lessee is not able to pay his debts, he is not obliged to assume that the persons employed to do the work will not receive their money from the lessee, and that an immediate forfeiture is necessary to save himself from liability. The proof tends to show that appellee did not know of the contract between Bartels and appellant until about the 10th day of September.

Counsel for appellant refer us to a large number of cases holding that a grantor entitled to re-enter or forfeit an estate on breach of condition, who does not exercise this right when facts within his knowledge occur that would entitle him to do so, has waived his right; but the facts in these cases show that there were long-continued acts or declarations in recognition of the estate sought to be forfeited; and it was held that the grantor was estopped from exercising his right of forfeiture, because by his failure to assert the right after breach of condition he induced the grantee to believe that he would not do so, and to continue in the prosecution of an enterprise requiring the expenditure of large sums of money. We find no fault with the doctrine of these cases, but think that they have no application here, where the lessees and the holder of the lien were given an opportunity to avoid the forfeiture, and were fully advised in due time of the lessor's intention to exercise the right of forfeiture.

It is further claimed, however, that, if appellant was not entitled to a mechanic's lien, he is entitled to the enforcement of an equitable lien against appellee's legal title to the property. This seems to have been the theory upon which the decree of the court below was based. An equitable lien is sought to be sustained upon the alleged ground that appellant was induced to believe by the agent of appellee that a new lease of the premises would be executed to him after the old lease to Bartels, Creely, and Smith should be forfeited. Upon the question of fact whether appellee's agent made a promise to give a new lease, or held out any representations that he would give a new lease, upon which appellant was authorized to rely, we are inclined, after a careful re-examination of the evidence, to adhere to the conclusion announced upon the former hearing. We are not satisfied that any such promise was made, or that any such representations were held out. The agent denies positively that he said or did anything to induce appellant to complete the performance of his contract with the lessees, or to induce him to believe that the premises would be relet to him. Appellant himself admits that the agent declined to make any promises, but stated that he intended

to cancel the lease, and, after he had done that, he would then determine whether he would make another lease or not.

Counsel for appellant say in their brief that this suit is not brought to declare and enforce a vendor's lien, nor a lien created by estoppel, but they claim that an equitable lien was created by the acts of the parties. They furthermore say: "It is not claimed that appellee fraudulently acquiesced in the work during its progress, but that appellee was guilty of fraud after its completion, making it inequitable for appellant to hold the property free from the equitable lien asked for." The theory of equitable liens has its ultimate foundation in contracts, express or implied, which deal with, or in some manner relate to, specific property. 3 Pom. Eq. Jur. § 1234. There was here no express contract between appellant and appellee, nor do we think that there is any implied contract to pay for the repairs or improvements. As a general rule, improvements of a permanent character, made upon real estate, and attached thereto, without the consent of the owner of the fee, by one having no title or interest, become a part of the realty, and vest in the owner of the fee. *Mathes v. Dobschuetz*, 72 Ill. 438. In equity, where one makes improvements innocently or through mistake upon the land of another, he will not ordinarily be allowed to enforce a claim for reimbursement as an actor; but when the true owner seeks relief in equity, as, for instance, to set aside a sale of the land on which the improvements have been made, or to obtain an accounting for rents and profits, he may be required to make compensation for the improvements, upon the principle that he who seeks equity must do equity. *Ebelmesser v. Ebelmesser*, 99 Ill. 541; 3 Pom. Eq. Jur. § 1241, and note. Even in such case compensation will only be allowed for the increased value caused by the improvements. *Ebelmesser v. Ebelmesser*, supra. Courts of equity will not grant active relief, and sustain a bill to recover for such enhanced value, after the true owner has recovered the premises at law. 2 Jones, Liens, § 1136. In proceedings instituted by the real owner it must appear that the party making the improvements did so under a claim of title which turned out to be defective, or under some mistake concerning his rights, or because he was induced to incur the expenditures through the fraud or deception of the owner. 3 Pom. Eq. Jur. § 1241, note 1. Here the repairs were made for a party known to be the owner of only a leasehold estate, presumably in reliance upon the statutory mechanic's lien, and not through confidence in a defective title, or through mistake, or through the fraud of the owner of the fee.

Counsel have called our attention to the case of *Perry v. Board*, 102 N. Y. 99, 6 N. E. Rep. 116. In that case there was a special agreement embodied in the resolution of a corporate body to pay the moneys advanced for the repairs. It is there announced as a general doctrine of equity that a lien will be given when the plaintiff's rights can be secured in no other way. This is carrying the doctrine of

equitable liens further than the courts of the other states have gone in that direction. *Crane v. Caldwell*, 14 Ill. 468; *Dewey v. Eckert*, 62 Ill. 218. It appears, however, in the *Perry Case*, as it does not appear here, that the owner of the property expressly authorized the party making the repairs to proceed with them, directing a mortgage to be executed to raise money to pay for them, approved of them after they were made, accepted them "not as a gratuity, but as services for which compensation should be given," and that the party in whose favor the equitable lien was enforced advanced his own money to pay the bills incurred for the improvements, at the request of the officials of the corporate body, and that his right to remuneration was clear. We do not regard the decision in that case as a precedent which should control the disposition of the case at bar. The judgment of the appellate court is affirmed.

(146 Ill. 59)

### ZUCKERMAN v. HAWES.<sup>1</sup>

(Supreme Court of Illinois. June 19, 1893.)

#### PRACTICE—BONDS.

1. A man who owns land worth \$75,000, incumbered for \$13,000, and other land worth \$12,000, and incumbered for \$3,000, is a sufficient surety for a bond of \$5,000.

2. Where a party who has been ruled to give bond produces a surety whom he in good faith believes to be sufficient, it is reversible error for the court upon rejecting the bondman to refuse to give the party a reasonable time to furnish another surety.

Appeal from appellate court, first district.

Action of forcible detainer by B. F. Hawes against Joseph Zuckerman. From an order of the appellate court dismissing defendant's appeal from a judgment against him, he again appeals. Reversed.

B. M. Shaffner, for appellant. Albert H. Meads, for appellee.

BAILEY, C. J. This is an appeal from a judgment of the appellate court dismissing the appellant's appeal to that court, at his costs, for a failure to comply with a rule requiring him to file a new bond. The suit was in forcible detainer, and was brought by the appellee against the appellant to recover possession of certain premises known as "288 Clark Street, Chicago." In the circuit court the appellee obtained judgment for the recovery of the premises, and from that judgment the appellant took an appeal to the appellate court. On the 12th day of October, 1892, which was one of the days of the October term, 1892, of that court, on motion of the appellee, the appellant was ruled to file a new bond in the penal sum of \$5,000 within 30 days from that date, with surety to be approved by the court. Again, on the 24th day of the same month, the appellee moved for a further rule on the appellant, requiring him to file another bond, and on that motion a

<sup>1</sup>Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

further order was entered, requiring the appellant to file a new bond in the penal sum of \$3,000, on or before 10 o'clock A. M. of October 31, 1892, with surety to be approved by the court; and it was further provided in the order that, on failure by the appellant to comply with its terms, his appeal should be dismissed, and also that if the new bond contemplated by that order should be filed, the former rule entered October 12, 1892, should remain in force. On the 31st day of October, 1892, the appellant, by way of complying with the order of October 24th, appeared, and presented a new bond in the penal sum of \$5,000, with Henry Cohn as surety, and Cohn was thereupon examined in open court as to his sufficiency as such surety. It is recited in the final order dismissing the appeal that upon such examination the surety testified "that he was worth to exceed the sum of \$100,000; that he owned the corner of Chestnut and Wells streets, in the city of Chicago, worth the sum of \$75,000, incumbered for \$13,000; that he owned certain other real estate in Chicago avenue worth \$12,000, incumbered for \$3,000; that he owned other real estate in the county of Cook; but all his real estate was incumbered." The court thereupon refused to accept him as surety, or to approve the bond thus tendered. The appellant then asked for further time in which to procure another surety, which request was denied, and a judgment was immediately entered dismissing the appeal, and for costs. It is recited in the judgment order that the appellant excepted to these rulings, and by the present appeal he seeks to have the same reviewed by this court.

No question is made by counsel for the appellee as to the mode in which the evidence heard in the appellate court in justification of the appellant's surety, or the ruling of that court refusing to approve the bond offered, or to allow the appellant further time to procure another surety, are preserved in the record, and brought to this court in the transcript. The case is argued on both sides upon the apparent assumption that all these proceedings are properly preserved in the record, and, that being so, we shall assume, for the purposes of this decision, that such is the case, and shall consider the questions thus sought to be raised upon their merits. Although the record gives us no information as to the grounds upon which either of the orders requiring the appellant to file a new bond was made, still, as the contrary is not shown, we may presume that facts which justified their entry were presented. The appellate court is a court of superior jurisdiction, in the technical sense of that term, and its orders and judgments must be held to be supported by the presumptions which ordinarily prevail in support of the judicial acts of courts of that class. The first question, then, is whether, upon the facts shown in justification of the appellant's surety, the court properly refused to accept the surety and approve the bond. We are inclined to the opinion that the surety offered was sufficient, and should have been accepted. He swears

that he is worth \$100,000 and over. If this be true, he is clearly a sufficient surety upon a bond for \$5,000. But the objection is that his property is all incumbered, and that the appellee, being compelled by law and without his own consent to accept as his security for his rents, damages, and costs during the pendency of the appeal the personal obligation of the surety on the appeal bond, is entitled to a surety from whom his money can be collected, without the necessity of his advancing other large sums of money to make his security available. Admitting all that to be true, we are not prepared to say that the surety offered should have been rejected. He swears that he is the owner of one piece of real estate of the value of \$75,000, and incumbered for \$13,000, and another worth \$12,000, incumbered for \$3,000. If this be true, (and nothing seems to have been shown to contradict it,) it can scarcely be doubted that the surety's equity in these two pieces of property would at any time have sold in the market for a sum largely in excess of the penalty of the bond. If the surety then had been accepted, it can scarcely be said that it would have involved the appellee in the risk of being compelled to pay off one or both the mortgages in order to make his bond available. The appellant, in cases of this character, should not be held to furnish security which, in any and every event and under all possible circumstances, will certainly produce the amount of the bond, without requiring any further outlay on the part of the appellee. To require security of that character in all cases would be highly oppressive, and would often be tantamount to a denial of the right to an appeal. A reasonable discretion should be exercised in passing upon the sufficiency of the surety, and one should be required of such pecuniary ability as will, in all reasonable probability, enable the appellee to collect his bond, if the appeal is decided in his favor. But we need not rest our decision upon this ground alone. Even if the surety was properly held to be insufficient, the circumstances are such as to cast no suspicion upon the good faith of the appellant in tendering him. He was guilty of no trifling with the court, but submitted a bond which he doubtless supposed was sufficient; and, until the court had passed upon it, he could not know or anticipate that it would be rejected. He was attempting in good faith to comply with the order of the court, and had good and substantial reasons for supposing that his bond would be approved. In view of these facts, it was clearly the duty of the court to grant his request for further time to furnish another surety. What length of time should be given was, of course, for the court to determine; but an absolute refusal to grant any time for that purpose, and instantly dismissing his appeal, was, under the circumstances, an abuse of discretion, which resulted in wrongfully depriving the appellant of the benefit of his appeal. For the error in refusing to grant the appellant a reasonable time to furnish another surety, and dismissing

the appeal for failure to comply with the rule to file a new bond, the judgment will be reversed, and the cause will be remanded to the appellate court for further proceedings. The transcript of the record of the circuit court having, under the provisions of the statute, been transmitted to and filed in this court, it will be returned to the appellate court as the basis of its further proceedings in that court. Judgment reversed.

(146 Ill. 126)

FIELD et al. v. CRAWFORD et al.<sup>1</sup>

(Supreme Court of Illinois. June 19, 1893.)

REVIEW ON APPEAL — QUESTIONS OF FACT — CO-PARTNERSHIP — HARMLESS ERROR — INSTRUCTIONS.

1. Whether a copartnership exists between two defendants is purely a question of fact, and the decision of the appellate court thereon is not reviewable.

2. Where the action is tried by the court without a jury, it is harmless error to hold as matter of law that the defendants were not copartners, since such holding does not bind the court in deciding the questions of fact.

3. Duplicate instructions should not be given.

Appeal from appellate court, first district.

Assumpsit by Marshall Field, Alonso G. Woodhouse, Harlow N. Higinbotham, Joseph N. Field, and John G. McWilliams, copartners as Marshall Field & Co., against Iram D. Crawford and Otto G. Schulenburg. Defendants obtained judgment, which was affirmed by the appellate court. Plaintiffs appeal. Affirmed.

Weigley, Bulkley & Gray, for appellants. Barnum, Humphrey & Barnum, for appellee Otto Schulenburg.

CRAIG, J. This was an action of assumpsit, brought by the appellants in the superior court of Cook county against Iram D. Crawford and Otto G. Schulenburg, as partners, to recover the amount of certain promissory notes executed by I. D. Crawford. To the declaration the defendant Schulenburg pleaded—First, nonassumpsit; second, that at the time of the alleged making of the supposed undertakings or promises in the said declaration mentioned he was not the copartner of said Iram D. Crawford under the alleged firm name of Iram D. Crawford or any other name, and never has been the copartner of said Crawford in any way, and does not jointly with him owe the plaintiffs anything, and never has so owed them anything, and of this he puts himself upon the country, etc.; third, that he did not make, nor execute, nor authorize in any way, nor consent to the making or execution of, the said several notes in said first, second, third, fourth, fifth, and sixth counts mentioned, nor either or any of said notes, and of this he puts himself upon the country, etc. By an agreement of the parties a jury was waived, and a trial was had before the court, and judgment rendered against the plaintiffs for costs.

<sup>1</sup> Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

On appeal to the appellate court the judgment of the superior court was affirmed.

Whether Otto G. Schulenburg was a partner with Iram D. Crawford was purely a question of fact to be determined from the evidence heard on the trial by the court. Upon the evidence introduced the court found that no partnership existed between the parties, and rendered judgment accordingly. This judgment was affirmed in the appellate court, and under the statute we are not at liberty to review the facts, and determine whether the superior and appellate courts decided correctly or not. The only question, therefore, that can be considered here is whether the superior court held properly in the propositions of law submitted. The plaintiffs submitted five propositions to be held as law, and they were all so held except the second, which was marked "Refused;" but upon looking into the record it will be found that the second proposition is a duplicate of the fifth, and for that reason it may be presumed the court marked it "Refused." Nothing could be gained by giving two instructions which covered the same matter, and hence it has often been held in this court that the circuit court is under no obligation to give duplicate instructions. So far, therefore, as the decision of the court is concerned in propositions of law submitted by plaintiffs, they can have no ground of complaint.

The defendants submitted five propositions which were held by the court, but, as no fault is found with any of these propositions except the third, that alone will be noticed. It is as follows: "Third. Upon all the evidence in these cases the court holds as a matter of law that the defendant Otto G. Schulenburg was not a copartner of Iram D. Crawford, and did not become liable as such at or at any time after the execution of the notes, or any of them, sued upon in such several actions now on trial." Section 42 of the practice act provides, where a case is tried by the court by agreement without a jury, either party may submit to the court written propositions to be held as law in the decision of the case. This section of the statute does not provide that propositions of fact should be submitted to the court to be held or refused, but it embraces propositions of law only. Whether Otto G. Schulenburg was a copartner of Iram D. Crawford was a question of fact to be determined from the evidence introduced before the court by the respective parties, and we are inclined to the opinion that the proposition ought to have been marked by the court "Refused," on the ground that it was a proposition of fact, and not of law. But we fail to perceive in what manner the plaintiff was injured by the action of the court on the proposition. After the case was closed, and the court reached the point to render a final judgment on the evidence, the court was neither bound nor concluded by the fact that the proposition of fact had been held, but, on the other hand, the court was at liberty to render a judgment in favor of either party, as the rights of either might appear from the evidence. Under such circumstances

the action of the court on the proposition is not ground for reversing the judgment. The judgment of the appellate court will be affirmed.

(145 Ill. 596)

**KEOKUK & HAMILTON BRIDGE CO. v. PEOPLE.<sup>1</sup>**

(Supreme Court of Illinois. June 19, 1893.)

**BOUNDARIES—STATE LINE—TAXATION—ASSESSMENT.**

1. The boundary line between Illinois and Iowa is the middle line of the principal channel of the Mississippi river. *State of Iowa v. State of Illinois*, 13 Sup. Ct. Rep. 239, followed.

2. Under Rev. St. 1891, c. 120, § 295, which provides that the assessors, in assessing certain bridges, shall state "the metes and bounds of the ground occupied by such bridge," it is the duty of the assessors to state the length of the bridge and approach assessed.

3. The objection that certain property is assessed more in proportion to its value than other property in the township cannot be raised upon application for judgment for delinquent taxes, where such assessment is the result of error of judgment, and not of fraud.

Appeal from Hancock county court; John D. Miller, Judge.

Application for judgment for delinquent taxes. The Keokuk & Hamilton Bridge company filed objections which were overruled, and it appeals. Reversed.

G. Edmunds, for appellant. Wm. H. Hartzell, State's Att'y., (Frank Halbower, of counsel,) for the People.

**CRAIG, J.** This is an appeal from a judgment of the county court of Hancock county for taxes for the years 1890 and 1891, assessed against the property of the Keokuk & Hamilton Bridge Company. The bridge company appeared in the county court, and filed several specific objections against the validity of the tax against its property. Evidence was heard, the objections overruled, and judgment entered for the amount of the tax assessed against the property. The bridge company applied for and obtained an appeal, and the following errors have been assigned on the record: (1) The court erred in rendering judgment against the lands of the Keokuk & Hamilton Bridge Company for the taxes of 1890 and 1891, or either of them, for the amount stated in said judgment, (a) because the property valued in the assessment upon which the tax is based was not all in the state of Illinois, the greater part thereof being in Iowa, and not subject to taxation in this state; (b) because said property was fraudulently assessed at more than its fair cash value, and more than any other property in the county is assessed in proportion to its value. (2) Because the property was not described as required by law, and most of the value was of property not in Illinois, and not subject to taxation in this state. (3) Because the law in relation to assessment and valuation of property was wholly disregarded, for the fraudulent purpose of

compelling said company to pay more than its just proportion of taxation.

The first question raised by the error assigned is whether the property assessed was all in the state of Illinois. The description of the property assessed, as appears from the return of the assessor, is as follows: "The Hancock County Bridge Company, called the 'Keokuk Bridge Company,' called, also, the 'Keokuk & Hamilton Bridge Company.' All the lands of the Keokuk & Hamilton Bridge Company, situated in Hancock county, Illinois, and lying and being in and on island No. 4, in the southwest quarter of section thirty, (30,) in township five (5) north, range eight (8) west, in said county, and extending westward into the Mississippi river, to the state line between the states of Illinois and Iowa, and more particularly described as follows, viz.: A strip of land 80 feet wide, more or less, the center line of said strip of land commencing at a point in the center of Railroad avenue, in the plat of ground known as the 'Keokuk & Hamilton Ferry & Manufacturing Company's Addition to the City of Hamilton,' in said county, 707 and three-fourths feet south, 72 degrees 40 min. east, of the center of the east end of said bridge; thence running north 72 degrees 40 minutes west, to the east end of said bridge; thence continuing the same course along the center line of said bridge to the stateline between the states of Illinois and Iowa, including the slopes, walls, embankments, abutments, piers, and bridge structures and improvements thereon." From this return made by the assessor it appears that the property assessed was all within the state of Illinois. It is claimed, however, in the argument, that the return has been overcome by evidence introduced on the hearing which shows that the assessment was based on a valuation of the bridge to the draw, which is beyond the boundary line of the state. We do not propose, in this case, to enter upon an extended discussion in regard to the location of the true boundary line between Iowa and Illinois, and that question will only be considered so far as may be necessary to settle the question whether any part of the bridge assessed in Illinois was in fact located in the state of Iowa at the time the assessment was made. It is a clear proposition that the assessor had no right to assess any part of the bridge located in the state of Iowa. By the return of the assessor he assumes to have assessed the bridge only to the state line; but as the assessor, in his return, fails to give the number of feet of approach and bridge assessed, it is impossible to determine, from the return, whether he crossed over into Iowa or not. He gives the starting point, but fails to note the number of feet from that point to the state line, as he should have done. There is, however, evidence in the record which shows how far the assessor assessed the property. Cole, the superintendent of appellant, testified that Guthrie, while acting as assessor on the board of review, said that he valued and assessed the bridge to the draw. The witness also stated that there was about 1,813 feet of bridge east of the draw, and 700 feet of approach,

<sup>1</sup> Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

and there was west of the east end of the draw 380 feet of bridge, and 250 feet of approach. There is other evidence in the record tending to prove that the bridge was assessed to the east pier of the draw, and we find nothing contradicting this fact. In disposing of the case, therefore, we shall take it for granted that the bridge was assessed to the draw. The question, then, is whether any portion of the bridge east of the draw was in Iowa. If it was, the assessor exceeded the authority conferred upon him by the state, as he had no power to assess any property beyond the limits of this state. There is much discussion in the arguments of the respective parties as to the true location of the boundary line between Illinois and Iowa, where the bridge in question is located across the Mississippi river, but as that question has recently been decided by the supreme court of the United States we shall content ourselves with citing but a few of the many authorities bearing on the question. In *Wheaton on International Law* (3d Eng. Ed., § 200) the author said: "By the treaty of peace concluded in Paris, in 1763, between France, Spain, and Great Britain, the province of Canada was ceded to Great Britain by France, and that of Florida to the same power by Spain; and the boundary between the French and British possessions in North America was ascertained by a line drawn through the middle of the river Mississippi, from its source to the Iberville, and from thence, through the latter river and the lakes of Maurepas and Pontchartrain, to the sea." The boundary line thus established between the territories belonging to England and France, as established by the treaty, was the middle of the Mississippi river; and it was clear that a line thus established between two governments would be the middle of the main channel or channel of commerce, so that each government might have a free and unmolested navigation of the river. After peace had been established between the United States and England the territory lying on the east of the Mississippi river passed into the hands of the United States, and that on the west remained in the hands of France, the boundary line remaining the same as before. The act of congress of April 18, 1818, authorizing the people of Illinois to form a constitution, after defining the northern boundary, declares as follows: "Thence west to the middle of the Mississippi river, and thence down along the middle of that river to its confluence with the Ohio river." 1 Starr & C. St. p. 50. The same language as respects the boundary has been preserved in the constitutions of the state, of 1818, 1848, and 1870. Id. pp. 55, 68, 99. The enabling act of Iowa, passed in 1845, (5 Stat. 742), fixes the eastern boundary of the state as follows: "Beginning at the mouth of the Des Moines river, at the middle of the Mississippi; thence, by the middle of the channel of that river, to a parallel of latitude, etc. The enabling act for the admission of Wisconsin, enacted in 1846, (9 Stat. 56,) gives the western boundary of the state as follows: "Thence, down the center of the main channel of the Mississippi, to the northwest corner of the

state of Illinois." Where the middle of a navigable river becomes the boundary line between two states, as was the case with Illinois and Iowa, the middle of the current or channel will be regarded as the boundary line. Thus Wheaton on International Law (section 192) says: "Where a navigable river forms the boundary of coterminous states the middle of the channel, or thalweg, is generally taken as the line of separation between the two states, the presumption of law being that the right of navigation is common to both; but this presumption may be destroyed by actual proof of prior occupancy, and long, undisturbed possession, giving to one of the riparian proprietors the exclusive title to the entire river." In Creasy on International Law (section 231) it is said: "It has been stated that where a navigable river separates neighboring states the thalweg, or middle of the navigable channel, forms the line of separation. Formerly, a line drawn along the middle of the water—the medium flum aquæ—was regarded as the boundary line, and still will be regarded, *prima facie*, as the boundary line, except as to those parts of the river as to which it can be proved that the vessels which navigate those parts keep their course habitually along some channel different from the medium flum. When this is the case the middle of the channel of traffic is now considered to be the line of demarcation." See, also, *Buttenth v. Bridge Co.*, 123 Ill. 535, 17 N. E. Rep. 439, where it is held that the middle of the main channel of a river between states will be regarded as the boundary line. In *St. Louis v. Rutz*, 138 U. S. 226, 11 Sup. Ct. Rep. 337, it is said: "The enabling act of April 18, 1818, (3 Stat. 429, § 2,) under which Illinois was organized as a state, and admitted into the Union, made the middle of the Mississippi river the western boundary of the state. The enabling act of March 6, 1820, (3 Stat. 545, § 2,) under which Missouri was organized as a state and admitted into the Union, made the middle of the main channel of the Mississippi river the eastern boundary of Missouri, so far as its boundary line was coterminous with the western boundary of Illinois. It has been held by the supreme court of Illinois (*Buttenth v. Bridge Co.*, 123 Ill. 535, 17 N. E. Rep. 439) that these two enabling acts are to be construed as *in pari materia*, and that the common boundary line between Missouri and Illinois is the 'middle of the main channel of the Mississippi river.' The 'middle of the main channel of the Mississippi' has been constantly treated as the eastern boundary of the state of Missouri. *Jones v. Souland*, 24 How. 41; *The Schools v. Risley*, 10 Wall. 91." The question here involved was before the supreme court of the United States in *State of Iowa v. State of Illinois*, at the last October term of the court, (13 Sup. Ct. Rep. 239;) and after a review of the authorities bearing on the question the court, among other things, said "that the true line in navigable rivers between the states of the Union, which separate the jurisdiction of one from the other, is the middle of the main channel of the river. Thus, the jurisdiction of each

state extends to the thread of the stream,—that is, the middle channel,—and, if there be several channels, to the middle of the principal one, or rather the one usually followed.” Under the authorities we think it is plain that the boundary line between Iowa and Illinois, where the bridge of appellant is constructed, is the middle of the main channel of the river; in other words, the thread of the stream. As has been seen, the assessor assessed the bridge to the draw, and the next question to be determined is whether the draw is at the center of the main channel of the river. Upon this point the appellant called three or four witnesses who had been acquainted with the channel of the river at the point in question for a number of years,—men who had been pilots on the river,—and these witnesses testify that the main channel of the river was east of the draw from 100 to 150 yards. If this testimony was correct—and it was not, as we understand the evidence, contradicted—the assessor assessed from three to four hundred and fifty feet of the bridge in Hancock county, which was located in Iowa.

We now come to the second error relied upon. Was the property described by the assessor as required by law? Section 299 of the revenue law provides (Rev. St. 1891, c. 120, § 295) that all bridge structures across any navigable stream forming the boundary line between the state of Illinois and any other state shall be assessed by the assessor in the county or town where located, as real estate; that the assessor shall give in his description the quarter section, section, township, and range in which the bridge is located, together with the metes and bounds of the ground occupied by such bridge, and the approaches thereto from the end of the Illinois shore to the center of the main channel of the stream crossed by the same. Under this section of the statute it was the duty of the assessor to state the length of the bridge and approach assessed. Had this course been pursued, as the statute required, after the center of the stream was once determined, there could be no uncertainty in regard to the fact whether the assessor had assessed property in Illinois which was located in Iowa.

The next question to be considered is whether the property was fraudulently assessed at more than its fair cash value. Whether the property was assessed more or less than it should have been, or more or less than other like property in the county, is unimportant. The assessor is an officer provided for by the legislature, whose duty it is to fix the valuation of property in his town, in order that all property may bear its just proportion of the burden of taxation. In the discharge of his duty the assessor is required to exercise his best judgment in placing a valuation on property, and when his judgment has been honestly exercised, and he has proceeded on a correct basis, courts cannot review the assessment. *Spencer v. People*, 68 Ill. 510. Boards of review have been provided where, upon proper application, changes may be made; but, unless the property has been fraudulently assessed more than its fair cash value, courts

cannot interfere with the action of the assessor. Here the property was assessed by the assessor at \$95,000, and it is so the amount is so grossly excessive as to amount to fraud. There is no evidence in the record that the assessor was actuated by any wrong or impure motives in assessing this property. He may have made a mistake, and assessed the property higher than it should have been assessed; but that mistake was a mere error of judgment which cannot be reversed and rectified by an application for judgment against the property assessed. From the evidence found in the record we are inclined to the opinion that, under the rule adopted by the township, of assessing property one-third of its cash value, the bridge was assessed more, in proportion to its value, than other property in the township; but the overvaluation was a mistake in judgment, which cannot be availed of in the proceeding. For the error indicated the judgment will be reversed, and the case remanded.

(145 Ill.

LAUER et al. v. KUDER et al.<sup>1</sup>

(Supreme Court of Illinois. June 19, 1893.)

ADVERSE PARTY AS WITNESS—FRAUDULENT CONVEYANCE—BURDEN OF PROOF.

1. Where a plaintiff calls the defendant a witness, he is not bound by such statements of the witness as are mere conclusions.

2. In a suit to set aside a deed from judgment debtor to his mother, the burden of proof of fraud is on the complainant.

Appeal from appellate court, third district.

Creditors' bill by Henry Lauer, Aaron Stern, Samuel Aul, and Charles Schaefer, partners, doing business as Rindskopf, Stern, Lauer & Co., against Christopher Lincoln Kuder and Susanna Kuder. Defendants obtained a decree, which was affirmed by the appellate court. Complainants appeal. Affirmed.

Kerrick, Lucas & Spencer and George Philbrick, for appellants. John J. Rindskopf, for appellees.

WILKIN, J. This was a creditors' bill filed by appellants against appellees, Susanna Kuder and Christopher L. Kuder, seeking to set aside a conveyance of real estate made by Christopher L. to Susanna, his mother, February 5, 1890. Prior to January 4, 1890, Christopher L., together with one Braden, were engaged in a mercantile business in Gifford, Champaign county, under the firm name of Kuder, Braden, and became indebted to appellants in the sum of \$2,500, and to other parties in various sums. The firm of Kuder & Braden failed about the 12th of January, 1890. On the 14th of that month Lewis Kuder, a resident of Champaign county, and father of Christopher L., died testate, seized in fee of 856 acres of land situated in said county, and also a considerable amount of personal property. By the terms of his will he provided as follows:

<sup>1</sup>Reported by Louis Boissot, Jr., Esq., of Chicago bar.



lows: First. For the payment of indebtedness, appointment of executors, etc. Second. "After the payment of my said debts and funeral expenses I give to my wife, Susanna Kuder, and to my children, each, Albert L. Kuder and Christopher L. Kuder, all the rest of my real and personal estate, share and share alike, and to their heirs respectively, with the right to sell any and all of said real and personal estate." Third. "I give and devise to my wife, Susanna Kuder, the land on which the homestead, including dwelling house and barn, \* \* \* [describing the land, 160 acres,] for her use absolutely." On January 18, 1890, appellants brought suit in the circuit court of Champaign county against the firm of Kuder & Braden. On January 27, 1890, the will of Lewis Kuder was probated. On February 5, 1890, Christopher L. Kuder made a deed conveying his interest in the land described in the bill to his mother. On March 11, 1890, appellants recovered judgment against Christopher L. Kuder for \$1,200, and, upon execution duly returned "No property found," on July 3, 1890, filed this bill to set aside said conveyance by Christopher L. Kuder to Susanna Kuder, charging that it was made with the intent to hinder and delay the creditors of Christopher L. Kuder. Afterwards other creditors of Kuder filed intervening petitions. The cause was heard on bill, answer, replication, and evidence reported by the master, and a decree entered dismissing the bill at the complainants' cost. This is an appeal from a judgment of the appellate court, affirming that decree.

The only question involved in the case is one of fact, viz. was the conveyance sought to be set aside made with the intent to disturb, delay, hinder, or defraud the creditors of the grantor? On the hearing, counsel for appellants introduced appellees as witnesses on their behalf. Susanna Kuder testified, in substance, that she loaned Christopher L. \$3,000 in September, 1883, and that the conveyance to her was made to pay the debt, she giving Christopher L., in addition thereto, her conditional note for \$1,000. Lewis Kuder, at the time of his death, owed large sums of money, the amount of which was not known at the date of the deed, and the condition upon which she was to pay the \$1,000 note was "that if any of the land had to be sold to pay those debts the note should be proportionally reduced." Both she and Christopher L. testified that there was no fraud in the transaction; that the alleged debt was bona fide, and the deed made in good faith, in consideration of that debt and conditional note. This was all the testimony offered in regard to the making of the deed. Counsel for appellees contend that appellants, having made these parties their own witnesses, cannot be heard to discredit them; that by calling them to testify in their behalf they vouch for their character and truthfulness; and cite in support of their position *Hill v. Ward*, 2 Gilman, 285; *Griffin v. City of Chicago*, 57 Ill. 317. While we agree that the proposition contended for is, as a general rule,

correct, it has only a qualified application to the evidence in this case. Appellants are not bound by the mere conclusions of these witnesses, and only by their statement of facts in so far as they are entitled to credit, taking into consideration the reasonableness of their testimony, and all other proper tests of the credibility of witnesses, and the weight of their evidence. *Bell v. Devore*, 96 Ill. 217; *Mitchell v. Sawyer*, 115 Ill. 657, 5 N. E. Rep. 109. But they are not concluded by the evidence of these or any other witnesses introduced by them. "The rule is, if a witness states facts against the interests of the party calling him, another witness may be called by the same party to disprove those facts, for such facts are evidence in the cause, and the other witness is not called directly to discredit the first, but the impeachment of his credit is incidental only, and consequential. 2 Phil. Ev. 448." *Rockwood v. Poundstone*, 38 Ill. 201. The difficulty of appellants' case does not arise from any rule of evidence precluding them from disproving the facts stated by appellees, but from the fact that they were unable to offer any affirmative proof to support the allegations of their bill. All the direct testimony in the case is to the effect that the conveyance was for a valuable consideration, and made in good faith. Conceding that some of this evidence is entitled to but little credit, being merely the conclusions of the witnesses, yet, if all that evidence should be disregarded, there would be no evidence in the record upon which to base a decree granting the relief prayed in the bill.

The contention of counsel for appellants that the value of the land conveyed by this deed is so greatly in excess of the consideration paid for it by Mrs. Kuder as to amount to evidence of fraud is not supported by the evidence. It will be observed that the conveyance does not include all the real estate of which Lewis Kuder died seised. If Christopher L. Kuder has any interest under the will of his father in the 160 acres, the use of which is given to Susanna, that interest is undisposed of by this conveyance. The value of the lands conveyed, as shown by a fair estimate of all the evidence on that issue, taking into consideration the amount of debts of the deceased chargeable against it, is not in excess of the consideration paid for it. At least there is no such disproportion between the value of the interest conveyed and the consideration as to amount even to slight evidence of fraud.

The relationship existing between the grantor and the grantee in the deed is, of course, to be considered in connection with all the other facts and circumstances in the case, but it is not a controlling fact. As we understand the evidence in this record, the position of appellants could only be sustained by casting the burden of proof upon appellees to establish the fairness of the conveyance; in other words, to disprove the allegations of the bill, which, of course, cannot be done. The judgment of the appellate court will be affirmed.

(145 Ill. 357)

JAMISON v. PEOPLE.<sup>1</sup>

(Supreme Court of Illinois. June 15, 1893.)

MURDER—CHANGE OF VENUE—CONTINUANCE—  
EVIDENCE—INSTRUCTIONS.

1. Upon petition for change of venue in a murder case the defendant swore to a dangerous prejudice against him throughout the county, and that since he had been in jail an attempt had been made to lynch him, which was defeated by the sheriff. The petition was supported by the affidavits of 5 residents of the county and contradicted by the affidavits of 337 residents of the county, who denied the existence of the prejudice, but did not deny the attempted lynching. *Held*, that a refusal to change the venue was proper, since the material question was as to the existence of the prejudice, and not as to the existence of the facts on which the defendant based his fears. *Price v. People*, 23 N. E. Rep. 639, 131 Ill. 223, followed.

2. A continuance having been granted defendant on account of the absence of six witnesses, a second continuance was asked four months later on account of the absence of three of the same witnesses. The witnesses lived only one day's journey from the place of trial, but no effort was made to procure their attendance, except writing a letter. *Held*, that sufficient diligence in attempting to get the witnesses had not been shown.

3. Evidence of defendant's capture after the homicide and his resistance of arrest are admissible as proof of guilt.

4. Witnesses who have had opportunities to observe the defendant may, although not experts, state their opportunities of observation, and then express their opinion as to his sanity, based solely upon such observation.

5. Where such a witness states that he had an interview with the defendant in jail, and relates part of the conversation between them, a general objection to the question, "What else was said?" is insufficient to raise the point that the rest of the conversation contained matters that ought not to be admitted, since, when the objection was made, there was nothing to indicate that the answer would contain any improper matter.

6. Where it is shown that the defendant said that he was drunk when he committed the homicide, and another witness testifies that he acted as though he had been drinking, it is proper to instruct the jury as to law in regard to homicide committed during intoxication, although most of the witnesses testify that defendant was sober.

7. It is proper to charge that it is not necessary that the jury should believe that every material fact in evidence has been proven beyond a reasonable doubt, but that it is sufficient if they believe that every material allegation in the indictment, or either count thereof, in manner and form as therein stated and charged, has been proven beyond a reasonable doubt.

8. It is proper to modify an instruction which states that, "while the law presumes all men to be sane, yet this presumption is overcome by evidence tending to prove insanity," so as to make it read, "yet this presumption may be overcome," etc.

9. It is proper to modify an instruction which states that "if there is evidence in this case sufficient to raise a reasonable doubt as to the sanity of the defendant, then the jury will find the defendant not guilty," so as to make it read: "If the evidence in this case is sufficient to raise a reasonable doubt as to the sanity of the defendant, then the jury will find the defendant not guilty."

<sup>1</sup> Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

Error to circuit court, Adams county.  
Oscar P. Ronney, Judge.

W. W. Berry, for plaintiff in error.  
T. Moloney, Atty. Gen., Carl E. Epl  
and J. C. Thompson, for the People.

BAILEY, C. J. At the May term, 1892, of the circuit court of Adams county William J. Jamison, alias William M. Smith, was indicted for the murder of Charles Aaron, and at the September term of 1892 he was tried and convicted, and punishment was fixed at death. Sentence having been pronounced upon him in accordance with the verdict of the jury, he has sued out of this court a writ of error which has been made a supersedeas, and the record is now before us for review.

There is little, if any, controversy as to the fact of the homicide, or the circumstances under which it was committed. Charles N. Aaron, at the time of his death, was a man about 33 years of age, a unmarried, and was living with his father and mother on a farm in Ellington township, Adams county. His mother was then an invalid, and was suffering from cancer in her face. Jamison, the defendant, who then gave his name as William M. Smith, was a negro, but claimed to be an Indian doctor, and to have special skill in the treatment of cancers. On the 15th day of February, 1892, he went to the house where Charles N. Aaron and his parents lived, for the purpose of treating Mr. Aaron, and an agreement, as it seems, whereupon entered into between him and Charles N. Aaron, by the terms of which he was to give Mrs. Aaron treatment for her cancer, and in case of a cure he was to be paid the sum of \$300. Jamison thereupon took up his abode with the Aaron family, and remained there until April 19th, preparing medicines and applying them to the face of his patient. During that time he slept on a pallet on the floor of the sick room, which was also the family sitting room. On the morning of April 10th John Aaron, the father, was the first to rise. After making the kitchen fire, and returning to the sitting room, at about 7 o'clock, he found Jamison about getting up, and looking, as Aaron testifies, "as if something was wrong." Nothing was said by either until Jamison commenced to talk about cutting stalks, saying that he could cut more stalks in a day with a pole than a man could with a team. John Aaron replied that he thought Jamison could not do that, whereupon Jamison retorted: "You are hairbrained, and have not got any sense. You stop and talk to everybody you see." John Aaron testified that in this conversation Jamison "talked angry and looked wicked." There were then present in the room Jamison, John Aaron and his wife, and Burgess Meyer, an employe on the farm. Just then Charles N. Aaron entered the room, and having overheard what Jamison had just said to his father, he remarked to Jamison: "You will have to quit abusing people. He is in his own house, and you stop it." John Aaron also said: "Yes, please do not talk to me in that way;" and Charles N. Aaron added: "I mean it. You will

have to stop." To this Jamison replied: "I will show you what kind of a man I am,"—and jumped up, put on his hat, and set his valise on a chair, as if he was going to leave. At this point breakfast was announced by Mrs. Simonds, the housekeeper, and John Aaron left the room. Jamison then said: "Charley, I want my money for some prescriptions I gave you." To this Charles replied: "You have not cured her yet. When you cure her, I am willing to pay you. The agreement was, I was to pay you when you cured her. You have not cured her yet;" and he then went into an adjoining room for the prescriptions, and returned with a large bundle of them, containing, as the witnesses testify, from 20 to 50, and threw them down on a chair a short distance from Jamison, saying: "Come out and behave yourself." Jamison replied: "You are robbing me. I want my money." Charles then left the sitting room and passed into the dining room. As he did so, Jamison said: "I will show them what kind of a man I am," and went to his valise, and took something therefrom, and followed into the dining room, closing the door behind him. He then said two or three times: "Charlie, you are trying to rob me. Give me my money, or I will shoot you." Charles replied: "Doc., you will not shoot anybody." Immediately Jamison fired off a revolver which he held in his hand, and Charles N. Aaron fell to the floor mortally wounded, and died of his wound a few minutes afterwards. Jamison then turned his revolver upon John Aaron, and demanded money of him. Aaron begged him not to shoot, saying that he would give him a check, and he thereupon ran across the room and went out, going through the kitchen. Mrs. Simonds here interposed, saying: "For God's sake, do not shoot another here," and Jamison pointed his revolver at her, and said: "Do not say another word, or I will shoot you." Jamison then went back across the hall, but immediately returned, and chased Aaron around the house to the front door of the dining room. He was then close upon him, and said: "Give me that check; give it to me quick." Aaron thereupon went into the dining room, followed by Jamison, and there drew a check in Jamison's favor for \$300; Jamison, while it was being drawn, standing over him with his revolver drawn, and telling him to be quick about it, or he would shoot. On receiving the check, Jamison left, going in the direction of Clioia, a railway station, about one-half of a mile away. Jamison went from Aaron's house to Clioia, and there inquired for a train to Quincy. Being informed that a train was due at 7:55, he remained at the station a short time, and then started down the railroad track towards Quincy on foot. In the mean time, Burgess Meyers having gone to the neighbors and told them what had occurred, a number of men collected, and started in pursuit of Jamison, and came within sight of him between Clioia and Eubanks station, a station about two miles from Clioia. When his pursuers came within gunshot of him, firing commenced

between Jamison and his pursuers; they firing at him with guns, and he returning the fire with his revolver. The evidence as to whether Jamison or those in pursuit commenced firing is conflicting, but the firing was kept up until Jamison was shot twice, first in his hand and afterwards in some part of his body, and he then dropped his valise, threw away his revolver, and ran to a house near the track, and, after attempting unsuccessfully to break in the door, sat down in a chair on the porch, and was there taken prisoner.

At the May term, 1892, of the circuit court of Adams county, that being the term at which the indictment was found, the defendant presented to the court an application for a change of venue on account of the prejudice of the inhabitants of Adams county, which was denied, and the decision of the court denying him a change of venue is assigned for error. The petition alleged, in substance, that Charles N. Aaron, the deceased, was a prominent citizen of the county, and a member of the board of supervisors; that the news of his death had spread over the entire county, and had reached the homes of citizens and friends of Aaron in each township in the county; that there are three daily newspapers published at Quincy, each having a large circulation in the county; that immediately after the defendant's arrest each of those papers published one-sided statements in relation to the homicide, which were calculated to create, and did create, a lasting prejudice against the defendant among the citizens of the county; that there are many weekly papers published in the county, some of which reach every town and neighborhood in the county; that these weekly papers published one-sided and exaggerated accounts of the killing of Aaron, which were calculated to and did create an undue prejudice in the minds of the people of the county against the defendant; that such feeling was so intense that the defendant feared that he would be forcibly taken from the jail, and hung by a mob; that the sheriff of the county was notified from time to time of the intention of the citizens of the county to congregate and take the defendant from the jail and hang him in defiance of law; that to such an extent did this feeling and purpose exist that the sheriff arranged to call to his assistance the police of the city of Quincy to resist such mob on the giving of an agreed signal; that the sheriff or his deputies or other persons remained on guard all night to guard against the approach of such mob bent upon hanging the defendant without warrant of law; that at about midnight on the 29th day of April, 1892, a large mob, composed of citizens of the county, and containing many prominent men, went to the jail, and demanded the surrender to them of the defendant; that they carried with them sledge hammers of great weight, to be used in forcing whatever obstructions might be between them and the defendant, and also a rope to hang the defendant; that two of these hammers are now in the possession of the sheriff; that

the sheriff protected the defendant, and refused to turn him over to the mob, and, with the assistance of the police, succeeded in dispersing the mob; that prominent citizens of the county have openly stated that the men who arrested the defendant should have hung him while they had him in their hands, and that it is common talk in the county that if the defendant should be acquitted he would be hung by the people; that prominent citizens of the county have stated that, if the defendant should obtain a change of venue, he would never be taken from the county alive, and that the people would never permit him to be removed from the county; that the petitioner fears that he cannot and will never receive a fair and impartial trial in Adams county because of the prejudice of the inhabitants of the county against him in this case; that the facts upon which he founds such belief are those above set forth, and also the further facts that exaggerated accounts of the killing of Aaron, prejudicial to the defendant, have been circulated from person to person, and from house to house, throughout the entire county, and the prejudice against the defendant has been spreading through the country since the day of the homicide; that such prejudice has become so general in the county that it is a frequent occurrence for men who are looked upon as good and substantial citizens and men of influence to declare from the streets and within the hearing of passers-by that the defendant ought to be hung; that some of the men who are thus manufacturing public opinion to the prejudice of the defendant become angry and excited when any person says that the defendant ought to have a change of venue; that this prejudice is of such character that it is impossible for the defendant to meet and overcome it, and that it is not abating to any extent whatever, but, on the contrary, is becoming more general, and that on account of such prejudice the defendant believes that it would be unsafe and dangerous for him to go to trial in the county. The petition was verified by the affidavit of the defendant, and in support of it five other affidavits of residents of Adams county were filed. These were: (1) An affidavit of Joseph M. Cleary, stating, in substance, that there had been, and still was, great excitement over the shooting of Aaron; that the homicide had been generally talked about among the people of the county; that many of the citizens of the county had said openly and in public places that the defendant murdered Aaron, and ought to be hung; that many had also said publicly that the people ought not to have permitted the defendant to be brought to Quincy, but should have shot or hung him while they had an opportunity; that the affiant had heard these expressions frequently, and from the mouths of different persons, and from persons living in different parts of the county; and that he does not believe that the defendant will receive a fair and impartial trial in the county, on account of the prejudice of the people against him. (2) An affidavit of Edward Noel that the affiant had heard statements by citizens

of the county that the defendant ought to be hung, that he believed that the feeling in the county was such that it was impossible for the defendant to have a fair and impartial trial in the county, and that he had heard as many as 18 persons, citizens of the county, say that the defendant ought to be taken out of the jail and hung without trial. (3) The affidavit of George T. Morgan that he had heard statements made by citizens of the county that the defendant ought to be hung for the murder of Aaron; that on the night of the ——— day of April, 189—, he saw a great number of persons assembled near the courthouse, and, judging from their actions, he believes that the assembly was a mob organized to break open the jail, and lynch the defendant; that he believes the feeling in Adams county is such that it is impossible for the defendant to have a fair and impartial trial in the county. (4) The affidavit of George W. Register that he had heard as many as 50 persons, citizens of the county, say that the defendant ought to be hung, and that he believed the feeling in the county to be such that it would be impossible for the defendant to have a fair and impartial trial therein. (5) The affidavit of Jordan Chavis that from the statements of different parties which he had heard he believed that it would be impossible for the defendant to have a fair and impartial trial in the county.

The state's attorney, on the other hand, traversed the averments of the petitioner and in support of his traverse filed the affidavits of 337 of the citizens of Adams county, residing in all parts of the county, including among the number many persons holding or having held official positions in the county, and also prominent professional and business men, and men who are shown to have an extensive acquaintance with the people of the county. In these affidavits the affiants stated, each for himself, that he was well acquainted with nearly all the people residing in his township, and had a large general acquaintance throughout the county; that he knew of no prejudice against the defendant existing among the affiant's acquaintances in the county, and did not believe that an feeling existed among any considerable number of persons in the county, other than an earnest desire that impartial, even-handed justice might be done to the defendant on the one hand and the people on the other; that no more interest appeared to be taken in the present case by the residents of the county than is usually apparent in all cases where the charge is murder, and the deceased is well known; that, on account of the character and social standing of the deceased, and his general acquaintance throughout the county, his untimely death caused considerable comment at the time among his acquaintances, but had ceased to be a general topic of discussion and conversation, and was then—this is, at the time of making the affidavit—only casually referred to; and that from the affiant's knowledge of the temper of the people of the county he had no hesitation in saying that the defendant could have his case tried as fairly and impa-

tially in Adams county as in any other county in the state. In many of the affidavits it was also expressly stated in terms that the inhabitants of the county had no prejudice against the defendant. In addition to the affidavits above mentioned, which were all in substantially the same language, the state's attorney filed the affidavit of John A. Long, who states, in substance, that he was, and ever since the year 1877 had been, a constable in Gilmer township; that he was one of the party who pursued and captured the defendant the morning the homicide was committed, and was the one who shot and wounded him; that there were about 20 men and boys present, mostly armed, and others were gathering rapidly; that no mob violence was attempted; that affiant left the prisoner in charge of those present, and went back to Eubanks, and telegraphed the sheriff to come for the prisoner; that the defendant was brought back to Eubanks by those in charge of him, where he remained for about two hours, until taken away by the sheriff's deputies; that no demonstration was made to shoot or lynch him there, and no spirit was shown except satisfaction that he was in the hands of the law; that Eubanks is about  $3\frac{1}{2}$  miles from the Aaron farm; that the defendant was taken by the officers to Quincy, without trouble or interference, and that since then there has been no attempt at mob violence towards the defendant in that neighborhood or that part of the county; that the feeling in that vicinity and through the county is one of sympathy for the Aaron family, but that no prejudice exists towards the defendant that would prevent him from getting an impartial trial; that affiant is well acquainted in the county, and has talked with many inhabitants of the county since the homicide, and has no hesitation in saying that there is no temper or prejudice against the defendant's getting a fair trial, but the general feeling and disposition is that the law take its course, and that the defendant be fairly tried according to law, and affiant believes that he can get as fair a trial in Adams county as in any county in the state. Also the affidavit of C. F. Perry, a reporter of the Quincy Daily Journal, giving a copy of an interview prepared by him and published in that paper, denying the rumor of a contemplated mob by the people of Ellington township, the reason assigned by the constable in the interview why they had not desired to take the law into their hands being that they were law-abiding men; that, while they realized the enormity of the crime, and felt intensely indignant towards the murderer, they knew that we have laws and courts to deal with such offenders, and have full confidence in those lawful methods. Also the affidavit of Michael Barry, a deputy sheriff of Adams county, that he was well acquainted with the people of every part of the county; that within the last five days he had conversed with over 100 of the prominent citizens of the county about the case, and was satisfied that the defendant could have a fair and impartial trial before a jury of the county; that there was no such prejudice in the minds of the people

of the county as would prevent his obtaining an impartial jury; that the county is very large, having over 60,000 inhabitants. Also the affidavit of John Vancil, the sheriff of the county, stating that he was well acquainted with the inhabitants of the city and of the various townships of the county; that since the defendant's arrest the affiant has talked about the case with people from all parts of the county, and knows their general feeling and temper regarding the case; that he had recently talked with at least a hundred prominent citizens from all portions of the county with reference to the defendant, and he did not believe that the minds of the people were prejudiced against the defendant in such manner as would in any way influence them upon the trial of the cause, or prevent the defendant from having a fair and impartial trial in the county; that the county is a large one, having some 60,000 inhabitants, and the affiant knew of no reason why the defendant could not have a fair and impartial jury from the county to pass upon his case; that no feeling existed among any considerable number of persons in the county, other than a desire that impartial and exact justice may be done the defendant on the one hand and the people on the other. Also the affidavit of Henry Steinkamp, giving the population of Adams county as in the other affidavits, and stating that about one-half of the people of the county were Germans, many of whom could not read the English language; that the newspapers referred to in the defendant's petition were all published in English, and that the larger part of this circulation was in the city of Quincy; that the affiant had conversed with a large number of the people of the county with reference to the charge against the defendant, and was free to say that, in his judgment, the defendant could have a fair and impartial trial in Adams county. Upon the evidence thus presented, the court denied the defendant's petition for a change of venue, and that decision is now assigned for error.

Under the statute in relation to changes of venue on account of the prejudices of the inhabitants of the county, where the defendant is charged with murder, as that statute has been interpreted by this court, the material issue to be tried upon the petition and affidavits filed by the accused and the traverse and counter affidavits filed by the prosecution is whether there is in fact a prejudice in the minds of the inhabitants of the county sufficient to raise a reasonable apprehension that the accused will not receive a fair and impartial trial in the county. *Price v. People*, 131 Ill. 223, 23 N. E. Rep. 639. It is contended here, as it was in the *Price Case*, that the issue to be determined is whether the particular facts upon which the accused bases his fears that he will not receive a fair trial do or do not exist, and that, if those facts are proved, and are of themselves sufficient to raise a reasonable apprehension that the inhabitants of the county are prejudiced against the accused to such a degree that he will not be likely to receive a fair and impartial trial, a case for a change of venue is made out. But in

the Price Case it was held by a majority of the court, after mature consideration, that the question to be determined was, not whether the evidentiary facts detailed in the petition were proved, but whether, upon all the evidence submitted, there was reasonable ground for fear that the alleged prejudice actually existed. So, in *Hickam v. People*, 137 Ill. 75, 27 N. E. Rep. 88, where the same question was presented, we said: "The existence or nonexistence of the prejudice of the inhabitants of the county was the issue made and presented to the court for determination, and it was decided according to the right of the case, upon the petition and the denial filed by the state's attorney, supported by counter affidavits." It cannot be denied that the state's attorney failed to disprove some of the specific facts set forth by the defendant in his petition. Thus, the statement that, after the defendant was arrested and committed to jail, a mob assembled about the jail, bent on taking him out and hanging him without warrant of law, and that they were prevented from accomplishing their purpose by the efforts of the sheriff, is not disposed of or disproved by the counter affidavits filed by the state's attorney. Now, if these facts and the other specific facts stated in the petition and not disproved were conclusive of such prejudice as would be likely to interfere with his obtaining a fair and impartial trial, then clearly the case made by the defendant was not met by the counter affidavits. But we are unable to see that such conclusive effect should be given them. Standing alone, they doubtless would tend to show a feeling on the part of the people of the county unfavorable to the defendant. But they may all be true, and still there be no such prejudice prevalent generally among the people of the county as would be likely to make it difficult to secure an impartial jury, or as would otherwise interfere improperly with the due administration of justice. When all the affidavits are considered, we think the conclusion is irresistible that there was no such prejudice against the defendant as would justify a reasonable apprehension that he could not be fairly and impartially tried in the county. If such prejudice existed and was prevalent throughout the county, the fact of its existence must have been known to most, if not all, the large number of citizens whose affidavits were filed by the state's attorney, and it is unreasonable to suppose that so large a number of men, most of whom appear to have been among the most prominent and widely known citizens of their respective localities, would be so reckless as to come forward, as they have done, and make affidavit that no such prejudice existed to their knowledge. In addition to this, a considerable number of these affiants state expressly and affirmatively that no prejudice against the defendant exists among the people of the county. We are of the opinion that the circuit court committed no error in finding that the prejudice alleged was not proved, and in denying the defendant a change of venue.

The next error assigned is upon the refusal of the court below to grant the de-

fendant a continuance. It appears that at the May term, 1892, of the circuit court—the term at which the indictment was presented—a motion was made on behalf of the defendant for a continuance, and granted. That motion was based upon an affidavit of Monroe Jamison, the defendant's father, showing that the defendant could not safely proceed to trial at that term, on account of the absence of six witnesses, who were named, and who all resided in Davidson county, Tenn. The testimony which it was expected these witnesses would give related to the previous conduct and history of the defendant while in the state of Tennessee, the place where his father and other members of his family resided; the object of the testimony being to prove his insanity. On the 3d day of October following—that being one of the days of the September, 1892, term of the court—a further motion was entered on behalf of the defendant for a continuance, based upon an affidavit made by the defendant's counsel, setting up the absence and materiality of three of the six witnesses mentioned in the former affidavit, and also of Monroe Jamison, the defendant's father, stating the evidence which these witnesses were expected to give in the language of the former affidavit. The affiant also stated that he was employed May 10, 1892, by the defendant's father, to prepare and present the motion for a change of venue, and, that being denied, he was further employed by him to prepare and present the motion for a continuance, which was granted; that affiant then agreed with Monroe Jamison to take charge of the defense, and to associate with him other attorneys, upon consideration that a retainer then agreed upon should be paid to affiant and his associates by August 1, 1892; that such retainer was not paid, because, as affiant believes, of the death of two of Monroe Jamison's children and of the expenses incident thereto; that on or about August 31, 1892, affiant called at the jail to see the defendant, and notify him of the situation, and that the defendant thereupon said to the affiant that he had no use for any lawyer; that he would be protected by a higher power, and that he neither wished affiant nor any other lawyer to take part in his defense; that on the first day of the September term of court the affiant stated to the court what had occurred between him and the defendant, whereupon the court entered an order that the affiant should take charge of the defense of the cause; that the defendant had been without counsel since the last day of the previous May term until the affiant was appointed by the court to defend him; that affiant, immediately upon his appointment, wrote a letter to Monroe Jamison, informing him that the cause had been set for Monday, October 3, 1892, and requesting him to be present with the witnesses, but had received no reply, and affiant had no knowledge of the cause of the absence of Monroe Jamison or the other witnesses; that affiant believes the defendant to be insane, and that he was so at the time of the commission of the homicide charged; that he believes that none of the

witnesses were absent with the permission or consent of the defendant, and that he expected to procure their testimony by the next term of court for the trial of criminal cases. This motion for a continuance was denied, and on the following day the trial was commenced. Monroe Jamison, as it appears, arrived and was present at the trial, but the other three witnesses named in the affidavit did not, and the trial proceeded in their absence. It seems very clear that no such diligence was shown as made it the duty of the court to award a further postponement of the trial. The cause had been once continued on account of the absence of the same witnesses, and nearly five months had elapsed without any steps being taken to procure their attendance. They all lived at or near Nashville, Tenn., and their journey from that place to the place of trial need not have occupied more than one day. No effort, however, seems to have been made to procure their attendance, beyond writing a letter to Monroe Jamison. He came, but failed to bring with him the other witnesses, and no reason is shown why they might not have also come.

It is next insisted that the court erred in admitting improper evidence offered on the part of the prosecution. A portion of the evidence objected to consisted of testimony detailing the circumstances of the pursuit and capture of the defendant by the crowd of people who gathered on learning of the homicide. This evidence was clearly competent. In criminal cases, a portion of the evidence laid before the jury often consists of the conduct of the party, either before or after being charged with the offense, presented not as a part of the *res gestae* of the criminal act itself, but as indicative of a guilty mind. *Rose*, Crim. Ev. 18. It has therefore been held perfectly competent for the prosecution to prove an attempted escape of the accused. *State v. Williams*, 54 Mo. 170; *Fanning v. State*, 14 Mo. 386; 2 Whart. Ev. § 1269. Upon the same principle, acts of the accused by way of resisting or preventing arrest may be shown.

Objection was also made to evidence of the opinions of several nonprofessional witnesses as to the sanity of the defendant, admitted in rebuttal. These witnesses were all of them more or less acquainted with the defendant, and had had an opportunity either of conversing with him or of observing his conduct and demeanor, either before or shortly after the commission of the homicide. Opinion evidence of this character is held to be admissible in this and most of the other states. The rule is that nonexperts who have had opportunities to observe a person may give their opinion of his mental condition or capacity, at the same time stating their reasons, and the facts observed on which they base their opinions, including conversations as a part of the observed facts; but to render such opinions admissible they must be limited to conclusions drawn from the specific facts thus disclosed. 1 Greenl. Ev. § 440, note g, and authorities there cited. The witnesses in this case were permitted to state their opportuni-

ties to observe the defendant, and then to express their opinion as to his sanity or insanity, based solely upon such observations. Such opinions were admissible.

Among the witnesses whose opinions were thus admitted was A. E. Hess, who had never seen the defendant until a few hours after he was committed to jail, and who then saw him, and had a conversation with him in the jail, which lasted, as he says, about half an hour. The witness, after stating that he thought he could form an intelligent opinion from that conversation as to the defendant's sanity, was permitted to state the conversation in detail, and then to express the opinion that the defendant at that time was sane. The defendant's counsel made repeated objections to the testimony of the witness as to the conversation itself, the objection first interposed, and the only specific objection made, being that it was not evidence in rebuttal. These objections were all overruled, and exceptions were duly preserved. The witness was the city editor of one of the Quincy newspapers, and the conversation was in the nature of an interview, consisting of questions propounded by the witness and answers given by the defendant. It related mainly to the circumstances of the homicide, the defendant saying, in substance, that he had no recollection of having shot Aaron; that he had been attending Mrs. Aaron continuously for several nights, and was very nervous, and had been drinking a good deal of gin, and that on account of his loss of sleep, his nervous exhaustion, and the gin he had taken, he was not himself, and had no recollection of what occurred. The witness was then asked, "What else was said?" and to that question a general objection was made and overruled. In answering it the witness proceeded to say that he asked the defendant about a reward offered at Little Rock, Ark., to which the defendant answered, in substance, that some one at Little Rock had put up a job on him there by sending a lewd woman to his office to be treated, and that she afterwards accused him of an assault with intent to commit a rape; that a friend of his came forward and put up \$300 for his bail, and he went to Nashville to get his father to come to Little Rock and straighten the matter out for him; that his friend advised him to leave town, but that he did not know that any reward had been offered for him until he came to this part of the country. No objection was made to this evidence other than the general one above mentioned, nor was any motion made to exclude this portion of the conversation from the jury after its purport became manifest, nor was the court asked to instruct the jury to disregard it. Even if it be conceded that this portion of the conversation ought not to have been admitted, we cannot see that any error was committed by the court in overruling the objection to the question put to the witness, viz. to state what further was said. As has already been shown, when nonexpert witnesses are permitted to give their opinions as to the sanity of the accused, their opinions must be founded upon facts observed by them, and those



facts, including conversations with the accused, must be given. Under this rule, the conversation as a whole was admissible, and when the court was called upon to rule upon the question calling for the residue of it, nothing was apparent indicating that any matter was called for which was improper. Under these circumstances, the court could not do otherwise than overrule the objection. Nor are we able to say that this portion of the conversation should have been excluded even if it had been properly objected to. There is nothing in the record indicating that the evidence of the conversation was not offered by the state's attorney in good faith for the mere purpose of laying a foundation for the admission of the witness' opinion as to the defendant's sanity. For that purpose he was bound to give in evidence the entire conversation, so far, at least, as it formed a part of the ground upon which the witness' opinion was based; and, when offered for that purpose, we see no ground upon which any part of it could be excluded. Of course, it was competent only for that one purpose, and the defendant was entitled to have it so limited by instructions to the jury; but so long as it was admissible for that purpose, its admission was not erroneous.

Complaint is made of the eleventh and thirteenth instructions given to the jury at the instance of the prosecution, which state the law applicable to the hypothesis that the defendant, at the time he committed the homicide, was under the influence of intoxicating liquors. It is not claimed that these instructions fail to state the law correctly, but that there is no evidence of the defendant's intoxication upon which they can be based. It is true that most of the witnesses testify that both at the time of the homicide and at the time of his arrest he was sober, but the defendant, at the time he was arrested, told one of the witnesses that he was drunk when he shot Aaron, and another witness testified that he acted as if he had been drinking. There being some evidence tending to show intoxication, it was proper to instruct the jury on that hypothesis.

Complaint is made of the seventeenth instruction given for the prosecution, which was as follows: "It is not necessary that the jury should believe that every material fact or circumstance in evidence before them has been proven beyond a reasonable doubt, but that it is sufficient if the jury believe, from the evidence in the case, that every material allegation in the indictment, or either count thereof, in manner and form as therein charged and stated, has been proven beyond a reasonable doubt." We are able to perceive no substantial objection to this instruction. It merely holds that the rule requiring proof beyond a reasonable doubt applies only to the material allegations of the indictment, but has no application to those mere evidentiary facts which the testimony of the witnesses may tend to establish. In all cases where the evidence is circumstantial its primary tendency is to prove certain facts which are merely evidentiary in their character,

and from which the ultimate facts to be proven follow as conclusions either of fact or of law. It is only the latter which must be proved beyond a reasonable doubt.

The following instruction was asked by the defendant's counsel, but was modified by the court by striking out the words "beyond a reasonable doubt" and inserting in lieu thereof the words in italics: "While the law presumes all men to be sane, yet this presumption [is] *may be overcome by evidence tending to prove insanity of the accused at the time of the commission of the alleged offense. When such evidence is introduced, then the presumption of sanity ceases, and the prosecution is bound to prove the sanity of the accused beyond a reasonable doubt. So, in the case, in which the defense of insanity is interposed, if the jury, after considering the evidence, entertains a reasonable doubt of the sanity of the defendant at the time of the alleged offense, then he must be acquitted.*" We think the modification of this instruction was proper. As asked, it was susceptible of the construction that the presumption of sanity is overcome by evidence, however slight, tending to prove insanity, while the rule is that, to overcome it, evidence must be produced sufficient to raise at least a reasonable doubt of the defendant's sanity. The modification brought the instruction into harmony with what is laid down in *Dacey v. People*, 116 Ill. 555, 6 N. E. Rep. 163: "The presumption of sanity inheres at every stage of the trial until insanity is made to appear by the evidence. The law in this state undoubtedly is that the legal presumption may be overcome by evidence tending to prove insanity of the accused, which is sufficient to raise a reasonable doubt of his sanity at the time of the commission of the act for which he is sought to be held accountable. When that is done, the presumption of sanity ceases, and the burden shifts to the prosecution, and it is then required to prove his sanity, as an element necessary to constitute crime, beyond a reasonable doubt."

The defendant also excepted to the modification of his fourth instruction. As asked, it was as follows: "The court instructs the jury that, if there is evidence in the case sufficient to raise a reasonable doubt as to the sanity of the defendant, then the jury will find the defendant not guilty." The instruction, as given, was modified so as to read as follows: "The court instructs the jury that, if the evidence in the case is sufficient to raise a reasonable doubt as to the sanity of the defendant, then the jury will find the defendant not guilty." The finding of the jury should be based upon all the evidence in the case, but the instruction, as asked, directed the jury to acquit the defendant if there was evidence in the case sufficient to raise a reasonable doubt in their minds as to the defendant's sanity, however strong may have been the evidence tending to rebut the defense of his insanity. There may have been evidence in the case which, taken by itself, was sufficient to raise a reasonable doubt in the minds

the jury, but the reasonable doubt upon which the jury should act must be one which arises from a consideration of all the evidence in the case. The modification of the instruction, therefore, was proper.

Finally, it is urged that the verdict of the jury is against the evidence. That the defendant shot and killed Charles N. Aaron in manner and form as charged in the indictment is clearly proved, and in fact is not disputed. The only material conflict in the evidence is to be found in that portion of it which applied to the defense of insanity. We have examined and considered all the evidence bearing upon that defense with that patience and care which the solemnity and importance, both to the defendant and to the public, necessarily demand. We shall not attempt here to give a resume of the evidence, but shall content ourselves with saying that, in view of all the evidence in the record, we are able to find no tenable ground for disturbing the verdict of the jury. The questions presented by the defense of insanity were purely questions of fact, of which the jury were the proper judges, and, the case having been fairly submitted to them by proper instructions, we find no basis in the evidence for holding that they have reached a wrong conclusion. We find no error in the record, and the judgment and sentence of the circuit court must therefore be affirmed.

(50 Ohio St. 405)

**PITTSBURGH, C. & ST. L. RY. CO. v. GARRETT.**

(Supreme Court of Ohio. June 13, 1893.)

**RAILROAD COMPANIES—CONSOLIDATION—RIGHTS OF STOCKHOLDERS—ARBITRATION.**

1. In the consolidation of railway companies under the statutes of this state, a stockholder who refuses to convert his stock into that of the consolidated company may, by the amendment of April 4, 1890, (87 Ohio Laws, 159,) compel the submission of the question of the value of his stock to the arbitration of three disinterested men, to be appointed by the judge of the court of common pleas of the proper county. An agreement to arbitrate, between him and the company, is not required.

2. A failure to make a demand before the proposed consolidated company acquires the status of an incorporated company under the laws of Ohio, by filing a copy of the ratified agreement of consolidation with the secretary of state, or a failure to make an attempt to agree with the company as to the value of his stock, does not defeat the right of a stockholder, refusing to convert his stock, to be paid its value.

3. It is the duty of the company proposing to consolidate to ascertain who, if any, of its stockholders, refuse to so convert their stock, and to cause the value of the stock of any who refuse to be ascertained and paid, "before the consolidation takes effect."

(Syllabus by the Court.)

Error to circuit court, Franklin county. Proceeding by Robert Garrett against the Pittsburgh, Cincinnati & St. Louis Railway Company for the appointment of arbitrators. From the judgment entered, defendant brings error. Affirmed.

Watson, Burr & Livesay, for plaintiff in

error. J. H. Collins, for defendant in error.

MINSHALL, J. On June 10, 1890, the directors of the Pittsburgh, Cincinnati & St. Louis Railway Company, an Ohio corporation, with part of its road situated in this state, entered into an agreement with the directors of certain other railway companies for the consolidation of their respective companies under the statutes of this state, the new company to be known as the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company. Afterwards, in pursuance of proper notice to that effect, this agreement was submitted to and ratified by the requisite majority of the stockholders of each company on August 19, 1890, and on the 28th day of the same month a copy of the agreement was filed in the office of the secretary of state; and thereby, under the provisions of section 3382, Rev. St., the several companies, parties to the agreement, became "one company," possessing in this state all the rights and franchises, and subject to all the restrictions and duties, of a railroad company. Robert Garrett, as surviving partner of Robert Garrett & Son, defendant in error, being the owner of 1,728 shares, of \$50 each, in the capital stock of the Pittsburgh, Cincinnati & St. Louis Railway Company, refused to convert his stock into that of the consolidated company, and, not being able to agree with his own or the new company as to the value of his shares, applied to a judge of the court of common pleas of Franklin county, for the appointment of arbitrators under the act of April 4, 1890, amending section 3388, and repealing section 3389, of the Revised Statutes. 87 Ohio Laws, 159. The principal question presented by the record is whether, without an agreement with either of the companies to submit the question to arbitration, the stockholder can compel such submission, and have the value of his stock ascertained in that way.

The amendment, in substance, provides that a stockholder who refuses to convert his stock into that of the consolidated company shall be paid its actual value, to be ascertained as therein provided; "such payment to be made before the consolidation takes effect." And if he and the board of directors of his company cannot agree as to the value "the parties may submit the question to arbitration \* \* \* by three disinterested persons, to be appointed, upon the motion of either of the parties," by the judge of the court of common pleas of the proper county, to be conducted in conformity to the law regulating arbitrations, "so far as the same may be applicable." It is claimed that the language, "the parties may submit the question to arbitration," requires that the submission must be by the agreement of both parties. It is, however, evident to our minds that such is not the proper construction. The language, "the parties may submit," does not necessarily import that the submission must be the concurrent act of both parties. If both may, it certainly avails as a right to either; and that such is the intention becomes clear from the language that immediately fol-

lows,—that the application for the appointment of arbitrators may be made "upon the motion of either of the parties." Either may make the application, not either with the consent or concurrence of the other. This gives to the proceeding an adversary character, and, where either refuses to enter into a submission, changes it from a voluntary into a compulsory arbitration. This conclusion is emphasized by the provisions of the following section, (3390,) which reads as follows: "In all such cases of arbitration the party desiring the arbitration shall give the opposite party at least ten days' notice of his intention to apply to the judge for the appointment of arbitrators, which notice shall be served in the same manner as is provided for the service of a summons, and shall specify the time and place for the hearing of the application." This provision, providing, as it does, that the proceeding shall be commenced by giving notice to the other party, to be served as a summons, by the party desiring arbitration, is irreconcilable with the claim that it can only be had upon the mutual submission of both parties. And, recurring again to section 3338, we find that either party may appeal from the decision or award to the court of common pleas of the county in which the arbitration is held, by giving bond, "unless, previous to the arbitration, the parties agree, in writing, to abide such award." This provision further indicates that arbitration may be had against the consent of one of the parties, and when so had an appeal is given. It is improbable that parties would enter into an agreement to arbitrate without an agreement to abide the award. It is the universal characteristic of a voluntary submission. And the giving of a right to appeal when no such agreement has been made shows the legislative understanding as to the character of the proceeding authorized by the statute. Unless commenced upon a submission entered into by both parties upon a stipulation to abide the award, the proceeding is not properly an arbitration. It is in the nature of a reference, and, being compulsory, an appeal is given to the dissatisfied party, to the common pleas, where the matter can be determined by due course of law. It is a mode provided for the condemnation of the stock of a dissenting stockholder; and, in analogy to many similar proceedings, as in the taking of private property for a public road, a summary method is provided for ascertaining the compensation to be paid the individual for his property taken, with the right to appeal to a tribunal in which the compensation can be assessed by a jury, if that made in the summary mode is unsatisfactory.

As a second defense to the application for the appointment of arbitrators the companies set forth the making of the agreement to consolidate by the directors of the different companies between the 10th and 18th of June, 1890; the submission of the agreement to the stockholders of the respective companies for their ratification on August 19, 1890, upon due notice having been previously given, and its ratifica-

tion by them at that time; and the filing of a copy of the agreement, so ratified with the secretary of state, on August 1, 1890,—and then aver that no notice or refusal to convert his stock by Robert Garrett or his firm, was given prior to the ratification by the stockholders, nor was any such notice given until long after August 28, 1890, nor was any attempt made to agree with the board of directors of the company as to the value of the stock, upon arbitrators to whom the question might be submitted. This was demurred to. The demurrer was sustained, and the ruling of the court thereon is assigned for error. From the first statute to the present, authorizing the consolidation of railroad companies in this state, it has been the policy of the legislature to require payment to be made to a stockholder of the value of his stock, where he refused to convert it into that of the consolidated company. But under the previous legislation this right was only given him where, previous to the consolidation, he requested to be done; and in such cases, its value having been fixed and ascertained by arbitration, voluntary or compulsory, if the party owning the stock refused to receive the amount awarded the company could deposit the same with the clerk of the court of common pleas of the county in which the arbitration was held, which deposit authorized the parties to proceed with the consolidation without further payment to the stockholder. The statute has, by the amendment of April 4, 1890, been changed in this regard. By the amendment the value of the stock of one who refuses to convert it must be ascertained and paid him before consolidation takes effect; the provision requiring the stockholder to demand it to be done before consolidation as a condition to the right, being dropped from the statute. So that under the amendment it became the duty of the company desiring to enter into the consolidation to ascertain who, if any, of its stockholders refused to convert their stock into the proposed consolidated company, and to have the value of the stock of any who refused ascertained and paid them in the manner provided, before the proceeding could be regularly perfected. So that none of the matters stated in this defense are of any avail, as against the rights of the defendant in error. The statute fixes no time in which the dissenting stockholder must indicate his refusal to convert his stock into that of the new company. It is the duty of the company of the dissenting stockholder to get his consent, and if it cannot it must then proceed to condemn the stock, under the provision of the statute, and to pay its value, before the consolidation takes effect. The fact that this was not done before filing a copy of the ratified agreement of consolidation with the secretary of state, and thereby acquiring the status of an incorporated railway company under the laws of the state, only shows that the consolidation of companies proceeded in disregard of the rights of dissenting stockholders in the Pittsburgh, Cincinnati & St. Louis Railway Company, and, unless a party may take advantage of his own wrong, can

of no avail to the old or new company, as against the rights of such stockholders. As to this claim the old company may be deemed in existence, or the claim may be prosecuted against the new company, which took the property of the old company charged with the payment of its debts. Section 3384, Rev. St.; *Compton v. Railway Co.*, 45 Ohio St. 592, 16 N. E. Rep. 110, and 18 N. E. Rep. 340.

Judgment affirmed.

(7 Ind. App. 266)

**PHENIX INS. CO. OF BROOKLYN v. LORENZ.**

(Appellate Court of Indiana. June 24, 1893.)

RECORD ON APPEAL — AMENDMENT — ACTION ON INSURANCE POLICY — CONDITIONS.

1. Where a record on appeal contains no copy of an exhibit alleged to have been filed as part of an answer, it is too late to amend it on rehearing.

2. In an action on an insurance policy it is not necessary to file a copy of the application with the complaint.

3. Where a clause in an application for insurance is so inconsistent with the conditions of the policy, as issued, that both cannot stand, and that in the application is one on which the issuing of the policy depends, it must control.

On rehearing. Denied.

For former report, see 33 N. E. Rep. 444.

ROSS, J. In a very earnest and forcible petition the appellant insists that the court erred in holding the third paragraph of the reply to be sufficient. The first contention is that, although the record does not show the written application to have been filed as a part of the second paragraph of the answer, it should nevertheless have been so considered, for the reason, as counsel insist, it was in fact so filed, and if the record is not correct in that respect it was the fault of the clerk who made the transcript. In support of this contention the original answer has been certified to this court. This court accepts and passes upon the record as certified by the clerk of the court below, and if it is incomplete or incorrect it is the fault of the parties to the record. It is their duty to see that the transcript of the record, when it comes to this court, is full, true, and complete. An instrument properly referred to, and filed with a pleading as an exhibit, may serve as such for several paragraphs, and it is not necessary that it be copied into each paragraph, or that a separate exhibit be filed with each; but it must be filed as an exhibit, and must be properly referred to in each paragraph, to make it a part thereof. The record in this case contains no exhibit, and the second paragraph of the answer does not properly refer to any. Having passed upon the record as it came to us, we cannot now permit it to be amended. While the application upon which the policy sued on was issued is a part of the contract between the parties, it has been repeatedly held that in an action on the policy, to recover for a loss thereunder, it is not necessary to file with the complaint a copy of such application. Insur-

ance Co. v. Kessler, 84 Ind. 310, and cases cited, and *Insurance Co. v. Weller*, 100 Ind. 92. The application is the proposition of the insured, and the policy its acceptance by the insurer; and while it is not necessary, in an action on the policy, to make the application an exhibit to the complaint, if the insurer seeks by answer to show that certain conditions contained in the policy have been violated by the insured, the insured may reply a waiver of the condition by the insurer, either at the time of the issuing of the policy, or subsequent thereto. In the case of *Pickel v. Insurance Co.*, 119 Ind. 291, 21 N. E. Rep. 898, which was an action on a policy to recover for a loss, the appellee answered that the policy was issued upon a written application, in which the appellant represented "that there was only an incumbrance of \$1,000 on the land" upon which the house insured was situate, when in fact there was a mortgage thereon of \$2,200, for which reason a forfeiture was asked. In another paragraph it was averred that the policy contained a condition that if the property insured should become mortgaged or incumbered during the existence of the policy it should become void; that during the existence of the policy the insured had mortgaged it, etc. To this answer, however, a demurrer was sustained. The insured replied that he had made a written application in which certain questions were unanswered, but that he had informed the agent of the company who wrote out the application that his property was incumbered for \$2,200, but the agent said it was not necessary to make that statement. It was also alleged that the application had been altered after he signed it, etc. The court, in passing upon the sufficiency of this reply, says: "An agent authorized to take applications for insurance should be deemed to be acting within the scope of his authority where he fills up the blank application of insurance; and if, by his fault or negligence, it contains a misstatement not authorized by the instructions of the party who signed it, the wrong should be imputed to the company, and not to the assured."

In the reply under consideration it is averred that the appellee directed the appellant's agent what to insert in the application with reference to the privilege of incumbering the property insured, and the agent pretended so to make the application, and he represented to the appellee that, with those facts in the application, the company's policy would permit him to incumber his property as he desired. The insured—a German, unable to read and write the English language, and upon such representations of said agent—accepted the policy of insurance. Under such a state of facts this court cannot lend its aid to assist the appellant in furthering the fraud already practiced upon the appellee. But it is said the application does not contain the statements alleged in the reply, and, if it is not as it should have been, it should first be reformed. If the application was made to speak falsely by the agent of the appellant it is not necessary that it be reformed before the appellee sue on the policy. As Coffey, J., in

**Insurance Co. v. Stark**, 120 Ind. 444, 22 N. E. Rep. 413, says: "It cannot be successfully maintained that a party should be required to prosecute a suit to reform an instrument of writing which was not under his control, and which he never executed." See, also, **Insurance Co. v. Allen**, 109 Ind. 273, 10 N. E. Rep. 85. If a clause or condition in an application for insurance is so inconsistent with a clause or condition in the policy issued thereon that both cannot stand together, and especially if that in the application is one upon which the issuing of the policy depends, it must, of necessity, control. In this case the appellant induced the appellee, if the facts alleged in the reply are true, to accept a policy containing a forfeiture clause, which is inconsistent with the terms and conditions of the application, representing that the application was made out as he requested, and that, therefore, the policy granted him the privilege of incumbering his property. These representations, as shown by the reply, induced the appellee to cancel a policy of insurance which he then had in another company, and to take insurance, instead, in appellant's company. We think the reply sufficient as a reply to that answer, not considering, however, the sufficiency of the answer itself. Petition overruled.

GAVIN, C. J., and REINHARD, J., are of the opinion that the petition should be granted.

(7 Ind. App. 148)

### SELLARS v. MYERS.

(Appellate Court of Indiana. June 6, 1893.)

#### COSTS IN FORMER ACTION—FAILURE TO PAY—STAY OF PROCEEDINGS.

On a motion to stay proceedings till the payment of costs in a former trial, which was before a justice, an affidavit made by plaintiff's attorney in opposition thereto showed that, on such former trial, plaintiff had no counsel, and that, on the rendition of a judgment against him, affiant was employed to obtain a new trial, which he did; that he obtained a change of venue to another justice, and then dismissed the case, having learned that plaintiff's total cause of action exceeded the jurisdiction of a justice, and intending to sue in the circuit court, as he subsequently did; and that the dismissal was not to harass defendant. The motion was granted, whereupon plaintiff asked to be allowed to sue as a poor person. This petition was submitted on affidavits of the parties, and refused. *Held*, that it was error to stay the proceedings, and to refuse permission to sue as a poor person.

Appeal from circuit court, Elkhart county; J. M. Vanfleet, Judge.

Action by James Sellars against Jacob Myers. From a judgment dismissing the cause, with costs against plaintiff, he appeals. Reversed.

Henry C. Dodge, for appellant. Jonas O. Hoover, for appellee.

LOTZ, J. The appellant instituted this action against the appellee on the 19th day of February, 1892. In his complaint he alleges that the appellee is indebted to him on account of work done. An item-

ized statement of the indebtedness is set out in the body of the complaint, which aggregates the sum of \$198. This complaint concludes as follows: "That said above account is past due and unpaid, and was due October 1, 1891, at which time plaintiff demanded and requested payment by defendant. Wherefore demands judgment for two hundred and ninety-eight (298) dollars." The appellee appeared to said action by counsel, and moved the court to stay the proceedings therein until certain costs in a former action should be paid. This motion was supported by the affidavit of Jonas Hoover, the attorney for appellee in this cause. This affidavit shows that on the 5th day of February, 1892, the appellee commenced an action against the appellant for the same cause of action set forth in the complaint in this suit, before John W. Bliss, a justice of the peace, in and for Osalo township, Elkhart county, Indiana, and in that proceeding the appellee filed an answer in general denial, and a venire was then taken to the court of one William Theis, a justice of the peace of Concord township, in said county; that said court, the appellant filed the identical complaint filed in this action; that the appellant caused a venire to be issued for a jury to try said cause in said county; that, before said cause was tried, appellant dismissed his suit, and that said court thereupon entered judgment against the appellant for costs in the sum of \$13, which judgment remains unpaid; that appellant has no property out of which said judgment can be made, and is insolvent; that immediately after the dismissal of said action the present one was commenced; that appellee has been put to great expense and trouble in attending court since the first action was instituted, and has expended money in procuring attendance of witnesses at the time for the trial of the first action; that, as a matter of fact, affiant verily believes that the appellant is indebted to appellee, but that, appellant being insolvent, appellee could not enforce, even though he secured a judgment; and that the proceedings herein are malicious and vexatious. Appellant filed a counter affidavit. This affidavit was made by one Henry C. Dodge, the attorney for appellant in this cause. By said affidavit it is shown that in the trial before the justice, John W. Bliss, as mentioned and set out in the affidavit of said Hoover, the appellee had no counsel, and that a judgment was taken against him, whereupon the appellee was employed by appellant to apply for a new trial, and to take charge of said cause; that the complaint upon which said trial was had counted only upon a part of the present cause of action, to-wit, in the sum of only \$44; that a new trial was granted, and that after the granting of said new trial the appellee took a change of venue to Justice The-

that after the granting of the new trial, and the change of venue, as aforesaid, affiant examined into appellant's claim against appellee, and learned that appellant had not set up all his cause of action, and that he (affiant) drew the complaint, excepting amendments made in the circuit court, and proposed to file the same before the justice to whom said cause was taken on change; that at said time it occurred to affiant that appellant's demand, including interest, was in excess of the justice's jurisdiction, and for that reason, and other good reasons affecting appellant's legal rights in the premises, affiant, in good faith, acting as counsel for appellant, determined to dismiss further proceedings in said justice's court, and prosecute appellant's claim in the circuit court, where all of his said claim could be properly prosecuted; that appellant was not present when affiant dismissed said cause, and did not know that said cause was to be dismissed until after it was done; that said cause was not dismissed to harass or annoy the appellee, but was solely because of the opinion of affiant, in good faith, that it was necessary to protect appellant's rights. Neither the appellee nor the appellant made any affidavits, nor was there any evidence given on said motion other than the affidavits of counsel. The motion was submitted upon these affidavits, and the court gave judgment as follows: "Whereupon, the court, upon due consideration, orders that the trial of this cause be stayed until the costs made before the justice herein be paid, to which order of the court said plaintiff at the time excepts." This order of the court was made on the 3d day of March. The record before us further shows that on the 7th day of March the appellant filed his petition, supported by his affidavit, to be allowed to prosecute said cause as a poor person. This petition was submitted to the court on the affidavits of the appellant and his counsel, and on the counter affidavits of appellee and his counsel. No other evidence was given or heard, except that contained in these affidavits. Every entry on the record shows that the only question at issue was the right of the appellant to prosecute as a poor person, but when the court came to rule on said application the record shows that the ruling was prefaced by certain statements of facts and reasons for the rulings. This statement is signed by the presiding judge. In this statement it is recited that "the defendants' motion to stay further proceedings until the plaintiff pays the costs made before the justice of the peace, and the motion to be allowed to prosecute as a poor person, are submitted to the court for decision on the affidavits and pleadings filed." It is an unusual proceeding for the presiding judge to inject the reason for his rulings into the record. If the statement in this case were confined to the reasons for the ruling, such conduct might be tolerable, but so much of it as says that the motion to stay the proceedings was submitted at this time is a palpable perversion of the record. No such issue was before the

court at that time. The court had previously ruled upon that issue. The sole question was the application to prosecute as a poor person. This being true, nothing contained in the statement signed by the judge, nor in the affidavits in reference to the application to prosecute as a poor person, can have any weight, or be considered, in determining the motion to stay proceedings. They are not evidence produced in reference to that issue. The court denied appellant's application to prosecute as a poor person, and, on his failure to pay the costs before the justice, dismissed the cause, and rendered judgment for costs against the appellant. These rulings of the court in staying the proceedings, and in refusing to permit the appellant to prosecute as a poor person, are of the errors assigned in this court.

It has often been decided that where a second action is waged between the same parties, for the same cause, the presumption is that the second action is vexatious, and unless this presumption is overcome the court, in all such cases, will order the proceedings stayed until the costs of the first suit are paid, and the burden of removing such presumption rests upon the plaintiff. *State v. Howe*, 64 Ind. 18; *Clemons v. Buffenbarger*, 106 Ind. 16, 5 N. E. Rep. 548; *Carrothers v. Carrothers*, 107 Ind. 530, 8 N. E. Rep. 563. The order to stay the proceedings is within the sound discretion of the court to grant or refuse, under the facts of each case. If the presumption of vexation be overcome, and it be shown that the plaintiff is not acting vexatiously, it is the duty of the court to refuse to stay the proceedings. If there be an abuse of this discretion, such abuse may be reviewed in the appellate courts. *Kitts v. Wilson*, 89 Ind. 95; *Harless v. Petty*, 98 Ind. 53; *Carrothers v. Carrothers*, supra. The bill of rights, embodied in the constitution of this state, (article 1, § 12,) provides that "all courts shall be open, and every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely and without purchase, completely and without denial, speedily and without delay." Under this guaranty the courts of this state are open to appellant, not only to institute his suit, but to prosecute it to final judgment, unless he has forfeited this right by his vexatious conduct. In view of this constitutional provision, a very clear and positive case of vexatious conduct ought to be made before the courts of this state should be closed to any litigant. It is a matter of common observation, in the trial of causes, that the plaintiff is sometimes surprised at the testimony of his own witnesses, or at the evidence produced by the opposite party; and it not infrequently happens that, when the evidence is closed, new features are presented, and he finds that the pleadings should be changed, or new issues formed. Under such circumstances he often finds it necessary, in order to fully protect his rights, to dismiss the action, and commence another, based upon the same subject-matter. At most, the presumption of vexation gives rise only to a bare possibility, which fades away

before the slightest countervailing evidence. Applying these principles to the case made by the affidavits, we think it clear that the court erred in staying the proceedings. Appellant was not represented by counsel at the first trial. His complaint embraced only a part of the cause of action contained in the complaint in the circuit. He was not present when the cause was dismissed by his counsel, and had no knowledge of the fact at the time. According to the averments of the complaint, appellant may have been entitled to recover interest on his claim at 6 per centum per annum. *Killian v. Eigenmann*, 57 Ind. 480; *Rend v. Boord*, 75 Ind. 307; Act March 5, 1891; Act 1891, p. 108; Rev. St. 1881, § 5200. Appellant's attorney swears that he believed that his client was entitled to recover interest on the claim from the day of the demand. If it be true that he was entitled to interest, then the amount for which he was entitled to recover judgment exceeded the jurisdiction of the justice, and any judgment rendered by the justice under such circumstances would have been void. *State v. Forry*, 64 Ind. 280. Entertaining this opinion, it was the duty of appellant's counsel to dismiss the action in the justice's court, and commence it in a court where his rights might be fully protected. It is also true that it was appellant's duty to pay the costs occasioned in the justice's courts, but because he was poor, and unable to do so, should not close the courts against him, unless it be made to appear clearly that his conduct in bringing the second suit is vexatious. This the evidence adduced fails to show. This conclusion renders it unnecessary to pass upon the other errors assigned. Judgment reversed, with instructions to overrule the motion to stay proceedings. The appellee having died since this cause was submitted, it is ordered that the reversal be of the date of submission.

(7 Ind. App. 115)

#### BRIGHAM v. DE WALD et al.

(Appellate Court of Indiana. June 7, 1893.)

#### MECHANICS' LIENS—APPLICATION OF PAYMENTS—PLEADING—FINDINGS BY COURT.

1. In an action to enforce a mechanic's lien, an objection that the complaint is insufficient because it does not allege the value of the labor or material furnished cannot be raised for the first time on appeal.

2. In an action to enforce a mechanic's lien, a finding that the value of the labor and material was, as agreed, a named amount; that a named amount had been paid, leaving a stated balance due, unpaid; and that such balance was "for work done and materials furnished for defendant's house,"—sufficiently shows that the materials and work were of the value agreed.

3. Such finding is not open to the objection that the amount found to be due is for a general balance due for work done and materials furnished in the erection of several houses for different persons.

4. Before a mechanic commenced work on defendant's house the contractor was indebted to the mechanic for other work. Defendant paid the contractor a sum on the contract, and out of such sum the contractor made a payment to the mechanic, which the latter, not

knowing its source, applied to the general account against the contractor, the work on defendant's house not having been then formed. *Held*, that the money so paid the mechanic would not be applied to the payment of his claim against the builder.

Appeal from superior court, Marion county; J. W. Harper, Judge.

Action by Mathias De Wald and another against Arthur C. Brigham. From a judgment for plaintiffs, defendant appeals. *Reversed*.

V. G. Clifford and W. F. Browders, for appellant. Ayres & Jones, for appellees.

DAVIS, J. This was an action instituted by appellees against appellant to foreclose a mechanic's lien for labor performed and material furnished in plumbing building erected by a contractor for appellant. On the trial the court made a special finding of the facts stated, conclusions of law thereon, and rendered judgment in favor of appellees for the balance due them. The errors assigned in general term were: (1) That the complaint does not contain facts sufficient to constitute a cause of action; (2) that the court erred in its conclusions of law on the facts found. The affirmance of the judgment in general term is the only error assigned in this court.

It is urged that the complaint is insufficient because the "value of the labor and material furnished" is not therein alleged. The statute gives subcontractors a lien against the owner of the property "to the extent of the value of any labor or material furnished." Section 1705, *Elliot's Supp.* No question was raised as to the sufficiency of the complaint in the trial court. The complaint charges the employment of appellees by a contractor of appellant to do the plumbing work in appellant's house, the doing of the work, furnishing of material, with notice thereof before and at the time, to appellant, and the filing of notice of the lien, the payment of a certain amount, and leaving a balance due on said claim of \$190.07, etc. Whatever might have been said as to the sufficiency of the complaint, if it had been tested by demurrer, it is not subject to attack for the first time on appeal. I quote from a decision of the supreme court as follows: "A verdict will many times aid a defective pleading, and pleadings which would be bad on demurrer are often held good after verdict. It is not only mere defects of form that are aided by verdict, but faults affecting substantial facts are often so aided." *Parker v. Clanton*, 72 Ind. 307. See section 338, Rev. St. 1881; *City of La Fayette v. Ashby*, (Ind. App.) 34 N. E. Rep. 234.

Counsel for appellant make three objections to the conclusions of law on the special finding of facts. The first is that the findings do not show the value of the materials and services furnished by appellees. The findings show that the value, as agreed, was \$225; that appellees were paid \$34.98, leaving a balance of \$190.07 due on the claim; that the balance was for materials furnished and work performed on appellant's house, due notice of which had been given him at and before such payment.



formance. This is sufficient to show that the materials furnished and the work done were of the value agreed upon.

The second objection is that the amount claimed is for a general balance due for work done and materials furnished by appellees for the contractor in the erection of several houses for different persons. The special findings are not open to this objection. It is expressly found that said sum of \$190.07 was "for work done and materials furnished for defendant's house." This, we think, is a finding of fact, and not a conclusion of law, as contended by appellant's counsel.

The third objection is that appellant is entitled to a credit of \$100 on the claim. The findings show that before appellees commenced the work on appellant's house the contractor was indebted to them for other work. Appellant paid the contractor \$500 on his contract on November 21, 1890, and out of said sum \$100 was paid to appellees by the contractor. The appellees did not know from whence the money came. Afterwards the labor and material in controversy were done and furnished, and the lien attached. There is no claim that it was agreed by or between any of the parties that the \$100 should be credited on this account. The application of the payment was made by appellees on a general account owing them by the contractor for labor done and material furnished in erecting different buildings. This was all done before any claim had accrued in favor of appellees against either appellant or the contractor on account of the matters in controversy. The court cannot now say, on the facts disclosed in the finding, that the \$100 should, in equity and good conscience, be applied as a credit on the amount owing appellees for labor and material afterwards furnished by them in the construction and completion of appellant's house. *Gantner v. Kemper*, 58 Mo. 567; *Waterman v. Younger*, 49 Mo. 413. We find no error in the record. Section 658, Rev. St. 1881. Judgment affirmed.

(7 Ind. App. 118)

# LITTLE v. BOARD OF COM'RS OF HAMILTON COUNTY.

(Appellate Court of Indiana, June 7, 1893.)

## FREE GRAVEL ROADS — ACTION BY CONTRACTOR AGAINST COMMISSIONERS — PLEADING.

1. Since the board of commissioners, in constructing free gravel roads, represent the interests of property owners, and do not act as agents of the county, proceedings by the contractor to enforce a claim for extra work are not maintainable against them in their representative capacity.

2. A paragraph of a complaint cannot be completed by reference to another paragraph.

Appeal from circuit court, Hamilton county; D. Moss, Judge.

Action by James M. Little against the board of commissioners of Hamilton county. From a judgment for defendant, plaintiff appeals. Affirmed.

Neal & Neal, for appellant. W. S. Christian and Kane & Davis, for appellee.

ROSS, J. The record discloses this to have been a proceeding instituted by the appellant before the board of commissioners of Hamilton county, Ind., by filing a claim for labor, material, etc. The claim was disallowed, and the appellant appealed to the Hamilton circuit court, where he filed an amended complaint in two paragraphs. Demurrers for want of facts were sustained by the court to each paragraph, and these rulings of the court are the only errors assigned here.

The first paragraph of the complaint discloses that the appellant entered into a written contract with the appellee, whereby he undertook and agreed, for a stipulated price, to construct a free gravel road, specifically describing the same, he to furnish the necessary material, be to all expenses finding gravel, opening and keeping banks or pits in order, watching gaps when hauling through inclosures, and any and all other expenses incurred by him in the construction of said free gravel road, and to grade, bridge, ditch, and gravel said road, and complete the same in all respects in accordance with the plans and specifications. It is then averred by the appellant that he commenced the construction of said road, and that during the progress of the work the appellee "modified and changed said contract as to the details of said work in such manner as to require and render necessary additional labor and material, and extra expenses of said contractor in making said improvements in excess of the labor, material, and expenses thereof under said contract, plans, and specifications before the said contract was modified and changed," which changes and modifications were beneficial and necessary to the proper construction of said road; that appellant made said changes and incurred said increased expenses, did the extra work, and furnished the additional material, at the instance and request of the appellee. It is also averred that appellant has been paid the entire contract price, but payment for said extra work, material, etc., has been refused, and is due and unpaid.

The second paragraph is somewhat different from the first, in that it alleges that the appellee made an order for an estimate of the cost of making said improvement, but afterwards rescinded the order, and that the assessments already made are insufficient to pay the original contract price, and also for said extra labor, material, etc.; that the appellee, although petitioned so to do, has failed and refused to give proper notice and to reassess the lands benefited by said improvement. It is also averred in this, as in the first paragraph, that the appellant contracted with the appellee to construct said road for a stipulated price, and, instead of making the contract a part of this paragraph, refers to the first paragraph to make it complete with reference to the contract. We deem it unnecessary to consider or decide questions presented relative to the authority of the appellee to change the original contract, imposing greater burdens upon the landowners under the original contract, without notice and public letting, for the reason that another question arises

which is fatal to appellant's cause of action as presented by his complaint. This action is against the board of commissioners as the representatives of the county to recover a judgment which, if rendered, must be paid out of the general fund of the county. In other words, it is an action to recover from the county. The board of commissioners, in the construction of free gravel roads, are not acting as the agents of the county, but, by the terms of the law, represent the interests of the property owners whose lands are liable to be assessed to pay for such improvements. Such agency, however, being an enforced one, is subject and operative only to the extent and upon the conditions provided by the law creating it. If the commissioners are not the agents of the county in the construction of free gravel roads, and the law grants them no power to create a liability in making such improvements which the county shall pay, it is impossible to conceive upon what theory the appellant can maintain this action. The statute conferring upon them the power to make such improvements does require that the entire cost shall be collected from the property owners, and it cannot be inferred that it was intended that in any event, or under any circumstances, should the cost of the improvement, or any part thereof, be paid out of the county's funds. *Board v. Fullen*, 111 Ind. 410, 12 N. E. Rep. 298; *Spidell v. Johnson*, 124 Ind. 235, 25 N. E. Rep. 889. If this had been an action to compel the board to make an assessment, or to pay over funds already collected, a different question would be presented. Such, however, is not the theory of this complaint. The second paragraph of the complaint, in addition to its want of general facts to state a cause of action, is sought to be made complete by reference to the first paragraph. It has been so often decided as to require no citation of authorities that the allegations of one paragraph of a pleading cannot be aided by reference to the allegations of another paragraph. Each pleading must be complete in itself. There was no error in sustaining the demurrers to each paragraph of the complaint. Judgment affirmed.

DAVIS, J., not present, and not participating in the decision of this case.

(7 Ind. App. 142)

# **BIGGS v. BOARD OF COM'RS OF LAKE COUNTY.**

(Appellate Court of Indiana. June 8, 1893.)

**TAXATION—ACTION OF BOARD OF REVIEW—COLLATERAL ATTACK.**

Act March 6, 1891, makes it the duty of the county board of review to equalize the valuation of property in the county for taxation, and gives it power to change or set aside assessments. *Held*, that the action of the board in reducing the assessments on real estate 50 per cent., and leaving assessments on personal property unchanged, cannot be reviewed in proceedings to recover taxes alleged to have been unlawfully collected.

Appeal from circuit court, Lake county; J. H. Gillette, Judge.

Proceedings by Flora M. Biggs against the board of commissioners of Lake county to recover taxes alleged to have been unlawfully collected. From a judgment for defendant on a demurrer to the complaint, plaintiff appeals. Affirmed.

J. Kopelke, for appellant.

LOTZ, J. The appellant on June 7, 1892, filed and presented to the board of commissioners of Lake county her claim for taxes which she alleged had been unlawfully collected from her. The board refused to allow her claim, and from such order she appealed to the Lake circuit court. In said court she filed an amended complaint, and appellee demurred thereto. The court sustained the demurrer, to which ruling the appellant excepted, and, refusing to further amend, the court gave judgment against the appellant. From this judgment the appeal is prosecuted. The error assigned here is the sustaining of the demurrer to the amended complaint.

Appellant's amended complaint stated, in substance, that she was a taxpayer of the town of Crown Point, and of Lake county; that on the 1st day of April, 1891, she was the owner of personal property of the actual and true value of no more than \$70,415, and that her property was assessed by the assessor at and for said sum for the purposes of taxation; that no change was made in such assessment, and such amount was placed upon the tax duplicate against her, and taxes computed thereon in the sum of \$1,337.88, upon which she was compelled to and did pay the county treasurer, as and for the April installment, 1891, the sum of \$950.60. She further alleges that that sum, by right, not only paid all her taxes for the year of 1891, but overpaid the same in the sum of \$281.60, which last sum, she alleges, was wrongfully collected from her; that her property should have been assessed only one-half of the sum put upon the tax duplicate against her; and that the taxes properly chargeable against her should have been only the sum of \$668.60. Her complaint also shows that the county board of review reduced the valuation of all the real estate in the said county, after it had been fixed by the assessors, 50 per centum, and that the valuation of personal property in said county was not reduced, but was permitted to remain as fixed by the assessors; that the state board of tax commissioners confirmed and approved the action of the board of review of Lake county in reducing the valuation of real estate in said county; that she appealed from the action of the county board of review in fixing the amount of the assessment on her personal property to the state board of tax commissioners, but that her appeal was denied. It is also alleged that, by the reduction of the valuation of the real estate in Lake county, such real estate was placed at less than one-half of its true, full, fair, cash value; that taxes upon real estate in said county were afterwards computed and paid upon such reduced valuation; and from these facts appellant concludes that her property has not been valued equally and uniformly with the other prop-

erty of said town and county for the purposes of taxation, but wrongfully assessed too high. The order of the county board of review, fixing the valuation of real and personal property, as set out in the complaint, is as follows: "The board, after hearing all the complaints, and after due consideration, it was moved by the board to let all recommendations made by the county assessor stand as approved. It was further moved and carried to reduce the valuation of all real estate and lots in each township 50%. This reduction is only to apply on the value of lands and lots. The valuation of personal property is to be left as reported and returned and corrected by the county and township assessors."

By sections 5813, 5814, Rev. St. 1881, it is made the duty of the board of commissioners of the county to refund, in all proper cases, taxes which have been wrongfully assessed. Appellant's property was assessed for the purposes of taxation under the act of the general assembly approved March 6, 1891, (Acts 1891, p. 199.) The constitutionality of this act is not questioned, but the contention is that the county board of review, by the rule and order above set out, assessed appellant's property higher in proportion to its actual value than real estate generally in said county; that this maladministration of the act contravenes section 1 of article 10 of the state constitution, which requires that all property, both real and personal, shall be justly valued, and receive a uniform and equal rate of assessment and taxation. There is no claim that appellant's property was assessed at more than its true cash value as required by section 53 of the above act, but it is contended that, under the order of the board of review, real estate is assessed too low, and that the effect of said order is to unjustly discriminate against her personal property, and that, as compared with real estate, the assessment is too high, unjust, and not uniform. The act of 1891, supra, following the constitution, is pervaded by a spirit of fairness and equality in the assessment of all kinds of property. A county board of review and the state board of tax commissioners are created, and clothed with quasi judicial powers, and specially charged with the duty of bringing about uniformity and equality of taxation. The action of these boards is judicial in its character, and their judgments are not open to collateral attack. If errors or irregularities are committed; they must be corrected by the mode pointed out by the statute. If not so corrected, they are conclusive, whatever errors may have been committed in the assessments. Courts have no power to control their discretion, or take upon themselves the functions of a revising and equalizing board. *Stanley v. Supervisors*, 121 N. S. 535, 7 Sup. Ct. Rep. 1234; *Newman v. Supervisors*, 45 N. Y. 676. It is insisted, however, that the order of the board cut off judicial discretion, and that the judgment of the board, in so far as it discriminates against personal property, is void. Appellant relies with great confidence upon the case of *Gummings v. Bank*, 101 U. S. 158, in sup-

port of this position. That case arose under a law of the state of Ohio. That act provided for separate state boards of equalization for real estate, for railroad capital, and for bank shares; but there was no state board to equalize personal property, including all other moneyed capital. The equalizing process, as to all other personal property and moneyed capital, rested with, and ceased with, the county boards. The assessors of real property and the assessors of personal property and the county auditor, who was required to assess bank shares, all concurred in establishing a rule of valuation by which real estate and personal property, except money, were assessed at one-third of their actual value, and invested capital at six-tenths of its value, and the assessment of the shares of incorporated banks, as returned by the auditor, at about six-tenths of their actual value. The state board of equalization increased the value of bank shares to their full cash value. There was a manifest inequality between the assessment of bank shares and all other personal and real property. The court held that when a rule or system of valuation is adopted by the officers whose duty it is to make the assessment, which is intended to operate unequally, in violation of the fundamental principles of the constitution, and when this rule is applied, not solely to one person, but to a large class of persons, equity may properly interfere to restrain the operation of the unconstitutional exercise of power, and, upon the payment of the amount of tax which is equal to that assessed on other property, will enjoin the collection of the illegal excess. That case differs from the one at bar in this respect: There the primary assessment was made by officers exercising purely ministerial functions. Under the rules adopted an unfair basis was furnished to the reviewing or equalizing boards. Any action that the boards might take under such circumstances could not bring about equality and uniformity of valuation. Here no complaint is made of the action of the assessors in making the primary assessment, but the complaint is against the board of review. This board of review, under our statute, (section 115,) is clothed with extensive powers over all kinds of assessments, even to the extent of setting them aside as to the whole county, and ordering new ones taken. When the board of review made the order reducing real-estate assessments 50 per centum, and left personal property assessments unchanged, we must presume that it was necessary to do so in order to equalize the assessments. This act was judicial in its character. If erroneous or hurtful, a remedy is given by the act itself. If the courts can review this act, then they can review any order made by the board, and assume the functions of a board of equalization. This is clearly not the purpose of the statute. If appellant has been wronged by the order she must right it in the method provided by law. Appellant also cites *Andrews v. King Co.*, 22 Amer. St. Rep. 136, and insists that it is decisive of the point in controversy here. We have examined that case. The act there

complained of was done by a ministerial officer, the assessor, and not by a board of equalization. We think the demurrer was correctly sustained. Judgment affirmed.

(7 Ind. App. 160)

**KEENEY et al. v. WHITLOCK.**

(Appellate Court of Indiana. June 8, 1893.)

**SALE—SCALES ERECTED ON REALTY—ESTOPPEL.**

Where platform scales were sold as personal property by the assignee of the insolvent landowner, and the sale approved without objection by any one in interest, one who purchases the realty afterwards with notice of such sale cannot claim the scales.

Appeal from circuit court, Ohio county; A. C. Downey, Judge.

Action by George H. Keeney and others against William H. Whitlock. Defendant had judgment, and plaintiffs appeal. Affirmed.

J. B. Coles and G. B. Hall, for appellants. R. L. Davis, for appellee.

**DAVIS, J.** Several errors are assigned, but the entire case turns on the question as to the ownership of the platform scales in question. There is no conflict in evidence, or controversy as to the facts. Joseph W. Talbott, the owner of the adjacent real estate, erected the scales in the street. Afterwards, when he became insolvent, he made an assignment, under the statute, to R. R. James, for the benefit of his creditors. James, as such assignee, sold the scales as personal property to appellee, which sale was reported to and confirmed by the court. On the next day the assignee sold the real estate to one Bradley, who knew that Whitlock had bought the scales the day before. Bradley afterwards sold the real estate to appellants, who then knew that appellee had previously bought and paid for the scales. Later appellants purchased the inchoate interest of Talbott's wife in the real estate, and subsequently appellee removed the scales. On this state of facts appellants seek to recover the value of the scales, or the damages sustained by reason of the alleged trespass on the real estate. It is insisted by appellants (1) that the title to this part of the street on which the scales were located was in the adjacent owner, subject only to the rights of the public to use the same as a street; (2) that the scales were a part of the real estate; (3) that through the conveyance of the trustee and wife of Talbott the title to the scales was vested in them. The claim of appellants is purely technical. They evidently did not understand that they were purchasing or paying for the scales. The question is, however, what are the rights of the respective parties,—whether technical or equitable? If it were conceded (which we do not decide) that the owner of the adjacent real estate held title to the center of the street in this case, subject only to the public easement, and that the scales were a part of the real estate, yet we are of the opinion that, under the undisputed facts disclosed by the record, appellee had the right to remove the scales. It clearly appears that all of the parties,

especially appellants, knew that appellee had bought and paid for the scales before any sale or conveyance was made of the real estate. Under the circumstances it would certainly be unjust and inequitable to hold that appellants acquired the scales through the conveyance executed by the trustee. It is insisted, however, that the wife of Talbott was not in any manner bound by any such acts or agreements of the trustee and other parties, and that appellants obtained title to the scales through her subsequent conveyance of an undivided inchoate interest in said real estate. We cannot concur in this view. See *Duncan v. City of Terre Haute*, 85 Ind. 104. The scales having been treated as personal property by the trustee, with the sanction and approval of the court having jurisdiction of the estate, and without objection of any of the parties in interest, our conclusion is that, under all the circumstances, the claim of appellants is without merit. Judgment affirmed.

(134 Ind. 6)

**BARNER et al. v. BAYLESS et al.**

(Supreme Court of Indiana. June 15, 1893.)

**RAILROAD AID—CONSTRUCTION OF ROAD.**

After a donation to aid in the construction of a railroad, the company built rough track, and ran a train over it. A second donation was then made for the same purpose. Held, that the completion of the road already laid, the construction of the grade, digging ditches, and furnishing and laying ties and iron, were within the meaning of the second donation.

On rehearing. Denied.

For former report, see 33 N. E. Rep. 90.

**COFFEY, J.** An earnest petition, assigning many reasons for a rehearing, filed in this case, all of which have received a careful consideration. We deem it unnecessary to notice, in this opinion, any of the reasons assigned, except the one which questions the sufficiency of the evidence on the record to sustain the finding of the court below. All other questions necessary to a decision of the cause are fully covered by the opinion heretofore filed.

It appears from the evidence in the cause that, in the year 1874, Center township, Clinton county, voted the sum of \$20,000 to aid the construction of the Frankfort & State Line Railroad through the township. In the year 1878 the township voted an additional \$20,000 for a like purpose. In 1879 the company appeared before the board of commissioners of Clinton county, and made proof of the fact that it had expended in the actual construction of its road in Center township a sum in excess of the first donation, and that it had run a train of cars over its road in the township, and was paid the amount of this donation. After the vote on the second donation was taken the railroad company, by resolution, extended its road seven-eighths of a mile, for the purpose of reaching land intended for the erection of a roundhouse and machine shops. It then entered into a contract with the Western Construction Company for the completion of the road.

tion of its road from the town of Frankfort to the state line dividing Indiana and Illinois. Under this contract the construction company not only completed the road as originally located, but also constructed the seven-eighths of a mile above mentioned. The evidence tends to show that when the construction company entered upon the work of completing the road, in the year 1880, it was not completed through Center township, and was not in a condition to be operated. The grade was not completed. The ties numbered about 2,640 to the mile. They were six feet in length, and many of them were poles without the removal of the bark, with a surface of less than an inch. The iron was in weight 30 pounds to the lineal yard, had never been surfaced, and was not in line, and much of it crooked. There was no ballast of any kind upon it, and the weeds had grown up in the center of the track higher than an ordinary man's head, so that it was difficult to walk over it. No ditches had been constructed along the track for the purpose of carrying off the water. The construction company, under its contract, completed the construction of the road, putting it in good condition, ready for operation, and in doing so expended in Center township, including the amount expended in constructing the extension, a sum in excess of \$30,000.

It is contended by the appellants:

First. That the railroad company had no power to extend its road after the donation was voted, and thereby bind the township for the cost of constructing such extension. We have found it unnecessary to enter into an examination of the question as to whether the railroad company had the power to extend its road, and bind the taxpayers of the township for the construction of such extension, for the reason that we think the finding of the court is right, independent of this question.

Second. It is contended by the appellants that the sum expended by the construction company in completing the road in Center township should not be taken into consideration, because they say that such sum was not expended in actual construction, but in the betterment of a road already constructed. We cannot agree with the appellants in this contention. We must assume that the purpose of the people of Center township in voting the second donation was to secure a completed railroad, that could be operated, and which would benefit them. We must assume, also, that when the first donation was paid the company had expended in the township, in the actual construction of its road, a sum equal to the donation, and that it had run a train of cars over its road through the township. Still the road was not completed, and was not in a condition to be operated, and was practically of no benefit to the people. Such completion, as we have seen, took place after the first donation was paid. We think the construction of grade, digging necessary ditches, furnishing and putting down ties, furnishing and laying iron, and the putting in of ballast, are all properly chargeable to the construction account of a railroad. We can conceive of no other

account to which it could be charged. It is not denied that by the expenditure of the money last named the road was put in good condition, and that the voters of Center township received all they had the right to expect. Nor is it necessary, to sustain the judgment in this case, that it should appear by the evidence that the company expended a sum equal to the donation in the construction of the road in Center township. This is an action by the appellants, as taxpayers, to avoid the tax, on the ground that the company had not expended that sum. The burden of the issue was upon them, and before they could succeed they were compelled to show affirmatively that no such sum had been expended. This we think the court was authorized, under the evidence, to find they had not done. We think the petition for a rehearing should be overruled.

(134 Ind. 642)

#### HUDSON v. VOREIS et al.

(Supreme Court of Indiana. June 8, 1893.)

#### OPENING HIGHWAY—VALIDITY OF ORDER—INJUNCTION.

1. Rev. St. 1881, § 5028, provides that "the order for laying out of any highway shall specify the width thereof." *Held*, that an order of the commissioners that "a road be established and opened as prayed for in the petition" was void, there being no statutory requirement that the petition in such a case should mention the width of the road.

2. The order being void, all proceedings thereunder could be enjoined.

Appeal from circuit court, Marshall county; A. C. Capron, Judge.

Action by Louis P. Hudson against Thomas L. Voreis, trustee, and others, to enjoin defendants from opening a highway through plaintiff's land. A demurrer to the complaint was sustained, and plaintiff appeals. Reversed.

Chas. P. Drummond, for appellant. McLaren & Martindale, for appellees.

HACKNEY, J. The appellant's action was to enjoin appellees from opening a highway through his lands to his injury, as specifically alleged, and upon the authority alone of an order of the board of commissioners of Marshall county, in the following words: "It is ordered by the board that a road be established and opened as prayed for in the petition in this cause." The complaint avers that said order is null and void, in that it did not define the width of the road proposed. The court below sustained a demurrer to the complaint, and the correctness of that ruling is the question here presented for decision.

The complaint is much like that in *Erwin v. Fulk*, 94 Ind. 235, and most of the questions here discussed are there fully decided. "The order for laying out of any highway shall specify the width thereof." Rev. St. 1881, § 5028. The failure by the board of commissioners or the circuit court to comply with this statutory requirement renders its judgments void, and not merely irregular. *White v. Conover*,

5 Blackf. 461; *Barnard v. Haworth*, 9 Ind. 103; *Sidener v. Essex*, 22 Ind. 201; *Erwin v. Fulk*, supra; *Strong v. Makeever*, 102 Ind. 578, 1 N. E. Rep. 502, and 4 N. E. Rep. 11; *Davison v. Gill*, 1 East, 64. A judgment is void if the thing essential to its validity is apparent upon the face of the record, and it may be treated as a nullity by all persons, in collateral as well as direct attacks. *Earle v. Earle*, 91 Ind. 27; *Erwin v. Fulk*, supra; *Railway Co. v. Sumners*, 118 Ind. 10, 14 N. E. Rep. 738. The enforcement of a void judgment may be enjoined. *Earl v. Matheney*, 60 Ind. 202; *Brown v. Goble*, 97 Ind. 86; *Erwin v. Fulk*, supra; *Railway Co. v. Sutton*, 130 Ind. 413, 30 N. E. Rep. 291. The petition for the location of a highway does not necessarily contain a description of the width of the proposed highway, (*Watson v. Crow-sore*, 93 Ind. 221.) and we cannot presume that it did contain it. An order locating and establishing a highway, giving no other specification of the width than by reference to the petition, is not a compliance with the statute. The object of the requirement is that the public may know the limits within which travel is permitted, and that a public record of such limits may be preserved, and not made to depend upon the preservation of some such document as the petition, report of viewers, or other paper, easily lost or destroyed. Here there is at most an attempt to comply with the statute by reference to one of such papers, which paper is not required to state such width, nor does it appear that the width was stated therein. If required to be stated in the petition, we could presume that the requirement had been complied with, but we can no more indulge such presumption than we can presume in favor of its stating that which is forbidden to be stated. The case of *Adams v. Harrington*, 114 Ind. 66, 14 N. E. Rep. 603, and the authorities there cited to the proposition that an appeal affords an adequate remedy at law, are not in conflict with the conclusion in this case, or the cases we cite in support of our conclusion, that, where the judgment is absolutely void, equity will grant relief against it. In *Vandut's Collateral Attack* (p. 837, § 778) it is maintained that the cases in Indiana, as we give them, are unsound, upon the ground that the landowner's failure to call attention to the omission should estop him to make an attack upon the proceeding collaterally, and that he should be defeated by holding that the commissioners exercised their full power, and established a highway of the maximum width. The cases are too numerous, and are too firmly settled in the precedents of this court and the practice in this state, to justify us in adopting the suggested departure. For over 50 years it has been held that the failure to observe this statutory direction rendered the establishing order void. If void, the authorities no less firmly hold that it may be attacked collaterally. We would find pleasure in holding that the appellant had a legal remedy, and that his resort to equitable relief should not prevail, but it is our duty to follow the unbroken line of authority in this state. The judgment of the circuit

court is reversed, with instructions to overrule appellee's demurrer to appellant's petition.

(124 Ind. 673)

# PARKER v. PENNSYLVANIA CO.

(Supreme Court of Indiana. June 6, 1893.)

RAILROAD COMPANIES — INJURY TO PERSON ON TRACK — CONTRIBUTORY NEGLIGENCE.

1. Where a person who is unacquainted with the locality, and without license, walks into an archway under a mill, which is merely large enough to admit an ordinary box car, and through which runs a railroad switch so curved as to prevent a view of an approaching car, he is a trespasser, and guilty of such contributory negligence as precludes a recovery for his death caused by the negligence of the railroad company in running a car into the archway at an unlawful rate of speed.

2. Though there are usually large numbers of people in the immediate vicinity of such switch and archway, and a four-foot walk along one side of the latter which is used by persons passing through it, the running of a car through such archway at a high rate of speed is nothing more than negligence, in the absence of actual knowledge by the company's operatives of the presence of deceased in such archway, and is not such willfulness as renders the company liable notwithstanding deceased's negligence.

Appeal from circuit court, Bartholomew county; N. R. Keyes, Judge.

Action by Phineas Parker, administrator of the estate of William A. Parker, deceased, against the Pennsylvania Company, for the death of plaintiff's intestate, caused by defendant's negligence and willfulness. From a judgment sustaining a demurrer to and dismissing the complaint, plaintiff appeals. Affirmed.

J. F. Cox and W. L. Cox, for appellant. S. Stansifer, for appellee.

HACKNEY, J. The appellant sued the appellee for damages in causing the death of William A. Parker. The complaint was in four paragraphs, to all of which the circuit court sustained demurrers, and this ruling is here presented for review. The theory of the first and third paragraphs is that the death was negligently produced, while the second and fourth paragraphs proceed upon the theory of willfulness in the acts complained of. The controlling facts alleged in any one of the paragraphs are that in the city of Columbus the appellee maintains a railway switch running east and west, and crossing the company's main line south of, and near to, the station building and platform; that opposite the station is located the Cereline mill, on the west side of said main track; that in said mill was an archway 250 feet long, and into which said switch was extended and maintained for the purpose of placing cars within said archway for loading from said mill of the product thereof; that the archway was so narrow that a box car almost filled it from wall to wall; that on the north side of said archway was a walk or footway four feet and two inches wide, used by persons passing through the building; that in the immediate vicinity of said crossing were usually large numbers of people;

that said William A. Parker was unacquainted with said building and its surroundings when he walked into said archway upon said footway to a point near the center of the building, and was killed. It is alleged that the appellee then knew that persons were in the habit of passing through said archway, and that to run a car through said archway at great speed would endanger the lives of those who might be therein; that there was then an ordinance of said city limiting the speed of cars to four miles per hour, and requiring that some person should be caused to proceed in advance of any car moved backwards within said city, for the purpose of keeping the track clear of pedestrians; that in disregard of the requirements of said ordinance, and of the situation, with its dangers as described, the appellee's servants caused an engine to push a box car over said switch and into said archway at a speed of twelve miles per hour, unaccompanied by any person, and without the knowledge of, or warning to, said decedent; that said car so running ran upon and killed the decedent there, there then being no means of escape for him. The first and third paragraphs allege that the decedent was free from negligence, and the second and fourth paragraphs omit allegations of the absence of contributory negligence, and allege that the acts complained of were done willfully. There is also an effort to distinguish the charge of negligence from that of willfulness by alleging that there was a curve in the switch which prevented the decedent from seeing the approaching car, and that from the appearance of the archway he believed in good faith that he could pass through in safety.

It is conceded by appellant's learned counsel that the specific facts alleged control in the construction of the complaint, and that the detached phrases, epithets, and conclusions cannot prevail against the facts so alleged. It is further conceded that the failure to observe the ordinance does not constitute willfulness, and it is so held in *Sherley v. Railroad Co.*, 121 Ind. 427, 23 N. E. Rep. 273. And it is conceded that the presence of contributory negligence on the part of the decedent would defeat a recovery on the ground of negligence, and that, if he was a trespasser, such contributory negligence existed. Considering the right of recovery as for negligence, we find the complaint insufficient, in that it not only fails to allege a license to the decedent to use the archway, but it appears clearly from the facts alleged that said archway was a place of great danger for one to go into. It was narrow, not of sufficient width to admit a box car and furnish room for retreating. Through it ran a railway switch, and said switch so curved as to prevent a view of a car approaching the archway. The decedent was a stranger as to the conditions then existing in and about said archway, including its uses by the appellee. It is not alleged that it was a public thoroughfare, and the facts alleged would seem to imply that it was not. In venturing into the archway he was confronted with all of the elements of danger

that the situation afforded. He was in duty bound to observe the dangers thus surrounding him. While we find it unnecessary to say that the facts show a rash assumption of the dangers incident to the situation, we do feel that it is beyond serious doubt that he was a trespasser upon the appellee's track when he lost his life. "It is not enough that persons do occasionally use the track, for to constitute a license it must appear, either expressly or by clear implication, that the owner of the track authorized them to use it." *Palmer v. Railroad Co.*, 112 Ind. 250, 14 N. E. Rep. 70. Here it does not appear that the decedent knew of the use by others of the archway in passing through; on the contrary, it is a necessary inference from the allegation that he was unacquainted with the building and its surroundings; that he did not rely on the use of it by others as a license to use it himself. With this conclusion, the first and third paragraphs were insufficient, and the demurrer was correctly sustained to them. Some of the cases supporting this conclusion are: *Railroad Co. v. Hedges*, 105 Ind. 398, 7 N. E. Rep. 801; *Railway Co. v. Schmidt*, 106 Ind. 73, 5 N. E. Rep. 634; *Railway Co. v. Bryan*, 107 Ind. 51, 7 N. E. Rep. 807; *Railroad, etc., Co. v. Mann*, 107 Ind. 89, 7 N. E. Rep. 898; *Railway Co. v. Ader*, 110 Ind. 376, 11 N. E. Rep. 437; *Palmer v. Railroad Co.*, *supra*.

Considering the right of recovery as for willfully causing the death of the plaintiff's decedent, it is proper to observe the absence of an allegation that appellee's operatives knew of the presence of Parker. That one may be held liable for the consequences of a willful act without an actual knowledge of the presence of the object acted upon is urged, and may be conceded, but this liability is never held where the act or the omission is one from which the injury could not reasonably have been anticipated as the natural and probable consequence of such act or omission. *Railway Co. v. Bryan*, *supra*. In this case the rule was correctly stated by the late Judge Mitchell as follows: "Where one person negligently comes into a situation of peril, before another can be held liable for an injury to him, it must appear that the latter had knowledge of his situation in time to have prevented the injury; or it must appear that the injurious act or omission was by design, and was such, considering the time and place, as that its nature and probable consequences would be to produce serious hurt to some one. To constitute a willful injury, the act which produced it must have been intentional, or must have been done under such circumstances as evinced a reckless disregard for the safety of others, and a willingness to inflict the injury complained of. It involves conduct which is quasi criminal. *Canal Co. v. Murphy*, 9 Bush, 522; *Railroad Co. v. Filbern*, 6 Bush, 574; *Association v. Loomis*, 20 Ill. 235." While it is admitted that the act complained of is negligence, it is earnestly and ably contended that, under the circumstances, considering the time, the place, and the habit of persons to pass through the archway, the act evinced a reckless disregard for the safety



of others. It is not alleged that the appellee did not possess the right to use the switch at the time and place and under the circumstances then existing. The exact point at issue is in the excessive speed of the car through the archway, a place of danger, without affirmative action for the protection of a possible trespasser. While conceding expressly that the same act upon an open switch would have been but negligence, it is argued that the archway gave to one therein no means of escape, and that a different rule should obtain,—a rule whereby such negligence becomes an aggressive wrong. In the decision from which we have quoted the place of injury was a street crossing in a populous city, a place where the injured party was not a trespasser, but had a perfect right to go, and where the company was required to anticipate his presence. The crossing was alleged to be "extra dangerous by the track being hidden from view for some distance by intervening buildings." It was there held that the facts were "in no wise different from those involved in the ordinary case where a locomotive is run over a highway at a high rate of speed, without giving the statutory signals. These are merely acts of nonfeasance, not of aggressive wrong. The consequences of undenied contributory negligence cannot be avoided in such a case by the fact that the track was "hidden from view for some distance by intervening buildings." Willfulness does not consist in negligence; on the contrary, as illustrated by the cases of Bryan and of Mann, heretofore cited, the two terms are incompatible. Negligence arises from inattention, thoughtlessness, or heedlessness, while willfulness cannot exist without purpose or design. No purpose or design can be said to exist where the injurious act results from negligence, and negligence cannot be of such a degree as to become willfulness. Indeed, this court has so often denied the claim which attempts to distinguish between degrees of negligence, that authority or further statement in denial should not be deemed necessary. The railroad company owes to the trespasser no protection against negligence. It does owe him the duty of all reasonable effort to avoid injuring him when his presence and his own inability to avoid injury are known to it, but does it owe such duty when his presence is not known? It would seem that a negative answer is all that the inquiry is susceptible of. The circumstances should be such as to charge the operatives with knowledge, actual or imputed, of the presence of the trespasser, and of his inability to avoid injury, before any duty of the company arises to require of it affirmative acts or effort to avoid injuring him. By imputed knowledge in such case we mean such as should be implied from the conduct of the party or others within the actual sight or hearing of such operatives. It is upon such knowledge that wantonness is held the equivalent of willfulness. To require more would be to deny to railway companies the free use of their lines, and would require of them superhuman vigilance against inflicting injury upon the

trespassing tramp who lurks about the yards to steal a ride, or loiters in some dark tunnel, or upon a respected citizen whose curiosity may lead him in such an archway as that of the Cereline mill. To require the companies to presume the presence of trespassers in places of danger, and to use all possible care to avoid injuring them, would destroy the line dividing negligence from willfulness in such cases, or would give no discouragement to trespassers, and would place in the same right the trespasser and those using the railway by a license or by public authority. We have no doubt that the facts as pleaded in the second and fourth paragraphs of the complaint state but causes for negligence, which causes are insufficient, for the reasons and upon the authorities upon which we hold the first and third paragraphs insufficient. The judgment of the circuit court is affirmed.

(135 Ind. 507)

DICKSON et al v. WALDRON.<sup>1</sup>

(Supreme Court of Indiana. June 7, 1893.)

## MASTER AND SERVANT—LIABILITY FOR ASSAULT BY SERVANT.

The manager of a theater is liable for an assault and battery on an inoffensive patron, made by one employed as doorkeeper and special police.

Appeal from superior court, Marion county; D. W. Howe, Judge.

Action by Henry E. Waldron against George A. Dickson and others for assault and battery, false imprisonment, and malicious prosecution. Plaintiff had judgment for an assault and battery, and defendants appeal. Affirmed.

R. O. Hawkins, Pierce Norton, Elam & Winter, John R. McFee, and Elliott & Elliott, for appellants. Otto Gresham, Joseph B. Kealing, and Martin M. Hugg, for appellee.

HOWARD, J. On October 1, 1887, and at the time of the bringing of this suit, appellants were the lessees and managers of the Park Theater, in the city of Indianapolis. At the entrance to the theater, about three feet from the sidewalk, a flight of stairs ran up to a landing, at the rear of which was the box office for the sale of tickets. At either side of the landing a flight of stairs led up to the east and west entrance doors to the theater. At the top of the first flight of stairs, at the edge of the landing, gates were placed, four feet high, to keep the crowd back. Between these gates was an opening where the chief officer of the theater, named Klingensmith, an employe of appellants, stood while the crowd was coming up, after which the gates were opened, and this officer went to keep order in the gallery. Appellants also managed and controlled other theaters in Indianapolis and elsewhere, and, in their absence, John Dickson, brother of the appellant George A. Dickson, was the general manager of the Park Theater, acting for appellants. He also assisted in selling tickets. John M. Kiley was the head janitor of the theater

<sup>1</sup> Rehearing denied, 35 N. E. 1.

and lived, with his family, in the theater building. He was also door-keeper, and stood at the west door, but could leave in case of emergency. At the request of appellants he was granted special police powers by the metropolitan board of police of the city of Indianapolis, such powers to be exercised at the Park Theater. He received his pay from appellants. He had been in the employment of appellants at the theater before receiving his police powers, and his pay was not increased after receiving such powers. Appellants requested his appointment at the suggestion of the chief police officer, Klingensmith, for the purpose of assisting him in preserving order in the theater. He was not relieved of any of his duties in the theater after being appointed special policeman. His instructions from appellants were not to make any arrests, except to assist Klingensmith, unless otherwise ordered by appellants or by John Dickson. In Klingensmith's absence, Kiley acted for him. Joseph Gordon was treasurer and ticket seller for the theater.

On the evening of October 1, 1887, Joseph Gordon was in the box office, selling tickets. John Dickson was also in the box office, assisting in the sale of tickets. On that evening, appellee, who was a conductor on the Indianapolis, Decatur & Western Railroad, came, with four friends, to attend an entertainment at the theater. Appellee testifies that he went upstairs to the ticket office for a 10-cent ticket; that he gave the ticket seller, Joseph Gordon, a silver dollar, and received from him his ticket, and only 70 cents in change; and that another of the party, named Doran, also had some misunderstanding as to the purchase of his ticket. The testimony of appellee then proceeds: "I do not remember just exactly whether Doran had purchased his ticket before me, or after I did. He wanted a ticket to go upstairs, too, and they gave him a ticket to go downstairs; and I says to the ticket seller, like this: I said: 'Here is five of us in a party, and want to go together. You have made a mistake in our tickets.' He said: 'What is the matter with you? Get away from that window, and give others a chance.' I said: 'I am not going until I get my right change. You have made a mistake in my change, too,'—and held out my hand. I had not taken my hand down from the shelf in front of the window, and he reached through the window, and grabbed my change and ticket, and slapped me in the face at the same time, and said, 'Damn you! get away from that window,' and reached for my brakeman, and grabbed his ticket, and said, 'Police,' or 'Johnny,'—I do not know which,—'Police,' or 'Johnny, arrest that man for a vag.' A man named Kiley, there,—a private policeman for the theater company,—stepped up at the side of me, or behind me, and knocked me down." He testifies that the first blow was on the left forehead, which knocked him partly down on his left elbow; that, when he attempted to rise, Kiley struck him again; that altogether he was struck six times on the head, three times on the left shoulder; and

twice on the left forearm; that, during this time, Kiley said nothing to him, but that he asked Kiley what he was beating him for, "and I said, if he had anything to arrest me for, to arrest me, and, for God's sake, not to beat my brains out;" that somebody then interfered, and Kiley, for the time, withdrew, and then Gordon came out of the ticket office, and grabbed appellee about the neck with his left arm, and began pounding him in the face with his fist, then knocked him down, and kicked him two or three times; that Kiley then arrested him, and sent him to the police station. The testimony of appellants' witnesses as to the transaction differs in almost all the details from that given by appellee, but not in the main facts; that is, the beating of appellee in front of the ticket office by Gordon and Kiley, that the quarrel resulted from disputes as to the purchase of tickets, that both assaults were made upon appellee before his arrest by Kiley, and that appellee did not strike either of his assailants. The testimony of Joseph Gordon and John Kiley shows their treatment of appellee to have been most brutal. Gordon testifies that he and John Dickson were in the ticket office when appellee came up, and threw down a silver dollar, and asked for a ticket, not specifying what priced ticket; that he gave him his ticket, and the proper change. His testimony then proceeds: "He [Waldron, appellee] said, 'You did not give me my right change.' I said, 'Yes, sir.' He said, 'No, sir.' I said, 'I gave you just the exact change with your ticket, and, if you did not get your change, somebody else got it.' He said, 'You did not.' I said, 'I did.' \* \* \* I sold two or three tickets while he stood there arguing." That appellee then called him a vile name. "I said: 'Becareful. I won't take that off of anybody,—you or anybody else.' He said, 'I want my change.' I said: 'Your change was right, and, if it is not, when we make up the house our cash will show it; and if there is any over we will make it good to you.'" That thereupon appellee repeated the vile name, and Gordon went out of the ticket office, and attacked appellee. "He was standing up pretty near the office, and I hit him, and he turned around and squared, and I hit him again. \* \* \* I could not say how hard I hit him. I hit him pretty hard. I tried to. \* \* \* In the face." That there was nothing said between them after Gordon came out of the office. "Then we got on over to the stairway, and I hit him again, and got my arm around his neck, and we were about three or four steps down from the top. \* \* \* I caught him around the neck with my arm, and pulled him down. \* \* \* I got him down on the stairway, and hit him two or three times more, and I kicked him a couple of times. \* \* \* I hit him in the face. \* \* \* I hit him three or four times there, and kicked him, and then he said, 'I have enough.' \* \* \* Mr. Kiley was downstairs at the time,—out on the sidewalk. \* \* \* I had quit when he hallooed, 'I have enough.' Kiley was coming up when he said that, and I said, 'Kiley, arrest this man.'" When Kiley

came up "I started to let go when [some] fellow said, 'Give it to him.' Kiley hit him with the mace." That when Kiley hit Waldron (appellee) the latter was "partially down,—just about halfway up. \* \* \* I was very near upon my feet. \* \* \* When Kiley came up and hit him I let go of him, and went upstairs, and went into the office, and sold tickets." The witness Adkins, who was ticket holder at the east door, testified: "I thought I would go down, and see, and stop that fussing, if I could. \* \* \* They had hold of each other when I got there. \* \* \* I just stooped down, and put my hand under their shoulders, and assisted them. \* \* \* Just as I was in the act of raising them up, I threw my eyes down the stairway, and saw Mr. Kiley coming up, and just about the time they got straightened on their feet. Mr. Gordon said to Mr. Kiley, 'Arrest that man.' Mr. Kiley came up to him, and I saw Mr. Kiley throw up his left hand, \* \* \* and the next I saw he struck him \* \* \* with his mace." Kiley himself testified that the appellant Henry M. Talbott had instructed him that his "duties were to take tickets at the door, and supervise the cleaning of the house, and assist Mr. Klingsmith in making arrests or preserving order." That sometimes, when employes would come to him, and tell him that there was a disturbance in some part of the house, he would go there. As to the disturbance, he testified: "I was walking up the stairway, and happened to glance up, and I saw Mr. Gordon having a fight,—fighting with a mace on the stairway. \* \* \* The man's head was up against the casing on the west side of the stairway. \* \* \* He was sitting facing me as I came up. \* \* \* He [Gordon] was on the step above him, and had hold of him. \* \* \* I did not hear the man say anything. Gordon only said, 'Arrest this man.' "What did you do after striking Mr. Waldron?" "I arrested him." John Dickson had remained during the whole time in the ticket office, and had seen the greater part of the conflict, as detailed by Gordon and Kiley, and, in his testimony, corroborates most of their statements. He says: "I went on selling tickets, and took no further notice of it. Things of that kind are liable to occur every once in a while." That he remained selling tickets. Did not go out during the whole trouble. Did not say anything to Gordon when he first told him what the trouble was. Did not give any directions to anybody. Saw Kiley coming up the stairs to where Gordon had hold of Waldron, and they were struggling, and partly raised up,—getting on their feet. "I do not think I said anything to him, [Kiley.] \* \* \* I went on selling tickets." The appellant George A. Dickson testified that Kiley was not to assist in any arrest unless called upon by Klingsmith, or unless under instructions of appellants or of John Dickson; that John Dickson acted for them in their absence. The appellant Henry M. Talbott testified that he agreed with the evidence given by his coappellant, and that the answers given by him were correct. He stated, further, that while Kiley was in

the theater he generally did what appellants told him, but was not sure that he gave Kiley orders personally; that "John Dickson was deputized to look after that." John Dickson was not present on this occasion, but was generally at the theater during entertainments. He testified that he "wore off his vest leaning against the inside shelf of the ticket office. He acted for appellants in signing the firm name to the request made of Kiley's appointment as policeman. The request was as follows:

"To the Board of Metropolitan Police Commissioners of the City of Indianapolis, Ind.:

"Indianapolis, Ind., April 21st, 1887.

"The undersigned respectfully requests your board to confer special police powers on John M. Kiley, who is employed and paid by the undersigned; the said powers to be used in and about Palace Theater and Dime Museum, Indianapolis, Ind. And in consideration of said grant of police powers the undersigned hereby become responsible for his obeying your rules, and for all illegal acts (done by said John M. Kiley while doing duty as special policeman. Dickson & Talbott.

"Approved. N. R. Ruckle, Pres't Bd. P. Commrs."

The complaint was in seven paragraphs, alleging three causes of action against appellants: Assault and battery, false imprisonment, and malicious prosecution. The court refused to admit evidence as to the charges of false imprisonment and malicious prosecution, and instructed the jury to find for the appellants on those issues. The court also instructed the jury that the appellants were not liable for the alleged assault and battery on Gordon, the ticket seller. Whether there was error in such ruling and instruction in favor of appellants we need not inquire, since appellee has not insisted on it. The jury found a general verdict for appellants as to the assault and battery, and for appellants as to the other two charges. The jury also found, in answer to special interrogatories, that John M. Kiley, while in appellants' theater, on October 1, 1887, struck appellee a number of blows upon the head with a mace, and thereby inflicted severe wounds; that such blows resulted in appellee's losing the hearing of his left ear, and otherwise permanently disabling him, and causing him to lose his situation as freight conductor; that appellee at the time and place mentioned, the view of John M. Kiley, did not commit any crime, or violate any ordinance of the city of Indianapolis, and that the said Kiley had no warrant for the arrest of appellee; that John M. Kiley, at the time alleged, was an employe of appellants; that he said nothing to appellee before assaulting him; that it was one of the duties of Kiley, as the servant and employe of appellants, to preserve order and suppress disturbances in appellants' theater, and that he had received from appellants general authority for that purpose; that appellee, while in appellants' theater on said occasion, had not committed any crime, nor violated any ordinance of said city; that the said Kiley, at said

place and time, assaulted and beat appellee on the head with his mace before he arrested him; that the said Kiley, when so assaulting appellee, was acting as the servant and employe of appellants, and engaged in their business, and acting within the general scope of the duties of his said employment; that John T. Dickson, brother of one of the appellants, was at said time present in the box office of said theater, and did, on said occasion, and prior thereto, sell tickets for appellants; that with the knowledge of appellants, at and prior to said time, the said John T. Dickson went to said theater, and gave instructions to appellants' employes, and that in the absence of appellants the said John T. Dickson was deputized to act for them at their said theater as manager; that he signed the firm name to the application for police powers to be conferred upon the said John M. Kiley, and that he had authority to so sign said firm name; that appellants were at said time the lessees and managers of said theater; that all the injuries received by appellee in and about said theater on said evening were inflicted by said John M. Kiley; that said Joseph Gordon was an employe of appellants, as one of the ticket sellers, on said evening, and was then and there on duty; that said John M. Kiley was an employe of appellants, as janitor and as ticket taker at the west entrance door of said theater, on said evening; that he was commissioned as special policeman about April 22, 1887, to act in connection with his other duties at appellants' said theater, and at their special request; that, at the request of said Gordon, said Kiley did arrest appellee on said evening; that all the wounds and bruises received by appellee at said theater on said evening were inflicted by said Kiley near said ticket office, and before the arrest of appellee; that neither of appellants was present at the time appellee received his injuries, and neither of them had directed or advised any assault upon appellee.

It is enough to say that these answers are fully sustained by the evidence in the record. The main question in this case, and perhaps the only one that need be decided, is whether appellants are liable to appellee for the injuries inflicted upon him by their employe John M. Kiley. The treatment due from a carrier to his passenger, from an innkeeper to his guest, and from a theatrical manager to his patron, while perhaps differing in degree, is similar in kind. The duty of a railroad company to its passengers is well expressed in *Railway Co. v. Cooper*, (Ind. App.) 33 N. E. Rep. 219. This was a case where a passenger, having purchased his ticket, was in the company's station, on his way to his train, when he was assaulted by one of the "gatemens;" and it was contended by the company that the gateman, in making the assault, was not acting in the scope of his employment. The court said: "It seems to us reasonably clear \* \* \* that the servant was, at the time of doing the acts complained of, on duty for his master, and at or near his proper place, and that the assault was committed on appellee while he was

properly on the master's ground, and under charge of the master's servants, and entitled to their protection, rather than their abuse. \* \* \* Moreover, the appellee did not bear the relation of a stranger to the appellant, but on the contrary it owed to him an affirmative duty, to protect him from the violence and insults of its own servants at the station. It is well settled that one who has purchased his ticket, and is passing at the proper time from the depot to the train, is a passenger, and entitled to the rights of a passenger. \* \* \* One of the prime duties resting upon a railroad company is to protect its passengers from assaults and injuries by its servants, nor does the question of its liability for a breach of this duty depend upon whether or not the servant, in the performance of the act, is within the scope of his employment." In *Railway Co. v. Prentice*, 13 Sup. Ct. Rep. 264, it is said: "A corporation is doubtless liable, like an individual, to make compensation for any tort committed by an agent in the course of his employment, although the act is done wantonly and recklessly, or against the express orders of the principal." See, also, *Railway Co. v. Willoby*, 33 N. E. Rep. 627, (decided at the last term of this court.) In *Railway Co. v. Bayfield*, 37 Mich. 205, Cooley, C. J., speaking for the court, says: "It is, in general, no excuse to the employer that an injury which has occurred was caused by disobedience of his orders, whether they be express orders or implied orders. He assumes the risks of such disobedience when he puts the servant into his business, and the reasons for holding him responsible for the servant's conduct are the same whether the injury results from a failure to observe the master's directions, or from a neglect of the ordinary precautions for which no specific directions are deemed necessary. It will be conceded that for a positive wrong beyond the scope of the master's business, intentionally or recklessly done, the master cannot be held responsible, this being very properly regarded as the personal trespass or tort of the servant himself. But when the wrong arises merely from an excess of authority committed in furthering the master's interests, and the master receives the benefit of the act, if any, it is neither reasonable nor just that the liability should depend upon any question of the exact limits of the servant's authority. The master fixes these, and it is his duty to keep his servant, in what is done by him, within the limits fixed. An act in excess would still have the apparent sanction of his authority. The occasion for it would be furnished by the employment, and the injured party could not always be expected to know, or be able to discover, whether it was or was not without express sanction." In *Higgins v. Turnpike Co.*, 46 N. Y. 23, the following is quoted with approval from an English case: "It is said that though it cannot be denied that the defendant authorized his guard to superintend the conduct of the omnibuses generally, and that such authority must be taken to include an authority to remove any who

misconducts himself, yet the defendant gave no authority to turn out an inoffensive passenger, and the plaintiff was one. But the master, by giving the guard authority to remove an offensive passenger, necessarily gave him authority to determine whether any passenger had misconducted himself. It is not convenient for the master personally to conduct the omnibuses, and he puts his guard in his place. Therefore, if the guard forms a wrong judgment, the master is responsible." In *Drew v. Peer*, 93 Pa. St. 234, which was a case where Peer and his wife had purchased tickets and entered a theater, and were ejected with force by the attaches of the theater because of their being colored persons, the following were approved as correct instructions to the jury: "If the ticket agent had called upon any one of the crowd 'to put that nigger out,' and some ruffian had done so, the defendant would be liable. \* \* \* If the injury was committed by an agent out of the usual course of employment, the defendant was not responsible; but, if the injury was committed by the defendant's doorkeeper or ticket taker, then it was in the course of their employment."

In the case at bar it was the ticket agent, Joseph Gordon, who called out to have appellee arrested, and it was not a ruffian bystander who put him out, but it was appellants' doorkeeper, acting in the course of his employment. In this case, also, the evidence shows, and the jury so found, that appellee was without fault. The trouble was occasioned entirely by a dispute as to the purchase of tickets, and both the ticket seller and the doorkeeper acted within the business of their employment, maintaining that side of the controversy which was in their master's interest. In *Higgins v. Turnpike Co.*, supra, it was claimed that no authority had been given to turn out an inoffensive passenger, and that, therefore, there was no liability for the servant's acts; but the court held that the authority to remove an offensive passenger necessarily carried authority to determine whether any passenger was offensive or not. So, here, the matter was about the master's business, and the servant, of necessity, must be the judge as to whether the conduct of appellee was such as to require his removal; and if a mistake was made, and an inoffensive patron of the theater was unjustly attacked and injured, the master must respond. "It is not convenient for the master personally to conduct the [business of keeping order in his theater,] and he puts his guard in his place. Therefore, if the guard forms a wrong judgment, the master is responsible." See, also, *Goff v. Railway Co.*, 3 El. & El. 673. But this case is even stronger; not only was the master here represented by his ticket agent and his janitor or doorkeeper, but his special agent, John Dickson, "deputized to act in his absence," was present in the theater ticket office, and looking out through the window upon the whole transaction. He testifies that he said and did nothing in the premises, and his silence can be taken only as his and appellants' approval of

what was done. Indeed, no rule is better established than that a principal is responsible for the acts of his agent, performed within the line of his duty, whether the particular act was or was not directly authorized, and whether it was or was not lawful. *Railroad Co. v. McKee*, 99 Ind. 519; *Pennsylvania Co. v. Weddell*, 100 Ind. 141; *Express Co. v. Patterson*, Ind. 430; *Railway Co. v. Foster*, 104 Ind. 293, 4 N. E. Rep. 20. But common carriers, innkeepers, merchants, managers of theaters, and others who invite the public to become their patrons and guests, and thus submit personal safety and comfort to their keeping, owe a more special duty to those who may accept such invitation. Such patrons and guests have a right to ask that they shall be protected from injury while present on such invitation, and particularly that they shall not suffer wrong from the agents and servants of those who have invited them. *Railroad Co. v. Flexman*, 103 Ill. 546; *Craker Railway Co.*, 36 Wis. 657.

But it is said that John M. Kiley was policeman, and therefore appellants are not responsible for his attack upon appellee. Whether, at the time of the injury complained of, Kiley was acting as policeman, or as agent of appellants, must depend upon the acts done by him. Because he was a police officer, it does not follow that all his acts were those of a policeman; and, because he was an agent of appellants, it does not follow that his acts were those of such agent. Even if he were a regular patrolman, called off the street by appellants or their agent to aid in enforcing the regulations of the theater, he would, for such purpose, be only an agent of appellants; and for his conduct as such agent, within the scope of his employment, appellants would be responsible. If, however, after entering the theater, he should discover appellee in the act of violating a criminal law of the state, or a penal ordinance of the city, and should proceed to arrest him for it, such act of arrest would be that of a police officer; and if such arrest were made on the officer's own motion, without direction, express or implied, on the part of appellants, then appellants would not be responsible. *Jardine v. Cornell*, 50 N. W. Law, 485, 14 Atl. Rep. 590. In this case, however, such questions do not arise. The court expressly withdrew from the consideration of the jury the issues made under the allegations of false imprisonment and malicious prosecution, and directed verdict for appellants on these issues. No evidence was admitted on these issues. Besides, the evidence given by both appellants and appellee showed unquestionably that all the injuries received by appellee were inflicted upon him before he was arrested, and it is still further established that appellee had done no act for which he should be arrested, and the jury so find. Kiley's acts as a policeman were committed after he had assaulted and beaten appellee. It could not be seriously contended that Kiley could do no wrong as a janitor and doorkeeper, but that every wrong done by him should be charged to his official character. This would be

able a proprietor to have all his employees commissioned as police officers, and thus escape all liabilities for their misconduct to his patrons. It is a question whether appellants should not be held liable for all the acts of Kiley, whether as special policeman, acting only for his employees, or as janitor or doorkeeper, all being within the scope of the business of his employment; but, as we have seen, such question is not before us. The verdict of the jury is in favor of the appellee on the charge of assault and battery, and the evidence, as well as the findings of the jury, shows that all assault and battery committed upon appellee was committed before Kiley exercised any of his powers as a police officer, and before he made the arrest of appellee. If appellee had attempted to resist arrest, or if he had attempted to get away after arrest, and he had received his injuries in consequence of such attempts, or if he had even committed any crime for which he should be arrested, there might be some reason in appellants' contention on this point. But on the contrary it is clear that appellee was innocent of any wrongdoing, for which he should be arrested. He never even struck back at either of his assailants. He neither resisted arrest, nor tried to get away when arrested. The only words uttered by him were rather a request to be arrested, and so avoid further danger to his person: "I asked him what he was beating me for; and I said, if he had anything to arrest me for, to arrest me, and, for God's sake, not to beat my brains out."

The cases of *Mall v. Lord*, 39 N. Y. 381, and *Hershey v. O'Neill*, 36 Fed. Rep. 168, are cases relied upon by appellants. In the first of these cases it seems to be held by the court that a clerk or superintendent of a store has not, by virtue of such employment, authority "to arrest, detain, and search any one suspected of having stolen, and sequestered about his person, any of the goods kept in such store." We think this cannot be the law. It is not in harmony with the weight of authority, nor with sound reason. If a superintendent or clerk of a store has such suspicions aroused in his mind by the actions of some visitor at the store, but two courses remain for him,—either to let the supposed thief go free, or to search him. The first course cannot be taken without unfaithfulness to the interests of the employer. The employer must therefore be held to sustain his superintendent in taking the second course, and if a mistake is made the employer must certainly be liable. He has selected his clerk, and must rely upon his judgment to act for his interests in his store. The clerk, in securing the stolen property, is not acting for himself, but for his employer. In the case of *Hershey v. O'Neill* the court seems to place its decision chiefly, not on the grounds assumed by appellants, but on the grounds that the plaintiff had in fact been guilty of an attempt to steal the goods, and that consequently a just verdict had been rendered, which ought not to be disturbed.

The other alleged errors discussed by counsel for appellants show no sufficient reason for disturbing the judgment ren-

dered. The complaint was sufficient under the statute. There was no available error in the rulings of the court on the evidence. The instructions to the jury were all that appellants were entitled to ask, and were more favorable to appellants than to appellee. There was a verbal error in one of the answers of the jury to an interrogatory, but it was harmless to appellants. The interrogatory was fully answered by the answer to the preceding interrogatory. The verdict and the answers to interrogatories are fully sustained by the evidence, and we find no available error in the record.

The judgment is affirmed.

(134 Ind. 571)

EVANSVILLE & R. R. CO. v. MADDUX.

(Supreme Court of Indiana. June 13, 1893.)

DEMURRER—MOTION TO MAKE DEFINITE—AMENDMENTS.

1. A demurrer to a complaint, for indefiniteness, which could be remedied by a motion to make more specific, will not lie.

2. An amendment which could have been made in the court below, to make the pleadings conform to the proof, will be presumed to have been made.

On rehearing. Denied.

For former opinion, see 33 N. E. Rep. 346.

HOWARD, J. Appellant contends that the demurrer to the first paragraph of the complaint should have been sustained, because, among other reasons, no particular point is indicated where the road was more dangerous than at other points. Even if this were true, we think that a motion to make more specific would have been the proper pleading to reach such defect. A demurrer will not be sustained for mere indefiniteness or uncertainty, which might be reached by a motion to make more certain and particular. The jury found the defect to be "at the point where the accident occurred." This correction could have been made on proper motion in the trial court, and will be deemed to have been so made. In *Lowry v. Dutton*, 28 Ind. 473, the court held that an objection that a complaint for trespass does not state where the trespass was committed is not raised by a demurrer for want of facts. And in *Hamilton v. Winterrowd*, 43 Ind. 393, it was held that an amendment which might have been made in the court below, to make a pleading correspond with the proof, will, in the supreme court, be deemed to have been made. See, also, *Krewson v. Cloud*, 45 Ind. 273, and *Hydraulic Co. v. Boyer*, 67 Ind. 236.

We think that the ninth finding of the jury shows that appellant knew of appellee's youth and inexperience, and knew that appellee had no opportunity of discovering the condition of the road at the point of the accident, and hence that there was, in this respect, no variance between the allegations and the proof.

The opinion does not draw, as an intendment from the verdict, the fact that appellee's parents were dead. He sued by next friend, and the fifteenth finding is that he was without other support than

his daily labor. He was, therefore, without parental support, and the opinion goes no further than this.

There is no conflict between the decision in this case and the decision since rendered by this court in *Railroad Co. v. Henderson*, (Ind. Sup.) 83 N. E. Rep. 1021. The statement of facts made in the pleadings was quite different in that case, as appears from the opinion there filed. But, in addition, the decision in that case turned almost altogether upon the evidence, while in this case the evidence is not in the record.

The petition for a rehearing is overruled.

**MANN, Respondent, v. CITY OF BROOKLYN, Appellant.**

(Court of Appeals of New York. June 6, 1893.)

Almet B. Jenks and Horace Graves, for appellant. James W. Ridgway, for respondent.

No opinion. Judgment affirmed, with costs, on opinion below. 17 N. Y. Supp. 643. All concur, except FINCH and GRAY, JJ., absent.

**GURNEY, Appellant, v. GRAND TRUNK RY. CO. OF CANADA, Respondent.**

(Court of Appeals of New York. June 6, 1893.)

Benj. B. Foster, for appellant. A. D. Scott, for respondent.

No opinion. Judgment affirmed, on opinion below, (14 N. Y. Supp. 321.) with costs. All concur, except FINCH and GRAY, JJ., absent.

**HARTMAN, Respondent, v. MORNING JOURNAL ASS'N, Appellant.**

(Court of Appeals of New York. June 6, 1893.)

Henry Yonge, for appellant. Louis J. Grant, for respondent.

No opinion. Judgment affirmed, with costs. 19 N. Y. Supp. 398, 401. All concur, except FINCH and GRAY, JJ., absent.

**HYMAN, Appellant, v. FRIEDMAN, Respondent.**

(Court of Appeals of New York. June 6, 1893.)

Chas. W. Brooke, for appellant. Morris Goodhart, for respondent.

No opinion. Judgment affirmed, with costs, on opinion below. 18 N. Y. Supp. 446. All concur, except FINCH and GRAY, JJ., absent.

**CAIN, Respondent, v. FLOOD, Appellant.**

(Court of Appeals of New York. June 6, 1893.)

Chas. W. Brooke, for appellant. James O'Neill, for respondent.

No opinion. Judgment affirmed, with costs, on opinion below. 14 N. Y. Supp. 776. All concur, except FINCH and GRAY, JJ., absent.

**HUNGERFORD CO., Respondent, v. ROSENSTEIN, Appellant.**

(Court of Appeals of New York. June 6, 1893.)

H. Aplington, for appellant. Wm. B. Ellison, for respondent.

No opinion. Judgment affirmed, with costs. 19 N. Y. Supp. 471. All concur, except FINCH and GRAY, JJ., absent.

**PREUSSER et al., Respondents, v. STOCKTON et al., Appellants.**

(Court of Appeals of New York. June 6, 1893.)

Thaddeus D. Kenneson, for appellants. John Graham, for respondents.

No opinion. Judgment affirmed, with costs. 14 N. Y. Supp. 877. All concur, except FINCH and GRAY, JJ., absent.

**DOUGHERTY, Respondent, v. ROME, W. & O. R. CO., Appellant.**

(Court of Appeals of New York. June 6, 1893.)

Hamilton Harris, for appellant. D. P. Morehouse, for respondent.

No opinion. Judgment affirmed, with costs. 18 N. Y. Supp. 841. All concur, except FINCH and GRAY, JJ., absent.

**HIRSCHBERGER, Respondent, v. MANHATTAN RY. CO. et al., Appellants.**

(Court of Appeals of New York. June 6, 1893.)

R. L. Maynard, for appellants. W. G. Peckham, for respondent.

No opinion. Judgment affirmed, with costs. 18 N. Y. Supp. 955. All concur, except FINCH and GRAY, JJ., absent.

**COOK, Respondent, v. LONG ISLAND R. CO., Appellant.**

(Court of Appeals of New York. June 6, 1893.)

Wm. J. Kelly, for appellant. Arthur C. Palmer, for respondent.

No opinion. Judgment affirmed, with costs. 19 N. Y. Supp. 648. All concur, except FINCH and GRAY, JJ., absent.

**MOWRY, Respondent, v. AGRICULTURAL INS. CO., Appellant.**

(Court of Appeals of New York. June 6, 1893.)

A. H. Sawyer, for appellant. N. B. Smith, for respondent.

No opinion. Judgment affirmed, with costs, on opinion below. 18 N. Y. Supp. 834. All concur, except FINCH and GRAY, JJ., absent.

**ELMER, Respondent, v. MUTUAL BEN. LIFE ASS'N OF AMERICA, Appellant.**

(Court of Appeals of New York. June 6, 1893.)

E. T. Lovatt, for appellant. Austen G. Fox and John B. Pine, for respondent.



No opinion. Judgment affirmed, with costs.  
19 N. Y. Supp. 289. All concur, except FINCH  
and GRAY, JJ., absent.

BUNDY, Respondent, v. NEWTON, Appel-  
lant.

(Court of Appeals of New York. June 6, 1893.)

E. H. Benn, for appellant. Fredk. E. Crane,  
for respondent.

No opinion. Judgment affirmed, with costs.  
19 N. Y. Supp. 734. All concur, except FINCH  
and GRAY, JJ., absent.

WING, Respondent, v. BLISS, Appellant.

(Court of Appeals of New York. June 6, 1893.)

Wm. C. Greene, for appellant. Spencer Clin-  
ton, for respondent.

No opinion. Judgment affirmed, with costs,  
on opinion below. 8 N. Y. Supp. 500. All con-  
cur, except FINCH and GRAY, JJ., absent.

RANDALL, Respondent, v. NATIONAL ICE  
CO. OF NEW YORK, Appellant.

(Court of Appeals of New York. June 6, 1893.)

G. H. Beckwith, for appellant. Louis W.  
Pratt, for respondent.

No opinion. Judgment affirmed, with costs.  
19 N. Y. Supp. 633. All concur, except FINCH  
and GRAY, JJ., absent.

McMANUS, Respondent, v. WOOLVERTON,  
Appellant.

(Court of Appeals of New York. June 6, 1893.)

John L. Hill, for appellant. Henry Schmitt,  
for respondent.

No opinion. Judgment affirmed, with costs.  
19 N. Y. Supp. 545. All concur, except FINCH  
and GRAY, JJ., absent.

AKBERG, Respondent, v. JOHN KRESS  
BREWING CO., Appellant.

(Court of Appeals of New York. June 6, 1893.)

Geo. P. Hotelling, for appellant. J. Edward  
Svanstrom, for respondent.

No opinion. Judgment affirmed, with costs.  
19 N. Y. Supp. 956. All concur, except FINCH  
and GRAY, JJ., absent.

DE LANCEY, Respondent, v. PIEPGRAS,  
Appellant.

(Court of Appeals of New York. June 13,  
1893.)

No opinion. Motion for reargument denied;  
10 costs. See 33 N. E. Rep. 822.

DUNSTAN, Respondent, v. HIGGINS, Appel-  
lant.

(Court of Appeals of New York. June 13,  
1893.)

No opinion. Motion for reargument denied,  
on ground that the alleged defect in the au-  
v.34N.E.DO.9-33

thentication of the record was not sufficiently  
pointed out by objection at the trial. See 33  
N. E. Rep. 729.

MYERS, Respondent, v. METROPOLITAN  
EL. RY. CO. et al., Appellants.

(Court of Appeals of New York. June 13,  
1893.)

Henry Schmitt, for appellants. Davies &  
Rapallo, for respondent.

No opinion. Motion to dismiss granted upon  
condition that appellants pay to respondent full  
costs of appeal, as upon argument to the court  
of appeals. 19 N. Y. Supp. 223.

PEOPLE ex rel. ST. NICHOLAS AVE. & O.  
T. R. CO., Appellant, v. GRANT, Mayor, Re-  
spondent.

(Court of Appeals of New York. June 20,  
1893.)

O. W. West, for appellant. Chas. Blandy,  
for respondent.

No opinion. Order affirmed, with costs, on  
opinion below. 21 N. Y. Supp. 232. All con-  
cur, except FINCH, J., absent.

CLARK, Respondent, v. CLARK, Appellant.

(Court of Appeals of New York. June 20,  
1893.)

E. Countryman, for appellant. Chas. M.  
Earle, for respondent.

No opinion. Orders affirmed, with costs. 22  
N. Y. Supp. 646. All concur, except FINCH,  
J., absent.

GUNTHER v. MAYER et al., Respondents.

(Court of Appeals of New York. June 20,  
1893.)

P. Q. Eckerson and Frederic G. Dow, for ap-  
pellants Manning and others. Thos. Allison,  
for respondents.

No opinion. Order affirmed, with costs. 22  
N. Y. Supp. 50. All concur, except FINCH,  
J., absent.

WESSELS et al., Appellants, v. BOETTCH-  
ER, Respondent.

(Court of Appeals of New York. June 20,  
1893.)

Esek Cowen, for appellants. Payson Merrill  
and Jason Hinman, for respondent.

No opinion. Order affirmed, with costs. 23  
N. Y. Supp. 480. All concur, except FINCH,  
J., absent.

PEOPLE ex rel. OAK HILL CEMETERY  
ASS'N, Appellant, v. PRATT et al., Assess-  
ors, Respondents.

(Court of Appeals of New York. June 20,  
1893.)

Asa W. Russell, for appellant. O. D. Kiehel,  
for respondents.

No opinion. Order affirmed, on opinion be-  
low, (21 N. Y. Supp. 853,) with costs. All con-  
cur, except FINCH, J., absent.

**PEOPLE v. LONG ISLAND SAV. BANK  
OF BROOKLYN.**(Court of Appeals of New York. June 20,  
1893.)

John A. Carney, for appellant, Samuel Hanna, S. W. Rosendale and John L. Hill, for respondent.

No opinion. Order affirmed, with costs. All concur, except FINCH, J., absent.

**ROWELL et al., Appellants, v. JANVRIN,  
Respondent.**(Court of Appeals of New York. June 20,  
1893.)

Edward Hassett, for appellants, Dickinson W. Richards, for respondent.

No opinion. Appeal dismissed, with costs. 23 N. Y. Supp. 481. All concur, except FINCH, J., absent.

**DE LACY, Appellant, v. ADAMS, Respondent.**(Court of Appeals of New York. June 20,  
1893.)

Howe &amp; Hummel, for appellant, Joel M. Marx, for respondent.

No opinion. Appeal dismissed, with costs. 23 N. Y. Supp. 297. All concur, except FINCH, J., absent.

**TORONTO GENERAL TRUSTS CO., Appellant, v. CHICAGO, B. & Q. R. CO. et al.,  
Respondents.**(Court of Appeals of New York. June 20,  
1893.)

F. K. Pendleton, for appellant, Elihu Root, for respondents.

No opinion. Judgment affirmed, on opinion below, in general term, (18 N. Y. Supp. 593,) with costs. All concur, except FINCH, J., absent, GRAY, J., not sitting, and MAYNARD, J., not voting.

**TORONTO GENERAL TRUSTS CO., Appellant, v. NATIONAL BANK OF COMMERCE IN NEW YORK, Respondent.**(Court of Appeals of New York. June 20,  
1893.)

F. K. Pendleton, for appellant, Frederic A. Ward, for respondent.

No opinion. Affirmed, on opinion in general term in case above. 18 N. Y. Supp. 593. Same vote.

**BOWDITCH, Trustee, Respondent, v. AY-  
RAULT, Appellant.**(Court of Appeals of New York. June 20,  
1893.)

John P. Bowman and John Rohrback, for appellant, Strange &amp; Doty, for respondent.

No opinion. Motion to settle form of judgment. Ordered, that the distribution, so far as the funds now in the hands of the trustee are concerned, shall be made to all the parties in accordance with the views expressed in the opinion of PECKHAM, J. 138 N. Y. 222, 83 N. E. Rep. 1067.

**WHITE, Respondent, v. CITY OF BROOKLYN, Appellant.**(Court of Appeals of New York. June 20,  
1893.)

No opinion. Motion to put cause on calendar denied, on account of laches on the part of plaintiff; \$10 costs.

**REHMFELDT, Respondent, v. CITY OF BROOKLYN, Appellant.**(Court of Appeals of New York. June 20,  
1893.)

Almet F. Jenks, for appellant, Chas. J. Peterson, for respondent.

No opinion. Judgment affirmed, with costs. 18 N. Y. Supp. 750. All concur, except FINCH, J., absent.

**MCDONALD, Appellant, v. NEW YORK CENT. & H. R. R. CO., Respondent.**(Court of Appeals of New York. June 20,  
1893.)

Geo. F. Yeoman, for appellant, Albert Harris, for respondent.

No opinion. Judgment affirmed, and judgment absolute for defendant on the stipulation with costs. 18 N. Y. Supp. 809. All concur, except ANDREWS, C. J., not voting, O'BRIEN, J., dissenting, and FINCH, J., absent.

**READ, Appellant, v. PATTERSON et al., Respondents.**(Court of Appeals of New York. June 20,  
1893.)

No opinion. Motion for reargument denied. \$10 costs. See 31 N. E. Rep. 445.

**ROBINSON v. GOVERS, Respondent.**(Court of Appeals of New York. June 20,  
1893.)

No opinion. Motion for reargument denied. \$10 costs. See 34 N. E. Rep. 209.

**KERR et al., Appellants, v. DILDINE, Respondent.**(Court of Appeals of New York. June 20,  
1893.)

No opinion. Motion to open default denied on the ground of inexcusable laches; costs.

**HONG KONG & S. BANKING CORP., Respondent, v. EMANUEL, Appellant.**(Court of Appeals of New York. June 20,  
1893.)

Sol. Kohn, for appellant, Robert L. B. field, for respondent.

No opinion. Judgment affirmed, with costs. See 17 N. Y. Supp. 790. All concur, except FINCH, J., absent.

GARTER, Respondent, v. NEW YORK  
CENT. & H. R. R. CO., Appellant.  
(Court of Appeals of New York. June 30,  
1893.)

Chas. A. Pooley, for appellant. E. M. & F.  
M. Ashley, for respondent.  
No opinion. Judgment affirmed, with costs.  
20 N. Y. Supp. 270. All concur, except  
FINCH, J., absent.

MONNET et al., Respondents, v. MERZ, Ap-  
pellant.  
(Court of Appeals of New York. June 30,  
1893.)

Wm. Man, for appellant. Wm. C. Wallace,  
for respondents.  
No opinion. Judgment affirmed, with costs.  
18 N. Y. Supp. 780. All concur, except  
FINCH, J., absent.

WIENER, Respondent, v. NEW YORK EL.  
R. CO. et al., Appellants.  
(Court of Appeals of New York. June 30,  
1893.)

R. L. Maynard, for appellants. Henry A.  
Forster, for respondent.  
No opinion. Judgment affirmed, with costs.  
16 N. Y. Supp. 913. All concur, except  
FINCH, J., absent.

McAVOY, Respondent, v. NEW YORK  
CENT. & H. R. R. CO., Appellant.  
(Court of Appeals of New York. June 30,  
1893.)

Chas. A. Pooley, for appellant. Filkins &  
Coe, for respondent.  
No opinion. Judgment affirmed, with costs.  
20 N. Y. Supp. 270. All concur, except FINCH,  
J., absent.

WOODARD, Respondent, v. FOSTER, Ap-  
pellant.  
(Court of Appeals of New York. June 30,  
1893.)

Geo. B. Jones, for appellant. Jerome Squires,  
for respondent.  
No opinion. Judgment affirmed, and judg-  
ment absolute ordered for the plaintiff on stip-  
ulation, with costs, on opinion at general term,  
18 N. Y. Supp. 827. All concur, except  
FINCH, J., absent.

GALL, Appellant, v. GALL et al., Respond-  
ents.  
(Court of Appeals of New York. June 30,  
1893.)

Waldorf H. Phillips, for appellant. A. Simis,  
Jr., for respondents.  
No opinion. Judgment affirmed, with costs.  
19 N. Y. Supp. 332. All concur, except  
FINCH, J., absent.

CUMMINGS, Respondent, v. LINE, Appellant.  
(Court of Appeals of New York. June 30,  
1893.)

P. Chamberlain, Jr., for appellant. L. M.  
Norton, for respondent.  
No opinion. Judgment affirmed, with costs.  
18 N. Y. Supp. 469. All concur, except  
FINCH, J., absent.

BROOKLYN TRUST CO., Respondent, v.  
TOLER, Appellant.  
(Court of Appeals of New York. June 30,  
1893.)

Royal S. Crane, for appellant. Wm. N. Dyk-  
man, for respondent.  
No opinion. Judgment affirmed, with costs.  
19 N. Y. Supp. 975. All concur, except  
FINCH, J., absent.

(159 Mass. 434)  
HOWLAND v. INHABITANTS OF TOWN  
OF MAYNARD.

(Supreme Judicial Court of Massachusetts.  
Suffolk. July 14, 1893.)

**LIBEL—ACTION AGAINST A TOWN—OFFICIAL PUB-  
LICATION.**

An action for libel will not lie against  
a town for the publication of defamatory mat-  
ter contained in an official report of an investi-  
gating committee duly selected.

Report from superior court, Suffolk  
county; H. K. Braley, Judge.

Action by Arthur H. Howland against  
the inhabitants of the town of Maynard  
for libel. The court ruled that the action  
would not lie, ordered a verdict, which  
was returned for defendant, and reported  
the case for the determination of the full  
bench. Judgment on the verdict ordered.

It appeared on the trial that the defama-  
tory matter charged by plaintiff to have  
been published by defendant was con-  
tained in an official publication of the re-  
port of an investigating committee duly  
selected by the town to investigate the  
manner in which plaintiff and another  
were performing a certain contract entered  
between them and defendant for the con-  
struction of water works.

E. Avery and H. L. Baker, for plaintiff.  
J. Hillis, for defendant.

MORTON, J. It is possible that this  
case might be disposed of on the ground  
that there was no publication by the  
town of the alleged libel, or that what  
was done was privileged; but, as we are  
of opinion that the defendant is not liable  
on the main question, we have not consid-  
ered the questions of publication and priv-  
ilege. Towns are instituted, in this state  
and in New England generally, for politi-  
cal purposes. They are created for con-  
venience in the administration of the gov-  
ernment. Stone v. Charlestown, 114 Mass.  
223; Coolidge v. Brookline, Id. 596; Aga-  
wam v. Hampden Co., 130 Mass. 531. They  
are given such powers as are necessary to  
carry into effect the purposes for which  
they are organized. Their powers are spe-

cial and limited, because the purposes for which they are established are circumscribed. So far as the duties imposed upon them are purely public, and common to all towns, such as the maintenance of police, health, schools, and highways, for instance, they are not liable for an injury caused to anyone through neglect in their performance, except in cases where a remedy is expressly given by statute. *Hill v. Boston*, 122 Mass. 344; *Tindley v. City of Salem*, 137 Mass. 171. But there are many matters upon which they act that are of local concern, and which, though public in the sense that they are for the general benefit of all of the inhabitants of the particular town, are special to the inhabitants of that town. Such are water-works, gas or electric lighting, free baths, the maintenance of main drains and common sewers, and other similar things. Upon all these matters, those which are common to all towns and those which may be called special and local, towns may act at meetings regularly called according to law. All things relating to them are or properly may be subject to the action and consideration of the voters of the town duly assembled in town meeting; and whatever is done at such a meeting is done in a legislative capacity, and not in any sense by it as a political body, or quasi private corporation, whatever may be the subject that is acted upon. The town may, at such meetings, act through committees, as the legislature does, and may accept or reject, in whole or in part, or recommit or modify in any manner, the reports of its committees. When the reports are finally acted on by the town, they become part of the doings of the meetings at which such action took place. The town may print and publish them in whole or in part, as the general court prints and publishes its proceedings. The town meeting is a political body, like the general court. No statute gives a right of action against a town to any individual who may be referred to in a vote of the town, or in any report of a committee accepted by it, in a manner which, if it were done by a private person, would be libelous; and no action lies on general principles, because what is done by the town is done by it in such a case as a political body and as a part of the administration of the government. To hold that an action of libel could be maintained against the defendant under the circumstances set out in this case would be to hold, in effect, that any party who felt himself aggrieved by any statement in the record of any city council in this state could maintain an action for libel against the city. We have been referred to no case in this country in which an action of libel has been maintained against a city or town. A case in Canada and one in England, to which our attention has been called, manifestly throw no light on the question, because of the differences between English and American municipalities. 1 *Dill. Mun. Corp.* (3d Ed.) §§ 28, 29. Moreover, it would seriously impair the freedom of investigation which is often required in the proper conduct of municipal affairs if cities and towns were to be sub-

jected to the liability of actions for libel. The view which we have taken of the case has rendered it unnecessary to consider whether a town can be guilty of malice, or to consider under what circumstances an action of tort will lie against a town and under what circumstances not,—questions which have been discussed at some length by the plaintiff in his brief.

Verdict to stand.

(150 Mass. 356)

EMERSON v. ATKINSON et al.

(Supreme Judicial Court of Massachusetts.

Suffolk. June 21, 1893.)

SETTLEMENT OF ACTION—AGREEMENT—CONSTRUCTION—MORTGAGES—ACTION TO REDEEM—WHO MAY MAINTAIN—ONE WHO HAS INTEREST AS PARTNER.

1. In an action against A. and mortgagees of partnership property for an accounting, it appeared that, after suit brought, A. and plaintiff made an agreement to settle the suit. A. was to arrange for renewing or discharging the existing mortgage indebtedness, "the completion of said arrangements being the time and condition fixed for the commencement of this agreement." "Upon the completion of said arrangements, and conditionally thereon, and simultaneously with the recording of any mortgages or other incumbrances necessary to carry out said arrangements," plaintiff "agrees to discharge his suit in equity, and to remove from the record any cloud resting thereon by reason of said suit," and "the parties hereto agree to enter into the following relations for the control and management of said property, and for the division of the work to be done in connection therewith." *Held*, that such agreement was not a settlement of the suit until A. effected the arrangement provided for therein.

2. The final provision of such contract recited that if A. is unable to carry through the arrangements with the principal mortgagees, and if he then co-operates with plaintiff, and they raise the money to discharge or renew such mortgage indebtedness, so that the property is preserved by their joint efforts, then their interests in the property shall be identical in all respects; the management of the theater, except leasing, to be under the sole charge of A. *Held*, that such provision was merely a supplemental condition of settlement of such suit, and that such result was not effected where there had been no renewal or discharge of such indebtedness.

3. The bill averred that certain defendants other than A. held four mortgages on the partnership property, two of which plaintiff admitted to be valid, and the other two he questioned. The prayer was for an accounting, the cancellation of the invalid mortgages, and an application of the proceeds of sale of the property to the discharge of the other mortgages, with no offer to redeem. After answer by the mortgagees, plaintiff, by supplemental bill, supplied the elements necessary to convert his bill into a bill to redeem. *Held*, that the compromise agreement between plaintiff and A. did not cut off the former's right to maintain the action against such mortgagees, on the ground that the suit was thereby delayed.

4. Pub. St. c. 181, § 21, provides that, when the condition of a mortgage has been broken, the mortgagor, "or any person lawfully claiming or holding under him, may redeem the mortgaged premises, unless," etc. St. 1877, c. 178, § 1, re-enacted in Pub. St. c. 151, § 4, confers on the supreme judicial court full equity jurisdiction. *Held*, that a person who has an interest as a partner in mortgaged property may maintain an action to redeem, since he is entitled to do so under the general principles of equity jurisprudence,

Report from supreme judicial court, Suffolk county: John Lathrop, Judge.

Bill and supplemental bill by Warren Emerson against Charles F. Atkinson, Isaac F. Woodbury and George E. Leighton, (copartners under the firm name of Woodbury & Leighton,) Andreas Blume, George J. Fullam, Benjamin F. Cutter, (trustees under the will of David Fullam,) William Harris, Warren K. Blodgett, and William K. Porter, to establish a partnership between plaintiff and defendant Atkinson, for a settlement of the same by a disposition of the partnership property on which the other defendants hold mortgages, for an accounting, and to redeem from such of the mortgages as are valid. There was a decree by a single justice, dismissing the bill and supplemental bill on the pleadings without prejudice to plaintiff's rights, under an agreement set out therein, who reported the case for the consideration of the full court. Reversed, and case ordered to stand for further hearing.

S. J. Elder, H. G. Parker, and W. M. Stockbridge, for plaintiff. R. M. Morse, Jr., and F. S. Hesselstine, for defendant Atkinson. G. O. Shattuck and W. A. Munroe, for defendants Woodbury & Leighton.

ALLEN, J. 1. As against the defendant Atkinson, the bill seeks to establish a partnership with the plaintiff, and to obtain a settlement of the same by a disposition of the partnership assets and payment of the debts. Before an answer was filed the parties entered into the agreement of June 8, 1892, whereupon the plaintiff filed in the case a statement that he and the defendant Atkinson had entered into an agreement of compromise of their respective interests, a copy whereof was annexed. This was apparently done for the information of the court, or of the other defendants. It was merely a statement, and contained no prayer, and was no part of the regular pleadings in the case, and had no effect upon the rights of the parties. Afterwards, a supplemental bill was filed, setting up the same agreement; and the defendant Atkinson, whose answer to the original bill had been delayed, filed an answer to both bills, admitting the agreement of June 8, 1892, and making various denials, upon which issue was joined. The bill having been dismissed on the reading of the pleadings, the only question, so far as the defendant Atkinson is concerned, is whether the agreement was a settlement of the original case. It seems to us, upon the whole, that it ought not to be so considered. It recites the suit, and the desire to settle it, and the terms agreed on, whereby Atkinson was to arrange for renewing or discharging the existing mortgage indebtedness, not exceeding \$155,000; and it contains several clauses indicating that the agreement was not to take effect as a settlement till this should have been accomplished. Among these are the following: "The completion of said arrangements being the time and condition fixed for the commencement of the operation

of this agreement." "Upon the completion of said arrangements, and conditionally thereon, and simultaneously with the recording of any mortgages or other incumbrances necessary to carry out said arrangements, said Emerson agrees to discharge his suit in equity, and to remove from the record any cloud resting thereon by reason of said suit." "Upon the completion of the foregoing arrangements, and conditionally thereon, the parties hereto agree to enter into the following relations for the control and management of said property, and for the division of the work to be done in connection therewith." The various stipulations as to the new state of things were all subject to the condition that in the first instance the mortgage indebtedness should be renewed or discharged. Till Atkinson should accomplish this, the agreement was not to go into effect. The language most strongly relied on as pointing to the other result is the provision at the end of the contract, as follows: "If Atkinson is unable to carry through the arrangements which have been agreed upon with Woodbury and Leighton, [the principal mortgagees,] and if he then co-operates with Emerson and the two together raise the money to discharge or renew Woodbury & Leighton's indebtedness, so that the property is preserved by their joint efforts, then their interests in said property shall be complete and identical throughout in all respects. The management of the theater, except leasing, to be under the sole charge of Atkinson." This, however, does not have the effect to make the agreement of settlement operative, unless action should be taken in accordance with its terms. It adds another contingency under which the compromise is to stand, but unless Atkinson co-operates with Emerson, and the two together raise the money, the agreement remains ineffectual. The first scheme was that Atkinson alone should raise the money or renew the indebtedness. The supplemental scheme was that if he should be unable to do it, and if the two together should accomplish it, then Emerson should have a greater interest. But the discharge or renewal of the indebtedness in some way was the essential thing to be accomplished, and unless this should be done the agreement of compromise was not to go into effect. We are therefore of opinion that the execution of the agreement is not a sufficient reason for dismissing the suit as to Atkinson, it being conceded that the mortgage indebtedness has never been discharged or renewed.

2. As against the defendants Woodbury & Leighton, the mortgages, the case stands as follows: The plaintiff's original bill, as against them, was not a bill to redeem, but the averments were that they held four mortgages upon property which the plaintiff contended belonged to the partnership consisting of himself and Atkinson. The first two mortgages were upon different pieces of property and were given to secure the same sum, (\$75,000,) which the plaintiff admitted to be valid mortgages to secure whatever might have

been advanced by Woodbury & Leighton under the same, and the other two mortgages, amounting to \$65,000 more, were questioned. The bill prayed that an account might be taken of the amounts advanced by Woodbury & Leighton, so far as secured by the first mortgage; that the third and fourth mortgages might be delivered up and canceled; and that the proceeds of the sale of the property might be applied to discharge said first mortgage, and all other legal indebtedness of the partnership, and from the balance to pay to the plaintiff such sum as should be found due to him upon an accounting. There was no offer to redeem, and the plaintiff, obviously, did not contemplate the redemption of the property from the mortgages by the raising or payment of any money by himself; but he sought to have a sale ordered by the court through a receiver, and to have the sums due to the mortgagees ascertained, and paid from the proceeds of the sale. In a bill to redeem, the offer to redeem is an essential feature. Pub. St. c. 181, § 21; Way v. Mullett, 143 Mass. 49, 8 N. E. Rep. 881; Brown v. Bank, 148 Mass. 300, 307, 19 N. E. Rep. 382; Kopper v. Dyer, 59 Vt. 477, 489, 9 Atl. Rep. 4; Goldsmith v. Osborne, 1 Edw. Ch. 560; Jones, Mortg. § 1095, and cases. No question, however, arises upon the point whether the plaintiff could maintain his bill on any other ground than as a bill to redeem, because, after answer filed by Woodbury & Leighton, the plaintiff filed a supplemental bill, in which he makes the requisite offers to redeem the first two mortgages held by them, and supplies the elements necessary to convert his bill into a bill to redeem, so far as those two mortgages are concerned. The defendants Woodbury & Leighton now contend that the plaintiff is not a person entitled to redeem, and they rely on Pub. St. c. 181, § 21, providing that, "when the condition of a mortgage has been broken, the mortgagor, or any person lawfully claiming or holding under him may redeem the mortgaged premises, unless," etc. Under a similar provision in Rev. St. c. 107, § 13, it was held in McDougald v. Capron, 7 Gray, 278, that one whose only interest in the premises was by virtue of a bond for a deed was not entitled to redeem, the court having no jurisdiction except under the statute; and it was said that the statute was intended to comprehend only those suits which were brought by the mortgagor, or by a person to whom his legal title had been transferred by deed, or by operation of law. Since that decision, full equity jurisdiction has been conferred upon the court, and it was thereby designed to add to the jurisdiction previously existing. St. 1877, c. 178, § 1. This statute was re-enacted in Pub. St. c. 181, § 4, and the retention of the other provision in chapter 181, § 21, does not limit the more general jurisdiction conferred by St. 1877, c. 178, § 1, and re-enacted in chapter 181, § 4. We do not determine whether, under Pub. St. c. 181, § 21, taken alone, the plaintiff might, on proof

of his alleged interest as partner, be entitled to redeem. St. 1877, c. 178, § 1, was designed to confer jurisdiction in equity of all cases and matters of equity cognizable under the general principles of equity jurisprudence. Billings v. Mann, 156 Mass. 203, 30 N. E. Rep. 1186. According to those general principles, the interest of the plaintiff as partner, if established, is sufficient to entitle him to redeem. Dyer v. Clark, 5 Metc. (Mass.) 562; Shaaks v. Klein, 104 U. S. 18; Davis v. Wetherell, 13 Allen, 60; Briggs v. Davis, 108 Mass. 322; Lamb v. Montague, 112 Mass. 352; Bacon v. Bowdoin, 22 Pick. 401; May v. Gates, 137 Mass. 389, 391; 4 Kent, Comm. 162; 2 Story, Eq. Jur. § 1023; Story, Partn. § 92.

These defendants further contend that the agreement of compromise cuts off the plaintiff's right to maintain this suit further against them. The chief argument in support of this position, in addition to those urged in behalf of the defendant Atkinson, and heretofore considered, is that the agreement had the effect to postpone for an indefinite period the proceedings in court, and thus to postpone the adjustment of their rights; that the plaintiff, in order to establish any right against these defendants, must first establish his partnership with Atkinson; and that this question was necessarily deferred by reason of the agreement. It is urged that it is a great hardship upon Woodbury & Leighton to compel them to remain parties to a litigation between Emerson and Atkinson, when they, as mortgagees, have no interest except to obtain the money justly due to them. It seems to us, however, that the agreement does not have the effect absolutely to cut off the plaintiff's right to redeem, though it might well lead the court to exercise other powers which it possesses in behalf of the mortgagees. It is not essential, in a case like this, to postpone the settlement of the rights of the mortgagees till a decision can be reached upon the questions between Emerson and Atkinson. So long as the plaintiff's case stood upon his original bill, the mortgagees' right to proceed under the powers of sale contained in their mortgages would not be cut off, because that effect is only given to a bill to redeem. Way v. Mullett, 143 Mass. 49, 8 N. E. Rep. 881. But since the filing of the supplemental bill the suit is to be treated as a suit for redemption, and by virtue of Pub. St. c. 181, § 28, as well as by the general powers exercised by courts of chancery, the court might properly pass an interlocutory order directing any sum not really in dispute to be paid to the mortgagees. The court might also, by a preliminary hearing upon this question alone, ascertain and determine, either finally or approximately, the sum due to these defendants, without delaying to hear the matters in dispute between the plaintiff and Atkinson, and might order the amount to be paid over by a certain day, making such provision as might be necessary or reasonable for the security of the plaintiff, while consistent with the rights of these defendants in respect to their other mortgages, in case the plaintiff should fail to establish the partnership with Atkinson,

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and thus to establish his right to redeem. *Brown v. Bank*, 148 Mass. 300, 308, 19 N. E. Rep. 882; *Bancroft v. Sawin*, 143 Mass. 144, 9 N. E. Rep. 539; *Clarkson v. De Peyster*, 1 Hopk. Ch. 274; 2 *Daniell*, Ch. Pr. (4th Amer. Ed.) 1000, and cases cited; *Id.* 1872, 1770; *Seton, Decrees*, (1st Amer. Ed.) 459. A suit to redeem is a suit in equity, and is subject to the rule that he who seeks equity must do equity. *Fay v. Valentine*, 12 Pick. 40; *Dary v. Kane*, 158 Mass. —, 33 N. E. Rep. 527; *Shaw v. Abbott*, 61 N. H. 254. It was and is within the power of these defendants to set the case down for a hearing before a single justice, or to make application for such hearing upon so much of the case as concerns them. So, in a suit like this, where the mortgage contains a power of sale, and where the plaintiff, in his prayers for relief, has asked for a sale, we see no difficulty in the way of authorizing the mortgagees to proceed with a sale under the power and under the direction of the court, either absolutely, or unless within a certain time the plaintiff should pay into court a specified sum. The decision in *Goldsmith v. Osborne*, 1 Edw. Ch. 540, is not applicable to a case like this. The result is that the entry must be: Case to stand for further hearing.

(159 Mass. 324)

## ALLEN v. CITY OF BOSTON.

(Supreme Judicial Court of Massachusetts.  
Suffolk. June 21, 1893.)

STREETS—RIGHTS OF ABUTTING OWNER—SEWERS  
—ACTION FOR DEFECT—DAMAGES.

1. An abutting owner, whose rights extend to the middle of a public street, may excavate a cellar under the sidewalk, provided he does not thereby violate any ordinance or regulation of the city, or interfere with any existing public use.

2. The fact that the cellar wall was not constructed so as to keep out sewage from a defective sewer would not indicate negligence, preventing recovery against the city; there being nothing to show that the owner knew of the defective condition of the sewer.

3. The fact that the premises were not directly connected with the sewer would not prevent recovery, since the liability did not depend on assessment of the premises for cost of the sewer, but upon the injury done.

4. The negligent omission of the city to make safe and light such a sewer cannot be excused, on the ground merely that jurisdiction over sewers, as to how they should be built, and in what part of the street, vested with the aldermen; the aldermen not having exercised the power.

5. Damages are recoverable, in such case, not only for injuries to the property, but to health and business, when specially alleged.

Exceptions from superior court, Suffolk county; Robert R. Bishop, Judge.

Action by George E. Allen against the city of Boston to recover damages for sewage and gases coming into the cellar of premises leased by him. Judgment, from which defendant excepts. Exceptions overruled.

W. C. Loring and R. S. Gorham, for plaintiff. A. J. Bailey, for defendant.

ALLEN, J. 1. The first objection now urged by the defendant is that the plain-

tiff's lessor acted in violation of law in building his cellar into the highway. This objection is untenable. There is no doubt that the general easement in the public, acquired by the location of a highway, extends to the limits of the highway as located. *Com. v. King*, 13 Metc. (Mass.) 115, 119. The right of the public includes various underground uses, of which the construction of sewers is one. *City of Boston v. Richardson*, 13 Allen, 146, 159, 160. But the owner of the land over which a highway is laid retains his right in the soil for all purposes which are consistent with the full enjoyment of the easement acquired by the public. *Tucker v. Tower*, 9 Pick. 109; *Denniston v. Clark*, 125 Mass. 216. This right of the owner may grow less and less, as the public needs increase; but at all times he retains all that is not needed for public uses, subject, however, to municipal or police regulations. 3 Kent. Comm. 433; 2 *Dill. Mun. Corp.* §§ 656b, 699, 700. The plaintiff's lessor, therefore, has a right to excavate under the sidewalk, if he thereby did not violate any ordinances or regulations of the city. It appears affirmatively that he did not. He interferes with no existing public use of the street. He was therefore using the land as he had a right to use it. *McCarthy v. City of Syracuse*, 46 N. Y. 194; *Mairs v. Association*, 89 N. Y. 498.

2. The defendant further contends that the plaintiff's lessor was negligent in not building his cellar wall so as to keep out sewage. There is nothing to show that he had any knowledge that the sewer could leak. There was no evidence that there had been any leaking of sewage into the premises before, or that it was ever ascertained till 1880 that sewage from the old sewer percolated into the same. In the absence of knowledge that the sewer was improperly built, the plaintiff's lessor might well assume that it was tight, and due care on his part did not require him to guard against a defective construction of the sewer, the existence of which he had no reason to suspect. The defendant's request for instructions upon this subject was rightly refused, and there is no occasion to consider whether knowledge on his part that the sewer was out of order would show negligence, under the circumstances, and debar the plaintiff from recovering for the kinds of damages complained of in this case.

3. The defendant asked the court to instruct the jury that they must find for the defendant if the only way in which the city could have prevented the injury was by removing the sewer either from the street or to some other part of the street. We are at a loss to see, on the evidence, how it could be found by the jury that there was no other way to prevent the injury than those supposed. It would seem that a new and tight sewer might have been laid there, and all the evidence in the case so assumes. The defendant contends that the city was not at liberty to put in a new sewer, and to make it tight, because the entire jurisdiction to prescribe the manner of making it, and the materials to be used in keeping it in repair, was in the board of aldermen. But at no time has



the board of aldermen gone so far as to prescribe in what part of the street the sewer should be laid, or how it should be built. All these matters have been left to the superintendent of sewers, who was a city officer. The city, therefore, by its officer, might put the sewer in any part of the street, and might prescribe the materials for building or repairing it. The duty of keeping the sewer in repair rested on the city, (*Child v. City of Boston*, 4 Allen, 41, 51, 52; *Emery v. City of Lowell*, 104 Mass. 18, 16; *Murphy v. Lowell*, 124 Mass. 564; *Bates v. Inhabitants of Westborough*, 151 Mass. 174, 182-184, 23 N. E. Rep. 1070;) and, if it was necessary to put the sewer in another part of the street, the city, through its superintendent of sewers, might have done it. Having the power to put the sewer where it would, the city could not be excused for a negligent omission to make it safe, merely on the ground that the power to fix the location, and to prescribe a plan of construction, rested with the board of aldermen, when the board of aldermen had all exercised that power. *Child v. City of Boston*, 4 Allen, 41, 53, 54; *Boston Belting Co. v. City of Boston*, 149 Mass. 44, 46, 47, 20 N. E. Rep. 320.

4. The fact that the plaintiff's premises were not directly connected with the old sewer does not prevent his recovering damages sustained by him through its negligent construction or maintenance. The liability of the city to the plaintiff does not depend upon the assessment of his estate for the cost of the sewer, but upon the injury done to him by the nuisance. *Stanchfield v. Newton*, 142 Mass. 110, 114, 7 N. E. Rep. 703; *Merrifield v. City of Worcester*, 110 Mass. 216, 221; *Ball v. Nye*, 99 Mass. 582; *McCarthy v. City of Syracuse*, 46 N. Y. 194.

5. The defendant also argues that the only damage the plaintiff can recover, if any, would be the injury to his property, and that injury to his health or business was wrongly allowed to be included in the damages. Such damages were specially alleged, and are clearly recoverable. *Hunt v. Gaslight Co.*, 8 Allen, 169; *French v. Lumber Co.*, 145 Mass. 261, 14 N. E. Rep. 113. In the opinion of a majority of the court, the entry must be, exceptions overruled.

(159 Mass. 404)

SWAMPSCOTT MACH. CO. v. RICE et ux.

(Supreme Judicial Court of Massachusetts.  
Suffolk. June 21, 1893.)

NOTE—NOTICE OF PROTEST.

Where a notary sent a notice of protest of a note addressed to the indorser to the payee, whose bookkeeper duly mailed it to the indorser, stamped, and with direction to return if not delivered in five days, and the letter was not returned, it was sufficient evidence that the notice was sent and received.

Exceptions from superior court, Suffolk county; Daniel W. Bond, Judge.

An action by the Swampscott Machine Company against Thomas Rice and wife upon a note signed by the husband, payable to the plaintiff, and indorsed in blank

before delivery. The indorsement of the wife was for the accommodation of the husband. The only evidence as to notice to the wife was as follows: The notary's certificate of protest stated that the notary inclosed a notice of nonpayment for the indorser, Ada C. Rice, under cover to the plaintiff. William P. Peirce, plaintiff's witness, testified that he was at date of maturity of the note in plaintiff's employment as a bookkeeper; that he received the notary's notice of protest of the note, that "immediately after or upon its receipt" by the witness, the witness, though he made no note or memorandum thereon, at the time in writing, and could not say upon what day of the week or month, inclosed the notice in an envelope, marked on outside to return in five days to plaintiff, with postage stamp thereon, addressed to defendant Ada C. Rice, to her residence in Cambridge, Mass.; that he did not personally put it in the post office in the United States mail box, but that it was the ordinary course and usual course of business for him to put all letters in the mail into a box or place in plaintiff's office, whence it was the usual and ordinary course of business for an office boy to carry plaintiff's letters to the United States post office, and that it was the witness' memory that in this case he followed his usual course of business by placing said envelope with notice in said box in the office; and in answer to the question "whether or not, to your knowledge, that envelope was ever returned" the witness said "No, sir," but the office boy, if any, was not produced as a witness, and no further evidence was offered except the defendant Ada C. Rice, who testified that she did not remember ever receiving any notice, and in cross-examination said she would not say that she did not receive any notice, but that she did not remember. Judgment for plaintiff. Defendants except. Exceptions overruled.

Williams & Copeland, for plaintiff. Jewett F. Wheeler and Edward B. Burpee, for defendants.

HOLMES, J. If the certificate of the notary public that he "duly" notified the indorsers is insufficient, taken with the context, to import that he did his duty and sent the notice in due time, as is intimated in *Insurance Co. v. Wilson*, 29 Va. 523, 563, 2 S. E. Rep. 888, the fact shown by the date of the certificate, which is July 30th, the very day of the demand. The plaintiff's bookkeeper received it at the date of the maturity of the note, and at once put it into a box in the office, stamped, and with a direction for return if not delivered in five days. It was the regular course of business for an office boy to carry the letters from this box to the post office. The letter never was returned. This was evidence that the notice was sent and received. *Dana v. Ketchum*, 19 Pick. 112; *Skilbeck v. Garbett*, 7 B. 846.

The other exception is waived. Exceptions overruled.

(159 Mass. 413)

STONE v. SMITH et al., Registrars of Voters.

(Supreme Judicial Court of Massachusetts. Suffolk. June 22, 1893.)

CONSTITUTIONAL LAW—REGISTRATION OF VOTERS.

St. 1892, c. 351, § 22, providing that certain persons, before registering for election purposes, must read from the official edition of the constitution, and write their names, is not in violation of the fourteenth amendment of the constitution of the United States.

Petition of Cyrus A. Stone for writ of mandamus against Philip Smith and others, registrars of voters for the city of Lynn. Writ denied. Petitioner appeals. Affirmed.

C. A. Stone, for petitioner.

FIELD, C. J. This is a petition for a writ of mandamus against the respondents, who are the board of registrars of voters for the city of Lynn. The petition alleges that the board, when in session, on the 28th day of September, in the year 1891, refused to enter the petitioner's name on the voting lists, for the reason that it did not appear that he had paid any state or county tax within two years, as required by article 3 of the amendments of the constitution of Massachusetts. The petitioner also alleges that the respondents informed him that, if he should pay a tax, they would also require him to show that he was able to read the constitution in the English language, and to write his name, as required by article 20 of the amendments of the constitution. The provisions of article 3 requiring the payment of a state or county tax within two years next preceding an election, as a qualification for the right to vote at such election for state officers, was abolished by article 32 of the amendments of the constitution, which went into effect on November 3, 1891; and there is no reason to believe that the respondents would now refuse to enter the petitioner's name on the voting lists because he has not paid a tax within two years.

The petitioner, at the argument in this court, presented a brief in his own handwriting, and read from it, and it was apparent that he could read and write the English language easily and well. The petitioner's contention is that under St. 1892, c. 351, § 22, the registrars must require such a person as he is "to read at least three lines other than the title from an official edition of the constitution, in such manner as to show that he is neither prompted nor reciting from memory," and must also require him "to write his name in the registry," and that such requirements are in violation of the rights secured to him, as a citizen of the United States, by the constitution of the United States. The only provision in the constitution of the United States, as originally adopted, concerning the qualification of electors in the states, is that the electors of the members of the house of representatives of the United States "shall have the qualifications requisite for electors of the most numerous branch of the state legislature." Article

1. § 2. When the constitution of the United States was adopted, the qualifications required of an elector of a representative or representatives in the house of representatives of Massachusetts were that he should be a male person, 21 years of age, resident in the town where he attempted to vote for the space of one year next preceding the election, and should have a freehold estate within the town of the annual income of £3, or any estate of the value of £60. Const. Mass. pt. 2, c. 1, § 3, art. 4. A constitution with such restrictions on the right to vote was regarded by the framers of the constitution of the United States as republican in form. Article 14 of the amendments of the constitution of the United States (section 2) provides that, "when the right to vote at any election, \* \* \* is denied to any of the male inhabitants of such states, being twenty-one years of age and citizens of the United States, or in any way abridged, except for participation in rebellion or other cause, the basis of representation therein shall be reduced in the proportion which the number of such citizens shall bear to the whole number of such citizens, twenty-one years of age, in such state." This distinctly recognizes the right of a state to deny or abridge the right to vote of the male inhabitants who are 21 years of age, and it is well known that many of the states have, from time to time, by an impartial and uniform rule of prohibition, denied the right to vote to such of their male inhabitants as were thought not to possess the qualifications necessary for an independent and intelligent exercise of the right. Article 15 of the amendments of the constitution of the United States provides that "the right of the citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude." This is the only prohibition on the states contained in the constitution of the United States which concerns the right to vote. It is settled that the right to vote is not one of the privileges or immunities of citizens of the United States, within the meaning of article 14 of the amendments of the constitution of the United States. U. S. v. Cruikshank, 92 U. S. 542; U. S. v. Reese, Id. 214; Ex parte Yarborough, 110 U. S. 651, 4 Sup. Ct. Rep. 152; Minor v. Happersett, 21 Wall. 162. The order dismissing the petition must be affirmed.

(159 Mass. 406)

ROCKWOOD v. ROBINSON et al.

(Supreme Judicial Court of Massachusetts. Middlesex. June 22, 1893.)

TRESPASS—ACTION BY LIFE TENANT—DAMAGES.

A will provided that the residue of testator's estate should go to R. during her life, with power to sell so much of the estate "as will insure her a comfortable living, \* \* \* and at her decease" that the balance of the estate should go to the town in trust. Held that, in trespass for taking gravel from land belonging to the residue, R. should recover the value

of the gravel taken, as well as for the trespass, as if she were owner of the fee.

Exceptions from superior court, Middlesex county; Charles P. Thompson, Judge.

Action in trespass by Louisa M. Rockwood against Walter B. Robinson and others. Plaintiff had judgment for a part only of her claim, and brings exceptions. Exceptions sustained.

The declaration charged trespass on plaintiff's premises, and taking and carrying away large quantities of gravel, sand, and loam, and converting same to defendants' own use, together with other damages. Plaintiff offered evidence tending to prove the value per cubic yard, as a commodity, of the sand and other materials taken by the defendants, and that the same was of great value, and that the plaintiff's damages were greatly enhanced thereby; but the court excluded this evidence, and ruled that plaintiff was a tenant for life under a will, and that as such she was not entitled to recover the value of said earth so taken by defendants as a commodity. The court found for the plaintiff, and assessed damages in the sum of \$100.

L. H. Wakefield and G. L. Sleeper, for plaintiff. Blaney & Robinson, for defendants.

FIELD, C. J. We assume that in an action in the nature of a trespass *quare clausum* a tenant for his own life can recover only for the injury to his particular estate, and that this includes only the injury to the possession and enjoyment of the estate during his life, and that the reversioner can recover in an action on the case for the injury to the reversion. *Bascom v. Dempsey*, 148 Mass. 409, 9 N. E. Rep. 744. When the plaintiff is in possession, and is the owner in fee, the damages are the diminished value of the property by reason of the trespass. *Mayo v. Springfield*, 138 Mass. 70. If the land contains gravel, sand, and other materials which, where the land is situated, are commonly bought and sold as a commodity, we think that the price commonly paid for such materials, as they lie in the land, may sometimes be competent on the question of the damages which an owner in fee has sustained by the removal of such materials. See *Providence & W. R. Co. v. City of Worcester*, 155 Mass. 35, 29 N. E. Rep. 56; *Handforth v. Maynard*, 154 Mass. 414, 28 N. E. Rep. 348.

We suppose the real question in this case is whether the plaintiff can recover full damages, as if she were the owner in fee. The plaintiff claims title under the will of Collins Morse. The devise of the residue of his estate, which included the land in question, is in these words: "I give, devise, and bequeath what is not otherwise disposed of by me, all the rest and residue of my estate, to my sister Louisa M. Rockwood, for and during her natural life, and she is empowered to sell and dispose of so much of my estate as will insure her a comfortable living, and to that end she is authorized to sell such portion of my real estate by public or private sale, giving good and sufficient deeds therefor, mean-

ing and intending to give her full control of the same, with full power to deed to grantees, their heirs and assigns, forever. And at her decease I give and devise the balance of my estate, of whatever nature or nature, to the town of Natick, but trust, nevertheless, the income of which is to be used for the preservation of a monument which my executor is hereby authorized to erect at my grave, and the care and beautifying of my lot in the cemetery. A report of the expenditure shall be made in the annual report of the preceding of said town. That the town shall not expend a greater sum than five per cent. per annum, deeming that a large amount as the town ought to pay. It is perhaps not entirely clear from the language whether the plaintiff is given absolutely the power to sell the land, any part of it, when she sees fit, and receive the proceeds, or is so restricted that she can sell it only when it is necessary to "insure her a comfortable living." Under either construction it cannot now be known whether any part of the land or its proceeds will ever come to the town of Natick, or whether she will need all the damages occasioned by the trespass complained of for her comfortable living. Under these circumstances the town of Natick should recover a damages for this trespass, it would be the proceeds subject to her claim upon them, if she needed them, or thought she needed them, for her comfortable living. If she should recover full damages, she should use the money recovered for her comfortable living, she would have no need of selling any part of the land for that purpose. It would be more convenient practice to permit only one recovery of the entire damages than to attempt to apportion the damages according to the respective interests of the plaintiff and the town of Natick, and then to require the town of Natick to hold the sum recovered by it for her use if she should need it during her life. A mortgagee of land is permitted to recover full damages in such a case as this, even when the trespass does not reduce the value of the land below the point of adequate security, though he must account with the mortgagor for any sum so recovered if the land is ultimately sold by the mortgagee under a power, or is redeemed by the mortgagor. *James v. Worcester*, 141 Mass. 361, 5 N. E. Rep. 826, and cases there cited. A bailee of personal property is permitted to recover full damages for an injury to the property. *Brewster v. Warner*, 1 Mass. 57.

A majority of the court think that the more reasonable solution of the difficulty is that the plaintiff, under the facts shown, should recover full damages. Whether, if the town of Natick should intervene, the court in this action at law or a court of equity might, if it thought it necessary, require the plaintiff to give security that she would hold the proceeds for the purposes indicated in the devise need not now be considered. The defendants ought to pay full damages if they are trespassers, and it does not greatly concern them whether they pay to one person

son or to two. *Homer v. Shelton*, 2 Metc. (Mass.) 194; *Schmauns v. Goss*, 182 Mass. 141, 146; *Attersoll v. Stevens*, 1 Taunt. 183. Exceptions sustained.

(150 Mass. 311)

**FINNEGAN v. FALL RIVER GAS-WORKS CO.**

(Supreme Judicial Court of Massachusetts.  
Bristol. June 22, 1893.)

**NEGLIGENCE — DANGEROUS PREMISES — QUESTION FOR JURY — CONTRIBUTORY NEGLIGENCE — EXPERT EVIDENCE.**

1. In an action against a gas company for the death, by inhaling gas, of one while in defendant's cellar for the purpose of reading the water meter, pursuant to his duties, the facts of the presence of gas in the cellar, that the cellar was not ventilated, and that defendant knew some one would be required to enter the cellar to read the water meter were sufficient to require the question of defendant's negligence to be submitted to the jury.

2. In such case, though there must have been a perceptible smell of gas when deceased entered the cellar, it cannot be said, as matter of law, that he took such manifest risk as to be guilty of contributory negligence.

3. In such case it is within the discretion of the court to allow a medical expert to give opinion evidence that deceased had a period of conscious suffering before death, though witness had not had any experience with this kind of asphyxiation personally or with patients.

Exceptions from superior court, Bristol county; Elisha B. Maynard, Judge.

Action by Patrick Finnegan, administrator of the estate of John J. Finnegan, deceased, against the Fall River Gas-Works Company, to recover for the death of decedent. Defendant had judgment by direction, and plaintiff brings exceptions. Exceptions sustained.

Hugo A. Dubuque, for plaintiff. Andrew J. Jennings, for defendant.

**HOLMES, J.** In the opinion of a majority of the court the exceptions must be sustained. The evidence for the plaintiff tended to show that his intestate was killed by inhaling gas while he was in the cellar of a building of the defendant in pursuance of his duty as an employee of the water board of the city of Fall River, for the purpose of reading a water meter. There was no evidence how the gas got into the cellar, nor any evidence of the defendant's negligence, beyond the facts that the gas was there, and that the ventilation of the cellar was stopped up; but it appears that the defendant, by taking water, voluntarily entered into a relation, the result of which, as it knew, was to require some one to enter its premises in order to read the water meter. It was bound to use reasonable care to prevent the place thus necessarily entered by the deceased from being a death trap. The jury might have found that it knew or ought to have known of the presence of gas in the cellar in quantities that might be dangerous, and that it might have prevented the accumulation by opening the ventilator, or might have put the meter in a different place. We are of

opinion that they might have found the defendant guilty of negligence towards the deceased. See *Smith v. Gaslight Co.*, 129 Mass. 318.

We must take it that there was a perceptible smell of gas when the deceased entered the cellar, but that he was acting under a certain stress of duty. We cannot say that the jury would not have been warranted in finding that the risk did not appear to be great, and, in fact, would not have been great if the ventilator had been open, and that, in view of the exigency, the deceased could take such risk as was manifest without losing the protection of the law. *Pomeroy v. Inhabitants of Westfield*, 154 Mass. 462, 465, 28 N. E. Rep. 899.

There was evidence for the jury, whatever may be thought of its weight, that the deceased had a period of conscious suffering before death. One of the doctors testified to that effect. To be sure, he had not had any experience of this kind of asphyxiation personally or with patients, but his general competency as an expert seems not to have been questioned; and, although it might not be admissible merely to repeat what a witness had read in a book, not itself admissible, still, when one who is competent on the general subject accepts from his reading, as probably true, a matter of detail which he has not verified, the fact gains an authority which it would not have had from the printed page alone, and, subject, perhaps, to the exercise of some discretion, may be admitted. We see no sufficient ground for saying that the testimony admitted in this case could be treated as furnishing no evidence of the fact. *Collier v. Simpson*, 5 Car. & P. 73; *State v. Wood*, 53 N. H. 484, 495; *State v. Baldwin*, 38 Kan. 1, 17, 12 Pac. Rep. 318; *State v. Terrell*, 12 Rich. Law, 321. Compare *Soquet v. State*, 72 Wis. 659, 40 N. W. Rep. 391.

Exceptions sustained.

(145 Ill. 447)

**ASHMORE et al. v. HAWKINS et al.<sup>1</sup>**

(Supreme Court of Illinois. June 19, 1893.)

**REVIEW ON APPEAL — EQUITY — DECREE.**

1. Where the issue is as to the mental capacity of the grantor, and over 50 witnesses testify, and there is a contradiction in their testimony, the supreme court will not reverse on the ground that the decree is not sustained by the evidence.

2. Affirmative relief, not asked for in the pleadings, should not be granted.

Appeal from circuit court, Douglas county; Edward P. Vail, Judge.

The facts fully appear in the following statement by WILKIN, J.:

This was a bill in chancery to set aside three deeds made by one James Hopkins, in his lifetime, on the ground that Hopkins, at the time he executed the same, was mentally incapacitated. The bill sets up that on the 25th day of March, 1884, James Hopkins deeded 160 acres of land to his daughter Louisa J. Ashmore, and 140

<sup>1</sup> Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

acres to his son, Samuel L. Hopkins. It further alleges that James Hopkins departed this life in September, 1886, leaving surviving him Elizabeth Ann Hopkins, his widow; Samuel L. Hopkins, his son; Louisa J. Ashmore, Vollie Alice Burgett, and Mary E. Gough, his daughters; and Alfred Hawkins, James Hawkins, Minnie M. Dewitt, Marian E. Hopkins, Ina Z. Hopkins, and James L. Hopkins, his grandchildren and only heirs at law. On the trial an issue as to whether the deeds described in the bill were the deeds of James Hopkins was submitted to a jury, and it, by its verdict, found they were not. On such finding the court adjudged and decreed each of said deeds to be null and void. From that decree the appellants have appealed to this court. Affirmed.

Woolverton, Eckhart & Moore and Crea & Ewing, for appellants. J. M. Newman, Joseph Winkler, and W. C. Johns, for appellees.

WILKIN, J., (after stating the facts as above.) It appears from the record that on the trial more than 50 witnesses testified before the jury, about an equal number testifying on behalf of either party. The principal question submitted to this court is, does the evidence sustain the decree? And the decision of that question depends upon whether the proof of the mental incapacity of James Hopkins, produced upon the trial, was sufficient to authorize the verdict of the jury. We have examined the evidence bearing on this question, and, weighing it, as we are compelled to do, without reference to the appearance and conduct of the witnesses on the stand, are of the opinion that, if no other evidence had been submitted to the jury than that introduced by the complainants, it would have been justified in finding as it did. The evidence of the witnesses is in irreconcilable conflict. We think the fact that the grantor was mentally and physically enfeebled by old age at the time he made the deeds in question was clearly proved, but whether that enfeebled condition had reached the point of incapacity to transact the ordinary business affairs of life is by no means clear. The court below and jury saw all the witnesses, and heard them testify, and were better able to judge of the weight of their testimony than is this court. Speaking on this subject in the recent case of Wilbur v. Wilbur, 138 Ill. 446, 27 N. E. Rep. 701, we said, repeating what had been frequently said before: "It was therefore the province of the jury to determine which was entitled to the greater weight, and in such case this court will not interfere, even though, as an original proposition, it might have arrived at a different conclusion. This rule is so well established, and supported by so many decisions of this court, that neither reason nor authority need be given for applying it to this case." The same language must be applied to the present case.

Counsel for appellants contend that the court below erred in not providing in its decree for the repayment of \$100 per year paid by them since the year 1885, as well

as taxes paid on the land conveyed to them. As to this point it is only necessary to say that no such affirmative relief was asked by the pleadings.

There being no errors of law, insisted on by appellants, as to the admission or exclusion of testimony, or the giving or refusing of instructions, and the evidence being sufficient, under the above-stated ruling, to support the verdict of the jury, the decree of the circuit court must be affirmed.

(145 Ill. 2)

VAHLE et al. v. BRAACKENSIECK.<sup>1</sup>

(Supreme Court of Illinois. April 3, 1893.)

APPELLATE PRACTICE—ADDITIONAL RECORD—JUDICIAL NOTICE—FORECLOSURE—WRIT OF ASSISTANCE—FORCIBLE DETAINER—RES JUDICATA.

1. Where a diminution of the record has been suggested, it is proper to allow an amended record to be filed instantaneously, without issuance of a writ of certiorari, where the adverse party has notice of the filing, and is heard on motion to strike the amended record from the files.

2. The supreme court will take judicial notice that the person who signed the decree appealed from was judge of the trial court at the time the decree was signed.

3. It is no objection to an application by a purchaser at foreclosure sale for a writ of assistance that he had been defeated in an action of forcible detainer to recover the premises, where, at the time of the trial for forcible detainer, the purchaser had not established his right to possession by serving upon the party in possession a copy of the decree as provided for in the decree itself. *Cochran v. Fogleson*, 5 N. E. Rep. 383, 116 Ill. 194, followed.

Appeal from appellate court, third district.

Bill by John H. Ducker and others against Frederick A. Vahle, Valentine Hoffman, and others, to foreclose a mortgage. A decree of foreclosure was entered, and the land sold to Bernard H. Braackensieck. No redemption having been made, the purchaser obtained a master's deed, and moved for a writ of assistance. The writ was awarded, and the order awarding it was affirmed by the appellate court. Defendants appeal. Affirmed.

L. H. Berger, for appellants. Carter, Govert & Pape, for appellee.

SHOPE, J. This was an application made to the circuit court of Adams county to redocket a cause lately pending therein, which being allowed, appeal thereupon moved for a writ of assistance. The original cause was a proceeding in chancery by John H. Ducker et al. against appellants and others, in said court, to foreclose a mortgage upon certain land, etc., in which a decree of foreclosure and sale was rendered containing the usual order of a deed, and the delivering up of the mortgaged premises, upon production to the parties in possession of such deed. If no redemption should be made, the appellee became the purchaser at the sale, and redemption not having been made, the master made and delivered to him a deed for the premises, which he produced

<sup>1</sup> Reported by Louis Boiesot, Jr., Esq., of the Chicago bar.

to appellants, and also copy of the decree, and demanded possession, which they refused to surrender. The court awarded the writ of assistance.

It was insisted in the appellate court that the record did not show service upon the appellant Vable in the original proceeding, whereupon appellee suggested diminution of the record, and asked leave to file additional record, which was allowed by that court. Subsequently appellant moved to strike the amended record from the files, which motion was overruled, and this action of the appellate court is assigned as error. The amended record was duly certified by the clerk of the circuit court of Adams county, and shows service upon Vable and all parties in interest. The ground upon which it is urged that the appellate court erred is that the amended record was permitted to be filed instantaneously, without notice to appellants, and without the issuance of certiorari. The practice adopted by the appellate court was entirely proper, and consistent with the uniform practice of this court. Appellants, being in court, were bound to take notice of the steps taken in the cause. But, if this were not so, it is apparent they had notice of the filing of the amended record, and were heard on their motion to strike it from the files. When the amended record has been made and properly certified, and is ready to be filed, the issuance of a certiorari is unnecessary expense. The court should, having proper care that the parties be not prejudiced, allow the record to be filed without the writ. *Rowley v. Hughes*, 40 Ill. 71; *Bergen v. Riggs*, Id. 62.

It is also objected that it appears from the transcript that the decree confirming the deed was rendered by one having no judicial authority, or that two judges of the court presided in the same court at the same time. The convening order of the circuit court of Adams county at the June term, 1891, shows that the Honorable William Marsh was present as the presiding judge. The decree was rendered on the 3d day of July, 1891, one of the days of said June term of said court, and appears to have been signed by and rendered by Oscar P. Bonny. The appellate court, as well as this court, will take judicial notice of who are the judges of the various courts of record of the state, and of their terms of office, and the organization and jurisdiction of such courts. *Russell v. Sargent*, 7 Ill. App. 98; *Ellsworth v. Moore*, 5 Iowa, 486; *Upton v. Paxton*, 72 Iowa, 295, 33 N. W. Rep. 773; *Tucker v. State*, 11 Md. 322; *Ex parte Peterson*, 33 Ala. 74; *Kilpatrick v. Com.*, 31 Pa. St. 198. The court, of its own motion, will advise itself, so as to verify matters of which it is required to take judicial notice. *City of Rock Island v. Cuijely*, 126 Ill. 408, 18 N. E. Rep. 753; *Greenl. Ev.* 4-6. We are required, therefore, to take judicial notice that the Honorable William Marsh was one of the judges of the sixth judicial circuit, in which said county of Adams is situated, when the June term, 1891, of said circuit convened, and that on the 3d of July, 1891, the day of the entry of said decree, his term of office had expired, and

that Oscar P. Bonny, who purports to have rendered said decree as judge of said court, was his successor in office.

It is objected that prior to the application for the writ of assistance appellee had brought forcible detainer under the sixth clause of the forcible entry and detainer act, in which judgment had been rendered for appellants. The contention is that appellee is thereby barred from obtaining the assistance of the court of equity, and the court erred in awarding the writ. The application for the writ was not the institution of a new suit, but was auxiliary or incidental to the decree previously entered, whereby the rights of the parties had become fixed and determined. The holding in this case conformed to the rule stated in *Oglesby v. Pearce*, 68 Ill. 220, and cases there cited. Appellee, as grantee in the master's deed, showed by affidavits filed that after the confirmation of the deed, and on the 9th day of December, 1891, he produced said deed to appellants, and demanded possession of the premises; and afterwards, on December 26, 1891, delivered to appellants, and each of them, a copy of the decree for sale, etc., entered in said cause, and again demanded possession of said premises. The forcible detainer proceeding was commenced on August 27, 1891. It is clear, therefore, that the right of appellee to the writ of assistance shown on this hearing had not accrued at the time of the institution or trial of the forcible detainer suit. He had not then complied with the decree by producing to appellants said master's deed, or served them with a copy of said decree, as therein provided. There is no pretense that the question of appellee's right to the possession of the premises, after complying with the decree, was litigated in the forcible detainer proceeding. This precise question was before us and determined in *Cochran v. Fogler*, 116 Ill. 194, 5 N. E. Rep. 883, and that case is conclusive of the point. We are of opinion that the judgment in forcible detainer did not bar appellee's right to the writ of assistance upon his subsequently complying with the decree. No new rights had been acquired by appellants since the rendition of the original decree, and the court was empowered, as against the parties to that proceeding, to redocket the cause, and enter such order as was necessary to execute its decree by the delivery of possession of the premises. *Kessinger v. Whittaker*, 82 Ill. 22; *Aldrich v. Sharp*, 3 Scam. 261; *Jackson v. Warren*, 82 Ill. 340. The judgment of the appellate court is affirmed.

(145 Ill. 345)

#### BULPIT v. MATTHEWS.<sup>1</sup>

(Supreme Court of Illinois. June 19, 1893.)

##### TRESPASS BY ANIMALS.

Under Rev. St. 1891, c. 8, § 1, which imposes a penalty upon any person permitting domestic animals to run at large, except where authorized by vote of the county or township, the owners of domestic animals are required,

<sup>1</sup> Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

at their peril, to keep them from trespassing. 42 Ill. App. 561, affirmed.

Bailey, J., dissenting.

Appeal from appellate court, third district.

This was trespass, originally brought before a justice of the peace, by T. J. Matthews, to recover damages done by stock of J. C. Bulpit to the crops of Matthews. On appeal to the circuit court it was stipulated that appellee's crops were uninclosed; that appellant kept his horses and mules, which did the damage, in a pasture inclosed by a good and sufficient fence to turnstock not breachy; that said stock was not breachy; that without fault, negligence, or want of proper care on the part of appellant, the stock escaped from the pasture to an open common adjoining, and strayed upon appellee's fields, and damaged the growing crops thereon to the amount of \$17.85. The circuit court found the defendant guilty, and rendered judgment for the damages accordingly. On appeal to the appellate court this judgment was affirmed, (42 Ill. App. 561;) and that court having granted a certificate of importance, under the statute, the defendant below prosecutes this further appeal. Affirmed.

John G. Drennan and J. C. McBride, for appellant. Ricks & Creighton, for appellee.

SHOPE, J. The propositions submitted to be held by the trial court as the law, and refused to be held, fairly present the question whether the owners of domestic animals in this state are required by law to keep them under control, that no damage is done by them to the property of another, at their peril. The circuit court, in effect, held that it was not necessary to fence against stock, but that the owner thereof is liable in damages if they trespass upon the lands of others, whether such land is inclosed or not, and irrespective of the reason or excuse for the animals being at large.

By the common law every owner of cattle was bound to keep them from trespassing upon the close of another, at his peril, and was answerable for their trespasses, as for his own. 3 Bl. Comm. 211; 2 Wat. Tresp. § 858; Cooley, Torts, 337. By section 1, c. 28, Rev. St. of this state, "the common law of England, so far as the same is applicable, and of a general nature, and all statutes or acts of the British parliament made in aid of, and to supply the defects of, the common law, prior to the fourth year of James the First, [with certain specified exceptions,] and which are of a general nature, and not local to that kingdom, shall be the rule of decision, and shall be considered as in full force, until repealed by legislative authority." This statute, without the exceptions, was passed by the general convention of the colony of Virginia May, 1776, (9 Hen. St. 127;) and in its present form was carried into the legislature of the Indiana Territory by the act of September 7, 1807, (Laws 1807, c. 24;) was in force in the territory of Illinois, (1 Pope's Laws, Ill. T. p. 34,) and was re-enacted by the first state leg-

islature by act of February 4, 1819, (Laws 1819, p. 3,) and has been retained, in the same form, in each succeeding revision of the statute. The question whether the rule of the common law mentioned was in force in this state first came before the court at its December term, 1848, in *Seely v. Peters*, 5 Gilman, 180; and it was then held, by a divided court, never to have been in force. It was held, following the construction placed upon the statute adopting the common law in *Boyer v. Sweet*, 3 Scam. 121, and *Penny v. Little*, 18 Ill. 301, that the common law was adopted and in force "only in cases where the law is applicable to the habits and condition of your society, and in harmony with the genius, spirit, and objects of your institutions." After showing the then unsettled condition of the vast prairies of the state, the scarcity of timber to fence them, and their capability to sustain thousands of cattle upon the natural grasses, the court said, "However well adapted the rule of the common law may be to a densely populated country, like England, it is surely but illy adapted to a new country, like ours," and after showing the universal habit at that time of inclosing fields devoted to agriculture, and permitting stock to run at large, further say, "We should feel inclined to hold, independently of any statute upon the subject, on account of the inapplicability of the common-law rule to the condition and circumstances of our people, that it does not and never has prevailed in Illinois." But the court, in that case, distinctly placed its decision upon the ground that the legislature, by the enactment of various statutes relating to fences and inclosures, expressly recognized the right of owners of domestic animals to permit them to run at large, and had, as then held, required the proprietors of fields to surround them with a good and sufficient fence before they could maintain an action for the trespass of stock therein. It followed, necessarily, from the construction given these statutes, that the common-law rule was not in force. In the subsequent cases *Misner v. Lighthall*, 18 Ill. 609; *Railroad Co. v. Patchin*, 16 Ill. 198; *McCormick v. Tate*, 20 Ill. 334; and other cases,—the question was more or less directly presented, and the holding in *Seely v. Peters* considered and approved. The question was again directly presented in *Headen v. Rust*, 3 Ill. 186, (determined at the December term, 1866, of this court.) The court there recognizing that the conditions which led the court to hold, in 1848, the principle of the common law inapplicable, because of the physical and social conditions and habits of the people, no longer existed, the decision was placed upon the ground that the law as declared in *Seely v. Peters* had been so long acquiesced in by the people, and the rule recognized by the legislature in the passage of various acts consistent with the holding in that case, that it belonged to the legislative department of government, more properly than the judiciary, to change it. And after reviewing various of such acts it was said: "The legislation established the fact that the general assembly and the people of the



state understand the law to require owners of land to fence against the depredations of stock, and that all persons have a right to permit their stock to run at large on the highways and commons, except so far as they are prohibited by legislative enactment. \* \* \* The conclusion from these enactments seems irresistible that the people have accepted the rule in *Seely v. Peters* as the law, and have manifested no disposition to disturb it, except in particular localities." A review of the legislation referred to, or the enactments subsequently, prior to the act of 1872, and relating to fences and inclosures, and regulating the right of stock to run at large in certain municipalities and political subdivisions of the state, will be unnecessary. It will be found that they recognize the law to be as held in the cases mentioned, and that acts of the legislature authorizing the restraining of domestic animals from running at large in such municipalities and subdivisions formed exceptions to the general rule and policy of the state.

But by the statute now in force, (chapter 8, Rev. St.,) passed in 1874, which is, in effect, sections 1 and 2 of the act of 1872, (rewritten,) a radical change was made. Of the causes producing the rapid development of the state, nothing need be said; but it is a matter of common knowledge that at the time of the passage of the present statute, and long prior to that date, if there was vacant land upon which cattle at large might graze, it was not, as a rule, to be found upon the prairies, but in the poorer and timbered portions of the state, and there in only comparatively small, and constantly decreasing, quantities. The conditions and circumstances of the country and people had radically changed since the decision of the *Seely v. Peters* case, and the reasons for rejecting the rule of the common law, so far as its exclusion was based upon the physical condition of the state, and the needs and habits of the people, had ceased to exist. It cannot be doubted that it was in view of these changed conditions, and, it may be presumed, in view of the holding in *Headen v. Rust*, that the legislation of 1874 upon the subject was enacted. Section 1 of the act of 1874 imposes a penalty upon any person suffering or permitting domestic animals to run at large within the state, except when authorized as in that act provided. Section 2 provides for submitting the question of permitting animals to run at large to a vote of the electors of the county. Section 3 relates to the form of the ballot, manner of voting, and canvassing and return of the votes. Section 4 provides: If a majority of all votes cast in the county at such election shall be for domestic animals, or any species thereof, running at large, it shall be lawful in such county, for domestic animals, or such species thereof, to run at large: provided, that if at any such election the vote in any precinct in counties not under township organization, or in any town in counties under township organization, or in any incorporated city, village, or town in any county, shall be against domestic animals, or any species thereof, running at large, it shall not be lawful for such animals to run

at large in such precinct or town, or incorporated city, village, or town." Section 5 provides that, in any county where in animals are allowed to run at large pursuant to a vote theretofore had, on petition, etc., being filed with the county clerk, a vote may be taken in any incorporated city or village, precinct or town, under the act, and, if a majority of the votes cast shall be against animals running at large, then it shall not be lawful for them to run at large in such city, village, precinct, or town. Section 6 provides that the act shall not be construed so as to prohibit the running at large of domestic animals in any county, precinct, or town, incorporated city or village, "where the same is allowed pursuant to any election held by virtue of any law in force at the time this act shall take effect." *Vogt v. Dunley*, 97 Ill. 424.

Construing these provisions together, it is manifest, we think, that the legislature intended that only as the result of an election at which the question had been submitted under the provisions of this, or some prior statute authorizing it, can domestic animals lawfully be at large within this state. Prior to the passage of this law, as we have seen, the territory in which they were prohibited from running at large was an exception out of the general rule. By this statute that rule was abrogated, and the general rule of law established that animals could not lawfully be at large within the state except within such political subdivisions as the people, by an affirmative vote, had formally expressed their desire that such animals should be permitted to run at large. All other running at large of stock upon the highways or commons, or upon the land of others than the owner, without license, is made unlawful. Undoubtedly, as suggested, in proceeding under the first section of the act, it will be necessary to show that the stock was at large by the permission or through the fault of the owner. To impose the penalty therein prescribed, some guilty intention to violate the law, or willful neglect of the duty imposed, must be shown. *Case v. Hall*, 21 Ill. 632; *Kinder v. Gillespie*, 63 Ill. 88. But this does not affect the question being considered. The stock at large, with or without the knowledge or consent of the owner, is unlawfully and wrongfully at large, unless, by an affirmative vote, the county, city or village, precinct or town, has been excepted out of the general rule and policy of the state. It is thus seen that every reason assigned in former decisions for the exclusion of the common-law rule has ceased to exist. The effect of the act of 1874 was to remove every impediment found by the court to exist in *Headen v. Rust*, supra, to the adopting of the common-law rule in this state. If the principle of the common law requiring the owner of cattle to keep them on his own land at his peril, which is based upon that other principle lying at the foundation of the right to possess and enjoy property in civilized society "that each shall so use his own as not to inflict injury upon another," was in conflict with the legislation of the state, or opposed to its legisla-

tive policy prior to the act of 1874, it cannot be said to be in conflict with, or opposed to, the policy of that law which makes the running at large of stock unlawful,—the rule and policy of the state. The principle of the common law is in harmony with existing statutes, and, as we have seen, applicable to the habits, circumstances, and conditions of the people. It is fairly to be presumed that this legislation was induced by the changed condition of the circumstances. The court had, just previous to the passage of the present law, which is sections 1 and 2 of the act of 1872, (rewritten,) while recognizing this change in the physical conditions of the state and the habits of its people, declined to recede from the doctrine of *Seely v. Peters*, because of the legislative policy of the state. And finding, as we do, that the legislature, by the act, removes the impediment found in *Headen v. Rust* to exist to the adopting of the common-law principle, it is to be presumed that the purpose was to render the principle applicable. We are of opinion that the effect has been that, by virtue of the statute adopting the common law, this principle has become the rule of decision in this state. That this was the intention of the legislature, is, we think, further evinced by the contemporaneous legislation. At the same session of the legislature, section 20, c. 54, ("Fences,") was passed in lieu of section 15, c. 51, of the Revised Statutes of 1845. After re-enacting, in substance, the original section, providing for the recovery of damages done by domestic animals breaking into inclosures, the fence being good and sufficient, there was added: "This section shall not be construed to require such fence in order to maintain an action for injuries done by animals running at large contrary to law." And section 21 of the same chapter was also added, which provides that if any such animal shall break into an inclosure, etc., "or shall be wrongfully upon the premises of another," the owner or occupant of such premises may take and keep such animal until damages, with reasonable charges for keeping, are paid, etc. The provisions clearly contemplate that animals may be running at large contrary to law, and wrongfully upon the land of another, irrespective of whether inclosed or not. In the case of *Lee v. Burk*, 15 Ill. App. 651, it was held, as early as 1884, that the effect of the act of 1874 was the practical re-enactment of the common-law principle, and that since the passage of that act any locality where domestic animals are not permitted by a vote taken under the statute to run at large, "every man must keep his cattle from his neighbor's premises, or respond in damages for injuries committed by them." The same rule is announced in *Birket v. Williams*, 30 Ill. App. 451. Neither of these cases came to this court, and the conclusion there reached would seem to have been acquiesced in by the bar and people of the state. The question is for the first time presented to this court, since the passage of the present laws relating to domestic animals; and we are of opinion that the common-law rule has, since

the passage of that act, been in force in this state, and that the courts below have therefore decided correctly.

Other errors are assigned, but, in view of the holding, they become wholly unimportant, and need not be considered. The judgment of the appellate court will be affirmed.

BAILEY, C. J., dissents.

(146 Ill. 3)

GRAYBEAL et al. v. GARDNER et al.  
(Supreme Court of Illinois. June 19, 1899.)

CONTEST OF WILL—EVIDENCE—INSTRUCTIONS.

1. Upon trial of a suit in equity to contest the validity of a will the admission in evidence of the order admitting the will to probate is harmless error where the order expressly states that the will was admitted to probate on the evidence of the subscribing witnesses alone, and both such witnesses testify in the suit before the order is offered in evidence.

2. Where the only question submitted to the jury is as to the testator's sanity, the due execution of the will is not in issue, and instructions which assume that the will was duly executed are not erroneous on that account.

3. Where the object of an instruction is not to define testamentary capacity, but to inform the jury that a testator may devise his property as he pleases, it is not necessary to repeat in every clause that a testator must be of sound mind and memory, especially where other instructions fully cover that point.

4. It is proper to instruct the jury that the burden of proof is upon the defendant to prove by the attesting witnesses that the testator was of sound mind and memory when he signed the will, and that, if they make such proof, the burden of establishing want of mental capacity shifts and devolves upon the contestants, and that before the jury could find against the will they must find from a preponderance of the evidence that the said testator did not have sufficient mind to make the alleged will; and considering all the evidence, they should find the evidence evenly balanced on that question they should find the paper offered in evidence to be the will of said testator. *Wilbur v. Wilbur*, 21 N. E. Rep. 1076, 129 Ill. 392, following.

5. Inconsistency between different instructions is harmless error where the inconsistency arises from error in the instruction in favor of the appellant.

Appeal from appellate court, third district.

Bill by Alice Graybeal and others against Jennie P. Gardner and others. Defendants obtained a decree, which was affirmed by the appellate court. Complainants appeal. Affirmed.

H. W. Masters and Gray & Waggoner for appellants. D. Abbott and Grant Chipherfield, for appellees.

WILKIN, J. This was a bill in chancery by appellants against appellees and others in the circuit court of Fulton county to the December term, 1891, to contest the validity of the last will and testament of Harrison Putman, deceased. The bill alleges that the complainants are grandchildren of Harrison Putman, who

<sup>1</sup> Reported by Louis Boiset, Jr., Esq., of the Chicago bar.

"on the 8th day of April, 1890, executed a certain instrument in writing, purporting to be his last will and testament, and afterwards, on the 18th day of June, 1891, departed this life, leaving the complainants and defendants as his heirs at law; that by said alleged will all of decedent's real and personal property was devised and bequeathed to the defendants, and none to complainants; that on the 26th day of August, 1891, said writing was exhibited to the circuit court of said county for probate, on appeal from the county court, where probate was refused; that Harrison Putman, at the time he executed such alleged will, was not of sound mind and memory, but, on the contrary, was in his dotage, and his mind and memory was so impaired as to render him wholly incapable of making any just and proper distribution of his estate." Appellees answered the bill, admitting complainants are the grandchildren of decedent, the execution of the instrument in writing by Harrison Putman, and his death, as alleged in the bill; that complainants and defendants are his heirs, and that nothing was devised or bequeathed to complainants; also the probate of the will; but denying that at the time of the execution of such will decedent was not of sound mind and memory, and in his dotage, and alleging the truth to be that at the time he was in the possession and exercise of all his mental faculties, and fully understood what he was doing; and denying that complainants are entitled to the relief prayed. Other defendants to the bill, failing to answer, were defaulted. On the bill and answer an issue of fact was made up, and tried by a jury, as provided by statute in such case, resulting in a verdict "that the paper offered in evidence by the proponents was the last will and testament of Harrison Putman, deceased." A motion by complainants for a new trial was overruled, and a decree entered dismissing the bill at their costs. On appeal the appellate court of the third district affirmed that decree.

A copy of the will, made an exhibit to the bill, is in the following language: "I, Harrison Putman, of Canton, in the county of Fulton, and state of Illinois, do make and declare this to be my last will and testament: First. I direct that all my just debts and funeral expenses be first fully paid. Second. I give and bequeath to my beloved daughter Caroline Thompson two thousand dollars in money. Third. I give and bequeath to my beloved daughter Jennie P. Gardner two thousand dollars in money. Fourth. I give and bequeath to my beloved daughter Mary Gardner two thousand dollars in money. Fifth. I give and bequeath to my beloved daughter Ella King two thousand dollars in money. Sixth. It is my will that the above legacies shall be paid first, as soon as practicable after my decease, and after the payment of the above legacies I desire that all my property remaining, both real and personal, shall be divided equally between my seven children, to wit, Francis B. Putman, Caroline Thompson, Martin Putman, Jennie P. Gardner, Mary Gardner, Ella King,

and Charles Putman. Seventh. It is my will that there be no administration upon my estate, and that my said children, as above named, shall adjust all matters in connection with my estate among themselves, as above directed. In witness whereof I, Harrison Putman, have hereunto set my hand and seal this 8th day of April, A. D. 1890." It was witnessed in the usual form by M. Walker and Joseph Kriske. It appears that Joseph Kriske, though stating that he witnessed the will, failed to declare on oath or affirmation before the county court that he "believed the testator to be of sound mind and memory at the time of signing and acknowledging the same," and for that reason the will was not admitted to probate in that court. On appeal to the circuit court it was duly admitted to probate, as is provided by section 13 of the statute of wills in cases of appeal, etc.

On the trial of the issue in this case, the court permitted the defendants, over the objection of complainants, to read to the jury the order of the circuit court admitting the will to probate, and this ruling is the first assignment of error relied upon by appellants to reverse the decree below. We held in the case of Purdy v. Hall, 134 Ill. 309, 25 N. E. Rep. 645, that it was error to permit the defendants to a bill like this to introduce in evidence the order of the county court admitting the contested will to probate. What was there said will apply with equal force to the admissibility of such an order of the circuit court on appeal, and it must be conceded that, where the appeal is by the proponents of the will, they being allowed on such appeal to introduce any evidence competent to establish a will in chancery, (section 13, supra,) there may be stronger reason for holding such evidence incompetent. We said, however, in the Purdy Case, we do not wish to be understood as holding that the introduction of such improper evidence would in all cases, or even in that case, of itself be reversible error. It is impossible to see how the slightest injury could have resulted to appellants from the error complained of. They had alleged in their bill that such an order was made, and therefore the mere proof of its existence was harmless. Before it was offered in evidence, both of the subscribing witnesses had testified in the most positive manner to every fact necessary to admit the will to probate, and the will itself, without objection, had been admitted in evidence. The order recited no evidence whatever bearing upon the issue before the jury, except that said subscribing witnesses testified that they, as witnesses, and at the request of the testator, saw him sign the writing as his last will, and that they signed the same as witnesses, "and that they believed that said Harrison Putman, the testator, was at the time of signing and acknowledging the said last will and testament of sound mind and memory." In other words, the order as read to the jury expressly stated that the will was admitted to probate in the circuit court on the evidence of the subscribing witnesses alone. If the will had been probated in the county court, a certificate

of the evidence of these witnesses would have been *prima facie* proof of the validity of the will, raising a presumption of the competency of the testator, until disproved by other evidence. *Rigg v. Wilton*, 13 Ill. 15; *Holloway v. Galloway*, 51 Ill. 159; *Carpenter v. Calvert*, 83 Ill. 62; *Wilbur v. Wilbur*, 129 Ill. 396, 21 N. E. Rep. 1076. The testimony of these witnesses, given in person before the jury, should, under the facts and circumstances of this case, be given no less weight than a mere certificate of it would have been entitled to if they had proved the execution of the will when called in the county court. Having made a *prima facie* case, then, by the evidence of the subscribing witnesses and the introduction of the will, the recital that those witnesses had sworn to the same facts before added nothing to the weight of their testimony. Their evidence, with or without the recital, made a *prima facie* case for the proponents, and nothing more. The error, therefore, of allowing the objectionable order to be read to the jury, should not operate to reverse the decree below.

It is insisted that the verdict of the jury is contrary to the evidence. Counsel for appellants say that, in order to make out a *prima facie* case, the proponents of the will were bound to show that the will was in writing, and signed by the testator, attested by two or more credible witnesses; that two witnesses testify that they saw the testator sign the will in their presence, and that they believe the testator was of sound mind and memory at the time of signing or acknowledging the same. That these matters of form and proof are essential to the validity of a will in this state is true, but it does not follow that they were in issue in this case. But a single question was submitted to the jury, viz. the soundness of the mind and memory of the testator at the time he executed the will which the bill alleges he made. On that issue the evidence is voluminous and conflicting. None of the witnesses were experts. The rule is that such witnesses, "after detailing the facts on which an opinion is based, may give to the jury that opinion, to be received by them and to be valued by them according to the intelligence of the witness, and his own capacity to form the opinion." *Roe v. Taylor*, 45 Ill. 485. Tested by this rule, the evidence of many of the witnesses on either side is of no value whatever. There is no difficulty in reaching the conclusion that Harrison Putman was endowed by nature with a vigorous intellect and strong will powers, and that these faculties remained unimpaired to the time of his death, except as they became enfeebled by old age. Some of the witnesses testifying on behalf of contestants describe him as being affected with senile dementia, or in a state of second childhood, about the time the will was executed, but it is very difficult, if not impossible, from their testimony to reach the conclusion that at the time his mind, when directed to an ordinary business transaction, was not fully capable of comprehending and understanding it. The clear preponderance of all the evidence is

that he was then of sound mind and memory, within the decisions of this court defining testamentary capacity. There is no evidence whatever in the record tending to show that he did not know the character and value of his property, or that he did not remember the natural objects of his bounty. True, he gave nothing by his will to his grandchildren, but that fact does not prove that he had forgotten them. *Snow v. Benton*, 28 Ill. 306. It cannot be said that the will was an irrational one, unless we hold all wills unreasonable which do not distribute the testator's property equally among his heirs at law. There is no pretense that the will was not written according to the testator's own dictation. It is very simple in form, and easily understood. The question for the jury was "whether the mind and memory of the testator was sufficiently sound to enable him to know and understand the business in which he was engaged at the time he executed the will, judging his competency of mind by the nature of the act to be done, and a consideration of all the circumstances of the case." *Trish v. Newell*, 62 Ill. 196. It was not necessary that he should have retained all his vigor of mind and memory in order to make a valid will. *Yoe v. McCord*, 74 Ill. 33; *English v. Porter*, 109 Ill. 265; *Rice v. Hall*, 120 Ill. 597, 12 N. E. Rep. 236; *Guild v. Hull*, 127 Ill. 523, 20 N. E. Rep. 665; *Campbell v. Campbell*, 130 Ill. 466, 22 N. E. Rep. 620. We think the verdict on the question submitted was in accordance with the weight of the evidence.

It is insisted that the court erred in giving instructions on behalf of proponents numbered 2, 3, 5, 6, 8, 8½, 8¾, and 9. The criticism made upon the second is without force. The object of that instruction was, not to define testamentary capacity, but to inform the jury that a person may dispose of his property by will as he pleases. It was not necessary to repeat in every clause of it that a testator must be of sound mind and memory. Other instructions, given both at the request of contestants and the defendants, fully covered that point. The objections urged to the other instructions except the ninth assume that the formal execution of the will, viz. its being in writing, and signed by the testator, attested by two or more witnesses, etc., was in issue before the jury, and it is said "these instructions assume that the testator executed said will, thereby taking from the jury the question of whether he signed it or not." As before stated, no such question was submitted to the jury, either by the pleadings or proofs. "The question whether a will has been executed with all the proper formalities is one of law, and not of fact, which a jury can consider." *Roe v. Taylor*, supra. The only substantial objection urged against the ninth is that it in effect put the burden of proof on appellants upon the whole case, when it is, in the first instance, upon proponents. The instruction does tell the jury that the burden of proof is upon the defendants to prove by the attesting witnesses that the testator was of sound mind and memory at the time of signing the will, in order to make a *prima*

facie case establishing the will; but that, if they had made such proof, then the burden of establishing the want of mental capacity was shifted, and devolved upon the contestants, and, before they could find against the will, they "must find from the preponderance of the evidence that said Harrison Putman did not, on the 8th day of April, 1890, have sufficient mind and memory to make and execute the alleged will; and if, after you shall have considered all the evidence in the case for the purpose of ascertaining therefrom whether the said Harrison Putman had sufficient mind and memory to make such will, you should find the evidence evenly balanced on that question, as to whether he had at that time sufficient mind and memory to make such will, you should find that said paper offered in evidence is the will of said Harrison Putman." The instruction does not differ materially from the one quoted and approved in *Wilbur v. Wilbur*, 129 Ill. 392, 21 N. E. Rep. 1076, in commenting upon which we said: "The rule, as stated in this instruction, throws the burden of proving the sanity of the testator, in the first instance, on the party asserting the validity of the will; yet, after a *prima facie* case has been once made out by the evidence of the subscribing witnesses, it throws the weight of the legal presumption of sanity into the scale in favor of the proponent, from which it necessarily results that upon the whole case the burden of proof rests upon the contestants," and, so understood, it was held to announce the correct rule as to the burden of proof; citing *Carpenter v. Culvert*, 83 Ill. 62. It is true that several other instructions given on behalf of proponents, and one on behalf of contestants, place the burden of proof as to soundness of mind and memory upon the defendants, but that is an error in appellants' favor, and one of which they cannot complain. A general objection is made to the modification of two of the instructions asked on behalf of the appellants, but we discover no error in that regard.

Among the reasons assigned in support of the motion for a new trial it was alleged that members of the jury, during the progress of the trial, accepted from the defendants, or their agents, intoxicating liquors, and drank the same; that the jury were improperly influenced by persons acting for the defendants; that the verdict of the jury was the result of improper influences; and it is very earnestly insisted that the circuit court erred in refusing to grant a new trial for these reasons. In support of the motion, and in denial of the charges therein made, a volume of affidavits was filed. The controversy is purely one of fact; the defendants denying most positively that they furnished intoxicating liquors to any member of the jury, directly or indirectly, or that they attempted in any way or manner whatever to influence it in its verdict. Some of the affidavits filed in support of the motion tend to prove that one, and perhaps two, of the jurors drank liquor during the trial, which they thought was furnished by persons acting in the interest of the defendants; but counter affidavits are to the contrary.

After reading the affidavits, we are satisfied that the alleged misconduct of members of the jury and of the defendants, or others acting in their behalf, was not established. There is an utter absence of proof that the verdict was the result of misconduct. On the whole record we are of opinion that the decree of the circuit court is right, and that the judgment of the appellate court should be affirmed.

(7 Ind. App. 698)

### CHICAGO & E. R. CO. v. OLSEN.

(Appellate Court of Indiana. June 20, 1893.)

#### CARRIERS — EJECTION OF PASSENGER — RE-ENTRY OF TRAIN.

Where a person who gets on an express car without having purchased a ticket, and remains thereon, in violation of the company's rules, is ejected from the train, and he afterwards re-enters it, and is carried to his destination, he receives the full benefit of the contract of carriage, if it was a valid one.

Appeal from circuit court, Lake county; William Johnston, Judge.

Action by Andrew Olsen against the Chicago & Erie Railroad Company to recover damages for the wrongful ejection of plaintiff from defendant's train, on which plaintiff claimed to be a passenger. From a judgment entered on the verdict of a jury in favor of plaintiff, defendant appeals. Reversed.

Otto Gresham and J. W. Youche, for appellant. R. Gregory, for appellee.

REINHARD, J. The facts in this case, and the legal principles to be applied to them, are in all essential particulars like those in the case of *Railroad Co. v. Field*, (decided June 16, 1893, by this court,) 84 N. E. Rep. 406. That case was reversed upon the special verdict of the jury. In the present case there was no special verdict, but the evidence is in the record, and does not make any stronger case for the appellee than the special verdict in the case cited. The appellant's motion for a new trial in this case was grounded upon the cause, in part, that the evidence was insufficient to sustain the verdict. The overruling of that motion is one of the errors assigned. We think the motion should have been sustained. There is this difference in the facts of the two cases: that in the case at bar the appellee was not compelled, as he avers in his complaint, to walk to Hammond, but he admits that he re-entered the train, and was carried upon it to said place, and this was the uncontradicted evidence. The only shadow of a cause of action upon which he could recover, therefore, is that the conductor compelled him to leave the train for a moment or two. After this he re-entered, and rode to Hammond. If his contract of carriage was valid, he got the full benefit of it. The theory of his complaint is the failure of the appellant to carry him according to contract. He can recover upon no other theory. Judgment reversed, with instructions to the lower court to grant the appellant a new trial.

(7 Ind. App. 189)

**KACKLEY v. EVANSVILLE & T. H. R. CO.**

(Appellate Court of Indiana. June 20, 1893.)

**REVIEW ON APPEAL — WEIGHT AND SUFFICIENCY OF EVIDENCE — ERRONEOUS INSTRUCTIONS — OBJECTIONS WAIVED — NEW TRIAL.**

1. A verdict will not be disturbed on appeal, where there is evidence in the record warranting the same.

2. Error in giving instructions is waived by failure to discuss the same.

3. Where a motion for a new trial joins all the instructions without separating or pointing out any one as erroneous, an assignment of error as to certain of such instructions can only be maintained by showing that all are incorrect.

4. Instructions which do not fully and correctly state the law applicable to the evidence under the issues are properly refused.

Appeal from circuit court, Daviess county; D. J. Hebron, Judge.

Action by James E. Kackley against the Evansville & Terre Haute Railroad Company. Judgment for defendant. Plaintiff appeals. Affirmed.

Cullop & Kessinger and C. K. Thorp, for appellant. John E. Iglehart, Edwin Taylor, and Gardiner & Taylor, for appellee.

DAVIS, J. The error assigned in this court is that the Daviess circuit court erred in overruling appellant's motion for a new trial. Several reasons are contained in the motion for a new trial, but only two have been argued by counsel for appellant. These two are that the verdict was contrary to the evidence and the law, and that the court erred in refusing and giving instructions. We have carefully read the evidence, and it is perhaps true that there is ample evidence in the record to have justified a verdict in behalf of appellee, but we are not able to agree with counsel that the evidence is all one way, and that appellee was entitled in any event to at least nominal damages. If substantial damages had been awarded, this court would not, under the long-established rule which obtains in this state, have reversed the judgment on the evidence; and the same rule forbids that we should reverse the judgment because of the failure to award nominal damages. There was some evidence in the record, which, if believed by the jury, warranted the conclusion reached in the verdict.

The third reason assigned in the motion for a new trial is as follows: "Error of law occurring on the trial of said cause, and excepted to by the plaintiff at the time, in this, to wit: (1) The court erred in refusing to instruct the jury as requested separately and severally by plaintiffs in instructions numbers one, two, and three. (2) The court erred in giving instructions numbers one, three, four, five, sixth, seventh, and eighth." No objection has been made to either the third or seventh instruction given by the court. The error, if any, in giving either of said instructions,

has been waived by failure to discuss the same. The motion for a new trial joins all the instructions together in general terms, without separating or pointing out any one or more as erroneous. Such an assignment, under the authorities, can only be maintained by showing that all the instructions are incorrect. In this state of the record, therefore, no question is presented for our consideration, so far as the instructions given are concerned. *Railway Co. v. McCartney*, 121 Ind. 385, 23 N. E. Rep. 258; *Mahoney v. Gauo*, 2 Ind. App. 107, 27 N. E. Rep. 315; *State v. Gregory*, 132 Ind. 387, 31 N. E. Rep. 952; *Williamson v. Brandenburg*, (Ind. App.) 32 N. E. Rep. 1022; *Walker v. Johnson*, (Ind. App.) 33 N. E. Rep. 267. The assignment in the motion as to instructions refused is not within the rule stated in *McKendry v. Sluker, Davis & Co.*, 1 Ind. App. 263, 27 N. E. Rep. 506. No question is presented by this assignment unless all the instructions so asked and refused should have been given. *Williamson v. Brandenburg*, supra; *Railway Co. v. McCartney*, supra. It is not affirmatively shown in the record in this case that the instructions refused were tendered to the court before the commencement of the argument. Section 534, Rev. St. 1881. Conceding, however, that the request was made within the proper time, it is necessary that the instructions so tendered should be accurately worded, and that the law should be fully and properly expressed therein. *Elliott, App. Proc.* § 735. The instructions so asked by appellant may have correctly stated the law so far as they went, but they did not in all respects fully and correctly state the law pertinent and applicable to the evidence under the issues. Notwithstanding the appellee may have been guilty, in all respects as charged in the complaint, of having wrongfully and unlawfully so constructed and maintained its bridge across White river as to impede or prevent the navigation of that stream, yet appellant could not recover on account thereof, unless he was damaged in some degree thereby. It was incumbent on him to prove to the satisfaction of the jury the other material averments of his complaint. On a careful reading of the entire record, we are not prepared to say that, when the instructions given are reconsidered as a whole, they do not correctly state the law. We are of the opinion that the eighth instruction given by the court was not erroneous. There was some evidence, at least, tending to sustain that theory of the case. If the jury (as the result seems to indicate they did) took that view of the case, then it is evident it would not matter what other instructions were given or refused. However this may be, the general theory of the instructions given was correct, and if there was prejudicial error in any of the instructions given or refused, the question is not, for the reasons stated, presented by the record. In any event, we do not find any reversible error in the record. Judgment affirmed.

(7 Ind. App. 168)

**OHIO FALLS CAR CO. v. SWEET & CLARK CO.**

(Appellate Court of Indiana. June 8, 1893.)

**VACATING JUDGMENT BY DEFAULT—NECESSITY OF MOTION IN WRITING—ORDERS OF COURT—SUFFICIENCY.**

1. Under Rev. St. 1881, § 396, providing that the court shall relieve a party from a judgment taken against him through mistake or excusable neglect on complaint or motion filed within two years, a written complaint or motion must be filed, in order to obtain the relief.

2. An order of court that the "affidavits herein filed in support of the motion heretofore filed for the purpose of setting aside the default hereinbefore taken against said plaintiff, and also the affidavits herein filed by said defendant with reference to said motion," shall be a part of the record, is too indefinite and general.

Appeal from circuit court, Grant county; R. T. St. John, Judge.

Action by the Ohio Falls Car Company against the Sweet & Clark Company for a breach of contract. The court refused to set aside a judgment and default, entered against plaintiff on a counterclaim filed by defendant, and plaintiff appeals. Judgment affirmed.

M. Z. Stannard, for appellant. Brownlee & Paulus, for appellee.

ROSS, J. The appellant filed its complaint in the Grant circuit court against the appellee, August 26, 1890, demanding damages for the breach of a contract. The appellee appeared and filed an answer of general denial, and also additional paragraphs of set-off and a counterclaim. On September 22, 1890, the appellant filed a reply of general denial to the answer of set-off and the counterclaim. Upon the issues thus formed the cause was called for trial, and the appellant filed a motion and affidavit for a continuance, which was overruled by the court, whereupon the appellant dismissed its complaint, and withdrew its reply and appearance, and, on motion of the appellee, appellant was defaulted on the counterclaim. The cause was then tried by the court, a finding made for the appellee on the counterclaim in the sum of \$1,600, and judgment entered accordingly, September 24th. On October 18, 1890, the appellant appeared by its counsel, and moved the court to set aside the judgment and default entered September 24th, and in support of their motion filed several affidavits. This motion was overruled by the court, to which ruling the appellant excepted. Several errors have been assigned by the appellant, but counsel have argued but one, namely, the overruling of the motion to set aside the judgment and default.

Section 396, Rev. St. 1881, provides, among other things, that "the court may also, in its discretion, allow a party to file his pleadings after the time limited therefor, and shall relieve a party from a judgment taken against him through mistake, inadvertence, surprise, or excusable neglect, and supply an omission in any proceedings, on complaint or motion filed within two years." This section requires

the filing of a written complaint or motion in order to obtain relief from a judgment taken against a party through his mistake, inadvertence, surprise, or excusable neglect. *Railway Co. v. Crockett*, 2 Ind. App. 136, 23 N. E. Rep. 222. The record does not contain any motion filed by the appellant. The only record entry on the subject of the filing of such a motion reads as follows: "Comes now the plaintiff, by counsel, and moves the court to set aside the judgment and default herein, and in support of which file their three affidavits therefor, in these words, to wit." Then follow the affidavits of the attorneys and the vice president of the appellant company. These affidavits, although copied into the record, are not a part thereof, unless made such by bill of exceptions or order of the court. Affidavits in support of a motion to set aside a default are simply evidence, and are not a part of the record, except made so by a bill of exceptions or order of the court.

After appellant's motion had been overruled by the court, on motion of the appellant, the court ordered that the several affidavits herein filed in support of the motion heretofore filed for the purpose of setting aside the default hereinbefore taken against said plaintiff, and also the affidavits therein filed by said defendant with reference to said motion, shall be, and the same are hereby, made a part of the record in this cause. Orders of the court making motions, etc., parts of the record should be specific. The above order is too indefinite and general. The record, however, does not contain any affidavits filed by the appellee, as designated by the order. This court cannot review and pass upon the sufficiency of the evidence, except it is all in the record. It is not all in the record in this case. There are no questions presented for review on this appeal. Judgment affirmed.

DAVIS, J., concurs in result.

(135 Ind. 1)

**CARR v. STATE.<sup>1</sup>**

(Supreme Court of Indiana. June 15, 1893.)

**ASSAULT—WHAT CONSTITUTES—ADMINISTRATION OF POISON—MURDER—EVIDENCE—CHARACTER OF ACCUSED.**

1. The unlawful infliction of an injury by administering poison constitutes an assault.

2. On a trial for murder by the administration of poison, evidence of defendant's general reputation for peace and quietude is admissible.

Appeal from circuit court, Marion county, M. F. Cox, Judge.

Jennie Carr was convicted of murder, and appeals. Reversed.

Francis T. Hord and Lafayette Perkins, for appellant. A. G. Smith, for the State.

HACKNEY, J. In the court below the appellant was tried, convicted, and sentenced to a life imprisonment, upon an indictment charging her with the crime of murder in the first degree, in the killing

<sup>1</sup>Rehearing denied.



of her child, Conwell Carr, by administering to him a deadly poison.

In the course of the trial, and as a part of her defense, it was proposed to prove by a competent witness that her character and reputation for peace and quietude were good. Upon the objection of the prosecutor, the evidence was excluded by the court, upon the expressed ground that such trait of character was not involved in the offense charged. The questions by which such evidence was sought were informal, but as the objection was sustained with express reference to the subject-matter, and as objection is not made here as to the form of such questions, we will determine the correctness of the ruling as made. In *Hall v. State*, 132 Ind. 317, 31 N. E. Rep. 536, this court passed upon the point here in issue. It is there said: "The appellant offered to prove his general reputation for peace and quietude, and the court excluded it. In this the court committed an error. Evidence of the general reputation of the accused for peace and quietude is permissible in a prosecution for murder, though the murder may have been committed by poisoning." In *Warner v. State*, 114 Ind. 137, 16 N. E. Rep. 189, this court held that an assault is a constituent element of the crime of murder. In *Com. v. Stratton*, 114 Mass. 303, the court says: "Although force and violence are included in all definitions of assault or assault and battery, yet, where there is physical injury to another person, it is sufficient that the cause is set in motion by the defendant, or that the person is subjected to its operations by means of any act or control which the defendant exerts;" citing 3 Chit. Crim. Law, 799; 1 Gabb. Crim. Law, 82; Rose. Crim. Ev. (8th Ed.) 296; 3 Bl. Comm. 120, and notes; and 2 Greenl. Ev. § 84. It is there further said: "If one should hand an explosive substance to another, and induce him to take it, by misrepresenting or concealing its dangerous qualities, and the other, ignorant of its character, should receive it, and cause it to explode in his pocket or hand, and should be injured by it, the offending party would be guilty of a battery, and that would necessarily include an assault. \* \* \* It would be the same if it exploded in his mouth or stomach. If that which causes the injury is set in motion by the wrongful act of the defendant, it cannot be material whether it acts upon the person injured externally or internally, by mechanical or chemical force." *Reg. v. Butten*, 8 Car. & P. 660. The contrary is not suggested, but it is practically conceded, as it must be, that the character for peace is involved in the offense of an assault or an assault and battery. This being true, and having reached the conclusion that an assault is involved in the unlawful infliction of an injury by administering poison, the action of the court in refusing the offered evidence was erroneous. The judgment of the criminal court is reversed, with instructions to sustain the appellant's motion for a new trial.

(124 Ind.

# SELLERS et al. v. CITY OF GREENCASTLE.

(Supreme Court of Indiana. June 16, 1898.)  
TRIAL—ORAL INSTRUCTION—WHAT CONSTITUTES  
READING STATUTE—HARMLESS ERROR.

1. Where part of an instruction is in writing, and the remainder consists of a section of the statute, which the court reads, the latter part is oral, and not a compliance with Rev. St. 1881, § 533, cl. 5, which provides that, either party requires it, the instructions given shall be in writing.

2. An error in giving an instruction which is partly oral, in that part of it consisted of a section of the statute read by the court, is harmless, where the court does not know from the record that the result reached by the jury and trial court was correct.

Appeal from circuit court, Putnam county; S. M. McGregor, Judge.

Suit between the city of Greencastle and James W. P. Sellers and others in relation to the annexation of certain territory to the corporation. From a judgment in favor of the city, Sellers and others appealed. Reversed.

Moore Bros., for appellants. T. Moore, for appellee.

HOWARD, J. This was a proceeding on appeal from the board of county commissioners for the annexation of certain territory to the city of Greencastle. The cause was submitted to a jury, and there was a verdict and judgment for appellee. At the proper time, the court was requested by appellants to give its instructions to the jury in writing, and it is claimed that error that the court, of its own motion, gave its first instruction partly in writing and partly orally, by reading to the jury a section of the statute. It is provided in clause 5, § 533, Rev. St. 1881, that, "when the argument of the cause is concluded, the court shall give general instructions to the jury, which shall be in writing, and be numbered and signed by the judge, required by either party." Appellee contends that it is not a violation of this statute to read to the jury from the statutes of the state, as part of an instruction, while the remainder of the instruction is written; that such reading is not oral instruction. We think that the authorities are against the position taken by appellee. In *Butterff v. Shelton*, 79 Ind. 93, the court, in giving its instructions in writing, after proper request, first stated to the jury verbally that the statute defining malicious prosecution is as follows, and then read to the jury from the statutes. The court said in that case: "This verbal statement, including the reading connected with it, constituted nothing more than an oral instruction. It had none of the peculiar attributes of an instruction in writing. It did not put what the court communicated to the jury upon paper in such a way as to afford the defendant the opportunities for reserving an exception to which he was entitled. It left what was said by the court in a condition which would have required it to be affe-

wards written down by some one, in case either party had desired to bring it into the record." In *Smurr v. State*, 88 Ind. 304, after proper request, the court gave instructions in writing, and, the jury afterwards returning into court for further instructions, the court read to the jury certain sections of the statute. This court said, in deciding the question thus raised: "It matters not that such oral instruction may be a correct exposition of the law. It is a party's right to have the charge in writing, the instructions numbered and signed by the court; and if this right is withheld, and the verdict be against him, a new trial must be granted. *Meredith v. Crawford*, 34 Ind. 399; *Gray v. Stivers*, 38 Ind. 197; *Hardin v. Helton*, 50 Ind. 319; *Provinces v. Heaston*, 67 Ind. 482; *Davis v. Foster*, 68 Ind. 235. Where the request to instruct in writing is made, it is not complied with by reading from the statutes of the state or from other law books. This is not reducing the charge to writing, as required by the statute." It is, of course, proper to copy into an instruction selections from the statute or other authorities, and read them as a part of the written instructions. In *Bradway v. Waddell*, 95 Ind. 170, this court, in approving the rule as laid down in *Bottom v. Shelton* and *Smurr v. State*, cited above, that it was error to read from the statute or other book, and that all instructions, when requested at the proper time, must be written out in full, and filed with the court, said: "The ruling in these cases is well sustained, not only by our own cases, but everywhere else under statutes like ours. In *Hopt v. People*, 104 U. S. 631, the trial court indicated a place for the insertion of an extract from a book, and this was held error. \* \* \* The like ruling was made in *People v. Sanford*, 43 Cal. 29." See, also, *Littell v. State*, 33 N. E. Rep. 417, (decided by this court at the last term.)

But the appellee, while admitting that an error was committed by the court, intimates that such error did no harm; that the verdict of the jury would doubtless have been the same whether the section were read from the volume, or copied by the court, and read to them. To take this view, we should be able to know that the result reached by the jury and the court was correct. This we cannot know. There are numerous reasons given for a new trial, in addition to the one under consideration, but which cannot be considered because the evidence is not in the record. Neither are we able to say whether the instruction complained of did harm or not. Reading the law from a book might have made a different impression upon the jury from what it would if read with the other law presented in the written instructions. Besides, it should be sufficient for us to know that the statute expressly provides that instructions should be in writing, if requested, and also to know that this construction of the statute has been maintained by our decisions whenever the question has been presented. Courts, even more than others, should be held to strict obedience to the law. Moreover, good reason and the

plainest rights of litigants require that uniformity should prevail in the manner of presenting the law to the jury; that, if the instructions are at all in writing, they should be so altogether. The rule is not a technical or arbitrary one, but is one of the utmost consequence to the fair and impartial administration of justice. The judgment is reversed, with instructions to grant a new trial.

(134 Ind. 699)

## INDIANA IMP. CO. v. WAGNER et al.

(Supreme Court of Indiana. June 16, 1893.)

COUNTY COMMISSIONERS — PROCEEDING TO INCORPORATE TOWN — APPEAL — WHEN WILL LIE — FINAL ORDER.

Rev. St. 1881, § 3301, relating to the incorporation of towns, provides, inter alia, that the election to determine whether proposed territory shall be incorporated shall be reported to the "board of commissioners at their next session, who, if satisfied of the legality of such election, shall make an order declaring that said town has been incorporated by the name adopted, which order shall be conclusive of such incorporation in all suits by or against such corporation." Section 5772 provides that an appeal to the circuit court will lie from any decision of the board of commissioners. *Held*, that an order made by such commissioners for an election to be held to determine whether a town should be incorporated was not a final order, and that no appeal would lie therefrom to the circuit court.

Appeal from circuit court, Stenben county; S. A. Powers, Judge.

Proceeding by John H. Wagner and others before the board of county commissioners for the incorporation of certain territory as the town of Hudson. From an order of the circuit court dismissing an appeal from an order of the board directing an election to be held to determine whether such territory should be incorporated, the Indiana Improvement Company appeals. Affirmed.

Thos. S. Wickwire and Rose & Rose, for appellant. Woodhull & Brown and N. W. Gilbert, for appellees.

HOWARD, J. On the 5th day of September, 1892, at a regular session of the board of county commissioners of Stenben county, Ind., the appellees filed a petition for the incorporation of the town of Hudson, embracing certain territory in said county, described in said petition. At the same time were filed a map of the territory sought to be incorporated, a census of the inhabitants, notice and proof of notice of filing the petition. At the same time the appellant, by its attorneys, appeared specially, and moved to quash the proceedings for lack of notice and other reasons given in the motion, claiming that appellant was the owner of an interest in a part of the lands sought to be incorporated. Appellant's motion was overruled, and the board made a finding showing the regularity of all the steps taken by the petitioners, and thereupon entered the following order: "It is ordered that said territory be incorporated as a town, to be known as the town of Hudson, if the qualified voters thereof assent thereto; and it

is further ordered that an election be held at the hall of the Grand Army of the Republic, within said territory, between the hours of eight o'clock A. M. and six o'clock P. M. on the 4th day of October, 1892, of the qualified voters thereof, for the purpose of determining whether said territory shall be incorporated as a town, notice of which election shall be given by the county auditor by ten days' publication in the Hudson World, a weekly newspaper published in said territory." From this order the appellant appealed to the Steuben circuit court, where, on motion of the appellees, the appeal was dismissed. This ruling of the court is the only error assigned.

There was formerly some conflict in our decisions as to whether an appeal would lie from an order of a board of county commissioners incorporating or refusing to incorporate a town; but in the case of *Grusenmeyer v. City of Logansport*, 76 Ind. 549, that question was set at rest, and it is no longer a matter of doubt that such appeal does lie. But appellees say that the order appealed from in this case is not a final order, and that, therefore, no appeal lies. The order made by the commissioners was, in effect, that an election should be held by the inhabitants of the territory in question to determine whether the town should be incorporated. The statute (section 3301, Rev. St. 1881) provides, further, that such election shall be reported to the "board of commissioners at their next session, who, if satisfied of the legality of such election, shall make an order declaring that said town has been incorporated by the name adopted, which order shall be conclusive of such incorporation in all suits by or against such corporation." It appears, therefore, that the board still has jurisdiction of the matter until this last order is made. The section of the statute quoted expressly provides that before declaring that the town has been incorporated the board shall be satisfied of the legality of the election held for that purpose. The board therefore has yet a final judgment to render before the matter passes from its jurisdiction. It is possible that the board may conclude that such incorporation has not taken place. As a general rule, appeals will lie only from final judgments. The rule restricting appeals to cases where a final judgment has been rendered is necessary to prevent the division of a case into parts, and to prevent a multiplicity of actions. Cases must be decided as an entirety, and by one tribunal. *Elliott*, App. Proc. § 80, and following sections. This authority (section 85) says that the test to determine whether an order is one from which an appeal will lie is "whether it puts an end to the particular case as to all the parties and all the issues." Applying this test to the order in this case, from which the appeal was taken, it will appear that the appeal did not lie. That order did not put an end to the case, either as to the parties or the issues. It was a mere interlocutory order, leaving the main question still for the decision of the board. It is true that, if this order were in fact

erroneous, there might be ground for appealing finally from the decision of the board, but it could not itself be appealed from while the board still retained jurisdiction over the matters in issue. While section 5772, Rev. St. 1881, provides that an appeal to the circuit court will lie from any decision of the board of county commissioners, yet this decision must be final in its nature. *Hanna v. Board*, 2 Ind. 170; *Freshour v. Turnpike Co.*, 16 Ind. 463, 4 N. E. Rep. 157. In the latter case the court says: "A proceeding for the location of a highway remains within and subject to the jurisdiction of the board of commissioners until by some order or decision made by said board the proceeding is substantially ended." See, also, *McKee v. Gould*, 108 Ind. 107, 8 N. E. Rep. 72; *Neptune v. Taylor*, 108 Ind. 459, 8 N. E. Rep. 566; *Tomlinson v. Peters*, 120 Ind. 237, 21 N. E. Rep. 910; *Donalson v. Lawson*, 126 Ind. 169, 25 N. E. Rep. 903. In *State v. Arnold*, 38 Ind. 41, all the steps taken in this case for the incorporation of a town were taken, and, in addition, the election was held, but no report of the election was made to the board of county commissioners; and this court accordingly held that the town was not incorporated. We think that the order of the board of commissioners from which the appeal was taken in this case was not a final order, nor one from which an appeal could properly be taken, and therefore that the circuit court did not err in dismissing such appeal. The judgment is affirmed.

(50 Ohio St. 37)

# PROBASCO v. RAINE, Auditor.

(Supreme Court of Ohio. June 13, 1893.)

## TAXATION—VALIDITY OF STATUTE—PUBLIC POLICY—FEES OF AUDITOR.

1. If a statute is constitutional it is valid and cannot be set aside by a court as being against public policy or natural right. There can be no public policy or right in conflict with a constitutional statute.

2. The fee of 4 per centum to county auditors, provided for by section 1071, Rev. St., does not disqualify such auditors from performing the duties and exercising the powers imposed on them by sections 2781 and 2782, Rev. St. (Syllabus by the Court.)

Error to superior court of Cincinnati.

Action by Henry Probasco, executor and trustee, against Frederick Raine, county auditor, for an injunction. Defendant had judgment, and plaintiff brings error. Reversed.

The other facts fully appear in the following statement by BURKET, J.:

On June 30, 1887, plaintiff in error, also plaintiff below, filed his petition in the superior court of Cincinnati against the defendant in error, also defendant below, as auditor of Hamilton county, seeking to enjoin said auditor from placing upon the tax duplicate, for taxation for the year 1887, the sum of \$100,000 of the stocks of the state, issued under the act of April 8, 1856, held by plaintiff, for the years 1841 to 1886, both inclusive, which stocks plaintiff claimed were exempt from

taxation by virtue of Act Feb. 4, 1825, (23 Ohio Laws, p. 55; Chase's St. p. 1472), and Act of April 8, 1856, (53 Ohio Laws, p. 112.) Defendant, in his answer, admits that he is about to place said stocks on the duplicate for taxation for the years aforesaid, and avers that said stocks are not exempt from taxation, and that they have been omitted for said years. The case was reserved to the general term of the superior court, and was there tried upon an agreed statement of facts, and judgment rendered for defendant, at costs of plaintiff. By the judgment of the court the auditor was ordered to proceed and place said stocks on the duplicate for taxation for each of said years, including in said assessment for the year 1886 a penalty of 50 per centum. To all of which plaintiff excepted. Plaintiff filed his motion for a new trial, which was overruled, and exceptions taken. A bill of exceptions was filed, bringing into the record the said agreed statement of facts, which is as follows:

"For the purpose of the trial of this cause the parties to this action agree upon the following as a full and complete statement of the facts herein, and also that, in so far as the pleadings herein may vary therefrom, the said pleadings may be considered as amended, or may be amended at any time, so as to conform thereto.

"(1) That Julia A. Probasco died prior to the commencement of this action, and that for more than ten (10) years immediately preceding the time of her death she was a resident of Clifton, Millcreek township, Hamilton county, Ohio.

"(2) That, on the day preceding the second Monday in April in each of the following years, Henry Probasco, as trustee and executor of the estate of said Julia A. Probasco, (the said Henry Probasco having been during all of said years a resident of Clifton, Millcreek township, Hamilton county, Ohio,) was the owner and holder of certificates of indebtedness of the state of Ohio, commonly known as 'canal stocks,' in the amounts of the par value thereof, as follows, viz.: 1881, \$100,000; 1882, \$100,000; 1883, \$100,000; 1884, \$100,000; 1885, \$100,000; 1886, \$100,000; none of which were returned for taxation nor listed upon the blanks left by the assessor in each of said years for his returns.

"(3) That said certificates of indebtedness were issued under and by virtue of an act of the legislature of Ohio passed April 8, 1856, (53 Ohio Laws, p. 112.) entitled 'An act to provide for the payment of the public debt of the state, due January 1, 1857, and for the payment of the interest on the public debt.' And it is agreed that said certificates were in the form of the blank certificate attached to the agreed statement of facts in case No. 42,618 of this court, marked 'Exhibit A. A. Gardner, Jr., Clerk of Sinking Fund Commissioners,' and which blank form, it is agreed, may be copied into the record herein, as part thereof.

"(4) That the holding by plaintiff of certificates of indebtedness issued as aforesaid, and the redemption thereof, as shown on the books of the sinking fund

commissioners of the state of Ohio, were as follows, viz.:

Oct. 24, 1865, certificate No. 1635.....	\$25,000 00
Oct. 24, 1866, " " " 1637.....	5,000 00
Jan. 24, 1866, " " " 1675 to 1679, incl.....	70,000 00
Making a total of.....	\$100,000 00

"That on the 25th day of January, 1887, all of said certificates of indebtedness were fully redeemed by the sinking fund commissioners.

"(5) That there was no change in the ownership of said certificates from the date of the first ownership thereof by plaintiff, save as above set forth, and that plaintiff was never otherwise the owner or holder of any of the said certificates of indebtedness, or of any other certificates of indebtedness of the state of Ohio.

"(6) That the certificates issued under the act of 1856, above referred to, bore the same rate of interest as those issued under the acts of 1825 and 1826, referred to in the pleadings, to wit, six per centum per annum.

"(7) That prior to the commencement of this action the defendant, Frederick Raine, as auditor of Hamilton county, Ohio, was about to charge plaintiff, on the tax lists and duplicates of said county, with the proper taxes on the said investments in said stock or bonds, as set forth in section 2 of this agreed statement of facts, and would have done so except for the proceedings herein.

"(8) That, as to all other property owned by plaintiff subject to taxation during each of said years, the same has been properly listed for taxation and the taxes paid thereon by plaintiff.

"(9) That none of said bonds or the state stocks issued under the said act of 1856, nor the investments therein, have ever, as a matter of fact, been listed for taxation, or subjected thereto by state authority; but the question as to whether the law required the same to be listed and taxed, under all the circumstances, is to be passed upon herein.

"(10) The amount of the indebtedness under the acts of 1825 and 1826 was, in 1865, \$2,334,000, and remained then outstanding at the date of the passage of the act of April 8, 1856. The income of said bonds was distributed and paid over by the executor and trustee to the beneficiary as the same was received.

"Exhibit A. Provisions of the constitution of Ohio, adopted A. D. 1851: 'Art. 7. The faith of the state being pledged for the payment of its public debt, in order to provide therefor, there shall be created a sinking fund which shall be sufficient to pay the accruing interest on such debt, and annually to reduce the principal thereof by a sum not less than one hundred thousand dollars, increased yearly, and each and every year, by compounding at the rate of six per cent. per annum. Art. 8. The auditor of state, secretary of state, and attorney general are hereby created a board of commissioners, to be styled 'The Commissioners of the Sinking Fund.'"

"No. 1,637. \$5,000. State of Ohio Canal Stock. Columbus, Ohio, Oct. 24, 1865. Be it known the state of Ohio owes to Mrs. Julia A. Probasco, or her assigns, the sum of five thousand dollars, bearing interest from the first day of July, 1865, inclusively, at the rate of six per cent. per annum, payable half yearly, on the first days of January and July, in the city of New York, being stock created in pursuance of an act of the general assembly of the state of Ohio, passed April 8th, 1856, the principal of which is reimbursable in the city of New York, at the pleasure of the state, after the 31st day of December, 1886, which debt is recorded in this office, and is transferable only by appearance in person or by attorney, according to law, upon the books of the commissioners of the sinking fund. In testimony whereof, this certificate hath been signed at the office of the board of commissioners of the sinking fund, at Columbus, aforesaid, by the president thereof, countersigned by the secretary of state, who hath also registered and certified the same, and affixed the great seal of the state thereto, and hath been certified to be valid and in due form by the attorney general of the state. James H. Goodman, Auditor of State and President. Countersigned and registered. Wm. Henry Smith. [Great Seal of the State of Ohio.]"

"Office of the Attorney General. Columbus, Ohio, Oct. 24, 1865. It is hereby certified that this obligation is in due form of law, and valid. C. N. Olds, Attorney General."

Jordan & Jordan, Perry & Jenney, R. A. Harrison, Paxton & Warrington, and Ramsey, Maxwell & Ramsey, for plaintiff in error. Spiegel, Bromwell & Foraker, County Solicitors, W. L. Avery, W. W. Boynton, and L. W. Goss, for defendant in error.

BURKET, J., (after stating the facts.) The sections of the Revised Statutes under which the auditor claims the authority to act in placing omitted property on the duplicate for taxation are sections 2781 and 2782. The validity and scope of these two sections have been determined by this court in former decisions. *Gager v. Prout*, 48 Ohio St. 89, 26 N. E. Rep. 1018; *Ratterman v. Ingalls*, 48 Ohio St. 468, 28 N. E. Rep. 168; *State v. Crites*, 48 Ohio St. 142, 26 N. E. Rep. 1052. But the point is now made that as the auditor receives a fee of 4 per cent., under section 1071, Rev. St., he is thereby disqualified from acting in the case. The fees of the auditor in Hamilton county are regulated by a statute applicable to Hamilton county alone, and are somewhat less than in the other counties of the state, but the principle involved is the same. The question is a very important one, and has been differently decided by different courts in this state, but this is the first time that the question is made here. We have carefully considered, not only the arguments presented by counsel in this case, but also the published opinions of the lower courts on the question; and we are clear in the opinion that the fees provided for in section

1071 do not disqualify the auditor from performing his duties under said sections 2781 and 2782. Whatever may be the rule elsewhere, it is clear that in this state the validity of an act passed by the legislature must be tested alone by the constitution, and that the courts have no right or power to nullify a statute upon the ground that it is against natural justice or public policy. When the legislature is silent the courts may declare the public policy, and mark out the lines of natural justice; but when the legislature has spoken, within the powers conferred by the constitution, its duly-enacted statutes form the public policy, and prescribe the rights of the people, and such statutes must be enforced, and not nullified, by the judicial and executive departments of the state. When the legislature, within the powers conferred by the constitution, has declared the public policy, and fixed the rights of the people by statute, the courts cannot declare a different policy, or fix different rights. In this regard the legislature is supreme, and the presumption is that it will do no wrong, and will pass no unjust laws. The remedy, if any is needed, is with the people, and not with the courts.

Section 2, art. 12, of the constitution, requires the legislature to pass laws taxing, by a uniform rule, all property in the state, except such as is therein exempted. This has been construed by this court to impose upon the legislature the duty of passing laws which will secure equality in the burden of taxation. *Bank v. Hines*, 8 Ohio St. 1. The result to be attained by the laws to be passed under this section is equal taxation, but the means by which that end shall be attained are left to the judgment and sound discretion of the legislature, acting within the powers conferred by the constitution. To have equality in taxation, all property must be brought upon the duplicate. Some officer must be authorized and empowered to cause all property to be listed for taxation. Such officer must be paid for his services, either by fees or salary. The legislature has full power, under the constitution, to say what officer shall perform such duties, and in what manner he shall be paid. It has enacted that such duties shall be performed by the auditor, and that he shall be paid as provided in section 1071. In the opinion of the legislature this is a proper means to attain, in part at least, equal taxation. It matters not whether the auditor acts judicially or ministerially in the discharge of his duties. The legislature is free to employ such means as in its opinion shall be most effective, whether they be judicial or ministerial, or both. The objection urged in argument that a man cannot be a judge in his own case, is a fallacy. The auditor has no case to be judged; but, on the contrary, he is the taxing officer before whom other parties are cited to appear and show cause why they should not bear their equal burden of taxation. His actions in the premises are subject to review in the courts, and thereby due process of law is had. Sections 2781 and 2782 are not in conflict with any provision or inhibition of the constitution, but seem to be clearly

authorized by section 2, art. 12, of that instrument. The auditor acts under oath, and good faith and an honest purpose in the discharge of his official duties are to be presumed. A probate judge acts judicially in the appointment of guardians and administrators, and receives a fee for each appointment, and yet such fee does not disqualify him from acting in the premises. A justice of the peace acts judicially, and is paid therefor by fees collected from litigants before him; and, while his mind may be biased in particular cases, it cannot be claimed that he is thereby disqualified from discharging his judicial duties. A judge who is a large taxpayer in his county or city is not thereby disqualified from sitting in judgment in cases against his county or city; and in such case a resident taxpayer in such county or city is not, by reason thereof, disqualified from sitting as a juror in the trial of such case. *Commissioners v. Lytle*, 3 Ohio, 289. The rule insisted upon in the case by plaintiff, as to the interest of the auditor, would disqualify every member of this court from sitting as a judge in the decision of this case. Almost every officer in this state is more or less, directly or indirectly, interested in the result of the duties by him performed, whether ministerial or judicial; but such interest does not disqualify him from performing his official duties, unless the legislature has by statute so provided. The case of *Gregory v. Railroad Co.*, 4 Ohio St. 675, cited and relied upon by counsel, fully sustains this view of the powers of the legislature, and the limitations of the powers of the judiciary. In that case the legislature, by statute, declared the policy of the state to be that when a judge should be interested in the subject-matter of the case he should not sit therein, and that the case should be transferred to an adjoining county for trial and decision. The two judges in that case disregarded that provision of the statute, and sat as judges in a case in which they had an interest, and the judgment was reversed for the reason that the judges were disqualified by statute. The court say on page 679 that the judges should have refused to sit in the case, and should have made known their interest at the earliest moment, so that the case might, under the statute, be transferred to an adjoining county. The case was reversed because the judges refused to follow the policy of the state, as declared by the statute, and not because of some public policy invented by the court. In this case the auditor has obeyed the statute, and we are asked to reverse the judgment, and adopt a policy different from that adopted by the legislature. This we cannot do. The action of the auditor is not final, so as to cut off further inquiry, but the whole case may be gone into anew by proper proceedings in court, as was done in this case, and therefore no great harm is likely to result to those who have not made a false return of their property. We therefore hold that the auditor should be sustained in exercising the powers and performing the duties imposed by sections 2781 and 2782.

But this does not dispose of the case. For myself, I think that these stocks are ex-

pressly exempted from taxation by the act of April 8, 1856, taken in connection with the act of February 4, 1825, and that the act of 1856 is constitutional. But, as the court is divided upon this question the point is left undecided. From the agreed statement of facts it appears that these stocks were registered, and therefore could not be concealed; that such stocks had never been taxed by state authority; and that there was good reason for the belief that the stocks were not taxable; and therefore the court is unanimous in the opinion that the returns for taxation for the years 1881 to 1886, both inclusive, were not false returns, within the meaning of that term, as defined by this court in *Ratterman v. Ingalls*, 48 Ohio St. 468, 28 N. E. Rep. 168. It therefore follows that the judgment of the superior court of Cincinnati, in general term, is erroneous, and that the judgment should be reversed, and judgment entered for plaintiff, as prayed for in his petition. Judgment accordingly.

(159 Mass. 348)

#### DEVINE v. BOSTON & A. R. CO.

(Supreme Judicial Court of Massachusetts.  
Suffolk. June 21, 1893.)

#### INJURY TO RAILROAD EMPLOYE — NEGLIGENCE OF PERSON IN CHARGE OF TRAIN — CONFLICTING EVIDENCE.

1. In an action for injuries caused by the violent bumping of a car, on which plaintiff was working, against a bunting post, a witness testified that "the car struck the post because there had been too much momentum for the space there was to stop in;" that he thought there would be a bump when he saw the train approaching the post; that he saw the brakeman putting on the brakes, and winding as hard as he could, and that he expected the car would strike before it did, as it was going faster than it should. He further testified that the supposition was that the brakeman would stop the cars before they reached the post, and that, if the brakeman had put the brake on earlier, it would have stopped them. There was also evidence that the conductor failed to give the stop signal to the engineer at the proper time. *Held*, that a finding that the accident was due to the negligence of the conductor or engineer, rather than of the brakeman, plaintiff's fellow servant, would not be disturbed on appeal.

2. Where a conductor had charge of a train, and, with intent to put two cars belonging thereto in a certain place, carelessly directed how the engine should operate against them, and they were kicked with too great force against a bunting post, and plaintiff was injured while cleaning one of the cars, the negligence was that of a person in charge of a train, within the statute, even though, at the moment when the cars struck the post, they were separated.

Exceptions from superior court, Suffolk county; Edgar J. Sherman, Judge.

Action by Delta Devine against the Boston & Albany Railroad Company to recover damages for personal injuries received by her while engaged in cleaning cars for defendant. There was a judgment for plaintiff, and defendant excepted. Exceptions overruled.

James A. McGeough, for plaintiff. Samuel Hoar, for defendant.

MORTON, J. The jury were instructed in substance, that, if the accident to the plaintiff was due to the negligence of the brakeman Emery in failing to stop the cars, then the plaintiff could not recover; and that, in order to entitle her to recover, it must appear that the accident was due to the negligence of the engineer Lancaster, or that of the conductor O'Brien. The jury returned a verdict for the plaintiff, and must therefore have found that the accident was not due to the negligence of Emery, and was due to the negligence of the engineer or conductor. There was evidence from which the jury was clearly justified in finding that the car in which the plaintiff was struck the bunting post with unusual force, and so as to throw the plaintiff down, and cause the injury of which she complains. The plaintiff testified "that, when they hit the bunting post, the cars went right up against each other; the two ends next each other went right up, and then fell down on the track again;" and she was thrown over the seat. It is true there was testimony tending quite strongly to show that the collision was not as violent as she described it, but that was a question for the jury. Mr. Barnes, a division superintendent on the defendant's railroad, and called as a witness by the defendant, testified, on direct examination, "that the car struck the post because there had been too much momentum for the space there was to stop in;" and, on cross-examination, "that he expected there would be a bump when he saw the train approaching the post." And Emery, the brakeman, testified that he was suspended from his duty as brakeman for two weeks immediately after this accident, from which the jury might reasonably infer that something in the nature of what the plaintiff and Barnes described actually took place. The defendant contends, however, that, on the whole evidence, the jury were not justified in finding that the accident was not due to the negligence of Emery, and was due to the negligence of the engineer or conductor; but, in addition to the testimony of Barnes that has been already referred to, he further testified that he saw the brakeman putting on the brake, and he seemed to be winding it up as hard as he could; that he expected the car would strike before it struck; and that it was going faster than it should. On cross-examination, as already observed, he said he expected there would be a bump when he saw the train approaching the post. On the recross of the redirect examination, he said "that the supposition was that the brakeman would stop them before they reached the post; but he thought the momentum was such that he could not, and that he was one car length from the post before he applied the brake." On a still further redirect examination, he said that, "if the brakeman had put the brake on earlier, it would have stopped them; that the brakeman should begin to wind up the hand brake at a suitable distance to stop the cars before they got to the end of the track, and his judgment was to determine where he should begin." The jury, however, may have thought that the earlier portion

of the testimony of the witness was more to be relied on than the later. If that were so, then they were justified in finding (if they did so find) that the accident was due to the giving by the engineer of too great momentum to the cars for the space they were to stop in.

As to the conductor O'Brien, there was testimony tending to show that, after the train had come in, and the passengers had got out, he took charge of it, for the purpose of distributing the cars of which it was made up onto the different tracks, and directed where they should be put. He gave the stop motion, as he himself testified, to the first three cars that were detached from the train. He also testified that he gave the kick motion for the two that struck the bunting post; but he does not seem to remember whether he gave the stop motion for them that morning or not. Nobody appears to remember who gave the stop motion that morning for these two cars. It appears from the testimony of the engineer and conductor that the stop motion was usually given by the conductor. It also appears from the testimony of the conductor that, when the two cars were kicked on to the stub track, he stood at the switch. It is not unreasonable to suppose that that was a place from which the stop motion could be easily given. It is said that the switchman sometimes gave the motion, but naturally he would not give it with the conductor at the switch. There was also testimony on the part of some of defendant's witnesses that nothing out of the usual way was done that morning. We think, under all the circumstances, it would not have been unwarrantable for the jury to infer that the stop motion, on the morning in question, was given by the conductor. If so, and if the jury also found, as Barnes testified, that the cars struck the post because there was too much momentum for the space there was to stop in, and that the momentum was such that the brakeman could not stop them, then the jury might also find that the excessive motion was due either to the negligence of the engineer in giving too great speed to the cars or to the failure of the conductor to give the stop motion soon enough. In either case the defendant would be liable.

The defendant excepted, in the language of its counsel, to so much of the charge as "ruled that the two cars that were actually separated from the engine at the time they hit the post were a 'train,' within the meaning of the statute." We do not understand the court to have ruled so. What the court did say, in substance, was that if O'Brien had charge of the train, and the purpose was to put these cars where they were finally placed, and he carelessly directed how the engine should operate against them, and they were sent with too much force, so that the brakeman could not stop them, and that was the cause of the injury, then the accident was due to the negligence of a person in charge of a train, even though, at the moment when the cars struck the post, they were separated. So construed, the instruction was correct.

The learned counsel for the defendant



has failed to satisfy us that his client was injured by instructions requested by the plaintiff which the court may have supposed it gave, but which do not appear, in fact, to have been given to the jury, or read or stated in its hearing. A majority of the court is of opinion that the entry must be, exceptions overruled; and it is so ordered.

159 Mass. 397)

### THAXTER v. SPRAGUE.

(Supreme Judicial Court of Massachusetts.  
Suffolk. June 22, 1893.)

#### SPECIFIC PERFORMANCE—PURCHASE OF LAND— EVIDENCE.

Defendant sold a house and lot in April to plaintiff, for \$1,700, \$50 being paid down, and \$25 to be paid each month. It was stipulated that \$200 be paid by July 10th, when plaintiff was to receive a deed and give a purchase-money mortgage, and that if plaintiff did not call for a deed, or care to complete the purchase, defendant should release her from further payments, and accept the \$200 for rent from April to October. Defendant afterwards waived the requirement of \$200 by July 10th, but by October plaintiff had paid that amount, and requested a deed to be made to her father-in-law, who did not appear to be privy to the arrangement. Plaintiff made no more payments, but about a month later, she wrote two letters asking why a deed had not been sent, the receipt of which letters by defendant did not appear. There was evidence that defendant notified plaintiff in January that she should take possession if what was due was not paid, and that she did so. Held that, as plaintiff neither offered to perform the contract on her part nor showed that she was able to do so, she was not entitled to specific performance.

Appeal from superior court, Suffolk county; P. Emory Aldrich, Judge.

Bill by Mary M. Thaxter against Maria E. Sprague for specific performance of a contract for the sale by defendant of a house and lot. From a decree dismissing the bill, plaintiff appeals. Bill dismissed.

W. M. Stockbridge, for appellant. Melvin O. Adams and Henry V. Cunningham, for appellee.

MORTON, J. This is a bill for specific performance. The plaintiff is not entitled to the relief which she seeks as a matter of strict right. The application is addressed to the discretion of the court, which, in considering it, will take into account all the circumstances. *Lee v. Kirby*, 104 Mass. 420; *Curran v. Water-Power Co.*, 116 Mass. 90; *Wolson v. Fenno*, 129 Mass. 405; *Railroad Corp. v. Babcock*, 6 Mete. (Mass.) 352. The contract on which the plaintiff relies was dated April 26, 1887, and provided for the payment of \$50 down by her, and \$25 per month till the whole amount of \$1,700 was paid, with interest and taxes. It also stipulated that \$200, exclusive of interest, was to be paid by July 10th, when the defendant was to give the plaintiff a deed, and take back a mortgage for the balance. There was also the further stipulation that if the plaintiff did not call for a deed, or care to continue the purchase, the defendant was to release her from future payments, and accept the \$200 for the

rent of the premises for the season, which was from April to October. The plaintiff paid the \$50 down, but, being afraid that she would not be able to pay the \$200 by July 10th, it was agreed that the defendant would be satisfied with the \$25 per month till the \$200 was paid. In October the plaintiff had paid the \$200, and, as she testified, she then requested the defendant to make a deed to her father-in-law, one Joshua Thaxter, agreeing that the respondent should have a mortgage back to secure the balance of the purchase money. She made no other request for a deed than this, and it did not appear that her father-in-law was privy to this arrangement, or that any mortgage was ever prepared. The plaintiff further testified that the defendant agreed to make the deed in the course of the following week, but did not. It appeared that after October the plaintiff did not make any payment, and that she did not pay the taxes, and the premises were advertised for sale by the collector. She wrote to the defendant then, asking why she had not sent the deed; the first time about a month after the interview in October, and the other about two weeks later, neither of which letters was there any evidence that the defendant received. After writing the second letter, she did nothing more. The plaintiff testified that she expended \$200 in permanent alterations and improvements on the premises, but it appeared that she used the premises for boarders, and that the alterations and improvements were made for their accommodation. There was evidence tending to show that the defendant caused notice to be given to the plaintiff in February, 1888, that, unless she paid what was due, she should take possession on the 1st of March. A statement of the amount due was subsequently given to the plaintiff, but she failed to pay it, and the defendant took possession of the premises. The bill was dismissed, without prejudice, but with costs.

It is possible that the judge who heard the case found as a fact that the plaintiff had decided not to continue with the purchase, and that the real motive in claiming the right to go on with the contract, after receiving the notice which she did from the defendant in February, was to secure the premises for another season. We cannot say that such a finding would have been unwarranted. Her failure after October to pay any of the monthly installments, or to do anything beyond writing the two letters, tends to support such a conclusion. But, in addition to this, we think it appears that there was a continuing breach of the contract by the plaintiff after October, and that there was no default on the part of the defendant. She has not only not offered to perform since then, but she has not shown that she was able to perform. In order to entitle her to a decree for specific performance, it must appear that she has performed, or been able and willing to perform, her part of the contract, and that the defendant has neglected or refused to perform her part of it. *Irvin v. Gregory*, 13 Gray, 215. The offer contained in the bill is not suffi-

cient. *Ely v. McKay*, 12 Allen, 323. Her request to the defendant to make a deed to her father-in-law, coupled with an agreement to make a mortgage back, was not an offer of performance on her part of the contract which she seeks to enforce, even though the defendant may have been ready at the time to make a deed to take back a mortgage from him. *Tinney v. Ashley*, 15 Pick. 546; *Gannett v. Albree*, 103 Mass. 372. Moreover, it does not appear that he was ready to take a deed and give back a mortgage. She fails, therefore, to show that she has performed, or been able to perform, the contract. We think the bill should be dismissed absolutely, with costs; and it is so ordered.

(159 Mass. 424)

### JOHNSON v. WHITON.

(Supreme Judicial Court of Massachusetts.  
Suffolk. June 23, 1893.)

#### WILL—CONSTRUCTION—TITLE OF DEVISEE—LIMITATION ON POWER OF ALIENATION.

A will provided that, "After the decease of all my children, I give, devise, and bequeath to my granddaughter W. and her heirs on her father's side one-third part of all my estate, both real and personal, and to my other grandchildren and their heirs, respectively, the remainder, to be divided in equal parts among them." *Held*, that the words of limitation, "and her heirs on her father's side," must be rejected, for want of power in testator to impose such qualification on the fee of W., and that, on the death of testator's children, she could convey a fee-simple absolute.

Appeal from superior court, Suffolk county.

Action by Albin Johnson against Royal Whiton to recover back money paid on a contract of purchase of certain real estate, on the ground that defendant was unable to convey a good title. From a judgment for defendant, plaintiff appeals. Affirmed.

William P. Fowler, for appellant.  
George M. Reed, for appellee.

HOLMES, J. This is an action to recover a deposit paid under an agreement to purchase land. The land in question passed under the seventh clause of the will of Royal Whiton to his five grandchildren, and a deed executed by them was tendered to the plaintiff, but was refused, on the ground that one of the grandchildren, Sarah A. Whiton, could not convey a fee-simple absolute, and this action is brought to try the question. The clause of the will referred to is as follows: "After the decease of all my children, I give, devise, and bequeath to my granddaughter Sarah A. Whiton and her heirs on her father's side one-third part of all my estate, both real and personal, and to my other grandchildren and their heirs, respectively, the remainder, to be divided in equal parts between them."

We see no room for doubt that the legal title passed by the foregoing clause. We think it equally plain that the words "and her heirs on her father's side" are words of limitation, and not words of purchase. The only serious question is whether the effect of them was to give

Sarah A. Whiton only a qualified and whether, by reason of the qualification, she is unable to convey a fee simple. We do not think that it would be probable to follow the decisions to be found in *Preston on Estates*, p. 449 et seq., *Challis on Real Property*, c. 19. By the law, to take land by descent a man must be of the blood of the first purchaser, (*Litt. 12a*; 2 Bl. Comm. 220;) and by *S. & 4 Wm. IV. c. 106, § 2*, descent is traced from the purchaser. For instance, if land had been acquired in fee simple by Sarah A. Whiton's father, it could not have descended from her to her heirs on her father's side. It was no great stretch to allow a limitation in the first instance to Sarah of a fee with the same descending quality that it would have had in the case supposed. *Challis, Real Prop.* 222, 224; *Co. Litt. 220b*; *Blake v. Hyatt*, L. R. 11 Ir. 284; 1 *Prest. Est.* 474. See *22 & 23 Vict. c. 35, § 19*. Especially is true if, as Mr. Challis argues, the grant under such a limitation could convey a fee simple, just as he or she could have done if the estate actually had descended from the father. But our statute of descent looks no further than the person himself who died seised of or entitled to the estate. *Pub. St. c. 125*. The analogy which lies at the foundation of the argument for the possibility of such limitations is wanting. A man cannot create a new kind of inheritance. *Co. Litt. Com. Dig. "Estates by Grant."* A. These and other authorities show, that, except in the case of a grant by king, if the words "on her father's side" do not effect the purpose intended, they are to be rejected, leaving the estate a fee simple, which was Mr. Washburn's opinion. 1 *Washb. Real Prop.* 61. Certainly it would seem that in this commonwealth an estate descending only to heirs on her father's side was a new kind of inheritance.

What we have to consider, however, is not the question of descent, but that of alienability; and that question brings further consideration into view. It would be most unfortunate and unexpected if it should be discovered at this late day that it was possible to impose such a qualification upon a fee, and to put it out of the power of the owners to give a clear title for generations. In the more familiar case of an estate tail, the legislature has acted, and the statute has been carried to the furthest verge by construction. *Pub. St. c. 120, § 15*; *Coombs v. Anderson*, 183 Mass. 376. It is not too much to say that it would be plainly contrary to the policy of the law of Massachusetts to deny the power of Sarah A. Whiton to convey an unqualified fee.

Judgment for defendant.

(159 Mass.

### DOUGLAS v. STETSON.

(Supreme Judicial Court of Massachusetts.  
Suffolk. June 26, 1893.)

#### CHATTEL MORTGAGE—PAYMENT—REISSUE—VALIDITY.

Where plaintiff borrows money of defendant on a note secured by chattel mort-

and, on maturity of the note, pays the same, and receives back the note and mortgage, which are not canceled, and thereafter borrows a second, but smaller, sum of money, and redelivers to the lender the old note and mortgage, the latter is not available as security for the debt.

Report from superior court, Suffolk county; Edgar J. Sherman, Judge.

Action by Elisha Douglas against John Stetson for conversion. Reported to supreme judicial court. Judgment for plaintiff.

C. E. Washburn, for plaintiff. Raymond R. Gilman and William H. Mitchell, for defendant.

MORTON, J. By the mortgage of March 8, 1889, the defendant acquired a defeasible title to the goods, subject to be defeated and revested in the mortgagors upon performance of the conditions of the mortgage. *Weeks v. Baker*, 152 Mass. 20, 24 N. E. Rep. 905; *Landon v. Emmons*, 97 Mass. 37, and cases cited. The payment by the mortgagors, without anything more, of the sum secured by the mortgage, operated of itself to discharge the mortgage; and the mortgagors were thereupon in possession of the goods as of their former title. *Joslyn v. Wyman*, 5 Allen, 62; *Merrill v. Chase*, 3 Allen, 339; *Clafin v. Godfrey*, 21 Pick. 1; *Parks v. Hall*, 2 Pick. 210, 211; *Bank v. Pratt*, 31 Me. 501; *Mead v. York*, 6 N. Y. 451. The defendant relies upon a release to him by the plaintiff of the note for a new loan accompanied by a redelivery of the mortgage, with the agreement that all the rights, privileges, and powers contained in the mortgage deed should be revived for the purpose of securing him for the loan thus made to the plaintiff. The question is whether this transaction vested the title to the goods in the defendant, it not being claimed that there ever was any delivering of them to him, or that he acquired any right to or authority over them except by this transaction. We do not think it did. The release of the note for a valuable consideration certainly did not convey to the defendant a title, defeasible or otherwise, to the goods. *Merrill v. Chase*, supra. Did the redelivery of the mortgage deed, under the circumstances and with the agreement set forth? It is said in *Rolle*, Abr. "Faits," note 3, p. 26, that "if a man seal and deliver a deed, and then the seal is torn off from such deed, if he seals and delivers it again, though the same writing remains, that is still a good deed;" and, again, in *Com. Dig.* "Fait," B 5, that "if a deed be canceled, and afterwards be executed and delivered de novo, it shall be good." It is evident that the authors were speaking of the delivery of a deed as originally drawn for the purpose of carrying out the agreement as originally made. This is not such a case. It is an attempt to attach a new debt, arising out of a new transaction, to a mortgage which has been paid, and is no longer a subsisting security, but which, it is claimed, the parties have revived by agreeing that it should be security for a new debt. *Joslyn v. Wyman*, supra; *Merrill v. Chase*, supra. The purpose of a written mortgage is to state in all essential par-

ticulars the contract between the parties to it. We think the original mortgage departs too widely from the transaction in which it was sought afterwards to use it to be made available as security for the loan then made. The parties are not the same. The original mortgage was made and executed by the plaintiff and his wife. The covenants contained in it were their covenants. The note secured by it was their note. The conditions related to the amount then borrowed, which was different from that borrowed by the plaintiff afterwards, and provided that the sum then borrowed should be paid within three months from the date of the mortgage, and that, upon its payment, the note signed by the plaintiff and his wife should be void. In order that the original mortgage deed should correspond with the transaction in which the defendant now seeks to avail himself of it as security, it would be necessary to rewrite it in many essential particulars. We must take the instrument as it is, and we do not think the defendant can avail himself of it as security for the debt to which he seeks to apply it. *Joslyn v. Wyman*, supra; *Merrill v. Chase*, supra; *Mead v. York*, supra. The defendant has proceeded on the footing of a mortgagee, and by virtue of the right and powers supposed to be vested in him as mortgagee. The instrument being in operation as a mortgage, the sale, which was against the plaintiff's objection, and without his consent, was wrongful. The case might stand differently if the plaintiff were seeking the aid of the court as a court of equity to compel the defendant to cancel and discharge or redeliver the mortgage. *Upton v. Bank*, 120 Mass. 153; *Joslyn v. Wyman*, supra. This, however, is an action at law. A majority of the court is of opinion that the entries should be, verdict set aside, judgment for plaintiff for \$259.82, and interest from date of writ; and it is so ordered.

(159 Mass. 427)

#### NORMILE et al. v. GILL.

(Supreme Judicial Court of Massachusetts.  
Suffolk. June 24, 1893.)

#### PARTY WALLS—OPENINGS FOR WINDOWS.

The owner of land, in building a party wall, partly on his own land, and partly on that of an adjoining owner, has no right, against objections of the adjoining owner, to leave openings for windows therein, to be used until such time as the adjoining owner shall build.

Appeal from superior court, Suffolk county; John W. Hammond, Judge.

Bill by Margaret E. Normile and others against Hugh Gill for an injunction. Decree for complainants. Defendant appeals. Affirmed.

Sherman L. Whipple, for appellant. James R. Murphy, for appellees.

ALLEN, J. The principal question is whether the owner of land, in building a party wall, partly upon his own land, and partly upon that lying adjacent, has a

right, against the objection of the adjacent owner, to leave openings in the wall for windows, to be used for his own convenience until such time as his neighbor shall build upon the adjacent land. We are of opinion that he has no such right. The ownership of the land under a party wall remains in the several owners, subject to the easement of supporting the building upon each lot by means of the common wall. This easement is limited to what is necessary for that purpose. The maintenance of windows by one owner, against the objection of the other, is inconsistent with the title and rights of the latter. By usage, the words "party wall" and "partition wall" have come to mean a solid wall. Various reasons of inconvenience or peril have been assigned for the doctrine, but they are all referable, we think, to the general doctrine that the easement is only a limited one, and it is not to be extended so as to include rights and privileges not belonging to the character of a wall which is to be owned in common, and in which the rights of each owner are equal. This question has not heretofore been determined in this state, though other questions relating to party walls have arisen. *Vinton v. Greene*, 158 Mass. —, 33 N. E. Rep. 607; *Everett v. Edwards*, 149 Mass. 588, 22 N. E. Rep. 52; *Matthews v. Dixey*, 149 Mass. 595, 22 N. E. Rep. 61; *Quinn v. Morse*, 130 Mass. 317; *Phillips v. Bordman*, 4 Allen, 147. The decisions in these cases are not directly applicable, but in other states the almost uniform current of decision has been against the right to leave such openings in party walls. *Partridge v. Gilbert*, 15 N. Y. 601, 614; *Brooks v. Curtis*, 60 N. Y. 639; *St. John v. Sweeney*, 59 How. Pr. 175; *Traute v. White*, (N. J. Ch.) 19 Atl. Rep. 196; *Vollmer's Appeal*, 61 Pa. St. 118; *Milne's Appeal*, 81 Pa. St. 54; *Ingals v. Plamondon*, 75 Ill. 118; *Gibson v. Holden*, 115 Ill. 199, 3 N. E. Rep. 282; *Bloch v. Isham*, 28 Ind. 37; *Sullivan v. Graffort*, 35 Iowa, 531; *Graves v. Smith*, 87 Ala. 450, 6 South. Rep. 308; *Dauenhauer v. Devine*, 51 Tex. 480; 3 Kent, Comm. 437, note.

Decree affirmed.

(159 Mass. 433)

#### LEWIS v. NORTON.

(Supreme Judicial Court of Massachusetts.  
Suffolk. June 28, 1893.)

#### LEVY OF EXECUTION—POWERS OF CONSTABLE.

Pub. St. c. 27, § 114, provides that a constable may, within his town, serve any writ or other process in a personal action where less than \$300 is involved. Pub. St. c. 172, § 29, requires, where a levy of execution is made by a sale, that the officer, besides notice to the debtor, shall post notice in the city or town where the land lies, and in two adjoining cities or towns. *Held*, that a constable cannot levy an execution by sale of land when he has no jurisdiction in the towns where the statute requires notices to be posted.

Exceptions from superior court, Suffolk county; Caleb Blodgett, Judge.

Writ of entry by Frank Lewis against Mary E. Norton. Judgment for demandant, and the tenant brings exceptions. Sustained.

W. B. Stevens, for demandant. Chas. Sprague, for tenant.

LATHROP, J. This is a writ of entry to obtain possession of a parcel of land in the city of Boston. The demandant claims title through a writ of execution issued out of the municipal court of the city of Boston, which was executed by sale by a constable of said city. Various objections are taken to the constable's proceedings, but there is only one which we need consider; and that presents the question whether a constable has any authority under our statutes to levy an execution by a sale of the land of the judgment debtor. Pub. St. c. 27, § 114, provides that a constable who gives and files a bond, as described in section 113, "in sum not less than three thousand dollars may, within his town, serve any writ or other process in a personal action in which the damages are laid at a sum not exceeding three hundred dollars, and any process in replevin in which the subject matter does not exceed in value three hundred dollars." See Pub. St. c. 28, § 9.

We concede at the outset that the words "writ or other process" include an execution, as the language in St. 1795, c. 41, § 1, is "any writ, summons, or execution." The words "or other process" first appear in Rev. St. c. 15, § 71, and were probably adopted for the sake of brevity. See also, Pub. St. c. 160, § 5. Constables "have no authority to serve process in civil actions, except such as is expressly conferred upon them by statute." *Morton v. C. J., in Leavitt v. Leavitt*, 135 Mass. 193. Their authority to serve a "writ or other process" in civil actions is confined strictly to the town or city for which they are appointed. If, therefore, a levy of execution requires the performance of an official act outside of such town or city, a constable cannot make the levy. Pub. St. c. 172, § 29, requires, where a levy of an execution is made by a sale, that "the officer shall give notice in writing of the time and place of sale to the debtor, if found within his precinct, and shall also cause notifications thereof to be posted up in some public place in the city or town where the land lies, and also in two adjoining cities or towns, if there are so many in the county." This statute contemplates that the levy shall be made by some officer whose jurisdiction extends over the whole county; and we are of opinion that a constable cannot make a levy of an execution by sale of land where, as in this case, he has no jurisdiction in the towns where the statute requires notifications to be posted up. The ruling of the learned justice of the superior court that the action could be maintained on the evidence was therefore wrong.

Exceptions sustained.

(146 Ill. 139)

**WAGNER v. CITY OF ROCK ISLAND.**<sup>1</sup>

(Supreme Court of Illinois. June 19, 1893.)

**MUNICIPAL CORPORATIONS—WATER RATES—ORDINANCE—INJUNCTION.**

1. Under Act April 15, 1873, authorizing municipal authorities to construct and maintain waterworks, and to collect from the inhabitants such rates for the use of water supplied as to such authorities shall seem expedient, a city may levy water rates that will yield a revenue in excess of the cost of operating the waterworks, even though they were originally constructed by the city for the purpose of supplying water for itself and its inhabitants, and not for purposes of profit.

2. Water rates levied by a city under such act need not be uniform, since they are not taxes levied by the city in its public capacity, but compensation for water furnished by the city in its private capacity.

3. An ordinance which fixes water rates for small consumers at so much per room, and for large consumers according to the amount of water used, as measured by meters, thereby decreasing slightly the rates paid by the small consumers, and increasing materially the rates paid by the large consumers, under a former ordinance, is not unreasonable, where it does not appear that the imposition of meter rates upon large consumers is not entirely equitable, as between the different individuals of that class, or that the small consumers are not required to pay rates relatively as high as those imposed upon the large consumers.

4. The fact that an ordinance is enforced against complainant, and not against others, is no ground for enjoining its enforcement as against him.

Appeal from appellate court, second district.

The facts appear in the following statement by BAILEY, C. J.:

This was a bill in chancery, brought by George Wagner against the city of Rock Island, to have a certain ordinance of the city fixing the rates or taxes to be paid by persons using water from the city waterworks held invalid, and set aside, and for an accounting as to the water rates or taxes justly payable by the complainant, and also for an injunction restraining the city and its officers from shutting off the complainant's water supply until the final determination of the suit. The city demurred to the bill, and, that being overruled, it elected to abide by its demurrer, and a decree was thereupon entered in accordance with the prayer of the bill. On appeal to the appellate court the decree was reversed, and the cause was remanded to the circuit court, with directions to sustain the demurrer and dismiss the bill; and the complainant now brings the record to this court on appeal from the judgment of reversal.

The bill alleges, in substance, that the city of Rock Island is a municipal corporation organized February 10, 1857, and reorganized and existing since December, 1879, under the general law for the incorporation of cities and villages; that in the fiscal year 1871-72 the city constructed a system of waterworks, which in the year 1881-82 was reconstructed and extended, and is still owned and maintained by it, for the purpose of supplying water from

the Mississippi river to and for the use of the city and its inhabitants, and has from time to time assessed and collected from its inhabitants such taxes or rates for the water so supplied as it has deemed just and expedient; that the complainant is, and for 18 years or more last past has been, a brewer, and the owner of a brewery, in the city, known as the "Atlantic Brewery," and for several years has had connected therewith a malt and bottling department; that for the purposes of his business he has used, and does use, large quantities of water, obtained to a considerable extent from the city waterworks, and has regularly paid to the city therefor all taxes or rates assessed to or demanded of him by the city, up to May 1, 1889; that up to that date the annual taxes or rates required to be paid to the city by consumers of water obtained through the waterworks were fixed and assessed against small consumers by general assessment at specified schedule rates per room, for all residences, boarding houses, hotels, offices, sleeping rooms, shops, restaurants, stores, and the like, and for large consumers at specific sums, agreed upon with them, respectively; and that the amount of taxes or rates so charged against and paid by the complainant for several years prior and up to May 1, 1889, amounted to from \$500 to \$525 per annum.

The bill further alleges that on March 18, 1889, the city passed an amended ordinance, providing, among other things, that the water rates or taxes which should be paid by persons using water from the city waterworks should be at certain schedule rates per room for all residences, boarding houses, hotels, offices, sleeping rooms, shops, stores, restaurants, and like uses, by small consumers,—those rates being the same, or less, than were specified in the ordinance before it was amended; that for railroads, breweries, bottling establishments, manufacturing establishments, elevators in stores or other buildings, wholesale liquor stores, rectifying liquor establishments, manufacturing drug stores, steam laundries, and all other large consumers not specified, meter rates, as prescribed in a table of rates fixed and adopted by the ordinance, should be charged, and for laundries not using steam, small dye works, and all other small consumers, the rates to be paid should be estimated meter rates, according to the consumption of water, the estimate to be made by the superintendent of the waterworks, with the approval of the committee, subject to the decision of the city council in case of disagreement; that it was further provided by the amended ordinance that where more than one meter was required by one consumer, owing to the arrangement of the connections with the mains, the rate should be computed separately for each meter, provided that exceptions might be made where the average for each meter was not less than \$250, and all in the same vicinity, and also that the superintendent, with the approval of the committee, should place meters, as rapidly as practicable, on the premises of all consumers, where, on account of uncertainty as to the quantity consumed,

<sup>1</sup> Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

probable waste of water, or other cause, he believed that the interests of the city required it; that any consumer who had for one year paid at the rate of \$100 per annum, or over, for water supplied from one connection with the street main, should, within six months after making written application, be supplied with a meter, at the expense of the city, and thereafter pay meter rates; that any consumer paying less than \$100, who was of the opinion that his rate was too high, should be supplied on like conditions, provided he paid the cost of the meter, exclusive of setting and repairs.

The bill further alleges that the erection and maintenance of the waterworks by the city was not for purposes of speculation and profit, or for deriving therefrom a revenue, as such, from its inhabitants, by the sale of water to them, or requiring them to pay the cost of construction and maintenance thereof, or interest thereon, or on the value of the plant, but for the purpose of supplying water from the Mississippi river to and for the use of the city and its inhabitants; that, under the law which provided for the erection of the waterworks, the cost thereof was to be paid by general taxation, and that it has been so paid, with the exception of \$50,000, for which unmatured bonds of the city are outstanding; that, for the 17 years during which they have been operated, the waterworks have been more than self-sustaining, and are yielding a surplus revenue of over \$4,000 per annum; that at the time of the passage of the amendatory ordinance the number of consumers of water from the city waterworks was about 1,100, of which about 1,030 were of the class designated as "small consumers," and that the number had not been materially less for several years prior to that date, and had not materially increased since; that it is estimated by the city authorities that under the amended city ordinance the receipts for water rates from small consumers will be reduced about \$1,500, and that the amount received from large consumers will be increased about \$4,500, thus producing a net increase of \$3,000 per annum, and that such increase is unreasonable, unauthorized by law, unjust, and oppressive upon the complainant and a few other large consumers, who are compelled to pay largely increased water rates and taxes; that under the ordinance great inequality and injustice results to the complainant, as one of the large consumers, and others of the same class, by reason of the different methods required by the ordinance, and the partial and imperfect administration thereof, for the ascertainment of the quantities of water consumed, and the amount of water rates or taxes payable therefor; that the city, by its superintendent of waterworks, servants, and agents, on or about May 1, 1889, without any application or request by the complainant, placed in his brewery three meters, for the purpose of indicating and determining the quantity of water supplied from the city waterworks, claiming that the ordinance required the same to be placed and kept there for that purpose, and that the com-

plainant should thereafter pay the rates and taxes chargeable for the quantity of water thereby shown to be supplied; that the complainant, for the preceding two years, had paid to the city at a rate exceeding \$100 per annum for the water supplied to him through each of the three pipes connecting his brewery with the street water main, and belonged to the class of consumers who, by the terms of the ordinance, are to be supplied with meters, and to pay meter rates, only after making written application therefor, and that, inasmuch as he has never made such application, he cannot be required to use meters, or to pay meter rates; that if the provision for the payment of rates by meter measurement is valid, and applicable to the complainant's case, it is, in like manner, applicable to the cases of all others of the same class; that although the class of large water consumers numbered about 60 at the time the ordinance was passed, and now numbers between 60 and 70, meters have been permanently attached and operated in not to exceed 10 cases, including the 3 in the complainant's brewery, and that, as to all others of the class, the former system of agreed rates per annum is still continued, instead of meter rates, as required by the ordinance; that in a number of instances meters have been temporarily attached, and upon objection thereto, and to the payment of meter rates, by such consumers, the meters have been removed, and contract rates agreed upon,—the rates so agreed upon being in all cases, as the complainant is informed and believes, considerably less than would have resulted from meter measurement; that in some cases the rates agreed upon have not been increased above those paid under previous contracts, and in others they have been slightly increased, though in but one instance more than 50 per cent., and generally not more than 25 per cent., over previous rates, while the complainant's increase, by the meter rates to which he has been subjected, has been from 500 to 600 per cent. over and above his contract rates prior to May 1, 1889, with no material increase in his water supply; that the water rates or taxes claimed and demanded of him by the city for the six months next after that date amounted to the sum of \$1,535.46, the amount charged him for the like period next prior to that date being \$262.50; that the increase in the rate demanded of the complainant constitutes two-thirds of the \$4,500 estimated increase in the amount to be realized from large consumers, although he is not the largest consumer of that class; that about August 12, 1889, the complainant was notified by the city collector of water rates that the sum of \$814.02 was due from him for water consumed on his premises for the quarter ending August 31, 1889; that on or about the 19th day of that month he was notified by the collector that, unless the amount thus claimed was paid by him within three days, his water supply would be cut off; that not being at that time possessed of all the facts in the premises, and being

unable, within three days, to collect them, and by reason of the threat to cut off his water supply, he paid the sum demanded, under protest; that on or about November 8, 1889, he was notified by the collector that the sum of \$721.14 was due for water consumed by him for the quarter ending November 31, 1889; that being then fully advised of the inequalities in water rates, arising from the different modes of computing the amounts charged to consumers of the same class, and the unjust discrimination against him, he declined to pay the sum demanded, and it has not been paid.

The complainant alleges that he had hoped that the city would come to some amicable adjustment with him of their differences, and on or about December 2, 1889, he requested the city council to review, adjust, and rebate the water rates charged against him, which it refused to do; that on December 27, 1889, he was notified by the collector of water rates that his water supply would be cut off before January 1, 1890; that his business materially and essentially depends upon a full and regular supply of water, and that being deprived of such supply for any considerable number of days would produce incalculable loss and injury to him; that there is no occasion for shutting off the complainant's water supply, as a means of securing or collecting water rates or taxes, as the complainant has ample ability to pay, and has at all times been, and now is, ready and willing to be charged his full and proportionate amount for his water supply, based upon a uniform method of determining the quantities and amounts, and the application thereof to all consumers of the same class, and to abide by any adjustment and agreement by the parties, or any adjudication by any court of competent jurisdiction, as to such amount, and, if the amount already paid by him is not sufficient to meet and pay the same, he is willing and offers to pay any balance found due and owing by him to the city; but he insists that upon a just accounting, based upon a uniform method of ascertaining the amount applied to all water consumers of the class to which the complainant belongs, the amount already paid by him under protest will be found to be equal to, or in excess of, the amount of all rates properly chargeable against him.

The bill prays that the amended ordinance be construed, and its validity, effect, and application be adjudged and determined, and, if found to be invalid, that the ordinance be set aside, and held for naught; that an account be taken of the amount justly payable by him for water rates, based upon a just, proper, and uniform rule for the ascertainment thereof, applicable and applied to all consumers of the same class with the complainant; that the payment already made by the complainant be applied as a credit in his favor upon the amount, if any, found due and payable by him, he being willing and offering to pay the amount which should be found due by him to the city; and also a general prayer for relief. The bill also prays for an in-

junction pendente lite, restraining the city, and its officers and agents, from shutting off the supply of water from the city waterworks on the complainant's premises until the final determination of the cause. An injunction having been granted by the circuit court in accordance with the complainant's prayer therefor, it was, by the decree of that court, made perpetual. The appellate court, as a part of its judgment reversing the decree, directed that the injunction be dissolved.

Ira O. Wilkinson and Adair Pleasants, for appellant. Joseph L. Haas, for appellee.

BAILEY, C. J., (after stating the facts as above.) As we understand the bill, the complainant bases his right to the relief prayed for upon two grounds: (1) That the ordinance of March 18, 1889, provides for the imposition and collection of water rates and taxes in excess of the actual cost of maintaining and operating its waterworks, and is therefore unjust, oppressive, and unreasonable; and (2) that the provisions of the ordinances are unjustly and unequally enforced, so as to compel the complainant to pay more than his just proportion of the water rates or taxes collected by the city. It will be noticed, as bearing upon the first of these grounds of complaint, that there is no allegation of any exorbitance or unfairness in the rates fixed by the ordinance, when the cost of constructing, as well as of maintaining and operating, the waterworks is taken into consideration. The contention is that, as the city was authorized by law to construct the waterworks, and pay the cost of the same by general taxation, and has paid such cost in that manner in part, it is bound to maintain and operate the works for the sole benefit of those who may choose to use the water thus furnished, and has no legal right or power to charge therefor rates which will produce a revenue in excess of what is necessary to defray the current expenses of their operation and maintenance. The second ground of complaint does not proceed upon the theory that there is any inequality or improper discrimination, either as between different classes of consumers, or between individuals of the same class, arising from the provisions of the ordinance itself. It is alleged that the ordinance diminishes to some extent the rates previously charged to small consumers, and very largely increases those previously charged to large consumers; but it is not alleged that, as thus modified, the rates charged to small consumers are relatively too low, or that those charged to large consumers are relatively too high. The city council having, in the exercise of its legislative discretion, seen fit to make these changes in the rates previously charged, a presumption arises, which the bill in no way attempts to rebut, that previous charges were unequal and unjust, and that, under the system formerly prevailing, small consumers had been charged somewhat more, and large consumers very much less, than the relative rates which ought, fairly and justly, to be im-



posed upon them. It is not claimed that the imposition of meter rates upon large consumers is not entirely equitable, as between the different individuals of that class. The amount of the actual consumption being precisely ascertained by the use of meters, the rates to be charged are accordingly proportioned to the amount of water consumed by each,—a system of fixing rates too manifestly just and equitable to require discussion. It is true the schedule of meter rates is based upon a sliding scale of prices,—the price per 1,000 gallons consumed being considerably diminished as the amount is increased,—but this is a matter to which the complainant cannot be heard to object, as the amount of water consumed by him seems to be sufficiently large to bring him within the operation of the lowest rate fixed by the schedule. Nor is it shown that the adoption of a different method for fixing the rates to be paid by small consumers, viz. by charging them fixed rates according to the number of rooms in the buildings to which water is supplied, is, in its operation, unjust or inequitable to large consumers. There is no allegation that small consumers are not thereby, in fact, required to pay, for the water consumed by them, rates relatively as high as those imposed upon large consumers by charging them meter rates.

The substantial complaint, then, is that the city and its officers are enforcing the ordinance against him according to its terms, thus compelling him to pay meter rates for the water supplied to his brewery from the waterworks, and that, while doing so, they have neglected to enforce the ordinance as against various of the other large consumers, and that the inequality and injustice alleged arise from that cause. He is therefore seeking, not to have the city required to enforce the ordinance against all consumers alike, but to have its enforcement, as against himself, restrained by injunction. One theory upon which the bill proceeds, and the one upon which much reliance seems to be placed, is that the imposition, upon consumers of water supplied from the city waterworks, of rates or taxes therefor, is an exercise of the taxing power, and is therefore controlled by the constitutional limitation, which requires taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same. This, we think, is a misapprehension. Taxes are the enforced proportional contribution from persons and property, levied by the state, by virtue of its sovereignty, for the support of the government, and for all public needs, and they are therefore justly and properly subjected to the rule of uniformity. But water rates are imposed and collected merely as the compensation or equivalent to be paid, by those who choose to receive and use the water, for the commodity thus furnished them by the city. No one is compelled to receive or use the water, so as to be under obligation to pay for it, except at his own election; and when he does receive and use it, with knowledge of the rates charged by the city therefor, he, by implication, agrees to pay those rates, and his obligation to make

payment rests upon contract, rather than upon an exercise by the state of the taxing power. In *Vreeland v. Jersey City*, 37 N. J. Law, 135, the statute, after providing that the board of public works should regulate the distribution of water, and the prices which those using it should pay, required them, from time to time, to fix a sum to be annually assessed upon vacant lots abutting upon streets in which water mains were laid, and lots, with buildings thereon, in which water was not taken, and it was held that no liability could rest upon any property owners, except those using the water, to pay the rates imposed. The rates imposed upon other property were held not to be sustainable either as special assessments or as general taxes. They were not valid as special assessments, since there was no limitation by which the imposition by the board was restricted to an amount representing actual and positive benefits to the lot; nor were they valid as a general tax, for the reason that the imposition was not uniform upon all the property within the jurisdiction of the city. But in *Vreeland v. O'Neil*, 36 N. J. Eq. 399, and *Vreeland v. Jersey City*, 37 N. J. Eq. 574, the question was presented as to the validity of the rates imposed under the same statute for water actually used; and it was held that, as the terms upon which the water was proposed to be furnished were published and well known, persons applying for a supply of water would be presumed to have assented thereto, and thus be liable to pay the required rates, upon the ground of an implied contract. To the same effect, see *Institution v. Jersey City*, 113 S. 506, 5 Sup. Ct. Rep. 612. The business of furnishing the inhabitants of a city with water by means of waterworks so constructed as to bring the water from so permanent a source of supply, and distribute it, by means of pipes laid in the streets, to the residences and places of business of those desiring to obtain their water supply in that manner, though not an exercise of the powers of sovereignty, is undoubtedly a business which is public in nature, and belongs to that class of occupations or enterprises upon which a public interest is impressed. The business is carried on by common carriers, telegraph companies, and gas companies are examples of the same class. The business, being one which is impressed with a public use, may, where proper legislative authority is given, be carried on directly by the municipal corporation, or it may be carried on by a private corporation acting under a proper franchise granted to it for that purpose. But, when a municipal corporation undertakes to construct and operate waterworks, it does so in the exercise of its private, and not of its governmental, functions. Thus, as said by Judge Dillon: "A city may be expressly authorized, in its discretion, to erect a public wharf, and charge tolls for its use, or to supply its inhabitants with water or gas, charging them therefor, and making a profit thereby. In one sense, such powers are public in their nature, because conferred for public advantage. In another sense, they may be considered private, because they

are such as may be, and often are, conferred upon individuals and private corporations, and result in a special advantage or benefit to the municipality, as distinct from the public at large." 1 Dill. Mun. Corp. § 27. "A municipal corporation which supplies its inhabitants with gas or water does so in its capacity of a private corporation, and not in the exercise of its powers of local sovereignty. If this power is granted to a borough or city, it is a special private franchise, made as well for the private emolument and advantage of the city as for the public good. In separating the two powers,—public and private,—regard must be had to the object of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character; but if the grant was for purposes of private advantages and emolument, though the public may derive a common benefit therefrom, the corporation, *quo ad hoc*, is to be regarded as a private company. It stands upon the same footing as would any individual or body of persons upon whom the like special franchises had been conferred." Appeal of Brumm, (Pa. Sup.) 12 Atl. Rep. 855. To same effect, see *Western Sav. Fund. Soc. v. City of Philadelphia*, 31 Pa. St. 175; *Bailey v. Mayor, etc.*, 3 Hill, 531.

The complainant, however, has attempted to distinguish the present case from those to which the foregoing authorities apply by alleging that the waterworks in question were not erected by the city for purposes of speculation or profit, or of deriving therefrom a revenue, by the sale of water to its citizens, but only for the purpose of supplying water from the Mississippi river for the use of itself and its inhabitants. Even admitting that such was the policy of the city and its officers at the time they embarked upon the enterprise of building waterworks, and supplying the people of the city with water, we are unable to see how that fact can have the legal significance claimed for it. It would go only to the motives upon which the city acted in the matter, and would have no bearing upon its right to change its policy whenever it saw fit to do so. Its power to build and maintain waterworks, and furnish water to its inhabitants for a consideration, is derived from, and is governed solely by, the statute; and even though the intention of the city and its officers may have been to furnish water to the people of the city at the mere cost of maintaining and operating the works, and to charge no rates that would result in accumulating a surplus revenue, the city is not bound to persist in that policy, but is at liberty, at any time, to abandon it, and impose reasonable rates and charges, although by so doing a revenue may be realized. It is a rule of common law that parties carrying on business which is public in its nature, or which is impressed with a public interest, cannot select their patrons arbitrarily, but must serve all who apply on equal terms, and at reasonable rates, but this is as far as the rules of common law seem to have gone. They do not require absolute uniformity of rates, nor

forbid discrimination by performing the service for one at rates lower than those exacted of others. The most familiar illustration of pursuits of this character is that of a common carrier, and the well-recognized rule is that, while the carrier cannot select his patrons arbitrarily, and must furnish equal facilities to all, and on equal terms, he is not forbidden to take one customer's goods at an unreasonably low rate, or to confer on that customer other practical advantages in the transportation, to which competitors and the general public are not admitted. *Schouler, Bailm. § 380; Hutch. Carr. § 447.* The same rule, doubtless, where no statutory restriction has intervened, is equally applicable to all other kinds of business which have become affected with a public interest, such as that ordinarily carried on by telegraph or gas companies, the construction and maintenance of public wharves, or the maintenance and operation of waterworks in cities; and, in the case of waterworks, we are unable to see why any different rule in this respect should apply when the works are owned and operated by the city from those which prevail where the business is carried on by a private corporation. The provisions of the statute in relation to waterworks may be found in article 10 of the general law in relation to the incorporation of cities and villages, (1 Starr & C. St. 508,) and in the "Act authorizing cities, incorporated towns, and villages to construct and maintain waterworks," approved April 15, 1873, and subsequent amendments thereto, (Id. 544.) By these statutes municipal corporations are authorized to provide for a supply of water for fire protection, and for the use of their inhabitants, by the erection, construction, and maintenance of waterworks; and for that purpose they are authorized to acquire the necessary real estate by purchase or condemnation, and to defray the expense of constructing and maintaining the works by general taxation, or, to a certain extent, by special assessment, and to borrow money and issue municipal bonds therefor. By section 4 of the act last above referred to power is given to the proper municipal authorities to make and enforce all needful rules and regulations in the erection, construction, and management of the waterworks, and for the use of the water thereby supplied, and to tax, assess, and collect from the inhabitants of the municipality such tax, rent, or rates for the use and benefit of water used or supplied to them by such waterworks as to such authorities shall seem just and expedient. By section 6 of the same act it is provided that the income received from such waterworks from water taxes, rents, or rates shall be kept in a separate fund, and shall first be applied to the payment and discharge of the cost, interest on bonds or money borrowed and used in the construction of the waterworks, and running expenses thereof, the surplus to be applied in such manner as the municipal authorities may direct. We find nothing in the ordinance in question in this case which seems to us to contravene either the rules of the common law or the provisions of the statute. There is no allega-

tion that the water rates charged to the complainant are in themselves unreasonable or extortionate, in the sense of being anything more than a just and fair equivalent for the water supplied to him from the waterworks, nor is any provision of the ordinance pointed out which is in itself unreasonable, or which the city council had not, under the statutes above referred to, a clear authority to pass.

The inequality complained of is one which arises solely from the neglect of the city officers to enforce the ordinance against other consumers; and, whatever may be the appropriate remedy for such neglect, or the means, if any, which the law provides for compelling the city officers to enforce the ordinance against all to which it applies alike, it is very clear that their failure to collect from others the full amount of their water rates cannot have the effect of discharging the complainant from his obligation to pay the rates imposed upon him by the ordinance. The case is not like one where several are under legal obligation to make up a fund of a definite amount by contributing thereto in fixed proportions, and where one is not liable to make good deficiencies caused by the default of the others. The city is entitled to collect the full amount due from all, whatever the aggregate may be, and its failure to collect from part can have no effect upon the liability of the others. In no point of view has the complainant shown himself entitled to the relief prayed for in his bill, and the judgment of the appellate court, reversing the decree, and directing that the bill be dismissed at the complainant's costs, for want of equity, will be affirmed.

(146 Ill. 372)

**PEORIA GASLIGHT & COKE CO. v.  
PEORIA TERMINAL RY. CO.<sup>1</sup>**

(Supreme Court of Illinois. June 19, 1893.)

**EMINENT DOMAIN—EVIDENCE—INSTRUCTIONS.**

1. In a proceeding by a railroad company to condemn land for its right of way, evidence of the prices paid by the company for other land along its right of way is incompetent as evidence of value, since such forced sales are not evidence of the real market value.

2. It is reversible error to instruct the jury that "if, after a full consideration of all the testimony in the case, in connection with your inspection of the premises, you conclude that your own inspection is a more reliable basis for the estimate and assessment of compensation and damages, then you have a right, under the law, so to do, but you should not arbitrarily and without reason reject any of the testimony," since such instruction authorizes the jury to base their valuation of the property solely upon their own inspection of the premises, regardless of the evidence. *Kiernan v. Railway Co.*, 14 N. E. Rep. 18, 123 Ill. 188, distinguished.

Appeal from circuit court, Peoria county; T. M. Shaw, Judge.

Condemnation proceedings by the Peoria Terminal Railway Company against the Peoria Gaslight & Coke Company. From the judgment, defendant appeals. Reversed.

<sup>1</sup>Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

Winslow Evans and Jack & Tichenor for appellant. George B. Foster and Stevens & Horton, for appellee.

BAILEY, J. This was a proceeding under the eminent domain law, brought by the Peoria Terminal Railway Company against the Peoria Gaslight & Coke Company, to condemn for right of way a portion of the premises owned and occupied by the defendant with its buildings and other improvements and machinery, constituting its gas works. The premises the defendant consist of one block of ground, bordering upon the Illinois river, and being something over 400 feet in length along the river, and about 300 feet in width, and containing about three acres. The land sought to be condemned consists of a strip 50 feet in width, along the margin of the river, and running the whole length of the defendant's premises, and containing 48-100 of an acre. At the trial the jury, after hearing the evidence and viewing the premises, rendered the verdict, fixing the compensation to be paid the defendant for the strip of land taken at \$4,550, and assessing the damages to the land not taken at \$2,750, making the total of the compensation and damages \$7,300. Upon this verdict judgment was entered in the usual form, and the defendant brings the record to this court by appeal.

As furnishing evidence of the value of the land proposed to be taken, the petitioner was permitted, against the objection and exception of the defendant, to prove by several witnesses what the petitioner had paid other property owners for right of way along the same line, and the decision of the court admitting that evidence is assigned for error. The propriety, in cases of this character, of admitting proof of sales of other similar property, made at about the same time, though doubted, and even denied, in some of the states, seems to us to be supported by the better reason, as well as by the greater weight of authority. *Lewis, Em. Dom. § 443*, and cases cited in notes. In this state its admissibility has been expressly affirmed in a few cases, and indirectly recognized in many others. Thus, in *Provision Co. v. City of Chicago*, 111 Ill. 651, a witness was permitted to give evidence as to the price at which another lot had been sold, without testifying as to the value of either that lot or of the one sought to be condemned, and it was held that there was no error in the admission of the evidence, being said: "From the very necessities of the case, actual sales of property in the vicinity, and near the time, are competent evidence so far as they go. On cross-examination, all circumstances can be drawn out, showing that the given sales are falls, and how much, of being a fair criterion of value." In *Railroad Co. v. Moroney*, 95 Ill. 179, evidence as to what an adjoining lot had been sold for, being offered in rebuttal, was excluded. The judgment was affirmed, on the ground that the proof offered was properly evidence in chief, but it was remarked that if it had been offered in the first instance it would doubtless have been admitted.

In *Railroad Co. v. Haller*, 92 Ill. 208, no evidence of this character seems to have been offered, nor does its admissibility seem to have been in question; but it was said that what the property would sell for before and after the road was constructed would be one of the modes of ascertaining the damages, if the price was shown to have been reduced by the building of the road; and, "if there was no other property of the same value or description in the place which had been sold, then other modes would have to be resorted to than the proof of the sale of such property before and after the damage was done." *White v. Hermann*, 51 Ill. 243, was a suit to recover damages for an alleged breach of a contract for the sale of a tract of land, and the value of the land embraced in the contract was one of the matters in issue. As bearing upon that issue, it was said that no objection could be seen to the admission of proof of the value of other property similarly situated at or near the date of the contract, or even of property of a different quality in its immediate vicinity, leaving the jury to determine the difference of value, and that, if any witness knew of similar property having been sold about the time of the contract, he might testify to that fact. *Chicago & N. W. Ry. Co. v. Chicago & E. R. Co.*, 112 Ill. 489, was a proceeding by one railroad company to condemn land owned and used by another company for transferring freight from its tracks to Lake Michigan. Proof was made of several sales of property in the vicinity designated by the witnesses as "dock property." The judgment was reversed on other grounds, and the propriety of this evidence was not directly passed upon, but the court, in discussing the mode of estimating the compensation to be paid for the property which, not being in the market or subject to sale, has, properly speaking, no market value, said: "While, in the nature of things, there can be no market value of a piece of property by being used in connection with, and as a part of, some extensive business or enterprise, its value must be determined by the uses to which it is applied. While, in such cases, the market value of neighboring lands differently circumstanced may be looked to as throwing some light upon the question, yet that alone would fall far short of furnishing a true or adequate test of the value of the property." The other decisions to which our attention is called do not seem to have any bearing upon the question of the admissibility of evidence of sales of other property. In *Kiernan v. Railway Co.*, 123 Ill. 188, 14 N. E. Rep. 18, evidence as to how far the selling value of other farms in the county crossed by railroads had been affected thereby was held inadmissible. In *Railroad Co. v. Blake*, 116 Ill. 163, 4 N. E. Rep. 488, the decision was that real-estate brokers who testify that they are acquainted with the value of real estate in the neighborhood of the land sought to be condemned are competent witnesses as to the value of the same, even though their knowledge of values in the locality is not satisfactorily shown to be based on actual sales. The cases of *Johnson v. Railway Co.*, 111 Ill. 413; *Green*

*v. City of Chicago*, 97 Ill. 370; *Railroad Co. v. Haslam*, 73 Ill. 494; and *Railroad Co. v. Winslow*, 66 Ill. 219,—all relate to the question of the admissibility of opinion evidence as to values, and do not involve the question of the admissibility of evidence of sales of other property.

The theory upon which evidence of sales of other similar property in the neighborhood at about the same time is held to be admissible is that it tends to show the fair market value of the property sought to be condemned; and it cannot be doubted that such sales, when made in the free and open market, where a fair opportunity for competition has existed, become material and often very important factors in determining the value of the particular property in question. But it seems very clear that, to have that tendency, they must have been made under circumstances where they are not compulsory, and where the vendor is not compelled to sell at all events, but is at liberty to invite competition among those desiring to become purchasers. Accordingly, among the various decisions in this or other states to which our attention has been called, or which our own researches have discovered, we find none in which the price paid at a forced or compulsory sale has been admitted as competent evidence of value. On the other hand, in *Dietrichs v. Railroad Co.*, 12 Neb. 225, 10 N. W. Rep. 718, evidence of the price paid at an administrator's sale for the very lots sought to be condemned was held to be incompetent. In discussing this subject, Mr. Lewis, in his treatise on the Law of Eminent Domain, says: "What the party condemning has paid for other property is incompetent. Such sales are not a fair criterion of value, for the reason that they are in the nature of a compromise. They are affected by an element which does not enter into similar transactions made in the ordinary course of business. The one party may force a sale at such price as may be fixed by the tribunal appointed by law. In most cases the same party must have the particular property, even if it costs more than its true value. The fear of one party of the other to take the risk of legal proceedings ordinarily results in the one party paying more, or the other taking less, than is considered to be the fair market value of the property. For these reasons, such sales would not seem to be competent evidence of value in any case, whether in a proceeding by the same condemning party or otherwise." Lewis, *Em. Dom.* § 447.

The text of the learned author here quoted seems to be well supported by the authorities. In *Kelliher v. Miller*, 97 Mass. 71, which was a suit brought to assess damages to land caused by the building and maintenance of a milldam, and the consequent overflow of the land with water, it was held that evidence of the amount paid for flowing other land was inadmissible; the court remarking that the case did not fall within the analogy of those cases which permit the value of adjacent and similarly situated parcels of land, as indicated by the prices for which they have been sold, to be shown where the question

on trial is the value of the land. So, in *Fall River Print Works v. Fall River*, 110 Mass. 423, which was a proceeding for the assessment of damages as compensation for land taken for a highway, it was held that evidence of amounts paid for other land taken for the purposes of the same street was a mere settlement of damages, and not an ordinary sale and purchase of an estate, and was therefore incompetent and improperly admitted. *Cobb v. City of Boston*, 112 Mass. 181, was a proceeding for the assessment of damages for lands taken by the city for a certain public improvement, and it was held that evidence of the sum paid by the city for other land similarly situated, by agreement of its owner, was inadmissible as evidence of the market value of the land taken. On this point the court said: "The defendant offered to prove, as evidence of market value, the sum paid by the city, by agreement with the owner, for another lot similarly situated. A price so fixed by compromise, when there can be no other purchaser, and the seller has no option to refuse to sell, and can only elect between the acceptance of the price offered and the delay, uncertainty, and trouble of legal proceedings for an assessment, is not a reasonable test of market value. It is in no sense a sale in the market." See, also, *Presbrey v. Railway Co.*, 103 Mass. 1; *Donovan v. City of Springfield*, 125 Mass. 371; *Tyler v. Mather*, 9 Gray, 183. The same question arose in *Howard v. City of Providence*, 6 R. I. 514. That was a proceeding for the assessment of damages for land taken and injured by laying out a street, and, for the purpose of proving the amount of damages to the particular landowner whose case was on trial, evidence was offered of the amounts paid by the city to other property owners in settlement of their appeals from awards of damages for adjoining lands taken for the street, and was excluded as incompetent. On affirming that ruling, the court said: "What the city paid other parties in compromise of suits pending on appeal for land damages, although the lands might be similarly situated with lands of the plaintiffs taken by the city, was certainly not evidence of the market value of the land, or of any substantial damage suffered by the plaintiff. Upon grounds of public policy, offers made in compromise of suits, pending litigation, are not to be used in evidence against the party making them. We do not see that such evidence ought to be any guide to the jury in estimating damages. When a party buys his peace, or compromises a pending suit, many considerations may influence him. The trouble, vexation, and costs of a lawsuit, payment of counsel, time expended in attending litigation, and other matters, may induce him for the avoiding of trouble to pay in compromise far more than the value of the thing in controversy." In *City of Springfield v. Schmook*, 68 Mo. 394, it was held that it was improper in such cases to prove what other persons had been allowed for their property, in order to establish the amount of the compensation to which the party was entitled by comparison, the court saying: "The as-

essment of damages in other cases may have proceeded upon incorrect principles, or the amount paid may have been the result of contract, or in excess of the true value. Such a mode of inquiry was improper, because it furnished no accurate standard for estimating the defendant's damages, and was likely to lead to the introduction of many collateral issues." In *Railroad Co. v. McLaren*, 47 Ga. 346, it was held to be error to admit evidence of what another railroad company had paid the party whose damages were being assessed for running its railroad through her land. See, also, *King v. Railroad Co.*, 34 Iowa, 458; *Chapin v. Railroad Co.*, 6 Cush. 422; *Amoskeag Manuf'g Co. v. Worcester*, 60 N. H. 522. We are referred to no decision in this state in which the opposite view as to the admissibility of evidence of the character of that now under consideration has been taken. In fact, so far as we are aware, the question has never been passed upon by this court, and we are therefore at liberty to adopt the rule which seems to us to be most fully supported by reason and authority. Acting upon that principle, we are disposed to concur in the rule supported by the authorities above cited, and to hold that the evidence of the prices paid by the railroad company to other property owners for right of way along its line was incompetent, and was improperly admitted.

Upon the question of the damages to the part of the defendant's premises not taken, the defendant produced some six or seven witnesses, whose testimony tended to show an amount of damages to the defendant's gas works, by taking that portion of the premises sought to be condemned, very largely in excess of the amount awarded by the jury. Most, if not all, of these witnesses, appear to have had large experience in the construction, operation, and management of gas works, and their values, and in relation to the areas necessary to their proper and successful operation. The petitioner, in rebuttal, examined three architects, who, after having examined the premises, expressed the opinion that the building of the railroad will have no material effect upon the defendant's buildings and plant. Upon this evidence, the court gave to the jury the following instruction: "You are instructed that you are the judges of the credibility of the witnesses, and of the value of their testimony in relation to the compensation and damage; and if, after full consideration of all the testimony in the case, in connection with your own inspection of the premises, you conclude that your own inspection of the premises is a more reliable basis for the estimate and assessment of compensation and damages, then you have a right, under the law, so to do, but you should not arbitrarily and without reason reject any of the testimony." This instruction clearly authorized the jury to base their estimate of compensation and damages solely upon their own inspection of the premises, provided only they were of opinion that such inspection furnished a more reliable basis for an assessment than did the evidence of the witnesses. While it required



them to consider the evidence, and directed them not to reject any of it arbitrarily and without reason, it gave to them a clear intimation that if, in their opinion, their inspection of the premises furnished a more reliable basis for an estimate of damages, such conclusion would of itself furnish a sufficient reason for wholly disregarding the testimony of the witnesses. Such, in our opinion, is not the law.

It has been frequently held by this court that the results of the personal view of the premises by the jury in condemnation cases are in the nature of evidence, and may be taken into consideration by them in passing upon the testimony of the witnesses, and that, where the evidence is conflicting, they may be resorted to by the jury as bearing upon the weight to be given to the variant and conflicting estimates given by the various witnesses, so that, if the verdict of the jury is supported by the evidence, it will not be disturbed simply because it is contrary to what appears to be the preponderance of the testimony. The case in which this view is stated most strongly of any to which our attention has been called is *Kiernan v. Railroad Co.*, 123 Ill. 188, 14 N. E. Rep. 18. There an instruction was approved which told the jury, in substance, that the result of their personal view of the premises was evidence properly to be taken into consideration in making up their verdict, and that, if they believed from the whole evidence that they had, from personal examination of the premises, arrived at a more accurate judgment and determination as to the value of the premises sought to be taken, and of the amount of damages, than was shown by evidence in open court, then, and in that case, they might, upon the evidence, rightfully fix the value of the land taken, and the amount of damage, at the amount so approved by their judgment, so formed from personal examination of the premises, as a jury, even though it might differ from the amount testified to, and from the weight of testimony given by witnesses in open court. It will be observed that in that instruction no license was given to the jury to disregard the evidence and base their estimate of damages upon their personal examination of the premises alone, even though they might be of the opinion that such examination furnished the best basis for an assessment; but they were instructed to consider the results of their view of the premises in connection with the evidence, and report the assessment which should thus appear to them to be just, although it might differ from the amount sustained by the preponderance of the testimony of the witnesses. The instruction in the present case, however, went further, and authorized the jury to first determine whether their own inspection of the premises furnished the more reliable basis for an assessment of damages, and, that question being settled in the affirmative, it justified their acting upon that basis alone, and making their assessment accordingly. In the more recent case of *Railroad Co. v. Schneider*, 127 Ill. 144, 20 N. E. Rep. 41, we held that, while the personal view by the jury in

condemnation cases is in the nature of evidence, yet the jury may not ignore all the evidence, and fix the compensation and damages directly contrary thereto, and that it is only where the evidence is conflicting that the jury may draw their own conclusions from a personal view. Even then an assessment beyond the maximum, or less than the minimum, fixed by the testimony, will not be sustained. The verdict must be supported by the evidence, and can in no case rest solely upon the personal examination of the premises by the jury, however well convinced they may be that their examination furnishes a more reliable basis for an assessment of damages than the testimony of the witnesses. In support of this view, see *Washburn v. Railroad Co.*, 59 Wis. 364, 18 N. W. Rep. 328. We are of the opinion that the instruction given in this case was erroneous.

A number of other questions are presented by counsel in their briefs, but, as the errors already pointed out necessitate a reversal of the judgment, we do not feel called upon to consider or discuss them. Without expressing any opinion as to the other questions suggested, we find ourselves compelled, for the errors above mentioned, to order that the judgment be reversed, and the cause remanded for a new trial.

(145 Ill. 489)

# MANUFACTURERS' & MERCHANTS' MUT. INS. CO. v. ARMSTRONG et al.<sup>1</sup>

(Supreme Court of Illinois, June 19, 1893.)

## INSURANCE—CONDITIONS OF POLICY—WAIVER.

1. A clause in a policy of fire insurance, that "it is a condition of this insurance that the following improvements shall be completed within 60 days of date hereof, or policy will be null and void," does not render the policy absolutely void at the end of 60 days, upon failure to make the required improvements.

2. Where such condition formed no part of the policy, as originally written, but was written on a separate piece of paper, and attached to the policy, by agents who had authority to issue the policy either with or without the condition, the condition may be orally waived by such agents, in spite of a provision in the policy that no waiver shall be binding unless written upon the policy.

3. Where the company, after expiration of the 60 days, and with notice that the improvements had not been made, recognize the policy as in full force by writing to the insured in regard to giving him additional insurance, without intimating that said policy was not in force, such recognition constitutes a waiver of the condition.

Appeal from appellate court, Second district.

Assumpsit by Thomas M. Armstrong and others, copartners doing business under the firm name and style of the L. Bauerle Company, against the Manufacturers' & Merchants' Mutual Insurance Company, upon a policy of insurance. Plaintiffs obtained judgment, which was affirmed by the appellate court. Defendant appeals. Affirmed.

<sup>1</sup>Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

Myron H. Beach and Albert D. Early, for appellant. Chas. A. Works, for appellees.

CRAIG, J. This was an action brought by appellees on a policy of insurance, in which certain property, located at Petosky, Mich., was insured against loss from fire. P. A. Montgomery & Co. were the general agents of the insurance company at Chicago; and in May, 1889, C. M. Fay, a member of plaintiffs' firm, applied to P. A. Montgomery & Co., at their office in Chicago, for insurance on their Michigan property. He was referred to Mr. Tyndall, an employe in the office, as a proper person with whom the negotiation for insurance might be conducted. In October, 1889, the insurance company sent an inspector to Petosky to inspect appellees' plant, with a view of insuring the property. After the inspector had made a report to P. A. Montgomery & Co., under date of October 24, 1889, they wrote appellees in relation to the insurance; and in this letter they were informed that they would have to put in their plant, within 60 days, certain appliances, to guard against fire, and to aid in extinguishing fire. Having received this communication, Fay went to Chicago to see P. A. Montgomery & Co. In the mean time, viz. on October 29th, they had mailed the policy upon which suit is brought to appellees, at Petosky. Going to the office of P. A. Montgomery & Co., Fay had a conversation with Tyndall, to whom he had always been referred, and with whom he had transacted all his former business relating to insurance written by P. A. Montgomery & Co. In that conversation he told Tyndall that it would be impossible to carry out the requirements within sixty days, to which Tyndall replied that they should go on, and do the best they could. Fay asked Tyndall what the rate would be when the requirements had been complied with, and Tyndall said they should then have a rate of \$2.50, being 40 cents less than the rate given in the policy that had been mailed the day before. After this conversation, Fay, in company with Tyndall, went out in the city to investigate the appliance required to be placed in the plant, and, after investigation, contracts were made for the required appliances. After investigating the appliances, Fay, upon being assured by Tyndall that he would not be required to have them put in within the specified time, notified Tyndall that he would accept the policy. The policy contained this provision: "It is a condition of this insurance that the following improvements shall be completed within sixty days of date hereof, or policy will be null and void." Following this are 17 different specifications, written out by Montgomery & Co., and attached to the policy. The policy also contains the following: "This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added thereto; and no officer, agent, or other representative of this company, shall have power to waive any provision or condition of this policy, except such as, by the terms of this policy, may

be the subject of agreement indorsed hereon or added hereto; and, as to such provisions and conditions, no officer, agent, or representative shall have such power, or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist, or be claimed by the insured, unless so written or attached." The contemplated improvements to be placed in the plant were not completed within 60 days from the date of the policy, and the property was burned on the 14th day of March, 1890. At the time of the fire the improvements were substantially completed, but they had not been inspected and formally turned over to the assured.

The defense interposed to the action on the policy was a failure of the assured to construct in and upon the property insured certain appliances to guard against fire, and to be used in extinguishing fire, within 60 days from the date of the policy, as was provided by certain conditions attached to the policy at the time it was issued by the agents, Montgomery & Co. These conditions were no part of the policy, as it was originally prepared by the company, but it appears from the evidence that they were written out on a separate piece of paper by the agents, and then attached to the policy by them. The evidence also tends to show that before the policy was accepted the agents of the company waived a compliance with the conditions within the 60 days, and that the assured accepted the policy under an agreement that the requirements should be complied with, not within 60 days, but within such time as the assured could reasonably have the appliances made, and placed in the property. The first question, therefore, to be considered, is whether the conditions of the policy, attached thereto by the agents, requiring the improvements to be placed in the plant within 60 days, have been waived. The policy contains a provision, in substance, that no waiver of any condition shall be valid unless written upon or attached to the policy, nor shall any privilege or permission affecting the insurance exist, or be claimed by the insured, unless so written or attached. When, and under what circumstances, the conditions of a policy may be waived by the general agents of the company, have been much discussed in the courts, and the decisions are not harmonious on the question. *Viele v. Insurance Co.*, 26 Iowa, 9, is an interesting case on the subject. It was there held that a condition in a policy of insurance,—that if the risk be increased by a change of occupation, or other means within the control of the assured, without the written consent of the insurers, the policy shall be void,—being inserted for the benefit of the insurers, they may dispense with a compliance therewith, or waive a forfeiture of the policy, incurred by a breach thereof, and thereby become estopped from setting up such condition or breach. It was also held that such waiver of the forfeiture, arising from the breach of the condition, need



not be in writing, but may be by parol; that any acts, declarations, or course of dealing by the insurers, with knowledge of the facts constituting a breach of a condition in the policy, recognizing and treating the policy as still in force, will amount to a waiver of the forfeiture, and estop the company from setting up the same as a defense. It was also held that a local agent, clothed with authority to make contracts of insurance, fix rates, etc., had power to waive forfeitures. In *Insurance Co. v. Gray*, 43 Kan. 497, 23 Pac. Rep. 637, where the policy contained a provision that no agent of the company, or any other person than the president or secretary, should have authority to alter or waive any of the terms or conditions of the policy, or make any indorsement thereon, and all agreements of the president or secretary must be signed by either of them, it was held that this provision may be modified by the company to the same extent as any other, and whatever the company can do may be done by its general agents. Among other things, the court said: "If it was within the power of the company, acting through its agents, to waive a condition, or change the contract, it surely might do so by parol, and might even waive the provisions stated in the policy with reference to the manner of altering or waiving its term and conditions." In *Insurance Co. v. Earle*, 33 Mich. 144, the question arose whether an agent of the company could change, by parol, the conditions of a policy which provided it could only be done by the consent of the company written thereon. The court held that a written bargain is of no higher legal degree than a parol one, and either may vary or discharge the other, and one who has agreed that he will only contract in writing, in a certain way, does not thereby preclude himself from making a parol bargain to change it; that there is no more force in an agreement in writing not to agree by parol, than in a parol agreement not to agree in writing. In *Shafer v. Insurance Co.*, 53 Wis. 362, 10 N. W. Rep. 381, the policy contained the following: "The use of general terms, or anything less than a distinct, special agreement, clearly expressed and indorsed on this policy, shall not be construed as a waiver of any printed or written condition or restriction herein; and whenever this policy may have become void, from any cause, it shall not be renewed or reinstated by the issue of any renewal certificate or receipt, or in any other way, except by special contract for such reinstating, in writing thereon, or by the issuing of a new policy." Held: "It was competent for the agent acting in behalf of the defendant to waive this, as well as other conditions of the policy." In *Insurance Co. v. Kinnler's Adm'x*, 28 Grat. 88, in discussion of the question of the waiver of a condition in a policy, it is said: "Such waiver or estoppel (for the terms 'waiver' and 'estoppel' may be indifferently used in application to the subject we are now considering) may take place either pending the negotiation for the policy, or after such negotiation has been

completed, and during the currency of the policy, and either before or after forfeiture incurred. Such waiver may be made by a general agent acting within the scope of his powers, needs no consideration to support it, and may be by parol, although the written consent of the insurer is required, by the terms of the policy."

As has been seen, the conditions involved were incorporated into the policy by the agents, *Montgomery & Co.* They had the authority to issue the policy with or without the conditions. They might have left out of the policy a part or all of the conditions, and, having this authority, no reason is perceived why they might not, by contract with the assured, waive a performance of the conditions for such time as they might think proper.

Appellant's counsel have cited certain cases (*Baumgartel v. Insurance Co.*, [N. Y. App.] 32 N. E. Rep. 991; *Allen v. Insurance Co.*, 123 N. Y. 6, 25 N. E. Rep. 809; *Quinlan v. Insurance Co.*, 133 N. Y. 356, 31 N. E. Rep. 31; *Messelback v. Norman*, 122 N. Y. 583, 26 N. E. Rep. 34; *Walsh v. Insurance Co.*, 73 N. Y. 5) as holding a different rule. These causes do not, in substance, hold, where a policy of insurance contains a provision that no officer, agent, or representative of the company shall be held to have waived any of the terms or conditions of a policy unless such waiver shall be in writing, and indorsed on the policy, that a waiver will not be binding, unless made and indorsed as required by the policy. We are not, however, inclined to apply the doctrine of these cases to the case under consideration. It is apparent from the evidence that the general agents, *Montgomery & Co.*, who issued the policy, and incorporated the conditions relied upon in the policy, themselves, agreed with the assured, before the policy was accepted, that they would not require the improvements to be completed within 60 days; and it would be a fraud on the insured to allow the company to repudiate the agreement upon which the policy was accepted by them.

There is another fact which has an important bearing in the decision of this case. It is deemed that the insurance company knew that the assured had not complied with the conditions of the policy in regard to making the improvements, and, knowing this fact, it recognized the policy as in full force, and led the assured to believe that they were protected, and under such circumstances the company is estopped from relying on a breach of the condition of the policy as a defense. It appears that prior to October 24, 1883, *Montgomery & Co.* were carrying insurance in different companies for the assured, amounting to some \$41,000. In their letter of October 24th they propose to reduce the amount to \$24,500. That letter also contained the following: "I inclose you herewith list of requirements, as made out by our Mr. Wardel, and we trust that you will comply with them as soon as possible; and when you get your plant in proper condition, and fully equipped, we will be willing to increase our lines again. The average rate at which we are writing these new policies, viz. \$2.90, is pretty low,

in view of the present unfinished condition of the risk, but we will make no change in this now." It seems to have been understood that, as soon as the required improvements should be placed in the plant, Montgomery & Co. would make another inspection, with a view to increasing the insurance; but on February 12th, some 50 days after the expiration of the 60 days within which the improvements were to be made, Montgomery & Co. write that they find it impossible to get the inspector there to pass on the sprinkler equipment until July. By return mail, appellees reply, saying "that won't do;" that the sprinkler equipment will be completed from 5th to 10th of March, and must be inspected immediately; if they cannot do it, some one must be found who can; that they desire \$20,000 additional insurance, etc. Immediately the agents reply, saying they will have an inspector there March 10th. "Keep us informed, that we may not send a man there until you are ready for him. We can provide all the insurance you want, when you are ready for it; but we cannot state at what rates we can re-write, and place additional lines, until after inspection is made." Appellees reply that they will keep the agents advised, by letter or wire, when they are ready for inspection, and on February 27th write that they will have the sprinkler system complete, and ready for inspection, March 3d, and conclude: "We have insurance expiring March 4th, and desire a prompt inspection and adjusting of rates." From this correspondence it is plain that after the expiration of the 60 days, and indeed up to the time of the fire, Montgomery & Co. knew that the required conditions of the policy had not been complied with, and yet they never intimated that the policy was not in force. If they did not regard the policy in force, it was their duty to notify the assured, cancel the policy, and deliver the unearned part of the premium; but although corresponding with the assured in regard to the completion of the required improvements, inspection of the same, and additional insurance, not a word was uttered which might lead the assured to suspect that the company regarded the policy at an end on account of the failure of the assured to complete the improvements in the plant within the time specified in the policy. "Any acts, declarations, or course of dealing by the insurers, with a knowledge of the facts constituting a breach of a condition of the policy, recognising the policy as still valid, and from which the insured might fairly infer that he was protected, will amount to a waiver of such breach, and estop the insurers from setting it up in defense." 2 May, Ins. § 497, p. 1143. Without extending the discussion on this question, we are inclined to hold that the company is estopped from claiming a forfeiture by the acts and conduct of its general agents.

It is also claimed by appellant that upon the expiration of the 60 days specified the policy, by its own terms, became absolutely void. This position is not tenable. A provision in a policy of insurance that it shall become void in a certain event will not render the policy absolutely void

upon the happening of such event. A provision of that character is made for the benefit of the insurer, and if the company does not wish to take advantage of the provision, and void the policy, it may properly waive the forfeiture; and, when this is done, neither the insured nor third parties can claim that the insurance is void. *Insurance Co. v. Klewer*, 123 Ill. 607, 22 N. E. Rep. 489; *Viele v. Insurance Co.*, 28 Iowa, 9.

There may have been slight errors in the ruling of the court in the admission of evidence, but we find no substantial error in this regard, nor in the ruling of the court on the instructions. The judgment of the appellate court will therefore be affirmed.

(145 Ill. 336)

HUTCHINSON et al. v. ULRICH et al.<sup>1</sup>

(Supreme Court of Illinois. April 3, 1893.)

COVENANT IN DEED—EASEMENT—CONSTRUCTION—EVIDENCE.

1. The owner of a block of 12 lots conveyed one of them by deed which contained a covenant that the seller would sell the remaining lots to parties who would "cause to be erected single dwellings only on each lot." *Held*, that such covenant inured to the benefit of all subsequent purchasers of the remaining lots, and created an easement in their favor.

2. A covenant to erect "only a single dwelling" on a certain lot does not prohibit the erection thereon of an apartment house designed for the use of several families.

3. The construction of the covenant is for the court, and evidence showing the meaning of the words "single dwelling" in the city where the land is situated is inadmissible, since the words are not terms of art.

Error to circuit court, Cook county; Murray F. Tuley, Judge.

The facts fully appear in the following statement by CRAIG, J.:

This was a bill brought by Charles L. Hutchinson, Alison W. Harlan, James Mullen, George W. Chamberlain, and Alice M. Lawton against Russel Ulrich and W. Irving Beman to enjoin the erection of a "flats" building or apartment house on the corner of Greenwood avenue and Forty-Fourth street, Chicago. In the circuit court a decree was rendered dismissing the bill for the want of equity, but without prejudice to the right of the complainants to sue at law. The complainants excepted to the decree, and sued out this writ of error. Affirmed.

The facts out of which this litigation arose may be briefly stated. In March, 1889, plaintiff in error Charles L. Hutchinson, being owner of a strip of land fronting on Greenwood avenue, and extending from Forty-Fourth to Forty-Fifth street, made and duly recorded a plat, whereby he divided the property into a block of 12 lots, numbered from 1, on the corner of Forty-Fourth street, to 12, on the corner of Forty-Fifth. Each lot has a frontage of substantially 50 feet, and a depth of something over 150. In making a plat, Hutchinson fixed a building line 30 feet from the line of Greenwood avenue. In April, 1889, he sold to plaintiff in error Mul-

<sup>1</sup> Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

len lot numbered 10. The deed, being otherwise in the ordinary form, contained the following words: "It is understood and agreed as part of the consideration above expressed that the purchaser is to erect on the premises described herein a single dwelling, costing not less than \$7,500, said dwelling to be commenced within a period of forty-five days from this date. It is further agreed that the seller will sell the remaining lots fronting on Greenwood avenue in said block to parties who will cause to be erected single dwellings only on each lot of fifty feet." Mullen built on lot 10 a house for a private residence, which cost him more than \$14,000. Meantime Hutchinson proceeded to sell the other 11 lots. Before the close of the year 1890 he had sold and conveyed all except lots 1 and 2. In October, 1891, and after his various deeds conveying the other 10 lots had been recorded, he sold and conveyed to one Parrish lots 1 and 2. Afterwards, and after the deed to Parrish had been recorded, Parrish's grantee, Loomis, conveyed lots 1 and 2 to defendants in error, Ulrich and Beman, who, having procured from Peabody a loan for the purpose, commenced to erect on the two lots a flat or apartment building upon each of the lots, the buildings to be four stories high, with a partition on the line between the buildings. The deed from Hutchinson to Parrish, conveying lots 1 and 2, contains the following clause: "It is understood and agreed as a part of the consideration expressed above that only a single dwelling is to be constructed or placed upon each fifty-foot lot, and that no building shall be constructed or placed upon the east thirty feet of said premises." Parrish conveyed to Loomis by warranty deed without any restriction, and Loomis conveyed to Ulrich and Beman, the defendants, by warranty deed without restriction.

John W. Showalter and Eastman & Schumacher, for plaintiffs in error. Wilson, Moore & McIlvaine, for defendants in error.

CRAIG, J., (after stating the facts as above.) It will be observed that plaintiff in error Mullen was the first purchaser from Hutchinson of one of the 12 lots which Hutchinson had platted and owned. In the deed from Hutchinson to Mullen is found a covenant that the grantor will sell the remaining lots fronting on Greenwood avenue in said block to parties who will cause to be erected single dwellings only on each lot of 50 feet. We think it is clear that this covenant inured to the benefit of all subsequent purchasers of the remaining 11 lots from Hutchinson, and by the terms of the covenant an easement was created in their favor as to all of the 11 lots sold after the execution of the Mullen deed. *Dock Co. v. Leavitt*, 54 N. Y. 35. It will also be observed that the deed from Hutchinson to Parrish conveying lots 1 and 2, the property now held by the defendants, and upon which they are erecting the structure in question, contains the following prohibition: "It is understood and agreed as a part of the consideration expressed above that only a single dwell-

ing is to be constructed or placed upon each fifty-foot lot, and that no building shall be constructed or placed upon the east thirty feet of said premises." If, therefore, there has been any violation of this clause in the deed made to Parrish by the defendants, who claim under him, and who are bound by any condition in any deed in their chain of title made to any of the grantees, the purchasers from Hutchinson of the remaining 11 lots may, under the clause in the Mullen deed, invoke the aid of a court in their favor.

It is insisted by the complainants that the words in the deed from Hutchinson to Parrish, "only a single dwelling," mean a dwelling house to be occupied by a single family. On the other hand, defendants claim that the words used in the deed mean only one dwelling house, which may be used by one family or more. The question, therefore, to be determined is one of construction pure and simple; in other words, what the contracting parties intended by the use of the words incorporated in the deed. Where real property is conveyed in fee restrictions in the use are not favored; but where the intention of the parties is clear in the creation of restrictions or limitations upon the use of a grantee, courts will enforce the same. But, as is said in *Eckhart v. Irons*, 128 Ill. 582, 20 N. E. Rep. 692: "If there is any doubt whether the restrictions were to cease then [at the end of fifteen years] or whether they were to be permanent, the existence of the doubt is to deny the existence of the easement or privilege. All doubts must be resolved in favor of natural rights and against restrictions thereon." In this country, real estate is an article of commerce. The uses to which it should be devoted are constantly changing as the business of the country increases, and as its new wants are developed. Hence it is contrary to the well-recognized business policy of the country to tie up real estate where the fee is conveyed with restrictions and prohibitions as to its use, and hence in the construction of deeds containing restrictions and prohibitions as to the use of property by a grantee all doubts should, as a general rule, be resolved in favor of a free use of property and against restrictions.

On the hearing a large number of affidavits of architects, real-estate men, and loaners of money on real estate were presented by the respective parties for the purpose of showing the meaning in the city of Chicago of the words contained in the deed. These affidavits were excluded by the court, and we fully concur with the circuit court in its decision. The words "only a single dwelling" are not words of art, nor does it appear that there is any usage or custom in Chicago under which such words have a local meaning in Chicago; and hence we are aware of no rule under which witnesses could give their opinion whether a flat could be included within the words used or not. The intention of the parties must be determined from the language of the deed itself, considered in connection with the surrounding circumstances at the time the deed was executed. Only a single dwelling is to be constructed or placed upon each 50-foot

lot. Does the word "single" apply to the building or the use which should be made of the building when constructed? The question is one which is not entirely free from doubt, but we are inclined to the opinion that the word "single" referred to the structure. The word "single" signifies one building. This seems more reasonable from the fact that Hutchinson, the grantor, in making other deeds for a part of the lots in the same subdivision used the word "one" as synonymous with the word "single." In the deed to Horne of lot 6, on August 6, 1890, Hutchinson provided that "the above-described premises are to be used for the purpose of a private dwelling only, and that but one dwelling shall be placed upon said property." In conveying lot 5 to Chamberlain, on September 25, 1890, and lot 4 on October 11, 1890, the same language was used as in the deed to Horne. We think the parties intended by the use of the words in the deed the same as if they had said in the deed "only one dwelling house should be erected on each fifty-foot lot." No doubt the grantor had in mind, and desired to prohibit, the erection of several small dwellings on each 50-foot lot; the intention being to require the erection of large structures on the property. It was also no doubt the intention of the grantor to require the property to be used for residence purposes. Under the clause in the deed, stores, livery stables, warehouses, houses for manufacturing purposes could not be erected; nothing but dwelling houses. At the time this deed was executed, flats or apartment houses where several families could reside were common in Chicago. Such buildings had been erected, and were then in use, within a short distance of these lots. If, therefore, it was the intention to prohibit the erection of a flat on the property, why did not the parties say so in the deed? Or if they intended that only a building such as is usually built for a private residence of a family should be erected, why not say that in the deed? There can be no doubt in regard to the fact that the parties knew the difference between a flat and an ordinary dwelling house erected as a private residence, and it is unreasonable to believe that the language incorporated in the deed would have been used if the intention was to prohibit the erection of a flat. *Gillis v. Bailey*, 21 N. H. 149, is a case cited and relied on by the complainants. The case is quite analogous to the one under consideration, but the deed in that case contained a recitation which tended to show the intention of the parties. The recitation in the New Hampshire case, among other things, contained the following: "And whereas, the corporation is induced to dispose of the lands in large parcels, and at prices below the true value, in order that the buildings erected thereon may not be crowded together, but may each be surrounded by space of open ground, and that for this purpose it has been agreed between the parties to these presents that only a single house," etc., "shall be erected." The court held the prohibition in the deed did not prevent the grantee from covering the whole lot with a building,

but that the recital showed that a residence for a family was intended. Here the deed contains nothing which throws any light on the language in dispute, and hence we do not regard the case as a controlling authority. We are satisfied that the decree of the circuit court was correct, and it will be affirmed.

(146 Ill. 9)

DUCKER et al. v. WEAR & BOOGHER  
DRY GOODS CO. SAME v. BURNHAM  
et al. SAME v. MARSHALL et al.<sup>1</sup>

(Supreme Court of Illinois, June 19, 1893.)

ESTATES—CONSTRUCTION OF WILL—EXECUTION—PROPERTY SUBJECT.

1. A devise to the testator's wife for life, with power to sell and dispose of the property, remainder in fee to testator's children, named in the will, followed by a provision that, if any of such named children die before the wife, then the property is to be equally divided between the survivors, creates a vested remainder, subject to a condition subsequent.

2. A vested estate in remainder is subject to levy and sale under execution.

Error to circuit court, Will county, George W. Stipp, Judge, and error to Will county court, Benj. Olin, Judge.

Attachments by the Wear & Boogher Dry Goods Company, Burnham, Hannah, Munger & Co., and Marshall & Patrick against John J. Ducker. Jennet Ducker and George A. Ducker filed interpleaders. Judgments for plaintiffs, and the interpleaders bring error. Affirmed.

The other facts fully appear in the following statement by MAGRUDER, J.:

The defendants in error began attachment suits in June and July, 1891, in Will county against John J. Ducker, and levied the writs of attachment upon "all the right, title, and interest of John J. Ducker" in certain real estate in that county. The appellants Jennet Ducker and George A. Ducker, in their own right, and as executors of the last will of James Ducker, deceased, were allowed to interplead in the attachment suits, and filed interpleaders, setting up that the only interest which John J. Ducker had in the premises levied upon, if any, was derived through and under the will of James Ducker, and that he had no present or existing leviable interest thereunder, and that the sum of \$2,000, bequeathed to the said John J. Ducker by the third clause of said will, was paid to him before the issuance of said attachment writs. The plaintiffs filed demurrers to the interpleaders. The demurrers were sustained, the interpleaders were dismissed, and judgments in attachment were rendered against John J. Ducker, and special executions issued for the sale of the property attached. Writs of error have been sued out from this court for the purpose of reviewing said judgments. The three suits—one in the county court and two in the circuit court—have been consolidated here by agreement, and heard together upon the same abstracts and briefs. James Ducker died some time between September 25, 1884, the date of his will, and December 30, 1885. The will is as

<sup>1</sup> Reported by Louis Bolsot, Jr., Esq., of the Chicago bar.

follows: "I, James Ducker, of Joliet, Ill., being of sound mind and memory, do hereby make, publish, and declare this my last will and testament. First. I hereby revoke all former wills by me made. Second. I direct the payment of all my just debts. Third. I give and bequeath to my five children, James W. Ducker, Maria J. Ducker, George A. Ducker, John J. Ducker, and Jessie M. Ducker, the sum of two thousand dollars (\$2,000) each, to be paid to them within two years after my death, as my executors may be able conveniently to raise the same out of my estate without sacrificing any part thereof. Fourth. I give, bequeath, and devise to my wife, Jennet Ducker, the use of all the rest of my real and personal estate for and during her natural life, and I hereby give her full power and authority to sell, dispose of, and convey any and all of said real and personal estate, and to invest the proceeds thereof in any other form she deems advisable; and I give her full right and authority to use and exhaust such part of the principal of my estate, real and personal, as she may at any time think necessary for her support and maintenance. This paragraph shall include my store in Joliet and the stock of goods therein, and the good will of the business, and I direct that said store and contents be delivered to her immediately after my death, and she may continue said business, or dispose of the same, as she thinks best. But this entire paragraph is subject to the charge of raising out of the property left by me the sums required to meet the second and third paragraphs of this will, which shall be done by my executors out of such property, and in such manner as they deem for the best interest of my estate. Fifth. After the death of my wife, I direct that all my property and estate then remaining, both real and personal, be by my surviving executor equally divided between my said five children, share and share alike. Sixth. In case of the death of any of my said children without issue, either before my death or before receiving either of the portions above given him or her I direct that the share of such child be equally divided among my surviving children, share and share alike. I hereby appoint my wife, Jennet Ducker, and my son George A. Ducker, the executors of this will, and request that no security be required of them upon their bond as such executors. I hereby empower my said executors to sell and convey any of my real and personal estate which they may deem it necessary or advisable to dispose of in order to raise the funds needed to comply with the requirements of the second and third paragraphs of this will."

Hill, Haven & Hill, for plaintiffs in error. Donahoe & McNaughton, for defendants in error.

MAGRUDER, J., (after stating the facts.) The question is whether the will gave John J. Ducker such an interest in the property of the testator as was subject to levy before the death of the widow. Under the will, Mrs. Ducker took an estate as tenant for life, with remainder over to

the five children of the testator, of whom John J. Ducker is one. Is that remainder vested or contingent? If it is vested, it is subject to levy; if it is contingent, it is not subject to levy. 2 Freem. Judgm. (4th Ed.) § 354. It is contended by counsel for appellants that the remainder is contingent, for two reasons: First, because it is dependent upon the uncertain event that some part of the estate shall remain undisposed of and unexhausted at the death of the life tenant; second, because it is dependent upon the uncertain event that John J. Ducker shall be alive when the particular estate is terminated by the death of the life tenant. The first reason is based upon the use of the words "then remaining," in the fifth clause of the will, considered in connection with the fourth clause thereof. The latter clause confers upon the life tenant the power of disposing of any and all of the estate, both real and personal. While, however, the power to sell and dispose of the estate is granted, there is no imperative direction that the land shall be converted into money, or the money into land. On the contrary, the intention of the testator, as gathered from the language of the two clauses, would appear to have been to leave it to the discretion or option of the life tenant whether she should exercise the power or not. By the fourth clause she is empowered either to continue the business in the store in Joliet, or to sell the store, and the stock therein, and the good will of the business, as she thinks best; and she is to use only such part of the principal of the estate as she may think necessary for her support and maintenance. The fact that by the terms of the fifth clause a provision is made for the division of such part of the "property and estate" as should remain at the death of the life tenant shows that the testator did not intend an absolute conversion of all his estate into personality. Hence an equitable conversion, which has been defined to be "the notional alteration of land into money, or money into land, in accordance with a direction to that effect of a testator or settlor, and in pursuance of the equitable doctrine that what is agreed or imperatively directed to be done is already done, or as good as done," does not arise out of the provisions of the present will. Where the conversion depends on the will or discretion of the executor, it will not be regarded as consummated in law until it is consummated in fact. 6 Amer. & Eng. Enc. Law, pp. 664, 665, and cases cited in notes. A power of sale added to a life estate does not raise the estate to a fee. Walker v. Pritchard, 121 Ill. 221, 12 N. E. Rep. 336; 1 Jarm. Wills, (Bigelow's 6th Ed.) marg. p. 377, and notes; Burleigh v. Clough, 52 N. H. 287. Although a will creates a life estate with power to sell and convey the fee, it may at the same time limit a remainder after the termination of the life estate. Walker v. Pritchard, supra. Whether such remainder is vested or contingent is not affected by the power of sale conferred by the will either on the life tenant or on the executor. If the power is so exercised as to dispose of all the estate, nothing may

be left to go to the remainder-man; but the remainder is not made contingent because it is uncertain whether the power will be exercised. The remainder may vest subject to the power. There is a distinction between a power and a right of property. A power of disposition does not imply ownership, but is a mere authority conferred by the will. *Burleigh v. Clough*, supra. "A limitation after a power of appointment, as to the use of A. for life, remainder to such use as A. shall appoint, and, in default of appointment, remainder to B., is a vested remainder, though liable to be divested by the execution of the power." 4 Kent, Comm. marg. p. 204. In *Railsback v. Lovejoy*, 116 Ill. 442, 6 N. E. Rep. 504, where a testator devised land to his widow for life, with remainder to his seven children, and gave the executor power to sell the land with the concurrence of the widow, and where the interest of one of the remainder-men was levied on and sold and conveyed by the sheriff during the lifetime of the widow, we held that the devisees took a vested estate in remainder, subject to the power of sale, and that the rights of the devisee whose interest was levied on passed to the purchaser at the sheriff's sale; and it was there said: "It is further contended by appellants, that by reason of the power of sale in the will \* \* \* the children \* \* \* had a contingent remainder only, and that consequently nothing passed by the sheriff's deed. This view is clearly unsound. The power had nothing to do with the vesting of the estate. It is obvious the estate vested in the children upon the testator's death, subject to the power." The *Railsback* case was subsequently referred to upon this point and approved in *Scotfield v. Olcott*, 120 Ill. 382, 11 N. E. Rep. 351.

It is said that it cannot be determined what part of the estate will remain undisposed of at the death of the widow, and that, therefore, there can be no vesting of the remainder until that time. The words "then remaining," as used in the fifth clause, can as well apply to what remains after the payment of the debts and bequests named in the second and third clauses as to what may remain after the exercise of the powers conferred upon the life tenant in the fourth clause. By the latter clause the payment of the debts and the gifts of \$10,000 to the children are required to be raised out of the property, and are made a charge thereon. If the remainder is contingent because it may consist of what remains after the exercise of the powers of sale and use conferred upon the life tenant, then, in case the life tenant should fail to sell any of the estate, or to exhaust for her own use any of the principal thereof, the remainder would still be contingent, because it would consist of what remains after paying off the charges created upon the property by the directions to pay the debts and the bequests. To hold that a remainder is contingent because it cannot be known how much will be left until the debts and funeral expenses and other charges are paid, would make every remainder given by will a contingent one. But it is well settled that a

devise to a person after the payment of debts and legacies is not contingent until such debts and legacies are paid, but confers an immediately vested interest. *Scotfield v. Olcott*, supra. In such cases the remainder vests subject to the payment of debts and legacies, and subject to the exercise of the power to use and sell, but liable to be divested as to so much of the estate as may be disposed of for the payment of debts and legacies, and by the execution of the power. The remainder is not made contingent by uncertainty as to the amount of the estate remaining undisposed of at the expiration of the life estate, but by uncertainty as to the persons who are to take. *Heilman v. Heilman*, 129 Ind. 59, 28 N. E. Rep. 310. In *Burleigh v. Clough*, supra, the will, after giving all the estate, real and personal, to the wife, "to her use and disposal during her natural life," contained these words: "And what is remaining at her decease undisposed of by her I give, devise, and bequeath unto Joshua E. Dennis and his heirs and assigns forever." It was held that the wife of the testator took an estate for life, with power to defeat the remainder over, and that Dennis took a vested remainder. See, also, *Ackerman v. Gorton*, 67 N. Y. 63; *Green v. Hewitt*, 97 Ill. 118; *Walker v. Pritchard*, supra; *Heilman v. Heilman*, supra; *Blanchard v. Blanchard*, 1 Allen, 223; *Leggett v. Firth*, 132 N. Y. 7, 29 N. E. Rep. 950; *Mitchell v. Knapp*, (Sup.) 8 N. Y. Supp. 40; *Candler v. Dinkle*, 4 Watts, 143.

In support of their position upon this branch of the case counsel for appellants rely upon certain decisions in Massachusetts and Georgia. The decisions, however, do not conclusively establish the doctrine that a grant in the will of power to the life tenant to sell or use all or a part of the estate creates such a contingency as to the existence of any remainder or as to the quantum of the remainder that the vesting will be postponed until the termination of the life estate. In *Bamforth v. Bamforth*, 123 Mass. 280, a devise over two parties was held to be contingent because of the use of the words, "should either of them be living," but uncertainty as to the amount of the estate was not given as a reason for not vesting. The case of *Johnson v. Battelle*, 125 Mass. 453, merely relates to the power of the life tenant to convey. In *Taft v. Taft*, 130 Mass. 461, a bill was filed by the remainder-men against the life tenant to enjoin her from selling the real estate, and it was held that the lower court properly sustained a demurrer to the bill, and dismissed it, because the life tenant had power to sell or dispose of the estate by will. The question was whether the life tenant was acting within her power, and not whether the remainder was contingent or vested; and therefore the remark that the gift of the remainder to the plaintiff was contingent upon the event that some estate remained at the death of the defendant, not disposed of by her will, was unnecessary to the decision. These Massachusetts cases are reviewed and criticized in *Mitchell v. Knapp*, supra, and held not to sustain the proposition that uncertainty

as to the amount of the estate devised over makes the remainder contingent. The weight of authority is against the proposition. *Welsh v. Woodbury*, 144 Mass. 542, 11 N. E. Rep. 762. In the case of *Darnell v. Barton*, 75 Ga. 377, the interest of one of the parties in the remainder was contingent upon his surviving the life tenant, irrespective of the uncertainty in the quantum of the remainder. We are of the opinion that the remainder in the case at bar is not contingent for the first of the two reasons above stated.

The second reason given why the remainder should be regarded as contingent is its alleged dependence upon the uncertainty of the survivorship of John J. Ducker at the time of the termination of the particular estate by the death of the life tenant. It is well settled that in the interpretation of wills the intention of the testator must control, and that the whole will and all its parts must be considered in order to ascertain what that intention is. It is also well settled that the laws favor the vesting of estates, and will construe the terms of a will as creating a vested estate, if possible. *Scotfield v. Olcott*, 120 Ill. 362, 11 N. E. Rep. 351; *Kellett v. Shepard*, 139 Ill. 433, 28 N. E. Rep. 751, 34 N. E. Rep. 254. A vested remainder, whereby a vested interest passes to the party, though to be enjoyed in futuro, is where the estate is invariably fixed to remain to a determinate person after the particular estate is spent. A contingent remainder, whereby no present interest passes, is where the estate in remainder is limited to take effect either to a dubious and uncertain person or upon a dubious and uncertain event. 2 Bl. Comm. 168, 169. If the time of payment merely be postponed, and it appear to be the intention of the testator that his bounty should immediately attach, the legacy is of the vested kind; but if the time be annexed to the substance of the gift as a condition precedent, it is contingent, and not transmissible. 2 Redf. Wills, marg. p. 248. The law presumes that words of postponement relate to the enjoyment of the remainder, rather than to the vesting thereof; and the intent to postpone the vesting of the estate must be clear and manifest. *Hellman v. Hellman*, supra. An estate limited upon a contingency to which the effect of a condition subsequent is given vests at once, subject to be divested upon the happening of the contingency. Whether the condition is really precedent or subsequent will depend upon whether it is incorporated into the gift to or description of the remainder-man, or is added as a separate clause after words which have already given a vested interest. *Lenz v. Prescott*, 141 Mass. 505, 11 N. E. Rep. 923; *Blanchard v. Blanchard*, 1 Allen, 223; *Collins v. Collins*, 40 Ohio St. 353; *Jeffers v. Lampson*, 10 Ohio St. 101; 20 Amer. & Eng. Enc. Law, p. 950. Where it is doubtful whether words of contingency or condition apply to the gift itself or to the time of payment, they will be construed as applying to the latter. *Eldridge v. Eldridge*, 9 Cush. 516; 2 Redf. Wills, marg. p. 248.

An application of these definitions to  
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the construction of the present will does not show clearly that it was the intention of the testator to postpone the vesting of the remainder. It will be observed that the sixth clause does not provide for a division among the surviving children of all the remaining property and estate, but only for a division of the share of any child dying without issue. The words "either of the portions," as used in the sixth clause, not only refer to the gifts named in the third clause, but also to the portions to be set off by the division which is directed to be made in the fifth clause. This being so, each child is referred to as "receiving" the portion "above given him" in the fifth clause. The surviving children were to take the share of the deceased child if he should die before "receiving" what had already been "above given him." There is thus a distinct recognition of the fact that the share of each child as specified in the fifth clause had been given to him before the division at the termination of the life estate should take place. The language of clause 6 imports that each child had a share before the period of its division should arrive, and that, although the time of its enjoyment was postponed, it had therefore vested, subject to being divested upon his death without issue. This disposes of the objection that clause 5 contains no language of gift to the children, but simply a direction to divide the estate after the death of the widow. It is a rule laid down in many of the cases that where there is no gift but by a direction to divide or transfer or pay from and after a given event, the vesting must be postponed until after that event has happened, unless from particular circumstances a contrary intention is to be collected. 2 Redf. Wills, marg. p. 236. But it cannot be said that here the testator intended the period of distribution to be not simply the time fixed for the enjoyment of the possession, but also for the vesting of the estate, because in the sixth clause he himself characterizes the fifth clause as being a gift of the portions therein referred to. The fifth clause, when construed in connection with the sixth, is the same as though it had been read, "After the death of my wife I give all my property," etc., "to be equally divided," etc. It is a well-known exception to the rule above referred to that, where the payment, distribution, or division is postponed for the convenience of the fund or property,—as, for instance, to let in a prior gift for life to another,—the estate will be vested, and not contingent. *Scotfield v. Olcott*, supra; 2 Redf. Wills, marg. p. 237, par. 37; *Hellman v. Hellman*, supra. The present case comes within this exception. As we gather the purpose of the testator from his will, he intended to give all his property to his five children, and, after making the specific legacies, he carved out of the remainder a life estate for the support and maintenance of his widow: that is to say, the enjoyment of the remainder by the children was simply postponed to let in the life estate. If the effect of the sixth clause is to limit the remainder to such of the children named as



should survive their mother, then the remainder is unquestionably contingent. But there are here no words or phrases of contingency which can be said to constitute a condition precedent, such as "if they shall be living at her death," or "to such of them as shall be living." Under the construction already given to the fifth and sixth clauses there is a direct gift of all the property after the life estate previously carved out. The devise is not made upon the contingency of survivorship, but in the fifth clause, as interpreted by the application thereto of the testator's words, "the portions above given him or her," the devise is made to devisees by name, and the condition appears only in a subsequent clause, and after words which have already given a vested interest. The devise is in fee to the five children, subject to be divested upon a condition subsequent, and therefore they took a vested remainder. It is manifest that the words "any surviving children," as used in the sixth clause, may refer to several periods of survivorship. They may refer to the children surviving at the death of the testator, or at the death of the child dying without issue, or at the time of the payment of the bequests named in the third clause, or at the death of the widow. If, however, they are regarded as referring, in the case of John J. Ducker, who is alive, and is conceded to have received the bequest made to him in the third clause, to the death of the life tenant, the devise to him was of a vested remainder, defeasible on a condition subsequent.

The provisions of James Ducker's will, as thus construed, present the instance of an estate in remainder, subject to a subsequent, and not a precedent, contingency or condition. Such an estate vests immediately, subject to be defeated by the happening of the condition. The present case is thus brought directly within the doctrine laid down in *Blanchard v. Blanchard*, *supra*, and approved by this court in the recent case of *Haward v. Peavey*, 128 Ill. 430, 21 N. E. Rep. 503. Whether a limitation creates a vested or a contingent remainder may depend upon the intent of the testator, as well as upon the conditions of its taking effect. Where the devise is to the testator's wife for life, and at her death to such of his children as shall then be living, the benefit does not purport to be conferred on the children as children or individuals named, but as survivors, which indicates that an immediate vesting is not intended. But where the devise is to the wife for life, with remainder to certain named children, and with a subsequent provision that, if any such named children die before the wife, then the property is to be equally divided between the survivors, the devise of the remainder is to certain definitely specified and named individuals, who, as remainder-men, already answer to the description by which they are to take, "and there is no obstacle to supposing an immediate vesting to have been intended." 4 Kent, Comm. (13th Ed.) marg. p. 203, note 1, and cases cited. We are consequently of the opinion that the

remainder is not contingent for the second reason presented by counsel. As John J. Ducker must be regarded, in the light of the views here expressed, as having taken a vested remainder under his father's will, his interest in the land attached was subject to levy. The judgments of the circuit and county courts are accordingly affirmed.

(145 Ill. 653)

**DUCKER et al. v. WEAR & BOOGER DRY GOODS CO.<sup>1</sup>**

(Supreme Court of Illinois. June 19, 1893.)

APPELLATE JURISDICTION—FREEHOLD—ATTACHMENT—INTERVENTION.

Where an attachment is levied on land, and third parties intervene, alleging that the defendant has no leviable interest in the land, the issue on the intervention involves a freehold, within the meaning of the statute allowing appeals directly to the supreme courts in cases involving a freehold.

Error to appellate court, second district.

Attachment by the Wear & Boogher Dry Goods Company against John J. Ducker. Jennet Ducker and George A. Ducker filed interpleaders. Judgment for plaintiff. The interpleaders brought error. Affirmed.

The other facts fully appear in the following statement by MAGRUDER, J.:

June 22, 1891, defendant in error, Wear & Boogher Dry Goods Company, commenced suit in attachment in the circuit court of Will county against John J. Ducker. The attachment writ, issued on the same day, was duly returned by the sheriff of Will county, levied June 22, 1891, upon "all the right, title, and interest of John J. Ducker" in certain real estate situate in Will county, Ill. October 3, 1891, by leave of court, Jennet Ducker and George A. Ducker, plaintiffs in error herein, filed a plea of interpleader in said cause, both in their own right and as executors of the last will and testament of James Ducker, deceased, in which they averred, in substance, that the only interest or supposed interest of the said John J. Ducker in and to the premises upon which the attachment writ was levied in said cause was under and by virtue of the last will and testament of said James Ducker, deceased, a copy of which will was attached to said interpleader; that said interpleaders were the same Jennet Ducker and George A. Ducker, and the said John J. Ducker was the same John J. Ducker, mentioned in said last will and testament; that under said last will and testament the said Jennet Ducker, in her own right, and the said Jennet Ducker and George A. Ducker, as executors of the last will and testament of James Ducker, deceased, had a present vested interest in the property levied upon under said writ of attachment, and that the said John J. Ducker had no present or existing leviable interest in the real estate levied upon at the time of said levy; and said interpleaders prayed that the levy under said attach-

<sup>1</sup> Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

ment writ might be quashed. To this plea of interpleader the Wear & Boogher Dry Goods Company demurred, and prayed that the plea be dismissed. The circuit court, by its order entered February 9, 1892, sustained the demurrer and dismissed said plea. Plaintiffs in error duly excepted, and prayed an appeal to the appellate court of the second district. The appellate court, by its order entered June 24, 1892, dismissed that appeal on the ground that it had no jurisdiction, a freehold being involved. The plaintiffs in error now seek in this court the reversal of such order of the appellate court. The will referred to is that which is set out and discussed in *Ducker v. Burnham*, 34 N. E. Rep. 538, in which the opinion was filed on June 19, 1893.

Hill, Haven & Hill, for plaintiffs in error.  
Donahoe & McNaughton, for defendant in error.

MAGRUDER, J., (after stating the facts.) The appellate court properly dismissed the appeal on the ground that a freehold was involved. As between the plaintiff below, the attaching creditor, and the defendant John J. Ducker, no freehold was involved. Where an attachment suit is begun, and the attachment writ is levied upon land, the plaintiff does not seek to get the title to the land, but to establish a lien thereon for the amount of his debt. It is true that, if nothing is done to arrest the suit, it will ultimately result in the loss of whatever title the debtor may have to the land; and yet no freehold is involved in such case, because the debtor may defeat the object of the suit, and prevent a disturbance of his title, by paying the amount of the lien sought to be enforced against it. The statute does not include all cases where the litigation may result in a loss of the freehold, but will not necessarily do so; nor does it include all cases where the freehold is directly affected by the judgment or decree. But here the interpleader and the demurrer thereto present a preliminary question which it is necessary to settle before it can be determined whether the plaintiff has a right to proceed with the enforcement of a lien against the land. That preliminary question relates to the debtors' title to the land, and arises out of an issue which necessarily involves a freehold. A freehold is not only involved where the necessary result of the judgment or decree is that one party gains and the other loses a freehold estate, but also where the title is so put in issue by the pleadings that the decision of the case necessarily involves a decision of such issue. *Malaer v. Hudgens*, 130 Ill. 225, 22 N. E. Rep. 855; *Sanford v. Kane*, 127 Ill. 591, 20 N. E. Rep. 810. In the case of *Monroe v. Van Meter*, 100 Ill. 347, where an interpleader was filed in an attachment suit by a third person claiming title to the land levied upon, we said: "In an ordinary attachment, where a levy is made upon real estate, it is plain that a freehold would not be involved; but in this case, after the writ had been levied on the real estate involved, appellees, who were not parties

to the proceeding, appeared, as they had the right to do, \* \* \* and interpleaded, claiming to own the property. \* \* \* It will be observed that under the pleadings the issue made and to be determined by the evidence was one of title to the land levied on. \* \* \* A freehold is always involved in an action where the title to the land is presented and in issue between the parties." The decision in the *Van Meter* Case is precisely applicable to the case at bar, and here, as there, it must be held that a freehold is involved. We do not regard it as material that the issue here presented is one of law rather than fact. The statute makes no such distinction. The demurrer to the interpleader raised the question whether the interpleaders had a present vested interest in the property levied upon, and, as an incident thereto, whether the attachment debtor had a "present or existing leviable interest therein." Counsel say there is no averment in the interpleader that the debtor had no freehold estate in the land attached. We think such averment is involved in the allegation that he had no "present or existing leviable interest" therein. Section 8 of the attachment act provides that the officer "shall without delay execute such writ of attachment upon the land, tenements, \* \* \* of the debtor, or upon any lands or tenements in and to which such debtor has or may claim any equitable interest or title." 1 Starr & C. Ann. St. 813. As the lands to be levied upon must be those to which the debtor has title, either legal or equitable, a leviable interest in land must be a legal or equitable title to land; and to determine whether the debtor has a leviable interest is to determine whether or not he has a title. A freehold has been defined to be "an estate in real property of inheritance, or for life, or the term by which it is held." *Gage v. Scales*, 100 Ill. 218. The judgment of the appellate court dismissing the appeal is affirmed.

(159 Mass. 420)

CHIPMAN v. PEABODY et al.

(Supreme Judicial Court of Massachusetts.  
Suffolk. June 23, 1893.)

CONFLICT OF LAWS—INSOLVENCY—TITLE TO LAND.

H., an insolvent in Massachusetts, gave a mortgage to a debtor resident therein on lands in Maine. The firm of which he was a member went into voluntary insolvency, and H. was declared an insolvent in Maine. The same assignee was appointed in both states. Held, that the title of the assignee to the land in Maine must be determined by the law of that state, and, as the mortgage was valid against the assignee in Maine, it cannot be avoided by him as assignee in Massachusetts, though void by the laws of such state.

Case reserved from supreme judicial court, Suffolk county; John Lathrop, Judge.

Bill by George W. Chipman, assignee of the estates of Dudley Hall and Dudley C. Hall, insolvents, against Kiddy, Peabody & Co., to set aside a mortgage case reserved. Bill dismissed.

George O. Shattuck and Wm. B. French, for plaintiff. J. Lowell, for defendants.

FIELD, C. J. This case comes before us upon demurrer to the plaintiff's bill. It appears from the bill that Dudley Hall and Dudley C. Hall were partners, under the name of Dudley Hall & Co. We infer that both were inhabitants of this commonwealth. They filed a voluntary petition in insolvency in the court of insolvency for the county of Middlesex, in this commonwealth, and were duly adjudged insolvent debtors, and the plaintiff and one Haskins were appointed assignees of the joint and separate estates of said copartners; and we infer that an assignment of their joint and separate estates was duly made to them, pursuant to Pub. St. c. 157, §§ 44-46. Haskins has since died, and the plaintiff is now the sole assignee. On December 17, 1890, Dudley C. Hall, then being insolvent, conveyed, by a deed of mortgage, to Frank E. Peabody, one of the respondents, about 28,000 acres of timber land situated in the county of Aroostook, in the state of Maine. This mortgage was made to secure a pre-existing indebtedness of the firm of Dudley Hall & Co. to the firm of Kidder, Peabody & Co., in which Frank E. Peabody was a partner with the other respondents, and Kidder, Peabody & Co. had, when the mortgage was made, reasonable cause to believe that said Dudley C. Hall and said Dudley Hall & Co. were insolvent, and that the conveyance was made in fraud of the laws of Massachusetts relating to insolvency. On March 10, 1891, this land was attached on mesne process by the Manufacturers' National Bank of Boston, and by Stetson & Co., of Bangor, Me., on writs returnable to the supreme judicial court of Maine. On May 9, 1891, certain creditors of Dudley C. Hall filed a petition in insolvency against him in the court of insolvency for the county of Penobscot, in Maine, and he was duly adjudged an insolvent debtor. The plaintiff and said Haskins were duly appointed by that court assignees of his estate, and we infer that an assignment of his estate was duly made to the assignees. The plaintiff is now the sole assignee of that estate. It is alleged that by the laws of Maine the attachments on this land were discharged by reason of this assignment. When these attachments were made, the statutes of Maine did not permit proceedings in insolvency against a nonresident debtor, and we infer that Dudley C. Hall was never an inhabitant of that state; but on March 27, 1891, the legislature of Maine amended the statutes relating to insolvency by an amendment, which took effect on May 2, 1891, whereby nonresident debtors holding personal property or real estate within that state could be put into insolvency, and it was under this amendment that Dudley C. Hall was adjudged an insolvent debtor in that state. By the statutes of Maine, conveyances of property by the debtor in fraud of the insolvency laws of that state can be avoided by the assignee if made within four months of the filing of the petition by or against the debtor. By the statutes of Massachusetts, such conveyances can be so avoided if made within six months of the filing of such a petition. The mort-

gage to Frank E. Peabody was made within six months of the filing of the petition in Massachusetts, but more than four months before the filing of the petition in Maine. The bill then alleges as follows: "(11) The plaintiff, as assignee of the joint and separate estates of Dudley Hall and Dudley C. Hall, under the deed of assignment from the judge of the court of insolvency for the county of Middlesex, in this commonwealth, has no standing in the courts of the state of Maine, and cannot maintain an action, either at law or in equity, to test the validity of the conveyance from said Dudley C. Hall to the defendant Frank E. Peabody; nor can the plaintiff, as assignee of the individual estate of Dudley C. Hall, under the deed of assignment from the court of insolvency for the county of Penobscot and state of Maine, maintain an action at law or in equity against said defendant in the state of Maine, because the conveyance from said Dudley C. Hall to the defendant Frank E. Peabody was made more than four months before the proceedings in insolvency were instituted in said court of insolvency for the county of Penobscot against said Dudley C. Hall."

We cannot take judicial notice of the statutes of Maine, and do not here undertake to construe them. We merely state the effect of them as alleged in the bill. The assignment by the court of insolvency in Massachusetts would not of its own force convey to the assignees appointed by that court the title to the land of Dudley C. Hall situated in Maine, unless the laws of Maine gave it such an effect, and the bill must be taken to allege that this assignment did not convey to them the title to this land. *Eddy v. Winchester*, 60 N. H. 63; *Osborn v. Adams*, 18 Pick. 245; *Taylor v. Insurance Co.*, 14 Allen, 353. The contention is that it is the object of our statutes relating to insolvency to vest in the assignee all the property of the debtor within and without the commonwealth not specifically excepted, and that, although the assignment may not of its own force operate to convey real property situated without the commonwealth, yet the debtor can be compelled, under Pub. St. c. 157, § 74, to execute to the assignee conveyances of any part of his estate, real or personal, although it is situated without the commonwealth. See Pub. St. c. 157, §§ 46, 70, 75, 93, 96, 98; St. 1888, c. 322. We assume, without deciding it, that it is the intention of our statutes to reach the real property of the debtor without the commonwealth, if it can be done, and that this may sometimes be done by means of a conveyance executed by him, and that the remedy provided by section 75, Pub. St., is not exclusive, but that a court of equity may compel such a conveyance. We understand, however, that, by force of the insolvency proceedings in Maine, the title to this land, when it was held by Dudley C. Hall at the time of filing the petition against him, vested in the assignees appointed there. It happens that the same persons were appointed assignees in Massachusetts and in Maine, but they might have been different persons. Dudley C.

Hall is not a party to the present suit, and the plaintiff does not seek any conveyance from him. The plaintiff, as assignee in Massachusetts, seeks an assignment of the mortgage given to Frank E. Peabody, although not the assignment of the mortgage debt. If he should obtain it, he would then apparently hold the mortgage as assignee in Massachusetts, and the equity of redemption as assignee in Maine. If the effect of such an assignment would be to render the mortgage void, or if the mortgage should be declared void, the result, so far as appears, would be that, as assignee in Maine, he would hold the land free from the mortgage. If the assignees were different persons, could it be contended that, if the mortgage was assigned to the plaintiff as assignee in Massachusetts, he could keep the mortgage alive, and foreclose it, unless the assignee in Maine should pay him the amount of the debt it was given to secure? By the statutes of Maine the mortgage is good as against the assignees appointed there. Whatever may be the general rule in bankruptcy or insolvency proceedings as to foreign lands, we think that, when there are two bankruptcies or two insolvencies of the same person in different jurisdictions, the title of the assignee to the land of the debtor situated in one jurisdiction must be determined by the law of the place where the land is situated. As by the law of Maine this mortgage is good against the plaintiff as assignee in Maine, we are of opinion that it cannot be avoided by him as assignee in Massachusetts. See *Chipman v. Bank*, 156 Mass. 147, 30 N. E. Rep. 610; *Batcheller v. Bank*, 157 Mass. 33, 31 N. E. Rep. 481. Bill dismissed.

(135 Ind. 23)

HENDERSON, State Auditor, v. LONDON & L. INS. CO.

(Supreme Court of Indiana. June 16, 1893.)  
STATUTES—VALIDITY—TITLE OF ACTS—CONSTITUTIONAL LAW—SPECIAL LEGISLATION.

1. Act March 9, 1891, entitled "An act to create a firemen's pension fund, for the pensioning of disabled firemen" and the dependent families of deceased firemen, to create a board of trustees of such fund, to authorize the retirement from service of members, and for other purposes in connection therewith, in cities of this state having paid fire departments, and declaring an emergency, provides (section 1) that every fire insurance company doing business in this state, but not organized under the laws of the state, shall, in January and July of each year, report to the auditor of each county wherein there is a city having a paid fire department the gross premiums received by such company on property in such county for the six months preceding, and of the losses actually paid, and shall pay into the county treasury of such county \$1 for every \$100 of the excess of such receipts over such losses; that the authority of any company failing to do so to do business in the state shall be revoked. Section 2 prescribes certain forfeitures on the failure of the county and state auditors to do their duty as provided by the act. Section 3 provides that the sum so paid into the county treasury shall be set apart as a "firemen's pension fund," and shall be dispensed as provided in the act. The remaining sections provide for trustees for such fund, and the manner of

distributing it. *Held*, that the act was in violation of Const. art. 4, § 19, providing that every act shall embrace but one subject, expressed in the title.

2. Such act is also an attempt to exercise the power of taxation, and, being local, not uniform, and for no public purpose, is in violation of Const. art. 10, § 1, which provides for a uniform and equal rate of assessment and taxation.

Appeal from superior court, Marion county; P. W. Bartholomew, Judge.

Action by the London & Lancashire Insurance Company to enjoin John O. Henderson, as state auditor, from revoking plaintiff's license as a foreign insurance company to do business within the state. From a judgment of the superior court at general term affirming a judgment of the special term overruling defendant's demurrer to the petition, defendant appeals. Affirmed.

A. G. Smith, Atty. Gen., Finch & Finch, and Duncan & Smith, for appellant. John W. Kera and Thos. Bates, for appellee.

HACKNEY, J. The appellee brought this action in the lower court to enjoin the appellant, as auditor of state, from revoking or attempting to revoke the license or authority of the appellee as a foreign insurance company to do business in the state of Indiana. The petition alleged that the appellee was, and for a number of years had been, engaged in business in the counties of this state; that since the 3d day of March, 1877, it had fully complied with the act of the general assembly in force from that date. (Rev. St. 1881, § 3765,) alleging in detail the steps taken in compliance with said act, and in otherwise obeying the laws of the state relating to the transaction of its business in this state; that it now holds, and ever since the 3d day of March, 1877, it has held, proper certificates of authority from said auditor to transact business in the various counties of this state as a foreign insurance company; that said auditor is threatening to, and will, if not restrained, revoke the authority so held by said company, said auditor therein acting under the act of the general assembly approved March 9, 1891, for the creation of a firemen's pension fund, etc. Acts 1891, p. 415. It is not alleged that said company complied with, or attempted to comply with, said act of March 9, 1891, in reporting its business done in Marion county, but it is alleged that said act is, as to foreign insurance companies, unconstitutional, and confers no legal power to revoke the authority of such companies to transact business within this state. The superior court in special term overruled the appellant's demurrer to the petition, and upon exception to said ruling the judgment was affirmed by said court in general term. The error assigned in this court is said ruling of the superior court in general term.

The title and first three sections of the act of March 9, 1891, the act the constitutionality of which is here questioned, are as follows: "An act to create a firemen's pension fund, for the pensioning of disabled firemen and the widows and depend-

ent children, mothers, and fathers of deceased firemen, to create a board of trustees of such fund, to authorize the retirement from service of disabled members and of all members after a service of twenty-five years, and pensioning of such members, and for other purposes in connection therewith in cities in this state having paid fire departments, and declaring an emergency. Section 1. Be it enacted by the general assembly of the state of Indiana, that every fire insurance company doing business in this state, and not organized under the laws of this state, shall, in the months of January and July of each year, report to the auditor of each county in the state wherein there is a city having a fire department paid by said city, under oath of the president and secretary of such company, the gross amount of all receipts received by such company on account of insurance premiums for insurance upon property in said county for the six months preceding the last day of the last preceding December and June, and of the losses actually paid during the same period, and shall at the time of making such report pay into the county treasury of such county one dollar on every one hundred dollars of the excess of said receipts over and above said losses. Any fire insurance company which shall fail or refuse to render an accurate account of its receipts and losses as herein provided, or to pay the required tax thereon into the county treasury, shall forfeit, for the benefit of said fund in said county, one hundred dollars for each day such report or payment shall be delayed, to be recovered in an action in the name of the state of Indiana on the relation of the auditor of said county in any court of competent jurisdiction; and in case of such failure or refusal of any such fire insurance company to make report or payment as herein provided it shall be the duty of such county auditor, within ten days thereafter, to report such failure and refusal to the auditor of state, who shall, upon the receipt of such notice, forthwith revoke all authority or license heretofore granted to such defaulting insurance company to do business in this state, and no further authority or license to do business in this state shall be granted or issued to such insurance company until the county auditor aforesaid shall have certified to the auditor of state that such insurance company has fully complied with the provisions of this act. Sec. 2. Any county auditor knowing that any fire insurance company is doing business in any city in said county having a fire department paid by said city, contrary to the provisions of this act, who shall fail for ten days after knowledge thereof to report such fact to the auditor of state, shall forfeit and pay for the firemen's pension fund in said county, for each day's failure after the expiration of said ten days, the sum of twenty-five dollars, to be recovered in an action brought in any court of competent jurisdiction by the board of trustees of the fire department of such city. And if the auditor of state, after receiving notice from the county auditor of any county that any fire insurance company is doing business in

such county contrary to the provisions of this act, shall fail or refuse forthwith to revoke the authority or license of such company to do business in this state, such auditor of state shall forfeit and pay for the benefit of the firemen's pension fund in said county the sum of fifty dollars for each day's failure, the same to be recovered in an action brought by said county auditor in any court of competent jurisdiction in Marion county. Sec. 3. The sum so paid into the county treasury of each county, as provided in section 1 of this act, shall be set apart and designated as a 'Firemen's Pension Fund,' and the same shall be held and disbursed for the purpose and objects and in the manner provided for in this act." The remaining sections of the act provide for the election, service, and duties of trustees for such pension fund, the manner of distributing and controlling such fund by such trustees, and that the act shall not be so construed as to affect existing legislation requiring insurance companies to pay taxes into the treasury of the state.

The first objection to the act is that it violates section 19, art. 4, of the state constitution, which is as follows: "Every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title; but if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title." It is important to ascertain the full scope and meaning of this provision of the constitution, and, as has often been said by this court, one obvious purpose was to limit an act to one subject and matters properly connected therewith; another purpose was that such subject, not the matters connected therewith, should be expressed in the title; and still another purpose was to limit the invalidity, by reason of any failure to so express the subject in the title, to so much of the subject as might not be so expressed. But can we say that these were the only purposes? In *Grubbs v. State*, 24 Ind. 295, it was declared that the provision was designed to prevent mischief in legislation which had prevailed before its adoption. Said Justice Fraser: "One of them was stated to be the enactment of laws under false and delusive titles, whereby measures had procured the support of legislators who were thus deceived as to the character of the laws; and another was deemed to be the conjunction in one act of two or more subjects, having no legal connection, for the purpose of procuring the passage of laws which might not alone command legislative sanction upon the strength of popular measures embraced in the same act." Judge Cooley, in his work on Constitutional Limitation, (page 172,) in speaking of the purpose of this provision in the constitutions of the states, says: "It may be assumed that the purpose of these provisions was—First, to prevent hodge-podge or 'logrolling' legislation; second, to prevent surprise or fraud upon the legislature by means of provisions in bills of which the titles gave no intimation, and which might therefore be overlooked,

and carelessly and unintentionally adopted; and, third, to fairly apprise the people, through such publication of legislative proceedings as is usually made, of the subjects of legislation that are being considered, in order that they may have an opportunity of being heard thereon, by petition or otherwise, if they shall so desire." See, also, *In re Borough of Phoenixville*, 100 Pa. St. 44. At a time when the constitution was fresh from the hands of its framers, this court held that one of the objects of this provision was to promote the codification of the enactments of the legislature. *Railway Co. v. Potts*, 7 Ind. 681. We could multiply the desired ends and laudable objects of this provision as expressed by the courts, but we deem those already stated as sufficient for the proper determination of the question under consideration. Counsel for the parties have cited many cases where acts covering very many subjects have been construed. Some of these manifest the spirit of liberality in construing statutes with reference to this provision, while others look more closely to the letter of the provision. It is observed, however, that, owing to the diversity of subjects legislated upon, and the varied forms of expressing those subjects, precedents are without assistance, further than as they apply general rules. In construing the enactments of the legislature with reference to their form, under the constitution, we are fully impressed with the importance as well as the delicacy of our task. Due respect for the rights, privileges, and powers of the legislative department of the state government, and a proper regard for the direction of the fundamental law, make it our duty to uphold legislation where it is not clear that the constitutional command has been violated or neglected, and where it has clearly been violated or neglected to so decide without regard to the objects sought or the interests involved in such legislation. To properly apply the rules suggested for our guidance, we should first ascertain the subject of the act in question.

From the sections of the act as quoted above it will be seen that the object was to make a certain class of firemen pensioners upon a certain class of insurance companies, and to provide and direct the instrumentalities through which this end should be accomplished. We realize that exception may be taken to this statement of the object, since it is contended that the act is not only an exercise of the taxing power, but is in a sense one of the penal conditions upon which such companies are permitted to do business in the state. Of this contention we will speak hereafter. That we give correctly the object of the act is supported by the further contention that such insurance companies have an interest in the preservation of the property insured, which interest is advanced by the maintenance of a wise, diligent, and faithful service of the fire companies, and that they owe some duty in maintaining such service. It is in this line that the act finds its chief support as a just measure. It will be found difficult, if not impossible, to discriminate between a statement of the object of this act and a

statement of its subject. This may not be true as a general rule with enactments, but we find it so in this instance. Possibly it may not be necessary, in expressing the subject of this act, in order to comply with the constitutional provision, that the instrumentalities through which the end is accomplished should be stated as a part of the subject; but to our minds it is clear that the subject cannot be less than the object in other respects, as we have stated it. "An act concerning pensioners" would have been a general statement of the subject of the act, but it would have been too general to advise any one intelligently of its character. Being an expression of the legislature, one of whose functions is to deal with public revenues, it would be supposed that pensioners were to be provided from such revenues; but suppositions are not to be indulged when the legislature is directed to express the subject certainly with enough particularity that at least one accustomed to reading such expressions might understand something of its objects and effects. It should be something more than a mere warning to the reader that unless he shall read the act, and learn if his interests are involved, his property may be affected by it. *Ordronaux's Constitutional Legislation* states (page 590) that "titles should distinctly recite what the particular subject of the law is." This may often be done by language quite general. Then, again, there are instances which require particularity. If the subject is composed of two or more essential elements, the expression of one of such elements in the title would not suffice. The absence of one of such elements in the title would be as misleading, and might be as pernicious, as the evils sought to be obstructed by the constitution. The subject of this act, as we have indicated, is to gather funds from foreign insurance companies, and to dispose of such funds for the relief of firemen. The title expresses the first of these objects included within the subject, but wholly omits the other of such objects. In *State v. Young*, 47 Ind. 150, a test was prescribed for determining if the subject is expressed in the title. It was said, in speaking of that element of the subject claimed to be absent from the title: "Suppose that there was no other provision in the act, \* \* \* if the section could not thus stand alone under the title it must fall." We apprehend that this is always true where only a part of the subject is expressed, and that it is especially true where that part of the subject omitted from the title is not naturally or ordinarily connected with that part of the subject which is expressed in the title. Omitting that part of the act relative to the bestowal of such fund upon firemen, and that provision requiring such companies to contribute to such fund could not stand alone under the title of the act as the subject is expressed. The requirement that the subject expressed should apprise the people of the subject of legislation, in order that an opportunity for a hearing or for petition may be had, is far from being complied with in the act before us. No notice whatever to those expected to contribute to such fund is given. It may be

said that other taxing acts have been held valid without expressing in the title the classes affected by them, but we think this will not be found true where the source is not general, and in the exercise of the natural and ordinary powers of taxation. Here we have an unusual and extraordinary exercise of the power, not only in the object and purpose, but in the source from which the fund is to be raised, and in the manner of levying it.

The act under consideration is attacked as violating several other provisions of the constitutions of the United States and of the state of Indiana, but we do not deem it our duty to determine but one of the questions so presented, having already held the act insufficient as to its title. It is said that the act is an attempted exercise by the legislature of the power of taxation, and that, being local, not uniform, and for no public purpose, is in violation of the taxing powers as conferred by the constitution, (article 10, § 1.) That provision of the constitution is as follows: "The general assembly shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only for municipal, educational, literary, scientific, religious, or charitable purposes as may be specially exempted by law." Is the enactment of the law before us an attempted exercise of the power of taxation as conferred by the constitution? In several states this character of legislation has been before the courts for construction, and we find the decided weight of authority holding that it is such an attempt. *San Francisco v. Liverpool, etc., Ins. Co.*, 74 Cal. 113, 15 Pac. Rep. 380; *State v. Wheeler*, 33 Neb. 563, 50 N. W. Rep. 770; *Association v. Wood*, 39 Pa. St. 73; *State v. Merchants Ins. Co.*, 12 La. Ann. 802. The only cases holding it as the exercise of any other power are *Trustees v. Roomo*, 93 N. Y. 313, where it is expressly held that such power is in the exaction of a license fee, or the fixing terms upon which such companies may transact business in the state; and *Fire Department v. Helfenstein*, 16 Wis. 142, where it is expressly held that the power exercised is "the police power inherent in the sovereignty of the state." Another case—that of *Association v. Lounsbury*, 21 Ill. 511—stands alone in declaring it is not only the taxing power, but that such power was correctly exercised, under the peculiar form of the constitution of that state.

We are not called upon to decide whether the legislature might properly have required the exaction here levied as a condition upon which such companies could do business in this state, as it was held in New York, but we are of the opinion that no such attempt was made. Since March, 1877, as we have shown, our legislation has prescribed the terms upon which such companies may transact business in this state, (Rev. St. 1881, § 3765,) and, as alleged in the complaint, this appellee during that period has fully complied with such terms. The act in question does not purport to add its exaction to the condi-

tions so prescribed by the act of 1877; on the contrary, it expressly denominates the levy a "tax." If there were room for question as to the correctness of our conclusion, we should find support from the concessions of appellant's able counsel that it must be treated as an effort to exercise the taxing power. Counsel for the appellant further say: "Of course we concede that the legislature cannot levy taxes for anything but public purposes, as, for instance, to assist a private person in his business, or even to aid him in misfortunes from fire or flood or other casualty." But it is insisted that the declared burden is for a public purpose, in that it is levied for the benefit and compensation of those, and the families of those, whose lives have been or may be imperiled or lost in pursuing the arduous and dangerous duties of saving from the flames the property of the citizens; that in the discharge of these duties the firemen sustain such relation to the public as to become, in the true sense, public servants; that the public demands the highest degree of skill, diligence, and good faith from these servants, and that this degree is best attained by holding out to them the certainty of care when injured, and family support when age, disease, or death comes upon them. To establish this contention, counsel devote considerable space in their briefs to quotations from text writers and from adjudged cases, principally the cases we have referred to, as not adhering to the proposition that this exaction is a tax, and they exhibit marked ability in building the theory so urged upon us. To this theory we are not inclined to give our adherence. The Wisconsin rule does not hold that the right exists in behalf of firemen as public servants. It disregards the relationship existing between firemen and the public, and justifies the exaction as the exercise of a police power, and in imposing the burden upon foreign companies as the condition upon which they are admitted to do business in the state. The Illinois rule can best be given by quoting from *Association v. Lounsbury*, supra. It is there said, (page 513:) "The other objection is that here a revenue is attempted to be raised, not for state purposes, nor yet to meet any public exigency or want, but purely for the benefit of a private charity; that it is not required to be paid into the state treasury, but must be paid to this private corporation, for whose benefit the burden is imposed. The general grant of legislative power found in the constitution confers upon the general assembly all legislative power, and authorizes the lawmakers to pass any laws and do any acts which are embraced in the broad and general word 'legislation' as known and defined in the English language. It authorizes the passage of any law which could be enacted in the most despotic government. It even authorizes everything which the people could enact in their primary capacity; anything which they would have a right to embody in the constitution itself." It is further stated, (page 514:) "There is nothing to be found in the constitution which can be held to inhibit the legislature from imposing burdens or raising money



from citizens of the state which is not for the direct benefit of the state, and is never designed to belong to the state." The only inference made to the relationship between firemen and the public is as follows: "With the view we take of this case, it is immaterial whether this be considered a public or a private charity; but it should more properly be considered a public charity." Our constitution gives no such unlimited power to the legislature, and as an authority for the construction of powers under our constitution we cannot accept this decision. Nor are we inclined to give special weight to it in favor of the contention of the appellant that firemen are public servants within that sense which would admit of the exercise of the taxing power of the state. The New York rule is that the percentage of receipts is exacted as a condition upon which companies are admitted to transact business in the state, as the terms of such admission, or the license fee for such privilege. This is not in the exercise of the taxing power, but so far as it may be recognized as prescribing the terms upon which foreign corporations are admitted into the state it is unimportant whether firemen are public servants or not. When it is held that legislation is for the purpose of defining the terms of admission, there is in this state no question of its constitutionality. Therefore the New York rule involves the question whether firemen are public servants only as to the distribution of a fund conceded to be raised by proper methods, namely, as the condition of admission into the state. Such is not the whole question with which we are dealing. Here we have a law enacted in the pretended exercise of the taxing power of the state, exacting a penalty from that part of the class of foreign insurance companies which do business in the four counties of this state having cities with paid fire departments; and the fund thus exacted by the power of the state is not for the benefit of the state, is not for the benefit of those portions of the state whose business with such companies must contribute to said fund. The business done in each of the four counties affected bears the burden of the exaction, and the fund is devoted to the benefit of firemen within four cities only. The property of such counties outside of such cities get no protection from such firemen, and the owners have no pecuniary interest in them. While the fund for the benefit of the city is obtained from the companies, the companies must first obtain it from the whole people of the county, thus requiring the people of the county indirectly to contribute to the pensioning of city firemen. The question, therefore, should be, are the firemen benefited the servants of those whose taxing power is exerted in their behalf? We think they are not, even if we should concede that they were in any sense servants, or dependent upon the bounty, or were the objects of the charity of the people of such cities. It must be borne in mind that they are not the servants of the state; they are not the servants of the county in which they live. Though they may deserve the highest praise and the most liberal re-

wards for their daring and hardships in combating the flames, they are the creatures and the servants of but a small subdivision of the state. Here the taxing power of the state is exerted for the benefit of a few of the citizens of the state who hold the obligation of their respective cities for their courage and their valued service, and the purpose is that this power shall be exerted for the discharge of that obligation. We do not regard this as the most objectionable feature of this act. We have 92 counties in this state, whose united power is thus exerted in levying a tax upon certain foreign insurance companies. As to the state, all foreign insurance companies constitute a class, and of this class all are not subject to the operation of this act,—only those who do business in four of such counties. The taxing power of the state cannot thus be made the means of levying municipal taxes upon a fraction of a class and of bestowing the tax so levied upon a small fraction of the citizens of the state, all of her citizens standing in like relation to her, unless she owes them some peculiar obligation, not existing in serving as firemen for some city. The taxing district of the state wherein taxes are directed for the benefit of those serving the state is the whole state. State taxes are not of uniform and equal rate when they apply to a portion of a class only, and omit a portion of the same class, and this is no less true because the class may be divided by county lines. Uniformity in rate, as required by the constitution, means that the same rate shall apply alike to all in any given taxing district. *Railway Co. v. Backus*, (Ind. Sup.) 33 N. E. Rep. 421; *Gilson v. Board*, 128 Ind. 65, 27 N. E. Rep. 235. The four counties affected have no power under this act to make the percentage from the business of the companies the condition upon which business shall be done by such companies, and the act does not purport to give such power. The percentage is not levied under any law or by any method known to the gathering of county or city revenues. The act is a plain and unmistakable effort to use the taxing power given to the state, and for the purposes of the state, in behalf of a favored class in a few of the cities of the state. As we have said, this cannot be done. The cases of *San Francisco v. Liverpool, etc., Ins. Co.*, supra; *State v. Wheeler*, supra; *Association v. Wood*, supra; *State v. Merchants' Ins. Co.*, supra, fully sustain our conclusion. The judgment of the lower court is affirmed.

(134 Ind. 681)

CLEVELAND, C., C. & I. RY. CO. v.  
WYNANT.

(Supreme Court of Indiana. June 7, 1893.)  
RAILROAD COMPANIES—NEGLIGENCE—LEAVING  
CAR ON HIGHWAY CROSSING—PERSONAL INJURIES—VERDICT—SUFFICIENCY OF EVIDENCE—DECISION ON FORMER APPEAL—INSTRUCTIONS.

1. A complaint which has been once held sufficient by the supreme court cannot be questioned on a second appeal. *Mason v. Burk*, 22 N. E. Rep. 119, 120 Ind. 404, followed.

2. In an action against a railroad company

for personal injuries caused by horses taking fright at a box car standing on the highway at a crossing, a verdict for plaintiff is not wanting in evidence to support it because plaintiff failed to prove that defendant placed the car on the crossing, since the inference that some one put it on the highway was a reasonable and logical one from the fact of its being there; and the question as to whether it was more reasonable to presume that defendant placed it there than that intermediaries did so was for the jury.

3. Where the only source of knowledge by the supreme court of what a witness testified to on a former trial of the same action is the report of the decision on a former appeal, the evidence of such witness is not before the court, since it must determine the case from the same evidence that was before the jury.

4. Where it appears that the horses were frightened both by the car on the crossing and by a noise at the car, for which neither plaintiff nor defendant is responsible, defendant is liable.

5. The complaint alleged that defendant's negligence consisted in leaving its car on the crossing. Plaintiff testified that the horses got scared at the car, and that she had no recollection of hearing any noise about the car, or testifying on the first trial that the horses got scared at a noise in or about the car. Her husband testified that the horses got scared both at the car and the noise, and admitted that on the former trial he testified that they were scared at the noise in or about the car. *Held*, that a verdict for plaintiff was supported by the evidence.

6. Though such evidence of plaintiff and her husband is incompetent because mere statements of conclusions, the verdict is not without support, since, whether the horses got scared at the noise or at the car or both was an inference of fact which the jury had the right to deduce from the facts proven.

7. A party who permits evidence to go to the jury without objection cannot make the court's refusal to strike it out on motion available error.

8. It is not error to refuse to charge that "defendant had the right to leave its cars standing upon the track . . . at any point or place," and if the car in question was placed by defendant at a point where it did not obstruct the highway, and it was afterwards, by persons not in its employ, moved on or partly on the highway, defendant would not be liable unless it negligently permitted it to so remain for an unreasonable length of time, "and after notice or knowledge to defendant or her employes that said car was upon said highway." *McCabe, J., dissenting.*

9. Where the court instructed that defendant had the right to have its cars standing on the track at any place, "except in or upon the right of way of the highway," and if the car in question was placed by defendant at a point where it did not obstruct the highway, and it was afterwards, by persons not in its employ, moved on or partly on the highway, defendant would not be liable unless it negligently permitted it to so remain for an unreasonable length of time,—the substance of so much of the refused instruction as was correct was given to the jury. *McCabe, J., dissenting.*

Appeal from circuit court, Madison county; M. A. Chipman, Judge.

Action by Harriet Wyant against the Cleveland, Columbus, Cincinnati & Indianapolis Railway Company for personal injuries caused by defendant's negligence. From a judgment for plaintiff, defendant appeals. Affirmed.

John T. Dye, William H. Dye, M. S. Robinson, and John W. Lovett, for appellant.

H. D. Thompson and O. L. Henry, for appellee.

*McCABE, J.* Appellee sued the appellant for a personal injury alleged to have been received by her through the negligence of appellant. Issue, trial by jury, verdict for plaintiff for \$3,570, upon which appellee had judgment over a motion for a new trial. The errors assigned are (1) that the court erred in overruling a demurrer to the complaint; (2) in overruling the motion for a new trial. The complaint was in two paragraphs, and they are the same they were when the case was here on two other appeals. Both paragraphs were held good on demurrer on the first appeal. 100 Ind. 160; *Id.*, 114 Ind. 525, 17 N. E. Rep. 118.

It is settled law that a ruling in a case on a former appeal in this court is the law of that case on the point ruled throughout all its subsequent stages until its final determination, and a complaint once held good on one appeal cannot thereafter, in another appeal of the same case, be questioned. *Mason v. Burk*, 120 Ind. 404, 22 N. E. Rep. 119; *Board v. Jameson*, 86 Ind. 154; *Gerber v. Friday*, 87 Ind. 366; *Jones v. Caster*, 96 Ind. 307. Therefore the first assignment of error is not well taken.

Among the reasons for a new trial was that the verdict was not sustained by sufficient evidence. As will be seen by reference to 100 Ind. 160, the plaintiff was injured by the team of horses drawing the vehicle in which she and her husband were riding becoming frightened and running away, at a place where the highway on which they were travelling crossed the railroad track of the appellant, resulting in the breaking of appellee's arm. The wrong with which the appellant was charged was negligently leaving one of its box cars standing on its track upon and partially across said highway, which extended 24 feet upon said highway, and to the edge of that part then used by the public as their route of travel, which caused the said team of horses, and each of them, to become frightened and wholly unmanageable, and to run away, overturning said wagon, thereby breaking her arm, without fault or negligence on her part. The appellant insists that the evidence is not sufficient to support the verdict, in that it fails to establish that the box car caused the fright of the horses, and caused them to become unmanageable and run away. On the other hand, it is contended that this court cannot reverse the judgment on the evidence alone if it tends to support the verdict. It is claimed by appellee's counsel that, if the evidence tends to support the verdict, this court cannot reverse the judgment on the evidence. This is not strictly correct. That expression has been used in a long line of cases by this court, but evidently not intending that the language should be construed in its literal signification. *Lane v. Brown*, 22 Ind. 239; *Shank v. State*, 25 Ind. 207; *Atkinson v. Martin*, 39 Ind. 242; *Railroad Co. v. Grove*, 47 Ind. 133; *Wingate v. Neldinger*, 50 Ind. 520; *Simpson v. Payne*, 58 Ind. 431; *Dur-*

rah v. Stillwell, 59 Ind. 139; Applegate v. Moffitt, 60 Ind. 104; Railroad Co. v. Snapp, 61 Ind. 303; Railroad Co. v. Husseleman, 65 Ind. 73; Martin v. Canble, 72 Ind. 67; Railroad Co. v. Tipton, 101 Ind. 197; Crocker v. Hadley, 102 Ind. 416, 1 N. E. Rep. 734; Secor v. Skiles, 106 Ind. 98, 5 N. E. Rep. 897; Railway Co. v. Savage, 110 Ind. 156, 9 N. E. Rep. 85; Cowger v. Land, 112 Ind. 263, 12 N. E. Rep. 96; Insurance Co. v. Yung, 113 Ind. 159, 15 N. E. Rep. 220; Isler v. Bland, 117 Ind. 457, 20 N. E. Rep. 308. It seems quite unreasonable to say that, if the evidence does nothing more than tend to support the verdict, this court cannot disturb it. Evidence is always admissible that tends to support or prove the issue on the part of the party offering it, however slight that tendency may be; and it is never required as a condition to the introduction of offered evidence that it must be sufficient to establish the issue for the party offering it. If its tendency is in that direction it is competent. There may be several facts essential to establish or prove the issue on behalf of the plaintiff in a given case, and there may have been evidence sufficient to prove one of them only, and yet on such evidence a verdict could not stand on appeal in this court, though such evidence tends to support it. While it tends to support the verdict, it is not sufficient, because it does not prove enough, even though wholly uncontradicted. In Martin v. Canble, supra, the expression is: "This court will not disturb the finding of the lower court on a disputed question of fact if there is evidence in the record on which the finding can stand." In Butterfield v. Trittip, 67 Ind., at page 342, it is said: "While this court may not properly weigh evidence, nor attempt to determine its preponderance either for or against the finding below, it is still the duty of this court, as we understand our duty, to carefully examine the evidence, when the point is made with a view of ascertaining whether or not there has been a failure of evidence on any material question. When the record discloses such a failure of evidence, it is as much the duty of this court to reverse the judgment below, on that ground, as for any other error." In Swales v. Southard, 64 Ind., at page 559, it is said: "There was legal evidence introduced on the trial, tending, and sufficient, to sustain the verdict of the jury." In Grant v. Westfall, 57 Ind. 127, it is said: "The only question is whether or not the verdict \* \* \* is sustained by sufficient legal evidence. We think it is." In Watt v. DeHaven, 55 Ind., at page 180, it is said: "We think the evidence \* \* \* amply sufficient to sustain the finding of the court below; but, if we thought otherwise, we would not \* \* \* disturb the finding on the mere weight of the evidence." And in Railroad Co. v. Taffe, 37 Ind., at page 369, it is said: "When there is legal evidence that conduces to prove every material fact in the case, we must," etc.

It was never intended by the expression that "the verdict on appeal cannot be disturbed in this court when the evidence tends to support it," to hold that less than

sufficient legal evidence to establish the issue or the truth of the verdict or finding would suffice, excluding from consideration all evidence conflicting therewith. Where the sufficiency of the evidence to support a verdict or finding is brought in question in this court on appeal, the question presented is very much like, and very nearly the same as, that presented by a demurrer to the evidence in the trial court. In Willcuts v. Insurance Co., 81 Ind., at page 303, this court said: "First. A demurrer to the evidence admits all facts of which there is any evidence, and all inferences which can be logically drawn from the evidence. Second. All reasonable and natural inferences which may be drawn from the evidence are admitted; but forced and unnatural ones are not. The court will also, on the argument of the demurrer, make every inference of fact in favor of the party \* \* \* which the jury might, with the least degree of propriety, have inferred, but they ought not to make forced inferences. Third. In considering the evidence demurred to, the courts will not weigh it, to determine whether a fact of which there is any evidence has or has not been proved; nor will they consider such evidence as is favorable to the demurring party if there be any opposing evidence. So, if the evidence conflict, the party demurring must admit that of his adversary to be true so far as it conflicts with his own." In Stockwell v. State, 101 Ind., at page 5, it is said: "That upon such demurrer the court will infer from the evidence every conclusion that the jury could reasonably have inferred from it; that all the facts of which there is any evidence are admitted, and all conclusions which can fairly and logically be deduced from those facts." The only difference in the two cases is, on a demurrer to the evidence the demurring party by his demurrer admits the evidence and logical inferences deducible therefrom to be true in favor of the opposite party, while on appeal the appellant does not admit the evidence and logical inferences therefrom to be true, but this court considers them true.

So, too, on an appeal here, the evidence must more than merely tend to support the verdict; it must be such as that, if every fact proven were admitted to be true, and every fact which could be logically and reasonably deduced therefrom were also admitted to be true, and that these facts embraced every fact essential to the existence and truth of the verdict, then, and not till then, is the evidence sufficient to support the verdict. No matter how great the contradictions to that evidence, if it comes up to the requirement above specified, it is sufficient to support the verdict in this court on appeal. If it does not, it is not sufficient. It is very earnestly insisted that the evidence is not sufficient, in that it fails to show that the appellant placed the boxcar on its track so as to extend into the highway. It is insisted that it might have been the work of intermeddlers. But the fact was proven beyond dispute that the car was there. The inference that somebody put it there was a reasonable and logical one, and one the jury had a right

to deduce from the proven fact that it was there. Which was the more reasonable and logical inference, that appellant put it there, or that some trespasser or intermeddler did so, was purely a question for the jury to determine. Their verdict indicates that they deemed it more reasonable to infer that the railway company, in the exercise of their dominion over their property, placed the car on their track, extending partially into the highway, and left it there, though that involved a wrongful act on appellant's part, than to infer that some stranger was guilty of two wrongs instead of one, namely, wrongfully moving the car from a proper place on the company's track, and wrongfully extending it into the highway. One or the other of these inferences necessarily arises from the proven fact that the car was found extending into the highway, and the inference that the owner placed it there; and while either inference was warranted, the one deduced was the more reasonable inference. Therefore the evidence was not insufficient in that respect. On the first appeal here the judgment was reversed because the evidence was insufficient to sustain the verdict. The appellee and her husband were the only persons that saw the accident, and the only witnesses to the transaction in court. From the report of the first trial it seems that they both testified that the team got frightened at a noise in or about the box car instead of the car itself. It is held on that appeal that the alleged negligence of leaving the car on the appellant's track protruding into the highway was not sufficient to entitle appellee to recover. It was there said that "it must not only be shown by the evidence that appellee's injuries were occasioned by the appellant's negligence as the proximate cause, without contributory negligence on her part, but substantially in the manner alleged in the complaint. It was charged in each paragraph of the complaint that the appellee's team of horses became frightened at the empty box car, etc. There is no evidence in the record tending to prove that appellee's team became frightened at the car; on the contrary, the evidence utterly refutes the charge that the team took fright at the car. \* \* \* Appellee testified: 'The horses got scared at the noise that was made. I could not tell what did it, but it was the noise that scared the horses.' Her husband testified to the effect that the horses became frightened at a noise in a car on the railroad out in the public highway. \* \* \* We are of opinion, therefore, that there is an absolute failure of evidence to sustain the case made by the material allegations of the complaint." On the last trial the appellee and her husband, still being the only witnesses to the accident, testified somewhat differently from what they did on the first trial. Her husband, on the last trial, testified in part as follows: "Well, sir, just as they came right to that road, they got frightened at the car, and jumped. The horses made a start before the noise was. The noise might have helped it, but I don't know whether it did or not. Well, sir, it was after I drove up the road, and

after the horses scared, and they made the jump to go; and I thought there was a noise there that did it, but I was not right certain about it, how it was or where it was." Speaking of how he testified on the first trial, he testified as follows: "Question. I will ask you if you didn't state on that trial, in regard to the horses being frightened, in answer to a question, that 'I could not tell what did it, but it was the noise that scared the horses.' Answer. I don't think I did, just that way. Why, I said they got scared at the cars, but there was a noise, I think, and the noise helped it. Q. Well, do you say now the noise helped it? A. Well, it might have helped it. I don't know as I could say. \* \* \* Of course they frightened at the car. Q. Now, you think the horses scared at both the car and the noise? A. Yes, sir; I always thought that. Both helped do it; the car first, \* \* \* and the other afterward. Q. And if you didn't state in the former examination that you found the door was loose, and the noise that came from that—from the wind rattling that—scared the horses? A. I believe I stated that; yes, sir. I thought the noise created by the door helped frighten them. Q. Didn't you say at that time [first trial] it did frighten them? A. I wouldn't like to say. I don't know whether I did or not. Q. And this question, 'What was it you said scared them?' and you answered, 'Some noise in the car. I thought it was a loose door. That was my own idea; but there was a noise there.' A. Yes, sir; I believe I said something about that. Q. Now, I will ask you this question, if you didn't answer this question as follows: 'Your horses didn't scare until they heard that noise?' and you answered, 'When they heard that noise they sprang, and before I knew much about anything else I was laying out.' A. Well, yes, sir; I don't know but I did." And the plaintiff testified as follows: "Q. Did you hear any noise there? A. I don't remember as I did. I don't remember that I did. Q. You don't remember of any noise? A. No, sir; I don't remember of any noise. I know that you said I did at the first trial, and I think about that. That made me think about it. Well, I don't. I can't say that I heard any noise. I can't say it. I have studied about it since. Q. Then, if you did testify to that, you have forgotten it? A. If I did, I expect I didn't know what I was testifying about. Q. Didn't you testify on the first trial that 'the horses scared at the noise that was made?' A. I don't remember that I did. Q. Didn't you say on that trial that 'I could not tell what did it, but it was the noise that scared the horses?' A. I couldn't say. I don't remember of saying it, and I don't remember of there being any noise. Q. Well, you don't remember of testifying to that? A. No, sir. I don't remember of that."

The testimony of these two witnesses becomes very vital on the point as to what frightened the horses, because on the first appeal the law of this case was settled that under the allegations of the complaint as they then were, and still are, if the noise in or about the car frightened the horses,

and caused them to become unmanageable and run away, the appellee could not recover, and the evidence would be insufficient to sustain the verdict. We are asked to reverse because the plaintiff's own testimony on the first trial refuted the complaint, in that it established that it was the noise in or about the car that frightened the horses, and that she now, as is charged in argument, conveniently forgets that she so testified on the former trial, and conveniently forgets whether there was any noise about the car or not when the horses took fright. If these charges against appellee were brought before this court by legitimate proof, and their truth established the falsity of the evidence that tends to support the verdict, they would have a controlling influence on the determination of this appeal, and the appellee would not escape the severe animadversion of this court. But the only means we have of knowing how she testified on the first trial is the report of the case in 100 Ind. 160. In considering the sufficiency of the evidence to sustain the verdict on the last trial, we are restricted and limited to the evidence that went to the jury that returned the verdict now under consideration; and if the appellee's testimony that went to the jury on the first trial was supposed to have a bearing on the credibility of her testimony on the last trial, it was the right of the appellant, and incumbent on it, to have introduced proof of such former testimony on the last trial; and then, and not till then, could the jury on the last trial have considered such former testimony, either for the purpose of affecting the credibility of appellee's testimony on the last trial or as a solemn admission under oath of a party to the record. The jury on the last trial could not consider these matters, because not given to them in evidence. It would be a dangerous and reprehensible practice to allow a jury to base their verdict in whole or in part on evidence that was never introduced before them; and it would be equally reprehensible in this court to overthrow their verdict as against evidence, in whole or in part, by considering evidence that was not introduced before the jury. "As the tree falleth, so shall it lie." When a verdict is assailed in this court as unsustained by the evidence, the evidence introduced before the jury can alone be considered, and generally only that part of it that tends to support the verdict. The appellee, in her direct examination, did not testify on the vital point as to what it was that frightened the horses. She only testified, on cross-examination by appellant, that she had no recollection of hearing a noise about the car, and no recollection of testifying on the first trial that the horses got scared at a noise in or about the car, and that the horses got scared at the car. Therefore, this testimony being called out by appellant not in response to anything she had stated in her chief examination, it could not have discredited anything she testified to on the last trial as to what caused the fright of the horses, because she did not testify on her chief examination to anything on that point in the last trial.

It is somewhat different with appellee's only other witness to that point, who was her husband. He admits on cross-examination, substantially, that he did testify on the former trial that the horses were scared at the noise in or about the car. He substantially testified on the last trial that they got scared at both the noise and the car. Though he bore a near relationship to the appellee, his former testimony could not be used as a declaration or admission of a party, because he was not a party to the suit. The only effect his former testimony could have had was to discredit his last testimony to the effect that the horses did not get scared at the car alone, but were scared at both the car and the noise. The jury in the last trial had the benefit of his former testimony, and could compare it with his last testimony, and it was their exclusive province to determine how much it weakened or discredited his last testimony. His last testimony was wholly undisputed and uncontradicted, unless it was so contradicted by his former testimony; and it was the duty of the jury to reconcile that conflict, if conflict there was, and say by their verdict which one of his stories they would believe. It was evident that one or the other of his stories was true. If the first one was true, the jury must have, under the instructions of the court, found for the appellant; and, if the last one, then it became the duty of the jury, as we shall hereinafter see, to find as they did. If the circumstances did not justify the jury in finding the last story of the witness Adam Wynant true, it was the imperative duty of the trial court, who had equal opportunities and facilities with the jury in weighing the testimony, to promptly grant the motion for a new trial. By refusing the new trial the trial judge has said to us that he, having carefully and conscientiously reviewed the evidence, is of opinion that the jury were justified in believing the last story of Mr. Wynant. We have already adverted to the rule that forbids us from disturbing a verdict or finding merely on the weight of the evidence. That rule forbids us to say that the first story of the witness outweighed the last, or that the jury made a mistake in weighing the conflicting stories, if they were conflicting. Again, it is, after all, not much of a conflict. When he testified before that it was the noise that scared the horses, it was evidently a mere inference of his. That inference might have been correct, but still it was an inference which evidently he deduced from the noise, from the action of the horses, and from all the attendant circumstances and appearances. For instance, one of the grounds for the appellant's motion for a new trial was the refusal of the trial court "to strike out a part of Adam Wynant's testimony, to wit, 'Well, sir; just as they got right to that road, they got frightened at the car.'" The ground on which appellant's counsel contend in this court that said testimony ought to have been stricken out is that it is a mere conclusion. On this point appellant's counsel say: "It is too well settled law to need reference to cases to convince this court that facts must be proven, and not conclusions; that it would have been

all right to testify what was there, and what was done, but not what did it. This would be depriving the court and the jury of their functions." We are inclined to concur with this view, and it follows that, if it is a conclusion of the witness when he testified that "the horses got frightened at the car," then it is equally a conclusion or inference of his when on the former trial he testified that the noise frightened the horses. There are several reasons why the alleged error in refusing to strike out that testimony was not available. One is, a party cannot sit by and permit improper testimony to go to the jury, and then make the court's refusal to strike it out available error. The failure to object at the proper time waives the error, if any was committed. So, then, whether the horses got scared at the car or the noise or both was an inference of fact, which the jury alone had the right to draw or deduce from the facts proven; and we cannot interfere with the inferences of fact they have embraced in and are essential to sustain the verdict, unless such inferences cannot be reasonably and logically drawn or deduced from the evidence. We cannot say that the inference cannot be reasonably and logically drawn and deduced from the evidence that the horses got frightened at the car and noise both. On the contrary, we think such an inference or deduction from the evidence was both reasonable and logical.

Can appellee recover under the complaint if Adam Wynant's statement was true that the horses got frightened at both the noise and the car? 2 *Thomp. Neg. p.* 1085, § 3, says: "Where an injury is the combined result of the negligence of the defendant and an accident for which neither the plaintiff nor the defendant is responsible, the defendant must pay damages, unless the injury would have happened if he had not been negligent." To the same effect, 18 *Amer. & Eng. Enc. Law.* 440, 441, and authorities there cited; *Village of Carterville v. Cook*, 129 Ill. 152, 22 N. E. Rep. 14; *Palmer v. Inhabitants of Andover*, 2 Cush. 600. The appellant was not liable for the consequences of fright caused by the noise, under the averments of the complaint, but was for that caused by the car. Neither was it the fault of the appellee, and the injury in this case could not have happened if the car had not been left in the highway. We therefore hold that, if the evidence showed that the fright was caused both by the car and the noise, the verdict is supported by the evidence.

The next question presented relates to the refusal to instruct the jury as requested by appellant. The court was at the proper time requested to reduce all instructions to writing, and all the instructions are properly in the record, and were given in writing. Among the instructions given by the court, and the only one covering that ground, was the following: "The defendant had the right to have its cars standing upon the track of its branch railroad at any point or place except in or upon the right of way of the highway, and if the car named in the complaint was placed by said defendant

on said railroad at a point where the same did not obstruct the highway, and said car was afterwards, and by the acts of persons not in the employ of the defendant, moved or placed at the point where it was at the time of the accident, on or partly on the highway, and said horses took fright at said car, the defendant would not be liable for the damage occasioned by the accident, unless the defendant negligently permitted said car to so remain upon said highway for an unreasonable length of time." The defendant at the proper time requested the court to instruct the jury as follows: "The defendant had the right to leave its cars standing upon the track of its branch railroad at any point or place, and if the car named in the complaint was placed by said defendant on said railroad, at a point where the same did not obstruct the highway, and said car was afterwards, and by the acts of persons not in the employ of the defendant, moved or placed at the point where it was at the time of the accident, on or partly on the highway, and said horses took fright at said car, the defendant would not be liable for the damage occasioned, unless the defendant negligently permitted said car to so remain upon said highway for an unreasonable length of time, and after notice or knowledge to the defendant or its employees that said car was upon said highway." There was no other instruction given that covered the same ground that this did, unless the one first above set out does. The court refused to give this instruction. It is settled law that the presumption that the trial court acted correctly and legally prevails until the contrary is made to appear affirmatively by the record. Therefore, if the record did not show all the instructions that were given, this court must presume that the trial court had already instructed the jury fully and correctly on the point requested, or, in the absence of the evidence, that the instruction was correctly refused because not applicable to the evidence. But this instruction was applicable to the evidence; yet it was not error to refuse it if the instruction first above set out embraced the substance of the refused instruction. *State v. Sutton*, 99 Ind. 300; *Blizzard v. Applegate*, 77 Ind. 516; *Jennings v. Howard*, 80 Ind. 214; *Williamson v. Yingling*, Id. 379; *Haus v. Niblack*, Id. 407; *Railway Co. v. Martin*, 82 Ind. 476; *Railway Co. v. Sponier*, 55 Ind. 165; *City of Evansville v. Wilter*, 58 Ind. 414; *Terry v. Shively*, 93 Ind. 413; *Railway Co. v. White*, 94 Ind. 257; *Atkinson v. Dailey*, 107 Ind. 117, 7 N. E. Rep. 902; *Association v. Grauman*, 107 Ind. 238, 7 N. E. Rep. 233. Neither was it error to refuse the instruction if a part of it was incorrect, though most of it was correct. The majority of the court is of opinion that there was no error in the refusal of the instruction, for both the reason that the substance of the refused instruction was embraced in the one given above, and that all of the refused instruction was not correct, and was calculated to mislead the jury, in that in the fore part of it the jury are told that the appellant "had the right to leave

its cars standing upon the track of its branch railroad at any point or place." The majority of the court are of the opinion that the substance of the other part of the instruction was embraced in that given, in that when the jury are told that appellant's liability only arises when it has negligently permitted the car to remain on the highway an unreasonable length of time, that it is thereby implied that appellant had knowledge, or ought to have known by the exercise of reasonable care, of the existence of the car on its track in the highway. The writer does not concur in either of these views. He is constrained to respectfully differ on those points with his brethren. The majority of the court is therefore of opinion that there is no error in the record, and the judgment is accordingly affirmed.

(8 Ind. App. 523)

FERGUSON et al. v. DESPO.

(Appellate Court of Indiana. June 24, 1893.)

RAILROAD COMPANIES—MECHANICS' LIENS—MATERIAL AND LABOR FOR SUBCONTRACTOR—LIABILITY OF CONTRACTOR—LIABILITY OF RAILROAD COMPANY—NOTICE—ASSIGNMENT OF ERROR—SUFFICIENCY.

1. Where the names of all the parties to an action are given in the body of an assignment of errors, it is sufficient, though the name of one party is omitted from the title of the cause.

2. Contractors for the construction of a railroad are not liable to the foreman of subcontractors for his services and for material furnished by him, in an action to recover a personal judgment against them, the subcontractors, and the railroad company, and to enforce a mechanic's lien, where it does not appear that the contractors owe the subcontractors anything on the contract, or that there is any privity between plaintiff and such contractors.

3. The railroad company is not liable personally to such foreman for board, groceries, tobacco, money, or other supplies furnished by him to the employes of such subcontractors; nor can the cost of such supplies be made a charge on its property, in the way of a mechanic's lien.

4. But the railroad company is liable to such foreman for his services while in the employ of the subcontractors.

5. Under Act April 13, 1885, § 1, as amended by Act March 9, 1889, § 6, (Elliott's Supp. § 1710,) providing that, if the work is done in pursuance of a contract with any subcontractor of a railroad corporation, the person performing it need not give notice to the corporation, as provided by Act March 6, 1883, to entitle him to a lien, but the performing of the work shall be sufficient notice, and that the provisions of the latter act, when applicable, shall remain in force, except that part of section 9 in reference to notice, no notice to the railroad company was necessary, further than the filing of notice of lien, to entitle such foreman to maintain an action against it for such services.

6. Nor was any demand on the company necessary to entitle him to maintain such action.

Appeal from circuit court, Lawrence county; R. W. Myers, Judge.

Action by Alfred O. Despo against Francis M. Ferguson, Emma Ferguson, and Mary Ferguson, as partners, Cummings & Conner, partners, and the Cincinnati & Bedford Railway Company, to recover for supplies furnished and services rendered

Cummings & Conner, as subcontractors, and to enforce a mechanic's lien. From a judgment for plaintiff, defendants Ferguson and the railway company appeal. Reversed as to Fergusons, and affirmed as to the railway company.

M. F. Dunn, for appellants. C. R. Haseley and Herod & Herod, for appellees.

REINHARD, J. We are asked to dismiss this appeal, or affirm the judgment, on the ground of an alleged defect in the assignment of errors. The amended assignment in the title of the cause leaves out the name of one of the appellants. In the body of the assignment, however, the names of all the parties are given, thus: "The above-named appellants [naming each of them] file this, their amended assignment of errors, making their codefendants below in the Lawrence circuit court [naming them] coappellees with said other appellee, Alfred O. Despo, for the reason that said [naming the coappellees] have not joined in this appeal, and assign additional errors." Then follow the separate assignments of errors. We regard the assignment as sufficient. The assignment of errors is the appellants' complaint in this court. It must contain the names of all the parties to the appeal, and a failure makes the assignment fatally defective. Elliott, App. Proc. § 322. This is likewise required of a complaint under the Code. Rev. St. 1881, § 338. But it has been held that the omission to give the names of the parties in the title may be supplied by naming them in the body of the complaint. Ammerman v. Crosby, 26 Ind. 451; 1 Work, Pr. §§ 344, 345.

Despo brought this action against the appellees Cummings & Conner, partners, and the appellants Francis M., Emma, and Mary Ferguson, partners, and the Cincinnati & Bedford Railway Company. The substance of the complaint is that in November, 1889, the Fergusons, as partners, entered into a contract with the said railway company for the construction of the railroad track and bridges of said company, or certain parts thereof; that, by the contract, the Fergusons were to erect and construct the abutments, piers, and masonry work for a certain bridge over the East Fork of White river, near Bedford, in Lawrence county, Ind., as a part of said railway; that the Fergusons contracted with Cummings & Conner for the construction of the stonework and masonry for such bridge; that Cummings & Conner entered upon the work, and completed it according to the agreement; that Despo furnished Cummings & Conner goods and merchandise on account of and necessary to the building and construction of said stonework and masonry, to the amount of \$918.44, at the special instance and request of said Cummings & Conner; that such work and labor and materials were performed, furnished, and used in the erection and construction of said stonework and masonry of said bridge; that, at the time Cummings & Conner commenced said work on said bridge, they contracted with said Despo to act as foreman and manager for them in the erection and construction



of said stonework and masonry of said bridge, at the agreed price of \$100 per month during the time said Cummings & Conner were engaged in said work; that Despo performed all his duties as such foreman or manager from November 25, 1889, until June 20, 1890, but that he only received \$116 in all for his labor, and that there yet remains due him \$504, which is wholly due and unpaid, although payment has been demanded of each and all the defendants for all of said sums, (plaintiff files herewith an itemized statement of account, marked "Exhibit A;") that on the 19th day of August, 1890, and within 60 days of the time of furnishing said materials and performing said work, plaintiff filed in the office of the recorder of Lawrence county, Ind., notice of his intention to hold a lien on the property of said railway company, which notice was duly recorded on the 19th day of August, 1890, and a copy of which is filed herewith, marked "Exhibit B." Wherefore plaintiff prays judgment against the several defendants above named in the sum of \$2,500, for the foreclosure of said mechanic's lien, and for a sale of the railway property, together with all the appurtenances thereunto belonging within said county of Lawrence, and all proper relief. The itemized account and copy of lien notice are filed as Exhibits A and B. Among the specifications of errors following the title of the cause and the statement hereinbefore set out, containing the names of appellants and appellees, is the following: "(4) Francis M. Ferguson, Mary Ferguson, and Emma Ferguson, and each of them, say that the court erred in overruling their separate and joint demurrer to the complaint of the appellee." The next assignment is as follows: "(5) Francis M. Ferguson, Mary Ferguson, and Emma Ferguson, for themselves, and each for himself and herself, says that the complaint does not contain facts sufficient to constitute a cause of action against them, or either of them." The record shows the filing of the following demurrer, omitting the caption and title: "(4) Francis M. Ferguson, Mary Ferguson, and Emma Ferguson, each for themselves, separately and severally, as well as for himself and herself, jointly, demur to the complaint herein for the reason that said complaint does not contain facts sufficient to constitute a good cause of action against them, or either of them, separately or severally or jointly." The demurrer is signed by the attorney for defendants. The record further shows that "the demurrers heretofore filed are by the court overruled, and to this ruling the defendants each except."

Counsel for appellee Despo insists that these assignments and the demurrer and rulings thereon do not present any question which this court can consider as a separate error against the Fergusons. After a careful consideration of the question we have come to the conclusion that the same is properly presented. The point we are to decide therefore is whether the complaint states a cause of action against the appellants Francis M., Mary, and Emma Ferguson.

It will be noticed by reading the com-

plaint that it is nowhere alleged that the appellants above named ever at any time employed Despo to do any work for them; nor does it appear they were the owners of the property upon which the work was done. It is shown that the railway company contracted with them to construct the work, and they, in turn, contracted with Cummings & Conner, and that the latter, as partners, employed and contracted with Despo for the work and materials. Whatever benefit was received from the work and materials furnished by Despo flowed to Cummings & Conner and the railway company, the latter as the owners of the property, and the former as the contractors who did the work. The action is not merely for the enforcement of a mechanic's and material man's lien, but it is to obtain a personal judgment against each of the defendants. In our opinion, the complaint does not disclose any state of facts which would make the Fergusons personally liable. It does not appear that they owed Cummings & Conner anything upon the contract, or that there is any privity between Despo and the Fergusons, and no principle of subrogation enters in by which Despo could succeed to any rights of said Fergusons. The demurrer as to them should have been sustained.

The further question is made that there is no cause of action against the railway company. Upon an investigation of the record, we entertain grave doubts as to whether any such question as affecting said company is properly presented, but, in view of our conclusion upon this subject, we have thought it best to decide the question. The bill of particulars contains all the items for which the appellee Despo seeks to recover. Besides the item of work and labor done in superintending the stone and masonry work, we do not think there are any for which the railway company could be held liable, either personally or by a charge upon its property in the way of a lien. These items are such as board, groceries, tobacco, and money furnished the hands and workmen of Cummings & Conner, none of them being materials that went into the construction of the work. We think, however, that the work and labor in superintending the job of the stonework and masonry on the piers and abutments of the bridge is an item that properly enters into Despo's lien, and for which he has a right to hold the company, if he is otherwise entitled to recover against it. The work sued for was commenced in November, 1889, and finished in 1890, and it is admitted by counsel on both sides that the rights of the appellee Despo under his lien must be determined by the law of 1889, in relation to mechanics' and material men's liens, unless there are prior laws unreppeled that are applicable to it. The act approved March 9, 1889, in section 6, amending section 1 of the act of April 13, 1885, provides that all persons who shall perform work or labor or furnish materials in the way of grading, building embankments, making excavations for the track, building bridges, trestlework, work of masonry, fencing, or any other structure,

etc., whether the work or labor performed or materials furnished be in pursuance of the contract with the railroad company as owner or lessee, or with a subcontractor, or agent of such railroad corporation in the work of constructing or repairing any such railroad, or part thereof, in this state, may have a lien to the extent of the labor performed or materials furnished, or both, upon the right of way and franchises of the corporation within the limits of the county in which such labor is performed or materials furnished, and upon all works and structures in this section mentioned. It is expressly provided that, if the work is done or material furnished in pursuance of a contract with any person, corporation, or company engaged as lessee, subcontractor, or agent of any railroad corporation in the construction or repairing of any railroad, as before mentioned, the person performing such labor or furnishing such material shall not be required to give notice to such corporation as provided by section 9 of the act approved March 6, 1883, in order to entitle him to hold a lien for such labor or material, but the performing of the labor and furnishing of the material shall be sufficient notice to such corporation. It is further provided that all the provisions of the act of March 6, 1883, when applicable, shall remain in force, in aid of the amended section, except that part of section 9 in reference to notice. Elliott's Supp. § 1710. A bare statement of the provisions of this section, we think, is sufficient to show that no notice is necessary to the railroad company further than the filing of the notice of intention to hold a lien, as required by section 1707, Elliott's Supp. The contention of the appellants, therefore, that notice is still required in order to hold the company for the lien, cannot prevail. We are therefore of the opinion that the court committed no error against the railway company in overruling its demurrer to the complaint, and that the complaint is sufficient for a foreclosure of the lien against said company.

Error is further predicated upon the conclusions of law which the court made upon its special finding of facts. The assignment of error in this particular is joint, and there might be some question as to whether the point is properly presented. We may say, however, that we have carefully examined the special findings and legal conclusions, and, so far as they affect the railway company, the conclusions are fully justified by the findings. It appears that none of the improper items contained in the bill of particulars were allowed by the court, and that all proper credits to which the company were entitled were given.

It is further insisted that there is no finding that a proper demand was made of the defendants before suit. In this, we think, counsel are mistaken, but we do not regard it necessary that a demand should have been made of the company. If the work was done and the materials were furnished, as found, and a notice of intention to hold a lien was filed within the time and in the manner re-

quired by the statute, which the court finds was done, we know of no rule, statutory or otherwise, that requires a specific demand for the money due before an action will lie.

Other errors are assigned, but not specifically discussed in the brief of appellants' counsel, and we need, therefore, not consider them. The judgment and decree of the court against the Cincinnati & Bedford Railway Company is affirmed, and the judgment against Francis M. Ferguson, Mary Ferguson, and Emma Ferguson is reversed, with instructions to the court below to sustain the demurrer of said appellants to the appellee's complaint, and for further proceedings as between said appellee and said appellants Francis M. Ferguson, Mary Ferguson, and Emma Ferguson not inconsistent with this opinion.

(7 Ind. App. 127)

DURRE et al. v. BROWN.

(Appellate Court of Indiana, June 9, 1893.)

COMPLAINT TO VACATE JUDGMENT BY DEFAULT—SUFFICIENCY—PARTIES.

1. A complaint to vacate a judgment by default, which alleges that the original action was on an "account," and that plaintiff (defendant in the original action) "never bought one cent's worth of goods" from defendants, sufficiently shows that the original action was on an account for goods sold and delivered.

2. A complaint to vacate a judgment by default in an action on an account for goods sold and delivered, which alleges that plaintiff (defendant in the original action) never bought any goods from defendants, and does not, and never did, owe them anything whatever, is equivalent to setting up a general denial, and is a sufficient defense.

3. An omission to fill the blank showing the day of the month on which a judgment by default was rendered does not make a complaint to vacate a judgment bad, since, when the month is given, the court will take judicial notice of the term when the judgment was rendered.

4. Under Rev. St. 1881, § 269, providing that those who are united in interest must be joined as parties in an action, where a judgment was rendered against defendants by default, it is not necessary, on a complaint by one of them to set aside the default, to make the other a party, since the latter's interest would not be affected by the prayer of the complaint being granted, for that would simply place his successful codefendant where he was before the default.

Appeal from circuit court, Perry county; E. Gough, Judge.

An action on an account was brought by Otto Durre and others against Charles H. Brown and Amelia C. Brown, and a judgment was rendered against defendants by default. On a complaint by Amelia C. Brown the judgment was vacated as to her, and Otto Durre and others appeal. Affirmed.

Wm. Henning, for appellants. Isaac S. Bramel, for appellee.

LOTZ, J. On the ——— day of May, 1891, the Perry circuit court rendered a judgment against one Charles H. Brown and the appellee, Amelia C. Brown, and in favor of the appellants, in the sum of \$149.65 and costs of suit. The judgment

was rendered on default of both defendants to the action. On the 21st day of July, 1891, and after the close of the term of court at which said judgment was rendered, the appellee filed her complaint against the appellants, to set aside and vacate said judgment, as to herself. In her complaint she alleges, in substance, that the appellants brought an action against her and her husband, Charles H. Brown, on an account; that at the time the summons was read to her she was confined in bed, and unable to sit up, and did not understand the meaning and import of the same, and never knew at the time that she was a defendant in said action, on account of said sickness, and she did not know that judgment was rendered against her for more than two months thereafter; that she does not, nor never did, owe the appellants anything whatever; that she never had any dealings with them, and "never bought one cent's worth of goods from them;" that in her absence, and without her knowledge or consent, and while she was prostrate in bed, and unconscious of any proceedings whatever, and upon her failure to appear, appellants took judgment against her on the — day of May, 1891, for \$149.65, Charles H. Brown, the other judgment defendant, was not made a party to this proceeding. Appellants demurred to this complaint, assigning two causes: (1) That it does not state facts sufficient to constitute a cause of action against them; and (2) that there is a defect of parties defendant, in this: that Charles H. Brown ought to be made a party defendant. The court overruled the demurrer. The appellants filed an answer of general denial. The cause was submitted to the court, and resulted in a finding and judgment for appellee. A motion for a new trial was overruled. The errors assigned are the overruling of the demurrer, and the motion for a new trial.

Where a judgment is regular on its face, it cannot be set aside for any purpose except to let in a defense to the merits. The complaint, for such purpose, should show the nature and character of the original action, in which the judgment was rendered, and also a pertinent, specific, and good defense thereto, and the facts constituting the defense must be shown. *Frost v. Dodge*, 15 Ind. 139; *Lee v. Busey*, 85 Ind. 543; *Slagle v. Bodmer*, 75 Ind. 330; *Nichols v. Nichols*, 96 Ind. 433. It is contended that the complaint does not comply with these rules. The nature of the first action is alleged to be an account, but the character of the account is not given. The word "account" has no clearly defined legal meaning, but the primary idea conveyed by the term is some matter of debit and credit, or of a demand in the nature of debit and credit, between parties, arising out of contract, or some duty imposed by law, or of a fiduciary relation. Its Latin derivatives, "ad. con. putare," signify to reckon together. It is none the less an account that the charges are by one person against the other, instead of being mutual demands of debit and credit. *Nelson v. Board*, 105 Ind. 287, 4 N. E. Rep. 703; *And. Law Dict.* The word "account,"

as used in this pleading, conveys the idea that the appellee was indebted to appellants but the character of the indebtedness is not disclosed, unless the other allegation, that she "never bought one cent's worth of goods from them," makes known the nature of the indebtedness. We think it may be fairly inferred from the two averments that the indebtedness was an account of goods sold and delivered.

It is also contended that no specific defense is set out in the complaint. A defense is that which is offered by a defendant as sufficient to defeat the complaint, by denying, justifying, or confessing and avoiding it. *Brower v. Nellis*, 33 N. E. Rep. 672, (decided at this term of this court.) The allegation here is that appellee never had any dealings with appellants, never bought any goods from them, and does not, and never did, owe them anything whatever. We think this equivalent to the defense by general denial. The general denial is not required to be specific in setting out the facts that will defeat a recovery.

It is further contended that the omission to fill the blank showing the day of the month on which the judgment was rendered makes the complaint bad. In the case of *Overton v. Rogers*, 99 Ind. 595, which was an action to review a judgment, it was said: "The complaint states that the judgment was rendered on the — day of —, 1882. To plead with such blanks is discreditable, but there was no demurrer to the complaint, and no motion to make it more specific, and the defect must be regarded as unavailable after a finding." The averments here are more specific than in the case from which the quotation is made. There nothing but the year was given. Here the month is given, and when the month is known the court will take judicial knowledge of the term of the court at which the judgment was rendered. The pleading is very carelessly drawn, and it is with some hesitation that we have reached the conclusion that it is sufficient to withstand the demurrer for want of facts.

The other cause of demurrer presents a more serious question. Under section 396, Rev. St. 1881, the court "shall relieve a party from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect." If the application to vacate or set aside a judgment be made at the same term of the court in which it is rendered, such application may be by motion, and without notice served upon the opposite party, or any party to the record. The theory of the law is that courts have full and complete control of the record of their proceedings during the entire term at which such proceedings are had, and during the term a court may, for good cause shown, correct, modify, or vacate any of its judgments. Any proceeding in a court is in fieri until the close of the term. When the parties are once rightfully in court its jurisdiction over them continues, without further notice, as long as any steps can be rightfully taken in the cause. *Burnside v. Eanla*, 43 Ind. 411; *Knight v. State*, 70 Ind. 375; *McClellan v. Binkley*, 78 Ind. 503; *Stout v. Duncan*,

87 Ind. 388; Railway Co. v. Johnston, 89 Ind. 88. It is for these reasons that no notice is required when the motion is made during the term. After the term has closed, and the proceedings have ceased to be in fieri, no legal steps can be taken against any party who has a substantial interest in them, except after notice given. When the cause of action declared upon in the original complaint was in the form of an account, it rested in simple contract; when it merged into the judgment, it became a contract of record.

Has Charles H. Brown such an interest in this action that he is a necessary party? "Of the parties in the action, those who are united in interest must be joined as plaintiffs or defendants; but, if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint." Section 269, Rev. St. 1881. Under this rule, all parties who are united in interest must be joined as plaintiffs, unless they come within the exceptions stated in the statute. Again, it is provided by section 262, Rev. St. 1881, that "all persons having an interest in the subject of the action, and in obtaining the relief demanded, shall be joined as plaintiffs, except as otherwise provided in this act." In the case of Durham v. Hall, 67 Ind. 123, the supreme court, in determining what are the exceptions referred to as "provided in this chapter," held, among other things, that they applied to cases where one or more of several refuse to give his or their consent to join as plaintiffs. Section 269, supra, says that the parties "who are united in interest must be joined," while section 262, supra, says that those "having an interest in the subject of the action, and in obtaining the relief demanded, shall be joined." An interest in the subject-matter and in the relief demanded makes a unity of interest, so that the effect of both of the above sections is practically the same. It is not sufficient that the parties have the same interest in the thing about which the controversy arises, but they must have the same interest in the subject-matter of the action. To illustrate, the judgment here is the thing concerning which the litigation arises, and appellee and Charles H. Brown are equally interested in it, but the subject-matter of this action is the excusable neglect. The true test of the right of parties to join must be in their interest in the judgment they may be entitled to recover. Work's Pr. § 98; Insurance Co. v. Gilman, 112 Ind. 7, 13 N. E. Rep. 118; Faulkner v. Brigel, 101 Ind. 329; Moyer v. Brand, 102 Ind. 301, 26 N. E. Rep. 125; Dill v. Voss, 94 Ind. 590. If this action resulted in changing the judgment from one against both of the judgment defendants to a judgment against Charles H. Brown alone, then his interest might be seriously affected, but if appellee is successful in this action it only results in placing the appellants and appellee in the same position they occupied before the default was taken. This proceeding cannot seriously affect the rights of Charles H. Brown, and he has no interest in the judgment that may be rendered on this complaint. Again,

there is no direct averment in the complaint that there was any judgment against Charles H. Brown. It is true that it is averred that the suit was brought against appellee and said Charles H. Brown, but he may have only been a nominal party, or the case may have been dismissed as to him, or he may have appeared and defeated it. We think the demurrer was correctly overruled. The only cause for a new trial is that the decision of the court is contrary to the law and evidence. We have examined the evidence, and it tends to sustain the finding.

Judgment affirmed.

REINHARD, J., took no part in this decision.

(7 Ind. App. 462)

# INDIANAPOLIS CABINET CO. v. HERRMANN.<sup>1</sup>

(Appellate Court of Indiana. June 9, 1893.)

CONTRACTS — UNCERTAINTY — INTERPRETATION — TRIAL — PERMITTING WITNESS TO REMAIN IN COURT ROOM — HARMLESS ERROR.

1. A contract to furnish a certain number of "car loads" of whitewood is not void for uncertainty because a car load varies from 35,000 to 60,000 feet.

2. Where a car load of whitewood varies from 35,000 to 60,000 feet, a contract to furnish whitewood "at the rate of 1½ car loads per month for six consecutive months," and containing an itemized statement specifically describing a certain number of pieces of wood, calls for nine car loads of wood, in the proportions named, each car not to contain less than 35,000 feet.

3. In an action on a contract, where, at the request of plaintiff's attorneys, the witnesses were separated, and excluded from the court room, the court did not abuse its discretion in permitting an agent of plaintiff, who was familiar with the business, to remain in the court room, in the absence of plaintiff, and assist counsel.

4. In an action for breach of a contract to furnish goods a judgment for plaintiff will not be reversed because he was permitted to read in evidence certain depositions, without producing the samples referred to in the answers to questions propounded by him, where the record fails to show that defendant was harmed thereby.

Appeal from superior court, Marion county; D. W. Howe, Judge.

Action on a contract by Henry Herrmann against the Indianapolis Cabinet Company. Judgment for plaintiff, and defendant appeals. Affirmed.

A. C. Harris, for appellant. A. Seidensticker and Duncan & Smith, for appellee.

DAVIS, J. This action was instituted by appellee against appellant to recover damages for the alleged breach of a contract, the terms of which will be hereinafter stated. The issues joined were submitted to a jury for trial, but after the evidence was heard the jury, by agreement of the parties, was dismissed, and a special finding of the facts was made by the court; and, on the conclusions of law thereon stated, judgment was rendered in favor of appellee for \$426.65. Each party excepted to the conclusions of law, and appellee appealed to the general term,

<sup>1</sup>Rehearing denied.

where errors were properly assigned by each of the parties. In general term, the judgment of the special term was reversed, with instructions to restate the conclusions of law, and to render judgment for appellee in the sum of \$1,836.01.

The principal question involved in this appeal is as to what is the proper construction of the agreement upon which suit is brought, which is as follows:

"December 22nd, 1887. The Indianapolis Cabinet Company, Indianapolis, Ind.—Gentlemen: Please furnish me with whitewood in the following proportions, and as hereinafter specified, at \$8.50 per M. feet, f. o. b. Indianapolis, Ind. Terms, sight draft after receipt and inspection of goods in New York. Deliveries to be made at the rate of 1½ carloads per month for six consecutive months. All dry sizes: 8,000 pieces 33x15; 10,000 pieces 35x16; 2,000 pieces 25x15; 500 pieces 43½x16; 1,000 pieces 25x11; 17,750 pieces 24x12; 2,000 pieces 29½x13½; 2,000 pieces 25x12; 5,000 pieces 39x15; 1,000 pieces 74x18; 4,000 pieces 33x12; 1,000 pieces 25x10; 1,750 pieces 24x11; 2,000 pieces 23½x11; 2,000 pieces 29½x11. All this stock must be stout, ¼ of an inch thick when dry, like sample furnished you to-day, of which I keep a duplicate in New York, being part of a shipment from you during last month. Quality of whitewood not to be inferior to former shipments; admitting, however, five per cent. of the amount ordered to contain split, not exceeding six inches in length. Should more than this percentage be defective, I am to have the right of placing them at your disposal. Five per cent. with sound knots. Balance to be clear stock. Please state if you accept order under these conditions, and how soon I may expect first shipment. [Signed] Yours, truly, H. Herrmann.

"Accepted. Indianapolis Cabinet Co."

The court also found that for many years prior to said date the appellee had been engaged in the business of manufacturing and dealing in all kinds of lumber used in making furniture; and that appellant had for many years been engaged in manufacturing stock or cut whitewood used in the manufacture of furniture. That appellee had been accustomed to buy, and appellant to sell, cut whitewood in car-load lots. That "in the lumber trade the term 'car load,' as applied to whitewood, does not mean any specific number of feet or quantity, nor does it appear from the evidence how many hundred or thousand feet of whitewood are contained in an average car load, further than may be inferred from the fact that the smallest cars will contain about 35,000 feet of whitewood, and the largest cars about 60,000 feet of such whitewood." That in November, 1887, appellant shipped to appellee a car load of whitewood, after which the letter above set out was written, and the order accepted. That on December 23, 1887, appellee wrote appellant that in reliance on such acceptance he had entered into a large contract for furniture, and for them to hurry "first car load with all possible speed." That on January 30, 1888, appellant wrote: "Will forward the first car some time next week,

and will make shipments promptly thereafter." That, on February 2d, appellee wrote again: "I rely on your promise to forward the first car some time next week, and the following shipments promptly thereafter; and, in consequence, I will not order the stock elsewhere." That, on February 11th, appellant did ship a car load of cut whitewood, of 40,000 feet. That the same was duly inspected in New York, and 29 per cent. of the whitewood contained in said shipment did not fulfill the requirements of the contract in respect to quality. That appellee promptly notified appellant of the result of inspection, and that the rejected material had been placed at disposal of appellant, offering, however, to take the same at 50 per cent. of contract price, which was accepted, and appellee fully paid appellant for the entire car load. That, in accepting said offer, appellant stated, "This kind of a loss cannot be allowed to occur in the cars which we ship you" and suggested that appellee should have his agent, or some one here, inspect the goods, and receive them. That, on March 26th, appellant shipped another car load, containing 39,000 feet, a part of which was also defective, and did not fulfill the requirements of the contract, of which due notice was given appellant, and payment in full was made on same terms as before. That, in addition to the two cars, about a half a car load of such lumber had prior thereto been delivered by appellant, and shipped, with other materials, through the branch office of appellee. That no part of the balance of the order was ever shipped. That, in subsequent correspondence, appellant asked for inspection at Indianapolis, and appellee insisted on inspection in New York, and suggested that appellant might secure some representative there to aid in the future inspection; and, further, he duly notified appellant that if the contract was not complied with he would be required to purchase the material elsewhere, and would hold appellant liable for the difference in price. That appellee was compelled to, and did, pay \$18 per 1,000 for the whitewood in order to comply with his obligation, on account of the failure of appellant. That the freight from Indianapolis to New York was \$1.45 per 1,000. That the total amount furnished by appellant under said contract was 86,924 feet. We have not endeavored to set out the special findings in full, but have called attention to the substance of so much thereof as may be necessary for the determination of the question presented.

The contention of appellant is that the writing, under the evidence, fails to constitute a contract, but was void for uncertainty, and did not bind appellant to furnish any whitewood. Counsel further insist that, if it does constitute a binding contract, it is only to the extent of the number of feet of whitewood specifically set forth and described in the pieces of lumber embraced in the itemized statement contained therein. If the theory last mentioned is correct, then it is conceded there was no error in the conclusions of Judge Howe in special term. The conten-

tion of appellee is that it was a contract binding appellant to furnish 9 car loads, each containing not less than 35,000 feet of whitewood, in the proportion therein described, to be delivered at the rate of  $1\frac{1}{2}$  car loads per month. This appears to have been the theory adopted by the court in general term, as announced in an opinion by Judge Taylor. When the language is uncertain or ambiguous, it is proper for the court, in construing the contract, and the rights of the parties thereunder, to consider the situation of the parties at the time of the execution of the paper, and their subsequent conduct under it, as giving a practical construction to it. The application of the rules of construction lead to the conclusion that the paper constituted a contract for 9 car loads of whitewood, in the proportion therein named, to be delivered at the rate of  $1\frac{1}{2}$  car loads per month. In the answer of appellant it is said a car load "means a car full," and it is found that "about one-half car load" was 18,893 feet, one "car load of cut whitewood" 40,075 feet, and "another car load" 39,113 feet. It is therefore apparent from the situation, correspondence, and conduct of the parties, in the light of all the facts found, that each of the parties knew different cars would hold from 35,000 to 60,000 feet of cut whitewood. Nothing is shown from which it can be inferred that either party could have been ignorant on this question. It is true the word "about" is used in the finding. "About," in this sense, means "not far from." The fact that a "car load" means any amount between about 35,000 and about 60,000 feet creates an element of uncertainty in the amount; and yet the uncertainty, under the circumstances of this case, is not of that kind that renders the contract void. So far as the contract is uncertain, the courts cannot enforce it, but, within the limits that the contract is certain, the courts will enforce it. The question is, "taking all the provisions of the writing, with the circumstances interpreting it," what is the result? *Raymond v. Rhodes*, 135 Mass. 337. In the case of *Holland v. Rea*, 48 Mich. 218, 12 N. W. Rep. 167, the contract was to furnish "500,000 feet, more or less." The terms of the agreement introduced an element of uncertainty into the face of the contract. The uncertainty was greater than exists here, and yet it was held that "the intention was that they should be allowed to deviate somewhat from the 500,000 feet, and that the plaintiff in error should be bound to take whatever quantity should be furnished, within the limits to which the deviation might properly extend, and it was certainly competent for the parties to bargain that way." So, in this case, the parties had the right to contract for nine car loads, without specifying the capacity of the cars. Notwithstanding the uncertainty, appellant was bound to deliver as much, at least, as nine cars of the smallest capacity. *Schreiber v. Butler*, 84 Ind. 576; *O'Ferrall v. Van Camp*, 124 Ind. 336, 24 N. E. Rep. 134.

On appellee's motion the witnesses were separated, and excluded from the room. At the request of his attorneys an excep-

tion was made in favor of Mr. Schmidt, the agent of appellee in charge of his branch establishment in Indianapolis. The deposition of appellee was read in evidence, and it does not appear that he was present in person at the trial. The evidence is not in the record, and what Mr. Schmidt may have testified to is not shown. He was allowed to remain in the court room, in pursuance of the statement that as he was the chief agent and head of appellee's business in Indianapolis, and was personally familiar with all the transactions had between the parties to the suit, the attorneys desired his aid, counsel, and assistance during the trial. This ruling was not so far as the record discloses, such an abuse of the discretion of the trial court as to warrant a reversal. *Cottrell v. Cottrell*, 81 Ind. 87; *Detrick v. McGlone*, 46 Ind. 291; *City of La Fayette v. Ashby*, (Ind. App.) 34 N. E. Rep. 238; Section 618, Elliott, App. Proc.

The only remaining question is whether the court erred in permitting answers propounded to witnesses by appellee, in depositions taken in New York, to be read on the trial, in the absence of certain pieces of whitewood referred to in such answers. The pieces appear to have been a portion of the samples retained by appellee, mentioned in the original order, and were present when the depositions were taken, but were not produced at the trial. The order indicates that the samples were in duplicate, one part of which was retained in New York, and the other part of which was furnished appellant. In the absence of the evidence, we are not advised as to whether such duplicate was ever in fact delivered to appellant. No complaint, however, is made on account of any such alleged failure. There is no claim that the sample referred to in the deposition was not the sample taken from the previous shipment, and retained by appellee, or that appellant did not have a duplicate thereof at the trial. We have not been able to determine, from the record or argument, that the presence or absence of the sample at the trial would have tended to change the result. No part of the  $2\frac{1}{2}$  car loads shipped under the order was present, so far as appears, either at the taking of the deposition or the trial. In any event, the record, in this respect, does not disclose any hurtful or prejudicial error against appellant. The judgment at general term is affirmed.

(3 Ind. App. 246)

BIERHAUS et al. v. WESTERN UNION  
TEL. CO.<sup>1</sup>

(Appellate Court of Indiana. June 20, 1893.)

TELEGRAPH COMPANIES—NEGLIGENCE—LIABILITY  
FOR SPECIAL DAMAGES—FAILURE TO DELIVER  
MESSAGE—EXCUSE—EVIDENCE.

1. Where a telegraph message, when read in the light of well-known usage in commercial correspondence, reasonably informs the operator that the message is one of business importance, and discloses the transaction so far as it is necessary to accomplish the purpose for which it is sent, the telegraph company is liable for all direct damages from the negligent failure to transmit or deliver it, as written, within a reasonable time.

<sup>1</sup> Rehearing denied. See 39 N. E. 581.

2. An attorney wired wholesale dealers: "Have you claim against P. L. D.? Answer how much." The latter replied: "Yes: one hundred and sixty-one dollars and fifteen cents." *Held*, that the telegraph company was liable to such dealers for special damages for failure to deliver such messages within a reasonable time, though it was not informed of their importance otherwise than by their character.

3. Where a telegraph company receives a message to transmit 20 miles, at a time when it cannot be sent, because of a prevailing storm and broken wires, and does not inform the sender of its inability to transmit the message, it will not be relieved from liability for special damages for failure to transmit it within a reasonable time on account of such storm.

4. A telegraph company is not relieved from liability for special damages for delay in delivering a message because it was sent and received in the evening, after the hour when free delivery ceased for the day at the receiving office, under a rule of the company, where neither the sender nor sendee is informed of such fact, or of the existence of such rule.

5. But where the sendee of such message is the attorney of the sender, and has knowledge of the existence of such rule, the company is not liable to the sender for special damages, where it delivers such message promptly on the following morning.

6. In an action against a telegraph company for failure to promptly deliver messages, the complaint alleged that, by reason of such failure, plaintiffs' debtor in the mean time converted his property into money, and fled from the state to parts unknown, and plaintiffs had lost their debt, and been prevented from collecting the same. *Held*, that the complaint showed that plaintiffs had sustained substantial injury.

7. Where it appears that such debtor and sendee resided in a foreign state, it is error to exclude evidence of the latter that he could have sued out an attachment, had the message been promptly delivered, and secured the debt, on the ground that the statutes of such foreign state, relating to attachments, had not been pleaded by plaintiffs, since, in the absence of any proper showing to the contrary, the statutes of such state would be presumed to be the same as those of this state, and it was unnecessary for plaintiffs to plead or prove them.

Appeal from circuit court, Knox county; G. W. Shaw, Judge.

Action by Edward Blerhaus and others against the Western Union Telegraph Company for negligently failing to deliver telegraph messages. From a judgment entered on the verdict of a jury in favor of plaintiffs for nominal damages only, they appeal. Reversed.

W. A. Cullop and C. B. Kessinger, for appellants. J. S. Pritchett and Beasley & Williams, for appellee.

LOTZ, J. The appellants sued the appellee to recover damages alleged to have been sustained on account of the negligence of the appellee in transmitting and delivering two telegraphic messages. Issue was joined. There was a trial by jury, and a verdict for appellants in the sum of 50 cents. The court rendered judgment in favor of appellants for 50 cents damages and 50 cents costs. The errors assigned in this court are (1) the overruling of the demurrer to the second paragraph of amended answer; and (2) the motion for a new trial.

If the appellants in the court below secured a judgment for all the damages recoverable under the allegations of their complaint, then they can have no valid grievance to present to this court, for, where the ultimate judgment is right, no intervening error will avail in securing a reversal. *Morrison v. Kendall*, (Ind. App.) 83 N. E. Rep. 370, (at this term;) *Hamilton v. City of Shelbyville*, Id. 1007, (decided at this term.)

The first question presented for our consideration is whether or not special damages can be recovered under the allegations of the complaint. If only nominal damages, and the sum paid for the transmission of the messages, can be recovered, then appellants have no cause for complaint, for the court below meted out to them all they were entitled to recover. The substantial allegations in that paragraph of the complaint upon which the judgment is founded are as follows: That the appellants were wholesale grocers and jobbers doing business in Vincennes, Ind., by the name of E. Bierhaus & Sons, and did business throughout that part of the state of Indiana and the adjoining state of Illinois. They employed traveling salesmen and clerks, who solicited business for them, and they had many customers at various places in both of said states. That on the 22d day of July, 1890, and long prior thereto, they did business at Mt. Carmel, Ill. That among their customers at said place was one P. L. Davis, who was indebted to them in the sum of \$161.15. That the appellee had a line of wire extending directly from Mt. Carmel to Vincennes, a distance of 20 miles, and was engaged in telegraphing for the public generally. That on said day appellants had in their employ one M. F. Hoskinson, a competent and practicing attorney at said Mt. Carmel, who was authorized by them to make collections for them. That on said day said Davis was the owner of a stock of goods and merchandise situate in said Mt. Carmel. That on said day, at about the hour of 3 o'clock P. M., said Hoskinson learned and ascertained that said Davis was disposing of his stock of merchandise, and converting his property into money, and preparing to leave the state of Illinois without paying his debts, and especially appellants' debt; and said Hoskinson thereupon prepared and delivered to the appellee, at its office in Mt. Carmel, directed to appellants, in their firm name, at 3:30 o'clock P. M. on said day, for transmission, the following message: "Have you claim against P. L. Davis? Answer how much." That the defendant then and there accepted said message, and agreed to transmit the same. That said message was for the use and benefit of appellants. That said telegram was not delivered to appellants until the hour of 8 o'clock and 5 minutes P. M. of said 22d day of July, 4 hours and 35 minutes after the same was delivered to appellee for transmission. That as soon as appellants received said message they at once prepared an answer thereto, and delivered the same to appellee, at its office in the city of Vincennes, addressed to said



Hoskinson, and requested appellee to transmit the same to Mt. Carmel, which said answer was as follows: "Yes; one hundred and sixty-one dollars and fifteen cents." That appellee then and there accepted and agreed to transmit the same, for and in consideration of the sum of 25 cents, which appellants then and there paid to appellee. That said telegram arrived at Mt. Carmel at 8:40 o'clock P. M. of said day, but was not delivered to said Hoskinson until 9 o'clock A. M. of the 23d day of July, 1890. That before said telegram was delivered the said Davis had disposed of all his property, and converted the same into money, and left the state of Illinois, and appellants' debt could not then be collected from him. That said Hoskinson was a resident of the city of Mt. Carmel. That he was then the judge of the county court of Wabash county, and his residence and place of business were well known, and he lived near appellee's office, and could have been easily found. That appellee well knew that Hoskinson was looking for an answer to his said message, as he went to appellee's office at 8 o'clock P. M. of said 22d day of July, and inquired for an answer to his telegram. That immediately after said Davis sold his property he departed from the state of Illinois for parts unknown to appellants, and has ever since kept his whereabouts unknown to them. That, if said message from said Hoskinson to appellants had been promptly transmitted and delivered, appellants would have responded at once, and, if the telegram to said Hoskinson had been promptly delivered, appellants could have made and collected their debt due them from said Davis. That, on account of appellee's negligence in transmitting and delivering said messages, appellants have lost the debt due them from Davis, and they were prevented from collecting the same, and have lost said debt, together with a fee of \$20, which they became liable to pay to said Hoskinson.

Appellee contends that there is nothing in the first message to apprise it of the importance of speedy transmission; that there is nothing in either of them that acquaints it with the fact that appellants desired to institute legal proceedings; that the first message may have been no more than an idle inquiry, or that Hoskinson may have wanted the information for various purposes other than legal proceedings; that it was not notified of the importance of either message, and that, therefore, no special damages can be recovered.

The transmission of information from one point to another by means of electrical wires is of comparatively recent origin. When persons and corporations first began to transmit such messages for hire, the courts applied to them the same rules that governed common carriers. There is little analogy between the two methods of doing business. The carrier transports the thing itself, while, in telegraphy, the information is not actually transported at all, but is conveyed by means of a continuous wire and electrical appliances. A language is spoken at one end, which an

educated and skillful operator understands and interprets at the other. The tendency has been to apply old rules to new inventions and methods. In the celebrated case of *Hadley v. Baxendale*, 9 Exch. 341, it appeared that the plaintiff, owner of a steam mill, broke a shaft, and, desiring to have another made, left the broken shaft with the defendant, a carrier, to take to an engineer to serve as a model for a new one. At the time of making the contract the defendant's clerk was informed that the mill was stopped, and that the plaintiff desired the broken shaft sent immediately. Its delivery was delayed, and the new shaft kept back. As a consequence the plaintiff brought an action for a breach of the contract with the carrier, and claimed, as special damages, the loss of profits while the mill was kept idle. But, because it was not made to appear that the defendant was informed that the want of the shaft was the only thing that was keeping the mill from operating, it was held that he could not be made responsible to the extent claimed. The reason for this rule is that, the defendant not having any knowledge of one element of the damages sought at the time he made the contract to carry the shaft, he could not be held to have contracted with reference to such possible result and consequence. Until recently, American judicial authority has been generally agreed that the rule for the measure of damages here laid down governs, in all cases, for the failure to transmit and deliver telegraphic messages correctly and promptly. That is to say, the company which undertakes to transmit the message must be apprised by the sender, or by the terms of the message itself, of the probable result and consequence flowing from the failure to transmit and deliver promptly; that, unless it has knowledge of such probable consequences, it cannot be said to contract in reference thereto. *Telegraph Co. v. Hall*, 124 U. S. 444, 8 Sup. Ct. Rep. 577; *Telegraph Co. v. Cooper*, 71 Tex. 507, 9 S. W. Rep. 598; 10 Amer. St. Rep. 772, note. Many cases might be cited in support of this rule. In some of the more recent decisions the tendency is to relax this rule, and some courts have gone so far as to entirely overthrow it. In *Daughtery v. Telegraph Co.*, 75 Ala. 168, it was held that the company was liable for the special damages for the nondelivery of a cipher message, the meaning of which was not known or explained to the company's agent. So it has also often been held that the company is liable for all proximate damages where the message is couched in language, the meaning of which is obscure or unknown to the company's agent. The courts are inclined to adopt the principle that it is sufficient to render the company liable for actual damages if the message show upon its face that it relates to a business transaction, and that loss will probably result unless it is promptly and correctly transmitted and delivered, and that it is not necessary that the company be apprised of the loss that may result from its default. If the message show that it relates to a commercial or legal transaction of value, it is sufficient to apprise the company of its character, and for

failure to use due diligence it must respond in all special, proximate damages. The following are some of the cases where this principle has been applied: Messages as follows: "Cover two hundred September, one hundred August." *Telegraph Co. v. Blanchard*, 68 Ga. 299. "Tencars new two whites. Aug. shipment fifty-six half." *Telegraph Co. v. Harris*, 19 Ill. App. 353. "Sell one hundred Western Union. Answer, price." *Tyler v. Telegraph Co.*, 60 Ill. 421. "Ship hogs at once." *Manville v. Telegraph Co.*, 37 Iowa, 214. "Ship cargo at 90 if you can secure freight at 10." *True v. Telegraph Co.*, 60 Me. 9. "If we have any Old Southern on hand sell same before board. Buy five Hudson at board." *Rittenhouse v. Independent Line of Telegraph*, 44 N. Y. 263. "Will take two cars sixteens. Ship soon as convenient via West Shore." This was in response to the following: "Pickled hams sixteens nine and a half." *Mowry v. Telegraph Co.*, 51 Hun, 126, 4 N. Y. Supp. 666. "Buy fifty Northwestern, fifty Prairie du Chien, limit forty-five." *Telegraph Co. v. Wenger*, 55 Pa. St. 262. "Car cribs six sixty c. a. f. prompt." Sent in reply to the following: "Quote cribs loose and strips packed." *Pepper v. Telegraph Co.*, 87 Tenn. 554, 11 S. W. Rep. 783. "Send bay horse to-day. Mock loads to-night." *Thompson v. Telegraph Co.*, 64 Wis. 531, 25 N. W. Rep. 789. In the well-considered case of *Cable Co. v. Lathrop*, 131 Ill. 575, 23 N. E. Rep. 583, after reviewing many authorities bearing on this question, the court concludes as follows: "We think the reasonable rule, and the one sustained by authority, is that where a message, as written, read in the light of well-known usage in commercial correspondence, reasonably informs the operator that the message is one of business importance, and discloses the transaction so far as it is necessary to accomplish the purpose for which it is sent, the company should be held liable for all the direct damages resulting from the negligent failure to transmit it, as written, within a reasonable time, unless such negligence is in some way excused."

No court has gone further in this direction than the supreme court of Indiana. In the case of *Hadley v. Telegraph Co.*, 115 Ind. 191, 15 N. E. Rep. 845, the telegram read as follows: "Want your cattle in the morning. Meet me at pasture." The message was sent on the 14th day of October, but was not delivered until the morning of the 15th, about the hour of 7 o'clock. It seems that the cattle had been sold for future delivery at the option of the purchaser, and the purpose of the message was to notify the seller to deliver the cattle at a certain time. It was the custom among stock dealers to take and weigh cattle at early daylight. On account of the failure to deliver the message promptly, the cattle were detained in a public highway for the space of 30 or 40 minutes before they could be weighed. That, on account of such detention and delay, they decreased in weight. It was held that the company was liable for the decrease in weight, although there was no showing that the company's agent was notified of the importance of the message,

or that he had any knowledge of the sale of the cattle, or of the custom among stock dealers, or that the cattle were liable to decrease in weight by not being weighed immediately after rising in the morning. It is hard to reconcile some of the holdings with the general rules that prevail in measuring the damages in the cases of a breach of a contract. A person, in making a contract, has the right to protect himself against liability by proper stipulations; and it is manifestly unjust to compel him to respond in damages for consequences which were unknown, and not even contemplated, by him. Telegraph companies, when they are incorporated, have certain extraordinary privileges granted to them by the state, and the state has the right to impose duties upon them. Accordingly, they are required to receive and transmit dispatches with impartiality, and in good faith, under a penalty for failure so to do. *Elliott, Supp. § 1120*. They are also made liable for special damages for failure or negligence in receiving, transmitting, and delivering messages. Section 4177, Rev. St. 1881. Most all the states have similar enactments. It seems to us that it is more logical to say that these are duties imposed upon the company by law, and that for the breach of these duties it is liable for all the damages that naturally and proximately result from the breach of the duty, and not from the breach of a contract.

The appellee further contends that the complaint does not show that the appellants have lost any legal remedy; that they may still pursue the said Davis, by legal process or otherwise, and collect their debt. If, however, the collection of their debt has been defeated or rendered improbable by the neglect of the appellee, we think the appellants have sustained a substantial injury. In *Parks v. Telegraph Co.*, 13 Cal. 423, the plaintiff, in reply to a message from their agent, informing them of the failure of a certain firm, and inquiring the amount due, sent the following: "Due, 1,800. Attach, if you can find property. Will send note by to-morrow stage." The message was delayed through the negligence of the defendant's agent, and when it reached its destination all the property of the firm had been attached by other creditors, and the plaintiff's claim was wholly lost. The loss of the debt was held to be the natural and proximate damages resulting from the defendant's negligence. In *Telegraph Co. v. Sheffield*, 71 Tex. 570, 10 S. W. Rep. 752, the message read as follows: "You had better come and attend to your claim at once." The delivery of the message was delayed by the negligence of the company so that other creditors attached, and obtained first liens upon, the property of the debtor. It was held that the measure of damages was the value of the debt, with interest to the date of trial, and the costs of the message. The same principle was applied to similar circumstances in *Bryant v. Telegraph Co.*, 1 Daly, 575. The complaint states a case which entitled the appellants to recover special damages.

The first part of the amended second

paragraph of the answer is addressed to the first message, and is designed to excuse the appellee from promptly transmitting the same. The facts upon this point alleged, in brief, are that said message was delivered to appellee's agent at Mt. Carmel at the hour of 5 o'clock and 10 minutes in the afternoon of July 22, 1890, and at that said time, and for several hours just previous thereto, a severe storm was raging at Mt. Carmel, Ill., and along the route over which the wires extended between Mt. Carmel and Vincennes, and such storm continued with great violence for the period of three hours after said message had been delivered for transmission; that during all of said time the air was so charged with electricity, and the wires so affected thereby, that it was impossible to transmit such message over such wires, and said wires were thrown down and broken by trees falling upon them; that as soon as said storm abated the message was, at the earliest possible moment, transmitted and delivered. Appellants assert that these facts do not show a sufficient justification for the delay; that no one but a skilled electrician or telegrapher can determine what storms affect the wires so that a message cannot be sent over them, and that none but the agents of the company could know that the wires were broken at remote points; that when the company received the message it knew of these facts, and appellants' agent did not; that when it accepted the message and money for transmission, if it failed to inform appellants of its inability to transmit at once, its liability became fixed from that moment; that, had appellants known of the inability, they might have availed themselves of other means of communication, and thus have secured their debt. The statute (section 1122, Elliott's Supp.) requires telegraph companies to receive messages. They have no option to refuse them, except upon payment of a penalty. The law does not require of them impossible or unreasonable things. If a message cannot be transmitted, by reason of storms or other atmospheric influences, the company will be excused. *Telegraph Co. v. Cohen*, 73 Ga. 522. If the delay in transmitting a message is caused by conditions beyond the control of the company, it cannot be compelled to respond in damages. *Beasley v. Telegraph Co.*, 39 Fed. Rep. 181. If, at the time the message is received, the company's agents have no knowledge that the wires are in such a condition that the message cannot be transmitted, or if, after it is received, conditions arise which render it impossible to transmit it promptly, it will be excused. *Fowler v. Telegraph Co.*, (Me.) 15 Atl. Rep. 29. But the case made by the answer does not fall within these rules. It is shown that at the time the message was received the company's agent knew of its inability to transmit the message promptly, by reason of the electrical storm and its broken wires. There is no showing that the appellants had knowledge of these conditions, or that the company's agent gave them any such information. It is true that appellants knew that a storm was raging, but it surely will not be con-

tended that every storm so affects the wires that messages cannot be transmitted, nor that every storm causes trees to fall over and break the wires. The law requires that the company shall deal with the public in good faith; that each party shall be placed on an equal footing. It is manifestly unfair for the company to receive the message, knowing that its wires are broken, and that an electrical storm is raging, which renders it impossible to transmit promptly, and keep such knowledge locked up from the sender. Persons resort to telegraphy because of its rapid communication, and pay exorbitant prices for the service because it is rapid. If the company knows that it cannot give quick communication when the message is accepted, it cannot excuse itself, except by notifying the person presenting the message of its inability. Suppose there were several lines between the same points, operated by different companies, and that one of the lines is broken, and cannot be repaired for several hours, and these facts are known to the company only. A message is presented and accepted, and no notice of inability is given. A delay of several hours ensues, and great damages are incurred. Would it be contended that the company would not be liable, when, if it had communicated its inability, the message might have been sent by another line, and the loss avoided? So, in this case, if appellants had been informed of appellee's inability they might have made the communication by other means. They were only half an hour away by rail, or two hours by courier. We think this part of the answer insufficient.

The second part of the answer relates to the failure to deliver the second message promptly. It is averred that this message was delivered to appellee's agent at Vincennes, Ind., at 8:30 o'clock P. M. of July 22d; that it was promptly transmitted to its office in Mt. Carmel, where it was received at 8:40 o'clock of the same day; that on said day, and for a long time prior thereto, there was a general rule and regulation in force at said office to the effect that, if any message was received after 8 o'clock P. M. of any day, such message would not be delivered by messenger of appellee away from said office, and that such message would only be delivered on the day of its reception, unless the person to whom such message was addressed employed a special messenger to make such delivery; that such custom was general and uniform at said office and place, and was well known and understood by the citizens and inhabitants of said Mt. Carmel and vicinity; that when the said M. F. Hoskinson, mentioned in the complaint, delivered the first message referred to in the complaint, he was fully informed as to said rule and regulation, and was then notified by appellee's agent that if an answer should be received to said message after the hour of 8 o'clock P. M. of said day the same would not be delivered away from the receiving office until the following day, unless a special messenger was employed to make such delivery; that no such messenger was employed; and that appellee delivered the

same promptly on the next day. Appellants contend that these facts do not excuse the appellee for the negligence imputed to it for a failure to deliver the second message, because it is not shown that when they sent the message from Vincennes they had knowledge of, or were informed of, the regulations at Mt. Carmel. It is well settled that a telegraph company may reasonably regulate its office hours and its free-delivery limits according to the requirements of the business at the various points where it holds itself out for public service. It is not the regulation that is complained of here, but the failure of the company to notify appellants of the existence of such regulation. In *Telegraph Co. v. Harding*, 103 Ind. 605, 3 N. E. Rep. 172, which was an action to recover a statutory penalty, it was held that a telegraph company is not required to keep its agents informed concerning the office hours at all other points, so that when a message is presented for transmission the sender may be apprised of any probable delay which may intervene at the other end of the line. This decision, however, was not unanimous, and it was expressly limited to cases for the recovery of a penalty. The intimation, however, is that, in a case to recover special damages, such regulation, without being communicated to the sender, would not exculpate the company from liability. Mitchell, J., said: "It might well be that in a case where a message was delivered which showed upon its face the importance of speedy transmission, and other means of making the transmission were available to the sender, which might be resorted to if he were informed that the one chosen was ineffectual, or his conduct might otherwise be materially controlled thereby, the company would be bound, at its peril, to ascertain and disclose its inability to serve him, or render itself liable to respond in damages." In *Telegraph Co. v. Brosche*, 72 Tex. 654, 10 S. W. Rep. 734, it was decided that a telegraph company could not relieve itself from liability for failing to deliver a message paid for, and sent by it, by showing that its office at the point of delivery was closed when the message was received for transmission. A telegraph company had an office regulation at Hannibal, Mo., which confined the free delivery of messages in that city to within a radius of 10 blocks. "It would, in our opinion, be quite unreasonable to expect the plaintiff to be advised of such a regulation. It would be much more reasonable to require the defendant's agent to notify the sender of a message of the free-delivery limits applicable only to the place of destination." *Brashears v. Telegraph Co.*, 45 Mo. App. 33. There are authorities which take a contrary view of this question: *Telegraph Co. v. Henderson*, 39 Ala. 510, 7 South. Rep. 419; *Stevenson v. Telegraph Co.*, 16 U. C. Q. B. 530; *Given v. Telegraph Co.*, 24 Fed. Rep. 119. In the case last cited, Mr. Justice Miller said: "Nor do we see that it is the duty of the Western Union Telegraph Company to keep the employees of every one of its offices in the United States informed of the time when every other office closes for the night. The immense num-

ber of these offices all over the United States, the frequent changes among them as to the time of closing, and the prodigious volume of a written book on this subject, seem to make this onerous and inconvenient to a degree which forbids it to be treated as a duty to its customers, for neglect of which it must be held liable for damages." We do not concur in the statement that onerous and burdensome conditions would be imposed upon the company if it were required to inform its customers of the office hours and delivery limits of the delivery office. It is a well-known fact that such companies have rate books, with the names of the stations alphabetically arranged, which its employees frequently resort to before they accept a message. By a proper designation the office hours and delivery limits of each station could be readily indicated. Such methods are applied in the postal services. Mr. Thompson, in his work on *Electricity*, (section 300,) says: "But it is mere judicial assumption to say, as was said in one case, [*Given v. Telegraph Co.*, supra,] that the employees in a telegraph office are not required to know the hour at which the office of a company in another city closes. On the contrary, it is an obvious suggestion that in any properly regulated telegraph system the offices would be classified, and there would be a uniform time for the closing of those in each class, of which time every agent receiving dispatches would be apprised. It is probable that there is not a receiving agent in the postal telegraph service of France or Germany that does not know the hour of closing of every office in the republic or empire." The averment here, however, is that the appellee informed appellants' agent at Mt. Carmel, before the second message was sent, of the existence of such regulation. As he was specially intrusted with the management of the business at that end of the line, his knowledge must be deemed the knowledge of his principals. *Brannon v. May*, 42 Ind. 92; *Insurance Co. v. Hinesley*, 75 Ind. 1. That part of the answer that is addressed to the failure to promptly transmit and deliver the first telegram is insufficient, and that part that is addressed to the failure to promptly deliver the second telegram is sufficient; but, as the pleading attempts to answer the whole complaint, the demurrer should have been sustained.

On the trial of the cause the appellants produced a witness, M. F. Hoskinson, who testified that he was a resident of Mt. Carmel, Ill., and had been practicing law for 14 years, and was then the county judge. Appellants then offered to show by him that he could have sued out, under the laws of Illinois, a writ of attachment, and attached sufficient property of the said Davis to have made the whole of appellant's debt, had said message been promptly delivered; that he, as the attorney for appellants, could have given bond and made the affidavits for a writ of attachment and garnishment. The appellee objected to this testimony, assigning as a reason for its inadmissibility that no statute of Illinois had been pleaded. The court excluded this testimony, and, among

other things, said, in the presence of the jury, that no statute of Illinois had been pleaded. To these remarks of the court in the presence of the jury, the appellants, at the time, excepted. The court seems to have based its ruling upon the theory that it was necessary to plead the statute of a foreign state before it could be given in evidence. The general rule is that, when a party relies upon the statute of a foreign state to give him a right of action or ground of defense, he must specially plead and prove the statute. The right of action declared upon in plaintiff's complaint is not given by a foreign statute. The right to recover damages for failure to promptly transmit and deliver a telegraphic message exists independently of any statutory enactment, but such right is specially given by section 4177, *supra*. The statutes of Illinois, if they were proper for any purpose in this case, were only evidence tending to establish appellants' right of recovery. It is a familiar rule that a party is not required to plead his evidence. The laws of a state to whose courts a party appeals for redress furnish, in all cases, *prima facie*, the rule of decision; and if either party claims the benefit of a different rule, as applicable to his case, he must aver and prove it. *Buchanan v. Hubbard*, 119 Ind. 187, 21 N. E. Rep. 538. In *Crake v. Crake*, 18 Ind. 156, it was said: "Where a right is sought to be enforced in one state in relation to a subject-matter existing in a foreign state, and no foreign law is proved, and no common-law rule ever prescribed, and no contract exists, \* \* \* the court will apply the law of the state in which it is sitting." The law of the sister state of Illinois, both statutory and common, in the absence of any showing to the contrary, is presumed to be the same as that of our own state. *Hynes v. McDermott*, 82 N. Y. 41; *Des Noyer v. McDonald*, 4 Minn. 515, (Gil. 402;); *Cooper v. Reaney*, 4 Minn. 528, (Gil. 413;); *Lewis v. Bush*, 30 Minn. 244, 15 N. W. Rep. 113; *Draggoot v. Graham*, 9 Ind. 212. It would seem under these rules that the appellants were under no compulsion to prove the statute laws of Illinois, but that they might rely upon the laws of Indiana without proof. *Lawson, Exp. Ev.* p. 59. If the appellee desired to invoke a foreign rule the burden rested upon it to overthrow the presumption. We may say, en passant, that the unwritten or common law of any other of the United States, or of England, may be proven by parol, by persons learned in such laws. Section 476, Rev. St. 1881. In England this rule extends to the written as well as the unwritten laws. In *Baron De Bode's Case*, 8 Q. B. 208, a French advocate practicing at Strasburg was permitted to depose that the feudal law had been put an end to in Alsace by the "torrent of the French revolution," and by a decree of the national convention. This rule has been followed in that country ever since, but the American rule is less liberal. It requires the production of the written law, but will hear parol evidence of experts as to its interpretation and effect. Section 477, Rev. St. 1881, provides that: "The existence and tenor or effect of

the laws of any foreign country may be proved as facts by parol evidence; but, if it shall appear that the law in question is contained in a written statute or code, the court may, in its discretion, reject any evidence of such law which is not accompanied by a copy thereof." The appellants were surely entitled to show that they could have given bond, and procured writs of attachment and garnishment, and secured their debt under the statutes of Indiana, without pleading the statutes of Illinois. It is not necessary to prove the law of the former. *Lawson, Exp. Ev.* p. 59. Judgment reversed, with instructions to sustain the motion for a new trial, and the demurrer to the amended second paragraph of answer, and for further proceedings in accordance with this opinion.

(7 Ind. App. 155)

### LAKE ERIE & W. R. CO. v. CLARK.

(Appellate Court of Indiana. June 20, 1893.)

RAILROAD COMPANIES — FIRES SET ON RIGHT OF WAY — ACTION FOR DAMAGES — SUFFICIENCY OF COMPLAINT — QUESTIONS ON APPEAL — RECORD — BILL OF EXCEPTIONS.

1. In an action against a railroad company for damages caused by fire set by defendant in weeds which it negligently permitted to accumulate on its right of way, and which fire defendant negligently permitted to escape to plaintiff's land, it is not necessary to allege that the fire was caused by some negligent act or defective machinery of defendant.

2. Where a motion to make the complaint more specific is not made a part of the record by bill of exceptions no question as to such motion will be considered on appeal.

3. Where the evidence is not preserved in a bill of exceptions the supreme court cannot determine whether or not the damages assessed are excessive, or the verdict is supported by the evidence.

Appeal from circuit court, Fulton county; A. C. Capron, Judge.

Action by James Clark against the Lake Erie & Western Railroad Company to recover damages caused by fire set by defendant, and negligently permitted by it to escape to plaintiff's land. From a judgment entered on the verdict of a jury in favor of plaintiff, defendant appeals. Affirmed.

Packard & Packard and Hackedorn & Foote, for appellant. Sam'l Parker, for appellee.

GAVIN, C. J. The appellee sued appellant to recover damages resulting from a fire started by appellant in grass and weeds negligently permitted to accumulate upon its right of way, which was by appellant negligently permitted to escape to appellee's land, all occurring without any contributory negligence upon the part of appellee. It is urged that the complaint is bad for want of averments that the fire was caused by some negligent act or defective machinery of appellant. Such averments are unnecessary. If appellant set fire to the dry grass and other combustible materials which it had negligently suffered to accumulate on its track and right of way, and without fault on appellee's part negligently permitted such fire

to escape to his lands, and burn and destroy his property, appellant would be liable to appellee for his damages, whether such fire was started negligently or otherwise. *Railroad Co. v. Jones*, 86 Ind. 496; *Railway Co. v. Overman*, 110 Ind. 538, 10 N. E. Rep. 575; *Railway Co. v. Hart*, 119 Ind. 273, 21 N. E. Rep. 753.

Complaint is made of the action of the court in overruling a motion to make the complaint more specific. In order to so present any question upon this ruling as to enable us to consider it, the motion should have been brought into the record by a bill of exceptions. This has not been done, and without this the motion is not properly authenticated as a part of the record. *Elliott, App. Proc.* § 814.

The overruling of the motion for a new trial is also assigned as error. The causes urged in favor of a new trial are that the damages assessed are excessive, and that the verdict is not sustained by the evidence. A transcript of evidence, certified by the shorthand reporter, is attached to the transcript, but it is not incorporated into any bill of exceptions, nor is there anything in the record which purports to be a bill of exceptions signed by the judge. This is absolutely necessary in order to present for review the questions attempted to be raised. Without its authentication by the judge, the stenographer's report of the evidence is entirely without force. *Elliott, App. Proc.* § 821; *Railway Co. v. Kane*, 120 Ind. 140, 22 N. E. Rep. 80.

Judgment affirmed.

(7 Ind. App. 147)

**LEMSTER v. WARNER et al.<sup>1</sup>**

(Appellate Court of Indiana. June 20, 1893.)

#### JURISDICTION ON APPEAL.

The jurisdiction of an appeal in an action to set aside a deed as fraudulent, and subject the land to the payment of a debt, is in the supreme court.

Appeal from circuit court, Porter county.

Action by Henry Lemster against Eliza Warner and another. Judgment for defendants. Plaintiff appeals. Transferred to the supreme court.

W. E. Pinney, for appellant. Jones & Jones, for appellees.

DAVIS, J. This was an action to set aside an alleged fraudulent conveyance, executed by appellee Warner, to appellee Merrill, and to subject the real estate therein described to the payment of a debt evidenced by a note executed by appellee Warner to appellant. The jurisdiction is in the supreme court. The clerk is therefore directed to transfer the case to the docket of the supreme court.

(7 Ind. App. 426)

**INDIANA FARMERS' LIVE-STOCK INS. CO. v. RUNDELL.**

(Appellate Court of Indiana. June 21, 1893.)

**LIVE-STOCK INSURANCE—ACTION ON POLICY—ANSWER—ISSUES RAISED—WARRANTIES—REPRESENTATIONS.**

1. An insurance policy on a stallion provided that the policy was issued on the "warrant-

<sup>1</sup> Transferred to Supreme Court. See 34 N. E. 900.

ties made in the application," and also provided that "this policy shall be void if any material fact or circumstance stated in writing has not been fairly represented." In the application the assured expressly stated, "I warrant the above answers to each of the foregoing questions to be true," and yet stipulated that he had "in no wise misrepresented or concealed any fact concerning said stock." Held, that statements in the application as to the value of the stallion, service fee, number of mares served during the season, and the number of colts obtained, would be construed as representations, the rule being against the construction of contradictory provisions so as to impose a warranty on the assured. 32 N. E. Rep. 865, reversed.

2. An answer in an action on such policy which sets up a general denial, a breach of warranty, and the death of the stallion through assured's alleged negligence, tenders no issue in relation to the falsity or materiality of such representations.

On rehearing. Affirmed.

For decision on appeal, see 32 N. E. Rep. 865.

DAVIS, J. This was an action on a policy of insurance to recover damages for the loss sustained on account of the death of the stallion insured within the terms of the policy. The policy was issued on February 16, 1891, and was a renewal of a former policy. The cause was tried by the court. On the facts specially found conclusions of law were stated, and judgment rendered in favor of appellee.

Concerning the statements in the application and the finding of facts, counsel for appellant say: "Let us look, then, to the application in this case, and see what was represented and warranted by this insured to procure this insurance policy. In answer to the first question, 'What is the cash value of stallion?' his answer is, '\$900.00.' In answer to the eighteenth question, 'State service fee,' his answer is, '\$20.00.' In answer to question 19, 'How many seasons has he made in this locality?' he answers, 'One.' In answer to question 20, 'Number of mares served last year, and number of colts obtained, and what was the service fee,' he answers '7—5—\$20;' that is, he served 7 mares, obtained 5 colts, and the service fee was \$20,—that is, \$20 each." In relation to and upon the several points, propositions, and answers in the application above referred to the finding of the court is as follows: "The value of the horse the court finds to be, instead of \$900, only \$750, when insured. The service fee of the horse for the year 1891 the court finds to have been, instead of \$20, without exception to have been from \$10 to \$15, and never as high as \$20. During the season before, of 1890, instead of serving 7 mares, and obtaining 5 colts at \$20 for each, the court finds that he served 6 or 7 mares, and got one colt. Nothing is found as to price." Counsel then call attention to the terms of the application and policy, which, with others, are hereinafter recited, and insist that the statements and answers above set out constitute warranties, and that on account of the breaches thereof, as shown by the finding, the policy is void.

The only question presented for our con-

sideration is whether the policy was rendered void by reason of the facts found by the court, as above quoted. In other words, do the answers to the questions in the application, to which we have called attention, constitute a warranty, under the terms of the contract, to be literally and exactly fulfilled, as distinguished from representations which must be substantially performed in all matters material to the risk; that is, in matters which are of essence of the contract? It should be borne in mind that the company, through its attorneys, officers, or agents, prepared the application, (except the answers,) and also the policy, for the purpose, the court will assume, both of protecting the company against fraud and of securing the just rights of the assured under a valid contract of insurance. The language which the court is required to interpret is the language of the company. The time of making the contract, the situation of the parties, together with all the circumstances attending the transaction, may, and ordinarily do, have more or less bearing upon the interpretation and construction of the contract. It is apparent that when the application was made in February, 1891, the parties understood from the answer referred to that five of the mares served by said stallion during the preceding season of 1890 were then with foal, as, in the ordinary course of gestation in such cases, the colts would not, as the result of such service, have been foaled at that time. The burden was on the appellant to show that the answers of the assured in the application were untrue. *Association v. Grauman*, 107 Ind. 288, 7 N. E. Rep. 233. The basis of the argument of counsel for appellant is stated in their own language as follows: "The facts of his value, that he had made a stand the preceding season," and had been successful in producing foals in five of seven opportunities, and that his services commanded the fee of \$20 for each service, all entered and went largely to make up the character, the quality, and insurable value of the animal as a breeding stallion. To have been false in any one of these answers, and especially as to his success in producing foals, and as to what his services commanded, was enough to have rendered this policy void; but when we see from the findings that each and all of them were false, and were so framed and set out in the record, and alongside the warranties themselves, we are driven to the conclusion that the court erred in stating its conclusions." There is no finding whatever as to the fee charged for the season of 1890. When the special finding of facts as to a material point is not full and complete, it is deemed to be adverse to the party on whom the burden of the issue rests. *Vinton v. Baldwin*, 95 Ind. 433; *Bank v. Dolen*, 121 Ind. 301, 23 N. E. Rep. 146; *Yerkes v. Sabin*, 97 Ind. 141; *Town of Freedom v. Norris*, 128 Ind. 377, 384, 27 N. E. Rep. 869. Whether the questions and answers should be construed as referring to the number of mares with foal or as to the number of colts foaled is not, in the view we have taken of the case, a matter of vital importance. It must be understood from the finding

of the court that one colt only was foaled in 1891, as the result of the services of the insured stallion in 1890. The answers as to the number of mares served, and the fee for such service in 1890, under the authorities, therefore, so far as the consideration of the questions in this case is concerned, must be regarded as true.

Construing the questions and answers in the application as a statement that the stallion had during the season of 1890 served seven mares at \$20 each, and as the result of such service five of them were then with foal, what is the effect of the finding that the stallion had in fact got one colt? Under the view most favorable to appellant, the alleged breach of the warranty or representation, as the same may be hereinafter determined, on which the principal contention of appellant is predicated, is that one colt was got by said stallion instead of five. It is well settled that the policy and application, when the latter is made a part of the former, must be construed together as one contract, and that statements and answers will not be construed as warranties when the context and language of the writings justify construing the same as representations. In short, in such construction the courts will be liberal, in order to give the policy effect, rather than to make it void. *Insurance Co. v. Hazlett*, 105 Ind. 212, 216, 4 N. E. Rep. 582; *Moulton v. Insurance Co.*, 111 U. S. 335, 4 Sup. Ct. Rep. 466; *National Bank v. Insurance Co.*, 95 U. S. 673. The language used in the application and policy in this case, as hereinafter shown, construes the statements in the application as representations, terms, and conditions, and also seeks to construe them as warranties, and this inconsistency renders the contract capable of two constructions, and requires the court to give it such a one as will be most favorable to the assured. In the language of Justice Harlan: "We rest the conclusion already indicated upon the broad ground that when a policy of insurance contains contradictory provisions, or has been so framed as to leave room for construction, rendering it doubtful whether the parties intended the exact truth of the applicant's statements to be a condition precedent to any binding contract, the court should lean against that construction which imposes upon the assured the obligation of a warranty." *National Bank v. Insurance Co.*, supra. In this connection we call attention to the fact that, while the policy provides that it is issued on the "warranties made in the application," and that in the application the assured expressly states, "I warrant the above answers to each of the foregoing questions to be true," yet it also is stipulated in the application that the assured has "in no wise misrepresented or concealed any fact concerning said stock;" and it is further provided in the policy that "this policy shall be void if any material fact or circumstance stated in writing has not been fairly represented;" also, in substance, that if the value of the stallion shall be less than the amount stated in the application, the liability of the com-



pany shall be ascertained on a certain ratio; also that "this policy is made and accepted in reference to the foregoing terms and conditions;" and also "all fraud, or attempt at fraud, by false swearing or otherwise, shall cause a forfeiture of all claims of this company under the policy." If it was the purpose of the company to secure a warranty of the correctness of each statement of the applicant, why did it not stop with the express declaration of a warranty? Why did the company go further, and incorporate into the policy a provision for its annulment in the event "any material fact or circumstance stated in the writing has not been fairly represented," and other similar stipulations? *National Bank v. Insurance Co.*, supra. The language of *Justice Harlan* in another case is appropriate in this connection, and we quote as follows: "Thus we have one part of the contract apparently stipulating for a warranty, while another part describes the statements of the assured as representations. The doubt as to the intention of the parties must, according to the settled doctrines of the law of insurance, be resolved against the party whose language it becomes necessary to interpret. The construction must therefore prevail which protects the insured against the obligations arising from a strict warranty." *Moulou v. Insurance Co.*, supra. The conclusion which we have indicated is also in harmony with and supported by the decision of our own supreme court. *Rogers v. Insurance Co.*, 121 Ind. 570, 23 N. E. Rep. 498; *Pickel v. Insurance Co.*, 119 Ind. 291, 21 N. E. Rep. 898; *Insurance Co. v. Pickel*, 119 Ind. 155, 21 N. E. Rep. 546; *Fitch v. Insurance Co.*, 59 N. Y. 557; *Insurance Co. v. Hazelett*, 105 Ind. 212, 4 N. E. Rep. 582. In the *Rogers Case*, supra, Judge Olds, speaking for the court, says: "It is expressly stated in the policy that the insurance 'is based upon the representations' contained in the application. The language used in the application and in the policy construes the statements in the application as representations, but also seeks to construe them as warranties. It is a well-recognized rule of construction that when the language used in a policy is capable of two constructions the one most favorable to the assured shall be given to it; but the appellee in this case seeks to place a narrow construction on the language used, and the construction most favorable to itself." The statements in the application and policy in this case cannot be construed as warranties, and the policy is therefore not void on account of any breach of warranty. In the decisions relied on by appellant, the statements therein in question in the respective cases were by the clear and express terms of the contracts made warranties. *Insurance Co. v. Miller*, 89 Ind. 475; *Insurance Co. v. Cannon*, 48 Ind. 269; *Insurance Co.*

*v. Benton*, 87 Ind. 138. In the last case cited the court says: "While a warranty relating to an existing fact must be literally true, or the policy does not attach, that which is promissory in its nature is not so strictly construed. In the later cases it has been held sufficient if substantially true or performed. . . . Warranties cannot be deviated from in the smallest particular, whether material or immaterial; but the insured is not answerable on account of representations, unless they differ in material respects from the truth, or are departed from in a material manner." The foregoing cases correctly enunciated the law applicable to the facts therein, but, as we have seen in this case, the appellant misconstrues the force and effect of the statements and answers which enter into the contract, and therefore the rule relied upon, and the able argument of counsel in support thereof, do not apply to the case in hand. When the statements under consideration are construed as representations, what is the effect of such representations on the policy? A representation, "if false and material to the risk," renders the contract void. *May, Ins. § 181*. The same author also says: "So an agreement that the falsity of any statement in the application shall avoid the policy excludes from the court or jury the question of its materiality." *Section 185*. In addition to the statements to which we have called attention, it is provided in the application "that the policy to be issued hereon shall be based entirely upon the answers contained in the application," and in the policy, in the same sentence in which it is stipulated that "this policy shall be void if any material fact or circumstance stated in writing has not been fairly represented," it is stated in conclusion, "or if any of the answers contained in the application upon which this policy was issued shall be found to be untrue." If the question was presented by any issue, the same rule of construction heretofore stated would govern this branch of the case.

The answer in this case is—First, a general denial; second, a breach of the warranty; and, third, the death of the stallion on account of alleged negligence on the part of the assured. These answers do not tender any issue in relation to either the falsity or materiality of the representations, and therefore, while we have been much impressed with the argument of the learned counsel for appellant in relation to the falsity and materiality of the answers to which attention has been invited, the investigation of these questions could not be productive of any good. There is no finding tending to support the third paragraph, and the only question properly presented arises on the second paragraph, in relation to the alleged breach of the warranty, which we have hereinbefore discussed and decided. Judgment affirmed.

(7 Ind. App. 246)

DAVIS et al. v. ELLIOTT et al.

(Appellate Court of Indiana. June 21, 1893.)

## MECHANICS' LIENS—LEASEHOLD.

The interest of a purchaser under a contract providing for forfeiture on default in payment is not a "leasehold," within Elliott's Supp. § 1706, relative to mechanics' liens, providing that, where the owner has only a leasehold interest, the lien, so far as concerns the building erected by the lienholder, is not impaired by the forfeiture of the lease for rent.

Appeal from circuit court, Elkhart county; J. M. Vanfleet, Judge.

Action by John C. Davis and others against Marion U. Elliott and others to enforce a mechanics' lien. Judgment for defendants. Plaintiffs appeal. Affirmed.

Chamberlain & Turner, for appellants. Osborne & Zook, for appellees.

GAVIN, C. J. The appellee Conn executed to Elliott a title bond for a certain vacant lot, for which Elliott was to pay in monthly installments. By the terms of the contract, time was made of the essence of the contract, and it was provided that, upon default of any payment, "this contract shall be and become absolutely null and void as to the rights of said second party, [Elliott,] and said first party shall be relieved herefrom," without any liability upon the part of Conn to repay any moneys paid. In such event, right of possession of the realty and all improvements thereon was to vest immediately in Conn. Elliott took possession, and moved upon the lot an old house from Conn's farm. This house he repaired, and also erected a small stable on the lot. For these improvements, appellants furnished material and did work, after which, in due time, they filed notice of a mechanic's lien on the lot and buildings. Elliott paid nothing whatever on the lot, and in nine months Conn commenced suit in ejectment, and recovered possession of the property, and afterwards sold it. Appellants prosecuted this action to enforce their lien.

Section 1706, Elliott's Supp., makes this provision concerning mechanics' liens: "Where the owner has only a leasehold interest, or the land is incumbered by mortgage, the lien, so far as concerns the building erected by said lienholder, is not impaired by the forfeiture of the lease for rent or the foreclosure of the mortgage." Prior to the enactment of this statute, it was well established that the rights of the holder of a mechanic's lien were subordinate to the rights of a prior mortgagee, and, as against a landlord or a vendor by a title bond, extended no further than the rights of the lessee or vendee. *Hopkins v. Hudson*, 107 Ind. 191, 8 N. E. Rep. 91; *Association v. Spears*, 115 Ind. 297, 17 N. E. Rep. 570; *Neeley v. Searight*, 113 Ind. 316, 15 N. E. Rep. 598; *Close v. Hunt*, 8 Blackf. 254; *Bishop v. Boyle*, 9 Ind. 169; *Hanch v. Ripley*, 127 Ind. 151, 26 N. E. Rep. 70; *Phil. Mech. Liens*, § 237.

Counsel for appellants, however, insist that by this statute the law has been changed, and they are entitled to a lien against the buildings, although not against the land. They urge that they

can see no reason why the legislature should give the mechanic a lien on the buildings as against a prior mortgagee or a lessor by an ordinary lease, and not as against the vendor by executory contract. While this proposition might well be answered in the affirmative, still the rights of parties are to be determined, not by what the legislature might well have done, but by what it has actually done. It is urged that the term "leasehold," as used in this statute, "should be so construed by this court as to include cases like the one in question, construing the word to have a broad enough significance to cover any case where the party was in lawful possession of the real estate under a contract for the sale of lands or otherwise." No authority is cited in support of this proposition. Nor do we deem the court justified in giving to the term "leasehold" any such a broad interpretation. To do so would be doing the extreme violence to the provisions of the statute. It is the province of the legislature, and not of the court, to define the cases in which a first lien shall attach to the buildings. This the legislature has done, in language plain and unambiguous, leaving no room for judicial construction. The word used is one in common use, the meaning of which is generally understood both by members of the legal profession and others. The right created by the contract in this case is entirely destitute of any characteristic feature of a leasehold interest. It is simply an executory contract of purchase and sale; only this, and nothing more. Whether or not a purchaser under a title bond might acquire an equitable interest in the land which would be liable to a mechanic's lien, notwithstanding forfeiture clauses, is a question not presented for our determination here. The relief sought by appellants is the right to subject to their lien the building fund from Conn's claim. This they cannot do, not because the judgment rendered in favor of Conn in the action to which they were not parties operates as an adjudication against them, but because all the evidence, when considered together, fails to show that they have any claim superior to Conn's right to both the land and the buildings which are a part of the land. *Callaway v. Freeman*, 29 Ga. 408; *Logan v. Taylor*, 20 Iowa, 297; *English v. Foote*, 8 Smedes & M. 444. Neither section 225, *Phil. Mech. Liens*, nor the case of *King v. Smith*, (Minn.) 44 N. W. Rep. 65, cited by counsel, lend any support to the proposition that appellants have any right superior to Conn. Judgment affirmed.

(7 Ind. App. 381)

WHEELER v. BARR et al.

(Appellate Court of Indiana. June 21, 1893.)

## NOTES—CONSIDERATION—FORGERY—NOTICE—PRINCIPAL AND AGENT—ESTOPPEL.

1. In an action against the principal and sureties on a note, the separate answer of one of the sureties that he executed the note without any consideration moving to him is bad, it making no difference who received the benefit thereof.

2. The fact that the payee of a note occasionally saw one of the sureties thereon, and did not mention the fact to him that he had a note with his signature thereon, is not proof that he received the note knowing such signature to be a forgery.

3. Though the payee of a note told the maker to get a certain person as surety thereon, this would not constitute the maker the payee's agent, so as to charge the payee with notice that the signature of such person was a forgery.

4. The maker of a note is estopped to allege that the payee is not the real party in interest, and that the money for which it was given belonged to some one else.

Appeal from circuit court, Whitley county; J. W. Adair, Judge.

Action by Thomas A. Wheeler against Joshua Simon and Barr and Orndorf. Judgment for defendants Barr and Orndorf. Plaintiff appeals. Reversed.

Arthur & Wurstaugh and Schuyler A. Haas, for appellant. Marshall & McNagney, for appellees.

REINHARD, J. The appellant sued Joshua Simon, principal, and the appellees Barr and Orndorf, sureties, on a promissory note. Simon made no appearance, and judgment was rendered against him upon default. Barr filed an answer of non est factum, and also a cross complaint asking the cancellation of the note in so far as it affected him. Orndorf filed an answer in one paragraph, to which a demurrer was sustained, whereupon he filed an amended answer in three paragraphs. The appellant demurred separately to each paragraph of this amended answer. The demurrer was overruled as to the first and second paragraphs and sustained as to the third, and proper exceptions were reserved upon these rulings. Orndorf also filed a cross complaint, to which a demurrer was overruled by the court, and an exception taken by the appellant. The cause was put at issue by the filing of the appellant's replies to the answers, and answers to the cross complaints of the appellees, Barr and Orndorf. There was a trial by the court, and finding for the defendants below, who are the appellees here. Appellant's motion for a new trial having been overruled, the court rendered judgment upon the finding.

Error is predicated upon the overruling of the demurrer to the amended answer of appellee Orndorf. It reads as follows: "And for further and second paragraph of answer the defendant Orndorf says he executed the note sued on without any consideration whatever to him moving, wherefore he prays judgment." *Anderson v. Meeker*, 31 Ind. 215, was a suit on a note against the maker, who answered "that the defendant received no consideration for the note." The trial court sustained a demurrer to this answer, and the supreme court sustained the ruling, saying: "The issue tendered by the paragraph was personal. If the note which was executed by the appellant had a consideration to support it, that was sufficient, whether received by the appellant or some one else with his consent." *Bingham v. Kimball*, 88 Ind. 184, was an action on a promissory note. The defendant answered that the

note was given by the defendant to the plaintiff "without any consideration of any kind to this defendant." The court sustained a demurrer to this answer, and the ruling was affirmed on appeal. The supreme court, in passing upon the question, said: "It was not necessary that the consideration for the note should pass to the defendant. The consideration must be some benefit to the party by whom the promise is made, or to a third person at his instance, or some detriment sustained at the instance of the party promising by the party in whose favor the promise is made." In *Moyer v. Brand*, 102 Ind. 301, 26 N. E. Rep. 125, the action was on a joint promissory note. One of the defendants answered "that as to him it was executed without any consideration whatever." To this answer a demurrer was sustained. The judgment was reversed upon this ruling, the supreme court distinguishing the two cases first above cited from the one then under consideration, upon the ground that the answer in the last case was broader than those in the others, and was equivalent to an averment that the note was executed without any consideration whatever, while the other answers limited the averment of no consideration to the person of the pleader exclusively. The cases first cited are in the last-named case conceded to declare the law correctly, and we think they cover the case now under consideration. Whether there was a consideration moving to the appellee Orndorf or not is immaterial. If there was a sufficient consideration for the note, whether the same moved to Orndorf or the principal maker or any other person, it is all the law requires. See, also, *Work*, Pr. § 600. We are therefore impelled to the conclusion that the court erred in overruling the demurrer to this paragraph of the answer.

It is further insisted that the finding is not sustained by the evidence, and this question is properly presented by the record. The first paragraph of Orndorf's amended answer alleges that Orndorf signed the note as surety with Barr, and under the belief and upon the representation of the appellant that Barr signed it also, but that as to Barr it was a forgery; that Simon, the principal, maker of the note, was the brother-in-law and agent of the appellant to procure the signatures of Barr and Orndorf, and knew before its delivery to him that Barr did not execute the same, and that Orndorf only signed the note on the faith of Barr's signature thereto. By reason of these things it is averred that the consideration has failed, etc. Appellant strenuously contends that there is no evidence whatever to sustain these averments as to knowledge on his part. This answer raised an affirmative issue on the part of Orndorf, and he assumed the burden of proving the material averments thus pleaded. If the appellant accepted the note without notice of the forgery, Orndorf is bound by his signature, notwithstanding the fact that the name of Barr had been forged, and Orndorf signed the note in the belief that Barr's signature was genuine. *Helms v. Agricultural Co.*, 73 Ind. 325.

Hunter v. Fitzmaurice, 102 Ind. 449, 2 N. E. Rep. 127; Schmidt v. Archer, 113 Ind. 365, 14 N. E. Rep. 543. We have carefully examined the entire evidence in this case, and have failed to find anything whatever from which the trial court could have legitimately inferred that the appellant had any knowledge or notice of any kind that Barr had not signed the note. The fact that the appellant occasionally saw Barr before and after the note was executed, and did not notify him that he had a note with his signature to it, cannot be construed as sufficient proof that appellant had such notice when he accepted the note. There was no attempt to prove any admission on the part of appellant, either by his silence when spoken to upon the subject of the alleged forgery, or by any statement of his own. So far as the evidence shows, the subject was never mentioned or discussed with appellant or in his presence or hearing, nor is it claimed that appellant ever made such an admission to any one. It cannot be true that a party holding the note of another, or about to receive such note, is required to notify him thereof, and, failing to do so, that he may be estopped from afterwards collecting such note. Nor do we see how the failure to mention the fact could, under the circumstances, be taken as an admission, or even an indication, that the holder knew the maker's signature to be a forgery. Nor is there in the record any evidence tending to prove an agency upon the part of Simon, the principal maker of the note, for the appellant, the payee, as alleged in Orndorf's answer. The answer avers that Simon was the brother-in-law and agent of appellant in procuring the signatures, and had full knowledge of the forgery when the note was taken. The evidence shows without contradiction that Simon married a niece of Wheeler, and sustained no other relationship to him; that Simon, wishing to borrow some money of appellant, sent him the note, with his own name upon it and those of Barr and Orndorf, and that Wheeler accepted the note and sent him the money. There is some testimony tending to show that Simon was then insolvent, and that appellant knew it, but we do not see how an inference could be drawn from this either that Simon was the agent of Wheeler, or that Wheeler knew or had good reason to believe that the name of Barr, one of the supposed sureties, was not genuine, but had been forged. But, conceding that Wheeler had requested Simon to procure Barr as a surety, and Simon, instead of doing so, had forged Barr's name to the note, this would not constitute Simon the agent of Wheeler, so as to charge the latter with notice that the signature of Barr was a forged one. See Hunter v. Fitzmaurice, supra. There was evidence from which the court might have concluded that the money for which the note was given was not the property of Wheeler, the payee of the note, but of his sister. Wheeler testified that his sister had left some money with him to be loaned out at interest, and he seemed to be willing to concede that this was the identical money, but claimed that the note was his property, and that he

was responsible to his sister for the amount he had thus received from her. We are informed by appellant's counsel, in their brief, that the court based its finding for the appellees largely upon the ground that the appellant was shown not to be the real party in interest. As the appellees' brief is silent upon this point, and as the record does not disclose the grounds of the finding, we are, of course, unable to know the real basis of the learned court's conclusion. But as this court is in duty bound to sustain the judgment of the trial court if it can be done upon any legal hypothesis, it will not be improper for us to inquire into the point suggested with a view of determining whether a proper solution of the question should result in the affirmance of the case. We are, however, unable to come to the conclusion that if the money represented by the note was the property of appellant's sister, the plaintiff must fail. In the first place, the appellees did not tender any issue of that kind by their answers or cross complaints; but, even if they had done so, we do not see how it could avail them. The decided cases clearly establish the rule that the makers of a note are estopped to deny that the payee of the instrument is the real party in interest. *Offutt v. Rucker*, 2 Ind. App. 351, 27 N. E. Rep. 589, and cases cited. We are of the opinion that the appellant's motion for a new trial should have been sustained. Judgment reversed.

(159 Mass. 409)

## LANGMAID et al. v. REED et al.

(Supreme Judicial Court of Massachusetts.

Middlesex. June 22, 1893.)

## INJUNCTION—VIOLATION OF COVENANT IN DEED—ERECTION OF STABLE—JURISDICTION OF SUPERIOR COURT.

1. St. 1883, c. 223, § 1, providing that the superior court shall have original and concurrent jurisdiction with the supreme judicial court in all matters in which relief in equity is sought, with all the powers incident to such jurisdiction, does not confer on the superior court the authority given the supreme judicial court by Pub. St. c. 102, § 39, to issue an injunction against the erection, occupancy, or use of a building as a stable for more than four horses in a city or town, except as the mayor and aldermen or selectmen may direct. *Baldwin v. Wilbraham*; 140 Mass. 459, 4 N. E. Rep. 829, followed.

2. St. 1890, c. 395, amending Pub. St. c. 102, § 39, so as to give the superior and supreme judicial courts concurrent jurisdiction to enjoin the occupancy or use of a stable in a city or town for more than four horses without a license, such jurisdiction having previously resided in the supreme judicial court alone, does not confer jurisdiction on the superior court of a suit pending at the time the amendatory act took effect.

3. Where the time for which defendant covenanted against the erection of a building expires before the determination of a suit to enjoin such erection, a decree should be rendered merely for damages for the violation of the restriction while it continued in force.

Appeal from superior court, Middlesex county; P. Emory Aldrich, Judge.

Bill by Dorcas A. Langmaid and others against Celia A. Reed and others to enforce a building restriction in a deed. De-

cees for complainants. Defendants appeal. Modified.

Chas. Q. Tirrell, for appellants. Lafayette G. Blair and Edward Avery, for appellees.

FIELD, C. J. This bill was filed in the superior court on February 18, 1890. The principal object of the bill, as originally brought, was to enforce a restriction contained in a deed of land to the defendants, to the effect "that no building other than a dwelling house, or building usually appurtenant thereto, should be erected or maintained on said land for the space of twenty years from the first day of October, A. D. 1871;" and the bill alleged that the defendants had begun the erection of a building of a kind not usually appurtenant to a dwelling house, which was to be used for a "livery, trading, and sales stable." The plaintiffs' deeds were subject to a similar restriction. There was also an allegation in the bill that the building which the defendants had begun to erect was designed to be used as a stable for more than four horses, and that they had not obtained any permission from the selectmen of the town of Watertown, where the land was situated, to erect and use such a stable, pursuant to Pub. St. c. 102, § 39. On May 1, 1891, the plaintiffs filed an amendment to the bill, alleging that the defendants had erected a stable of much larger dimensions than were necessary for keeping four horses, and were using the stable "as a sale stable, and place of business;" that they had not obtained permission from the selectmen of Watertown for the erection of such a stable; that such a stable was not a building usually appurtenant to a dwelling house, and was "a nuisance of such a kind and character as to greatly injure and damage the plaintiffs in their property." Certain issues were framed and submitted to a jury. The findings of the jury were generally in favor of the plaintiffs, except that they found that the building actually erected, which was of somewhat smaller dimensions than that described in the original bill, was such a building as is usually appurtenant to a dwelling house, and was not a nuisance, as alleged in the amended bill. The final decree was entered on October 3, 1892, and it appears to have been rendered by the presiding justice after "having heard the evidence and argument of the parties," etc. The defendants appealed. There is no report of any kind. The papers show only the pleadings; the issues submitted to the jury, and the findings of the jury thereon; the issuing of a temporary injunction, and a modification of it; and the final decree.

The findings of the jury, not having been set aside, must be taken as true. *Franklin v. Greene*, 2 Allen, 519. The justice who finally heard the cause could, however, find, on the evidence before him, any other material facts not inconsistent with these findings. The appeal brings before us no question of fact, and the only question of law is whether the decree is warranted by the frame of the bill, and is consistent with the findings of the jury. The restric-

tion contained in the deeds expired on October 1, 1891, and therefore was not in force when the decree was rendered, to wit, October 3, 1892, and of course there could be, in the decree, no injunction against violating the restriction; but, as the restriction had been in force for more than a year and a half after the bill was filed, damages might be assessed for any violation of the restriction which was proved.

The other part of the bill, relating to the erection and use of a stable for more than four horses without the permission of the selectmen of Watertown, is distinct from the first part, and rests wholly upon the statutes. Pub. St. c. 102, § 39, authorized "the supreme judicial court, or a justice thereof, in term time or vacation," to issue an injunction "to prevent such erection, occupancy, or use" of a building as a stable for more than four horses, in any part of a city or town, except such part as the mayor and aldermen or selectmen may direct. This authority in the court is independent of its authority, as a court of equity, to restrain actual nuisances. A stable used for more than four horses may or may not be a nuisance; but, whether it is or not, it is competent for the legislature to say that it shall not be kept, except in such places as the mayor and aldermen of a city, or the selectmen of towns, may permit, and to confer upon a court authority to enforce this prohibition by injunction, because stables, in their nature, are often offensive to the community, and the use of them may be regulated by the legislatures. But a majority of the court are of opinion that the superior court, under St. 1883, c. 223,<sup>1</sup> did not acquire jurisdiction to enforce the provisions of Pub. St. c. 102, § 39, for the reasons given in *Baldwin v. Wilbraham*, 140 Mass. 459, 4 N. E. Rep. 829. See St. 1891, c. 293. Pub. St. c. 102, § 39, was amended by St. 1890, c. 230, passed after this bill was filed. This amendment provides for a license, and confines the injunction which may be issued to "an injunction to prevent such occupancy or use" without such license, the word "erection" having been omitted. This amendment was itself amended by St. 1890, c. 395, approved June 7, 1890; and the superior court was thereby given concurrent jurisdiction with the supreme judicial court to "issue an injunction to prevent such occupancy or use" unless a license was obtained. St. 1891, c. 220, is confined to stables in cities. St. 1890, c. 395, did not purport to relate to pending suits in the superior court; and we think it cannot be held to give jurisdiction to that court over a case pending there at the time it took effect, but of which, previously, it had had no jurisdiction. *Wheatland v. Lovering*, 10 Gray, 16.

The restriction having expired before the final decree was rendered, and the court having no jurisdiction over the bill to restrain the occupancy or use of a stable for

<sup>1</sup> St. 1883, c. 223, § 1, provides that "the superior court shall have original and concurrent jurisdiction with the supreme judicial court in all matters in which relief or discovery in equity is sought, with all the powers and authorities incident to such jurisdiction."

more than four horses without the license of the selectmen, the final decree should be confined to damages for the violation of the restriction while it continued in force. It appears from the findings of the jury that the building actually erected was such as is usually appurtenant to a dwelling house; and therefore, as we infer, it was not erected in violation of the restriction. But it also appears that the defendants commenced the erection of a building "of a kind and character not usually appurtenant to dwelling houses, and of the kind and character and for the use described and set forth in paragraph 6, in said bill of complaint," and this may have occasioned some damage to the plaintiffs. We do not know from the papers that the justice who entered the decree assessed damages for anything else, and therefore we cannot say that any error appears in this part of the decree. The decree must be reversed as to the injunction, and affirmed as to damages and costs.

(146 Ill. 64)

#### CITY OF CHICAGO v. BROWNELL.<sup>1</sup>

(Supreme Court of Illinois. June 19, 1893.)

##### MUNICIPAL ORDINANCE—REASONABLENESS.

An ordinance which imposes a penalty for book making and pool selling within the city limits, except in certain enumerated localities, is not void for unreasonableness, since the discrimination is not between people, but between places, and the exception of certain localities does not authorize book making and pool selling at such places. 41 Ill. App. 70, reversed.

Error to appellate court, first district.

E. J. Brownell was convicted before a justice of the peace for violating an ordinance of the city of Chicago. The decision was reversed on appeal, and the city of Chicago brings error. Reversed.

John S. Miller and George A. DuPuy, for plaintiff in error. Knight & Brown, for defendant in error.

**WILKIN, J.** On the 29th day of April, 1890, the defendant in error was convicted before one of the justices of the peace of Cook county of the violation of an ordinance of the city of Chicago, and judgment entered against him for the sum of \$100, and costs of the prosecution. He appealed to the criminal court of Cook county, and that court, on a trial of the case, held the ordinance under which he was prosecuted illegal and void, and discharged him. Plaintiff in error prosecuted an appeal to the appellate court of the first district, where the judgment of the criminal court was affirmed. 41 Ill. App. 70. This appeal is from that judgment of affirmance.

The only question in the case is as to the validity of the ordinance for a violation of which defendant in error was prosecuted. It was regularly passed by the city council of the city of Chicago, on the 16th day of September, 1889, and is an exact copy of an act of the general assembly of

this state, approved May 31, 1887, entitled "An act to prohibit book making and pool selling," except that the language was so modified as to make it applicable only to the territorial limits of said city. The ordinance is as follows: "Be it ordained by the city council of the city of Chicago: Section 1. That any person, persons, or corporations who keep any room, shed, tenement, tent, booth, or building, or any part thereof, or who occupies any place upon any public or private grounds within this city, with any book, instrument, or device, for the purpose of recording or registering bets or wagers, or of selling pools, or any person who records or registers bets or wagers or sells pools upon the result of any trial or contest of skill, speed, or power of endurance of man or beast, or upon the result of any political nomination, appointment, or election, or, being the owner, lessee, or occupant of any room, shed, tenement, tent, booth, or building, or part thereof, knowingly permits the same to be used or occupied for any of these purposes, or therein keeps, exhibits, or employs any device or apparatus for the purpose of recording or registering such bets or wagers, or selling of such pools, or becomes the custodian or depository for hire or privilege of any money, property, or thing of value staked, wagered, or pledged upon any result, shall be fined in a sum not less than fifty dollars, nor exceeding two hundred dollars: provided, however, that the provisions of this ordinance shall not apply to the actual inclosure of fair or race track associations that are incorporated under the laws of the state, during the actual time of the meetings of said association, or within twenty-four hours before any such meeting." It is not contended that the invalidity of this ordinance was shown by any extraneous evidence introduced on the trial. The forty-fifth clause of section 1, art. 5, of the act entitled "Cities, villages, and towns," (paragraph 68, c. 24, p. 467, 1 Starr & C. St.) authorizes the city council of cities of this state, organized under said act, "to suppress gaming, and gambling houses, lotteries, and all fraudulent devices and practices for the purposes of gaming, or obtaining money or property." That the city council of the city of Chicago had the power, under this statute, to forbid and punish the acts mentioned in this ordinance, is not and cannot be denied. Unless, therefore, the ordinance shows upon its face an abuse of that power, it must be upheld.

Counsel for defendant in error, as we understand, contend it is void, because it violates the rule that all ordinances must be impartial; and they liken it to an ordinance which, under the same circumstances, makes an act done by one person penal, but by another not. They say it is an "attempt to legalize or give authority of law to book making and pool selling in certain places within the city of Chicago, and to prohibit and suppress the same in other places within said city," and this construction seems to have been adopted by the appellate court, the ordinance being there treated as conferring, by implication, "upon some privilege to be what is

<sup>1</sup> Reported by Louis Boiesot, Jr., Esq., of the Chicago bar.

prohibited to others." This position is based upon the assumption that, by the concluding clause or proviso in the ordinance, book making and pool selling is made lawful, within "the actual inclosures of fairs or race track associations that are incorporated under the laws of this state, during the actual time of meetings of said associations, or within twenty-four hours before such meeting." Does the fact that the provisions of this ordinance are not to apply to certain localities in the city confer upon any person the right to do the forbidden acts in those localities? Certainly not. All that can be properly said as to the discriminating effect of the ordinance taken as a whole is that it provides for the punishment of book making and pool selling within the city generally, but exempts certain places, under the control of incorporated associations, at particular times, from its operation. It in no sense authorizes or sanctions book making or pool selling in the excepted places at the time mentioned, but simply makes no provision for the punishment of those who may do the acts within those inclosures at such times. The ordinance does not, in terms, prohibit the acts which are punishable, but treats them throughout as already being unlawful, simply fixing the penalty. In the case of *State v. Burgoerfer*, decided by the supreme court of Missouri, and reported in 17 S. W. Rep. 646, it appeared that on April 1, 1891, an act of the general assembly of that state was approved, entitled "An act to prohibit book making and pool selling," which provided that "every one shall be guilty of a misdemeanor who keeps rooms for book making or pool selling, upon the result of any trial, or contest of skill, or powers of endurance of man or beast, which is to take place beyond the limits of this state, or who makes books or sells pools upon such event, or who makes books or sells pools upon the result of any political nomination, appointment, or election wherever held." The defendant, who was prosecuted for a violation of that act, insisted that it was unconstitutional, in that the title did not express its subject, the title being "An act to prohibit," while the body of the statute "regulates book making," and therefore the title did not contain the "subject" of the act, within the meaning of the constitution of the state, and the court stated the question for decision to be, "Does this act prohibit or regulate book making and pool selling?" and said: "If it is one of prohibition, and this is clearly expressed in the title, the act is valid. On the other hand, if it is one of regulation, it is invalid." It was held in a well-reasoned opinion by Thomas, J., that the act was valid, and the fact that book making and pool selling was not prohibited by the act on events to occur in the state did not make it an act "regulating or permitting the same to be done." It is there said: "There is a radical and fundamental distinction between a failure to provide punishment for an act and the sanction of it;" and many cases are cited in support of the distinction, which we think are in point. So we say here, the fact that the or-

dinace by the proviso is not to apply to "the actual inclosures of fair or race track associations," etc., in no sense makes it an ordinance authorizing, sanctioning, or approving the selling of pools or book making within the actual inclosure of fair or race track associations.

But it seems to be thought that, by failing to provide for the punishment of the offense in the excepted places at all times, the ordinance is unjust and oppressive; that it operates unfairly upon the citizens of the city; and *City of Lake View v. Tate*, 33 Ill. App. 78, and 130 Ill. 247, 22 N. E. Rep. 791, is cited as an authority sustaining the position. In that case the general rule was applied by both this and the appellate court, to the effect that "all city ordinances must be reasonable, and consistent with the laws of the state, and must not be oppressive, unequal, or unjust, or partial, or discriminating in their operation;" that is to say, as applied to that case, a city ordinance which limited the speed of railroad trains on one road running through the city, but permitted others to run without limit, there being no circumstances making it necessary to apply a different rule to the respective roads, was unreasonable and void, because it unjustly discriminated against the railroad company, the trains of which were limited in their speed. The same rule is announced in *City of Chicago v. Rumpff*, 45 Ill. 90, and *Tugman v. Chicago*, 73 Ill. 405. See Dill. Mun. Corp. (3d Ed.) §§ 319, 320, 322. The attempt to apply that rule to this case proceeds upon the untenable ground that, but for the ordinance in question, the defendant in error would have had the right to do the act punishable by its provisions. On the contrary, the ordinance took away from the citizens of the city of Chicago no right which they had before it was passed. The statute of the state had already made the acts named in the ordinance unlawful. Defendant in error had no better or greater right to engage in book making or pool selling before the ordinance was adopted than afterward. It is difficult to see how, even in the absence of the statute of which this ordinance is a copy, the defendant in error could have had a legal right to engage in the business made penal by the statute, as has a citizen to sell meats in a city, or a railroad company to run its trains; but whether or not, in the absence of the act of 1887, a person could be punished for book making or pool selling in this state, it seems clear that no right existed to engage in that business which the state or a municipal corporation could be called upon to protect, for the reason that no one could patronize such a business without being guilty of a violation of the statute against gaming.

How, then, can defendant in error say this ordinance unjustly discriminates against him? What legal right has been taken from him or impaired? But, again, if it were admitted that the ordinance, by implication, sanctions book making, etc., within "the actual inclosures of fair or race track associations that are incorporated under the laws of the state," etc., it does not appear that defendant in error or any one else is discriminated against. If any



one can lawfully engage in that business, in those places, at such times, for anything appearing in this ordinance, defendant in error, and all other persons so disposed, can do the same. On the principle that a city council may discriminate between different localities within the city limits, in granting license to sell intoxicating liquors, "making no distinction between persons, but between places only," as was held in *City of East St. Louis v. Wehrung*, 46 Ill. 393, this ordinance would be valid in any view which can be taken of it. The validity of the statute from which the ordinance is copied is not questioned, nor are we able to discover any substantial grounds upon which it could be, and yet we are asked to hold that an ordinance of the city of Chicago, passed under ample power, the object of which is to enforce that statute precisely as the legislature made it, is unreasonable, unjust, and void. Whatever may have been the object of the legislature in adding the proviso to the statute, whether to commit to fair and race track associations, duly incorporated, the duty, under their charters, of prohibiting the species of gambling named in the body of the act within their actual inclosures, during the actual time of their meetings, and for 24 hours prior thereto, or to leave that matter to be regulated entirely by such associations, or intended that in those places the offense should be punishable under the statute against gaming, it cannot be given the effect of preventing municipal corporations, throughout the state in which grounds of such association happen to be located, from enforcing the salutary provisions of the act by ordinance. No valid legal objection has or in our opinion can be urged against the ordinance under which defendant in error was convicted. The judgment of the appellate court will be reversed, and the cause remanded to the criminal court of Cook county, with directions to proceed in conformity with the views herein expressed.

(145 Ill. 653)

HEISEN v. HEISEN et al.<sup>1</sup>

(Supreme Court of Illinois. June 19, 1893.)

DOWER—LEASE—ESTOPPEL—GUARDIAN AND WARD.

1. Under Rev. St. 1891, c. 41, § 1, which abolishes the estate by curtesy, and gives a surviving husband dower in his wife's lands, his right of dower is, before assignment, a mere right of action, and not an estate. *Crum v. Sawyer*, 24 N. E. Rep. 956, 132 Ill. 443, overruled.

2. A man who, after his wife's death, and before his dower has been assigned, takes from the guardian of her minor heir a lease of part of her land, cannot claim dower in the leased premises during the continuance of the lease, since he is estopped to deny his landlord's title.

3. In such case the husband's right of dower in the residue of the land is merely the right to a third of such residue, without regard to the extent of the land included in the lease.

4. A parol agreement between the husband and the guardian that the former might have dower in the demised premises is void as a mod-

ification of the written lease because it is an attempt to vary a written instrument by parol, and is void as an assignment of dower because a guardian has no power to assign dower.

5. Nor does the fact that the lease was accepted in reliance upon such parol agreement estop the ward from denying the validity of such agreement where it appears that the husband knew that the probate court refused to permit the guardian to give a lease which recognized the right of dower, since the ward cannot be estopped by an act of the guardian which the other party knew to be unauthorized.

6. Under Rev. St. 1891, c. 41, § 39, which provides that "where the estate cannot be divided without great injury thereto, the dower may be assigned of the rents," a report of commissioners to the effect that dower cannot be set off consistently with the interests of the estate is not a condition precedent to an award of dower by the court out of the rents.

Error to superior court of Cook county; H. M. Shepard, Judge.

Petition by Charles C. Heisen against Myrtle C. Heisen and others to recover dower. Petitioner obtained dower in only part of the land, and he brings error. Affirmed.

William Brace and Aldrich, Payne & De-frees, for plaintiff in error. Stillman & Lyons, for defendants in error.

SHOPE, J. By section 1 of the dower act (chapter 41, Rev. St.) the plaintiff in error was endowed of one-third of the lands of which his wife dies seised for and during his natural life. This is conceded, and the question presented is whether by the acceptance of the lease of the guardian of the minor, owner of the fee, his right to assert dower has been suspended during the term thereby created. The legislature having abolished tenancy by the curtesy, and conferred upon a husband the right of dower in his wife's lands in general terms, and without the use of words showing an intention to enlarge the right of husband beyond that granted to the wife, it is to be presumed that the same right was intended to be conferred upon each. The language of the statute is that "the estate of curtesy is hereby abolished, and the surviving husband or wife shall be endowed of the third part of all the lands whereof the deceased husband or wife was seised of an estate of inheritance," etc. And it is also to be presumed that the dower right intended to be conferred was such as had previously existed in this state in favor of widows of deceased owners of lands. The right of dower in the wife was an inchoate expectancy during coverture, maturing upon the death of the husband into a right of action to have admeasured to her dower in the lands of which he had been seised, and to which her dower had not been released. After the death of the husband, and before assignment, the right rested in action merely, was not an estate in the land, nor did it give the dowress a right of entry. *Blain v. Harrison*, 11 Ill. 384; *Hoots v. Graham*, 23 Ill. 81; *Reynolds v. McCurry*, 100 Ill. 356; *Kauffman v. Peacock*, 115 Ill. 212, 3 N. E. Rep. 749; *Beat v. Jenks*, 123 Ill. 447, 15 N. E. Rep. 173; *Walker v. Doane*, 131 Ill. 27, 22 N. E. Rep. 1006; 1 Lomax, Dig. 92. It could exist only in the person

<sup>1</sup> Reported by Louis Bolsot, Jr., Esq., of the Chicago bar.

upon whom it was cast by operation of law, could be released so as to unite with the fee, but was not subject to alienation. *Summers v. Babb*, 13 Ill. 483; *Dock Co. v. Kinzie*, 49 Ill. 289; *Hart v. Burch*, 130 Ill. 426, 22 N. E. Rep. 831.

We are of opinion that under the statute the right of the husband to dower in his wife's lands before assignment is not an estate in the lands, but a right of action to demand assignment of his dower. What is said on this point in *Crum v. Sawyer*, 132 Ill. 443, 24 N. E. Rep. 956, contrary to the view here expressed, was unnecessary to the decision of that case, and, having been inadvertently said, is to be regarded as inaccurate. But it was properly held in that case that the husband, being *sui juris*, and the right of dower conferred by the statute not having been trammelled or hedged about by rules of law growing out of the disability of married women at common law, no reason exists why he may not release his inchoate expectancy, or his right of action for dower, or bar recovery in respect thereof, as he might release or bar any other expectancy or right; and it would necessarily follow that the husband would be barred of his right to assert dower in the lands of his deceased wife by any act or conduct that would estop him from the assertion of any other right. While the tenant may be permitted to show that the title of his landlord has determined, the rule that he will not be permitted to dispute the title under which he enters is too familiar to require citation of authorities. Here the plaintiff in error, not being entitled to enter by virtue of his claim of dower, as we have seen, entered under a lease of the entire lot for a term ending with the minority of the ward, April 29, 1901. He, by his indenture, covenanted to pay the full rent stipulated in quarterly installments, and to erect upon the premises a four-story building costing not less than \$40,000; to keep the premises in repair, pay taxes and water rates, etc.; and for a failure to keep said covenants, or to pay said rents or any part thereof, as stipulated, covenanted for the right of re-entry by the landlord, and bound himself to surrender the demised premises, etc., at the end of the term. In this case, unlike the condition that would arise from the mere acceptance of a deed poll, where no right remained in the grantor, and no duty remained to be performed towards him under the deed, the covenants and obligations are, by the indenture, reciprocal and mutual. *Foster v. Dwinel*, 49 Me. 44; *Willison v. Watkins*, 3 Pet. 47; *Doe v. Barton*, 11 Adol. & E. 307. "If the lease be made by deed indented, then are both parties concluded, but if it be by deed pull the lessee is not estopped to say that the lessor had nothing at the time of the lease made." *Coke*, Litt. 47b. So, "if a man take a lease of his own land by deed indented reserving a rent, the lessor is concluded." *Id.*; *Id.* 363b. *Herm. Estop.* 590, 591. It will be unnecessary to pursue this branch of the discussion further, for the reason that it is not necessary to determine the case upon the distinction between dower right of husband under the statute

and that of widow at common law. After the death of a husband the widow is *sui juris*, and the doctrine of estoppel applies to her acts as to those of other persons." 5 Amer. & Eng. Enc. Law, "Dower;" 1 Washb. Real Prop. \*205; *Scrib. Dower*, c. 11, § 39, and cases cited.

As said by Chancellor Kent in *Jones v. Powell*, 6 Johns. Ch. 194: "There is no reason why a widow who is a free and competent moral agent should not have the capacity to agree to any fair arrangement which convenience or prudence dictated by which her dower should be extinguished." It is said in *Tiedeman on Real Property*, (section 130:) "After the death of the husband the widow may, by acts which are sufficient to work an estoppel in ordinary cases, bar her right of dower without any formal release." We have been referred to no case, decided in this country, where the effect of the acceptance of a lease by a dowress of the premises out of which dower is demanded has arisen or been determined. We need not review the authorities to show that the widow is held to be *sui juris*, and capable of binding herself by contract, or to determine what unequivocal acts of the dowress have been held generally sufficient to estop her from claiming dower. The very exhaustive and able research of counsel has failed to discover a single case or text writer who has treated upon the particular subject announcing a rule contrary to that laid down by English and American text writers based upon early English decisions. The text writers, so far as they treat of the subject, are all one way, and the dearth of decided cases would seem to indicate acquiescence in the doctrine of those early cases. We find in *Perkins*, (section 350,) first printed in 1532, (translation and notes by Greening, 1827,) it is stated: "If a man seised of Blackacre in fee take a wife, and die, and the wife accept a lease for life of Blackacre, she cannot demand dower of the same; for if she demand it she must demand it against herself." The author then puts a query as to the effect of taking a lease for years. In *Viner's Abridgment*, (2d Ed.) tit. "Dower," p. 243, pl. 3, it is said: "The heir of the husband makes a lease for years of the land to the wife after the husband's death; now, during this lease, dower is suspended;" citing *Jenk. Cent.* pt. 2, p. 73, Case No. 38. So in *Bacon's Abridgment*, tit. "Dower," (F, p. 382,) it is said: "And if she take a lease for years only, yet she shall not sue to have her dower during these years, because it was her own act to suspend the fruit and effect of her dower during that time;" citing *Perkins*, Conv. 350; *Fitch. Nat. Brev.* 146; *Lane v. Cowper*, Moore, 103. So in *Park on Dower* (page 214) it is said: "So, where a widow accepts a chattel interest in the lands of which she is dowable, her right to be endowed is held to be suspended during the continuance of the chattel interest; as where, after the death of the husband, the widow accepts a lease for years of her husband's lands from the heir, during this lease her dower is suspended." Citing *Jenk. Cent.* pt. 2, p. 37, Case No. 88; *Fitch. Nat. Brev.* 149a. See, also, *Lamb. Dower*, p. 80; *Rop. Husb.*

& Wife, 562; Bright, Husb. & Wife, 542; Bell, Husb. & Wife, 384. And, also, *Scrib. Dower*, c. 11, §§ 16-18, where the subject is discussed, and authorities collated. The cases referred to, and upon which the doctrine seems to be predicated, are *Y. B. 2 Hen. IV.*, folio 7, pl. 30, and *Y. B. 6 Hen. IV.*, folio 7, pl. 32. *Br. Cr. Cas.* 372, and *Bracebridge's Case*, *Plowd.* 417, are also cited in *Jenk. Cent.* pt. 2, p. 37, Case No. 38. These cases have been accepted by text writers as establishing the doctrine indicated, and, so far as we have been enabled to examine them, sustain the rule.

It is insisted, however, that the estoppel cannot apply, because there was not here a leasing of the whole estate, there being a separate lot not included in the lease; and that, as under our statute it is not necessary to assign dower in each tract, but it may be assigned in one or more tracts of land for all, the court erred in not assigning out of the portion not leased dower in all the lands. This is, we think, a misapprehension. The acceptance of the lease, if for the life of the dowress, operated as a bar; if for years, as a suspension of the right of action during the term in the premises leased. If less than the whole estate was included in the term, she was endowable out of the residue only. 1 *Rep. Husb. & Wife*, 562. And she was estopped pro tanto from asserting dower in the premises demised. Moreover, the bill does not seek to have dower assigned in the one tract for the other, but the frame and prayer is for an apportionment of the rents reserved in the lease. The court properly found that plaintiff in error had a right to demand dower in the premises not included in the lease, and in awarding the same accordingly.

It is also insisted that the leasehold estate eo instanti upon its creation became pro tanto merged in the dower. It is not necessary to determine what would have been the effect had dower been assigned so as to vest an estate for life therein in plaintiff in error, for the reason that it had not been assigned, and could not, if the right of action is suspended by the acceptance of the lease, become an interest in the land during the continuance of the term, but must remain a mere right of action, incapable of enforcement until the termination of the leasehold estate. It is clear, therefore, that there is no estate or interest in the land in plaintiff in error, in which the estate for years could be merged.

It is also urged that the ward is estopped from interposing the making and acceptance of the lease to prevent the recovery of dower by the parol understanding and agreement antecedent to its execution and acceptance that the plaintiff in error might proceed and have dower assigned in the demised premises in the then pending proceeding. Evidence of parol agreement and understandings antecedent to or contemporaneous with the execution of an instrument under seal is not admissible to vary the terms of the written instrument. *Starkie, Ev.* 648; *Barnett v. Barnes*, 73 Ill. 216; *Insurance Co. v. Holzgrafe*, 53 Ill. 522; *Strehl v. D'Evers*, 66 Ill. 77; *Loach v. Farnum*, 90 Ill. 368; *Gable*

*v. Wetherholt*, 116 Ill. 313, 6 N. E. Rep. 453; *Wilson v. Deen*, 74 N. Y. 531. It is sought to avoid the effect of this rule by saying that the purpose of the testimony is not to alter the terms of the instrument, but to show that the rent was to be apportioned. It is manifest that the effect would be, if counsel are correct in their assumption of what it establishes, to change the covenant of the plaintiff to pay rent. What is sought is to avoid the force and effect of the covenant to pay \$4,500 per annum, and so modify it that it shall in effect be a covenant to pay \$3,000 per annum only. But it is argued by counsel that the effect of the parol agreement sought to be proved should be treated as an assignment of dower by the guardian; that is, as an apportionment of \$1,500 of the rent to the dower. Whatever may be the rule elsewhere, it is well settled in this state, as, indeed, it must be held under the statute, that the guardian has no power to assign dower. *Bonner v. Peterson*, 44 Ill. 253; *Strawn v. Strawn*, 50 Ill. 261; *Muller v. Benner*, 69 Ill. 108. There is here no pretense that the minor owner in fee made any agreement or attempt to assign dower, and the discussion, therefore, of whether the minor is competent to assign, is unimportant. Any attempt on the part of the guardian to assign dower, or to apportion the rents, was absolutely void.

But it is further insisted that, but for the parol agreement with the guardian that the rent to be paid was \$3,000 only, and the execution of the lease containing the covenant to pay \$4,500 to the guardian as rent should in no way operate to prevent the recovery of dower, and the apportionment of the \$4,500 of rent accordingly, plaintiff in error would not have made or executed the lease; and, its execution by plaintiff in error having been induced by such parol agreement and understanding, and he having accepted it in reliance thereon, its interposition as a defense in violation of such parol agreement will operate as a fraud upon him, and evidence of the parol agreement and understanding is therefore admissible to estop the defendants from setting up the lease to defeat recovery of dower. And also it is insisted that the parol evidence is admissible to show that the guardian and minor are using the lease for a purpose other and different from that intended by the parties at the time of its execution. That evidence of parol agreements may be competent for such purposes in proper cases may be conceded, but we are of opinion that the rule laid down in the cases cited by counsel can have no application here. The power of the guardian over the real estate of his ward is confined to its leasing, maintenance, and repair under the direction of the probate court. *Cases, supra*, and *Field v. Herrick*, 5 Ill. App. 57, opinion by McAllister, J. It is alleged, and the evidence shows, that the probate court refused to allow the guardian to make any contract of leasing which recognized any right or interest of plaintiff in error in or to this property; of which plaintiff in error had actual notice. He was bound to know, and is presumed to have known, that any other agreement or stipulation than that

included in the writing executed, was made by the guardian without any legal authority to bind his ward's estate. It cannot be contended that the ward can be estopped by the void act of the guardian at the instance of a party who had notice that the guardian was acting without the authority of law. We are of opinion that plaintiff in error, by the execution and acceptance of the lease, is estopped from asserting dower in the demised premises until the termination of the estate for years thereby created.

It is next urged that the court erred in assigning dower to plaintiff in error out of the rents and profits of subplot 5 in Philo Carpenter's subdivision, etc., before mentioned, without first having appointed commissioners to make the allotment. The contention is that, as a condition precedent to the power of the court to award dower out of the income or rents and profits of the land, there must be a report of commissioners, appointed in pursuance of section 34 of the dower act; that dower cannot be allotted and set off consistently with the interests of the estate. This is, we think, a misapprehension of the statute. Section 39 provides: "When the estate out of which dower is to be assigned consists of a mill or other tenement which cannot be divided without damage to the whole, and in all cases where the estate cannot be divided without great injury thereto, the dower may be assigned of the rents, issues, and profits thereof, to be had and received by the person entitled thereto as tenant in common with the owner of the estate, or the yearly value of the dower may be ascertained by a jury, and decree entered requiring payment of the same," etc. The uniform construction of this statute, so far as we are aware, has been that, in respect of the property designated,—that is, a mill or other tenement which cannot be divided without damage to the whole,—the thirty-ninth section created an exception out of the practice contemplated by the thirty-fourth section. Dower, by the common law and by our statute, is required to be of one-third part in value of the lands and tenements of which the widow (or surviving husband) is dowerable, to be set out by metes and bounds when practicable. But when either the condition of the title out of which the dower arises or the physical condition of the estate renders the setting out of the dower by metes and bounds impracticable, dower was and is, under our statute, to be allotted out of the use, rents, issues, or profits. *Scrib. Dower, 74; Hart v. Burch, supra.* Where the court finds that the premises out of which allotment of dower is demanded is "a mill or other tenement which cannot be divided without damage to the whole," the appointment of commissioners would be useless, and an unnecessary expense; and in such cases we are of opinion that the statute contemplates a finding of the fact by the court, and thereupon to assign dower conformably to the provisions of section 39. The court having found from the evidence that said lot 5 was occupied by a residence building known as "No. 51 Ashland Avenue, Chicago," and "that the same cannot

be divided without damage to the whole, and without great injury to said premises," properly assigned dower of the rents, issues, and profits, to be received by the tenant in common with the owner of the fee. Finding no substantial error in the record, the judgment of the superior court is affirmed.

(135 Ind. 547)

**BARNARD et al. v. SHIRLEY.<sup>1</sup>**

(Supreme Court of Indiana. June 6, 1893.)

**WATER COURSES—POLLUTION—SANITARIUM—ESTOPPEL.**

1. Persons using the water of an artesian well to bathe patients at a sanitarium, the well and sanitarium being on their own premises, are not liable to an adjoining owner for allowing the water so polluted to flow into a stream which is the natural water course of the basin in which the well is situated; there being no negligence or malice, and all due care being used to avoid injury.

2. Defendants sunk an artesian well on their own premises. The water was turned into a small stream, which flowed across plaintiff's land, and which was the only natural or possible means of escape. Afterwards the water was found to have medicinal properties, and a sanitarium was erected for the treatment of persons afflicted with various diseases. Held not unlawful to build and operate the sanitarium, where no negligence was shown, though the water was polluted thereby.

3. Plaintiff, having stood by while the money was being expended in erecting such sanitarium, and having acquiesced for more than a year in the flow of water, could not enjoin the continued operation of the sanitarium.

Appeal from circuit court, Morgan county; G. W. Grubbs, Judge.

Action by Sarah M. Shirley against Elizabeth Barnard and others for an injunction, etc. Judgment for plaintiff. Defendants appeal. Reversed.

Jordan & Mathews and W. R. Harrison, for appellants. W. S. Shirley, for appellee.

HOWARD, J. Since May, 1886, the appellee has been the owner of certain lots and lands in and adjoining the city of Martinsville, occupied by her as a farm. Appellants are the owners of certain lots in the city of Martinsville, adjoining the lands of appellee. During the years 1887 and 1888, a well was drilled upon appellants' lots to the depth of 800 feet, in search of gas. Instead of gas, a large volume of water flowed from the well, and has so continued to flow ever since. The water having been found by analysis to possess curative properties for certain diseases, appellants erected a bathhouse upon their said lots, to be used for bathing persons afflicted with diseases who might be benefited by the artesian waters. On the 16th day of September, 1889, the appellee filed her complaint against appellants in the Morgan circuit court, alleging that appellants, after using said artesian water in bathing the bodies of diseased persons, the same having all manner of diseases, including syphilis, and after said water has become fouled and polluted thereby, caused the same to be conveyed in a tile ditch under ground, constructed by them, to the lands of appellee, causing such water to flow

<sup>1</sup> Rehearing denied, 35 N. E. 117. See 47 N. E. 671. Rehearing denied.

upon and over the lands of appellee and into a natural stream of water running thereon, causing said natural stream of water to become befouled and polluted thereby, exposing the same to the stock pasturing and feeding upon appellee's said land where said stock is accustomed to run, feed, and pasture, such as milch cows, horses, and hogs, and the same drinking said water in its befouled and polluted condition as aforesaid. That said stream of water is a small spring branch of pure water, having its source in springs about one mile from appellee's land, and confined in a small channel upon appellee's land, and passing through appellee's land the distance of 53 rods, and having no outlet, but sinking into the lands of appellee and others below. That said artesian water, in its polluted condition, so caused by appellants as aforesaid, and so caused to flow upon appellee's land, accumulates in great ponds of water upon appellee's said premises, becoming polluted and stagnant thereon, to the great and irreparable damage of appellee and her said land, and to the stock pasturing and feeding thereon; also endangering the health of persons living upon said land and drinking the milk from said cows. That said mineral water from said artesian well never at any time flowed upon appellee's land and into said stream of water, by percolation or otherwise, until the same was caused to flow thereon and therein by appellants in manner as aforesaid. Concluding with a demand for damages in the sum of \$1,000, and praying that appellants be forever enjoined from causing and permitting said water from said well to run upon and flow over the lands of appellee, and into said stream of water, and for other proper relief. A demurrer having been overruled to this complaint, appellants answered by general denial, and also by special plea. There was a motion to strike out parts of the special answer, which motion was sustained. A demurrer was afterwards filed to the second paragraph of the answer, which was sustained. Appellants moved for a jury to try the cause, and also moved for a jury to answer questions of fact, both of which motions were overruled. To all of these rulings appellants duly excepted. The cause was submitted to the court, and the court, having heard the evidence, found for the appellee, assessing her damages in the sum of \$50, and appellants were "enjoined from causing or permitting the water of the artesian well which shall have been used at their sanitarium and bathhouse \* \* \* in bathing or washing persons afflicted with syphilis or other infectious ailment or disorder to flow into said branch or stream, or over and upon the lands of plaintiff, \* \* \* and are further enjoined and restrained from polluting or corrupting the water from said well which may be left by them to flow into said branch and stream in such manner that the water of said branch and stream other than that flowing from said well may be rendered dangerous or injurious to livestock." A motion for a new trial was overruled.

Various errors are assigned and dis-

cussed, but the controlling questions in the case arise under the ruling of the court in sustaining the demurrer to the second paragraph of the answer. This paragraph of answer, omitting the parts stricken out as not material, or as being such as might have admitted of proof under the general denial, is as follows: "For further answer they [appellants] say that the stream of natural water set forth in plaintiff's complaint is a small stream and branch, which flows from sources northeast of the city of Martinsville, thence southward to near the center, north and south of said city, thence westward across said city, thence south to and across plaintiff's said land, and has so flowed for many years prior to plaintiff's having any interest in said land. That the said well from which said waters flow upon the said lots of defendants was dug and bored and the flow thereof caused by an association of many citizens of said city of Martinsville, with the assent and approval of plaintiff. That the only means or way of escape of said water is in and along said branch over the said lands of plaintiff. That for more than one year after the said well was so dug and bored the waters therefrom flowed from defendants' said lots into said branch by open ditches, and were so caused to flow by the said association of persons who dug and bored the same, and without objection by plaintiff, and with her acquiescence. That thereupon and thereafter, upon testing said waters by scientific analysis, by drinking and using the same in baths, they were found to be of great value, and to have highly curative properties, and to be of great service and value in healing persons afflicted with various disorders,—rheumatism, neuralgia, kidney affections, paralysis, and many other disorders; whereupon defendants erected a bathhouse to utilize said waters for the benefit of all persons so afflicted upon their said lots at a cost of ten thousand dollars, and have treated, benefited, and cured hundreds of persons from all parts of the country so afflicted as aforesaid, and are still engaged at their said bathhouse in healing and curing such sick and afflicted. That in erecting said bathhouse and in using said waters of said artesian well for the healing of persons as aforesaid, and in all defendants did in the use of said waters and the draining the same away, as complained by said plaintiff, said defendants used all proper and possible care to avoid injury, damage, or inconvenience to said plaintiff and all others, and only did such acts as were proper and necessary to be done in the use of said waters for the purposes aforesaid. That said plaintiff stood by and assented to and acquiesced in the said expenditure of said sum in the erection of said bathhouse by defendants. That, after so erecting said bathhouse, defendants placed under ground a drain, made of porous tile, to convey the surplus water from said artesian well under ground to the branch above plaintiff's land, because the said branch was the only natural and only convenient outlet for said water, and did not thereby materially increase the flow of water in said branch."

The question presented for decision is

new in this state,—whether one who sinks an artesian well upon his own land, and uses the water to bathe the patients in a sanitarium or hospital erected by him on said premises, is liable to injunction and damages for allowing the water to flow into a stream which is the natural water course of the basin in which the artesian well is situated, the owner being free from negligence or malice, and using all due care in avoiding injury to his neighbor. In a Pennsylvania case the plaintiff was the owner of property on one side of a street, and brought an action for damages for alleged injury to his property by the defendant company, which had constructed its elevated road on its own land, on the other side of the street. It was alleged that the noise, dust, smoke, and cinders, and the constant jar of passing trains, interfered with plaintiff's enjoyment of his property, and lessened its value. The court in that case premised that under the constitution of Pennsylvania the company would only be liable if, under the same circumstances, an individual would be liable at common law, and held that in case a natural person were operating the road under the same circumstances he would not be responsible in damages, for the reason that he would have a right to the reasonable use and enjoyment of his property; and if in such use, without negligence or malice on his part, a loss should unavoidably fall upon his neighbor, he would not be liable therefor. No principle of law is better settled than that a man has the right to the lawful use and enjoyment of his own property, and that if, in the enjoyment of such right, without negligence or malice, an inconvenience or loss occurs to his neighbor, it is a wrong for which there is no liability. This must be so, or every man would be at the mercy of his neighbor in the use and enjoyment of his own. No man is answerable in damages for the reasonable exercise of a right, where it is accompanied by a cautious regard for the rights of others, where there is no just ground for the charge of negligence or unskillfulness, and where the act is not done maliciously. *Panton v. Holland*, 17 Johns. 99. We need not consume time by further citation of authorities for so plain a proposition. It is settled law. It is true that this principle is qualified to a certain extent. A man may not carry on a business which poisons the air and renders it unhealthy in a thickly populated neighborhood, and especially in the center of a large city. So establishments which involve danger, as powder mills and certain kinds of manufactories, must seek a secluded place, where as few persons may be inconvenienced as possible. These exceptions to the general rule are well established. But the great interests of mankind must go on unhampered. Railroads must reach cities; the treasures of the earth must be drawn from the mines; factories and mills must send forth noise, dust, and smoke. Inconveniences resulting from such causes must be endured by individuals for the general good; otherwise we should have to forego a multitude of the blessings of modern civilization. *Railroad Co. v. Marchant*, 119 Pa. St. 541, 13 Atl. Rep. 690, and

authorities there cited. In *Gannon v. Hargadon*, 10 Allen, 106, the court held that "the right of a party to the free and untrammelled control of his own land above, upon, and beneath the surface cannot be interfered with or restrained by any considerations of injury to others which may be occasioned by the flow of mere surface water in consequence of the lawful appropriation of land by its owner to a particular use or mode of enjoyment. \* \* \* A party may improve any portion of his land, although he may thereby cause the surface water flowing thereon, whencesoever it may come, to pass off in a different direction, and in larger quantities, than previously. If such an act causes damages to adjacent land, it is *damnum absque injuria*." The law is the same in this state. *Turnpike Co. v. Green*, 99 Ind. 205. Where, in Massachusetts, a riparian owner built a dam across a stream, to create a fish pond on his own land, it was held to be a reasonable use of the water; and a mill owner below had no cause to complain of it, either at common law or under the statute of that state as to mills. Yet it seems that a mill owner may not enlarge the quantity of water flowing in a stream from his mill through the land of a lower proprietor by turning a new stream into his pond. The wrong consists in turning any water upon the land which does not naturally flow there. This, however, does not extend to preventing a proprietor upon a stream from digging ditches or doing other acts in the proper cultivation of his land, though the effect of it is to increase the quantity of water in the stream. *Washb. Easem.* (4th Ed.) p. 375. In California, a man in irrigating his farm turned a stream upon it from an adjacent ravine. The water percolated through the soil into a neighboring mine in such quantities as to ruin the mine. It was held that the farmer was reasonably exercising his right to irrigate his land, and was responsible only for the injuries caused by his negligence or unskillfulness, or for such as were caused by any wanton abuse of his right. *Gibson v. Puchta*, 33 Cal. 318. In another California case the landowner permitted the water taken from artesian wells on his lands, and carried through a ditch to irrigate his fields, to percolate through the ditch, to the injury of his neighbor's land. It was found that at small expense the water might have been drained from the ditch so as probably to prevent the injury, and he was accordingly enjoined from continuing the injury. What might have been the opinion of the court in case the fields could not be irrigated without injury to the neighbor does not appear. *Parker v. Larsen*, 86 Cal. 236, 24 Pac. Rep. 989.

The general rule in England is that a person discharging noxious substances into a stream will be liable to the riparian owners lower down for any damage occasioned, yet some exception seems to be made in favor of mining operations. *Balnb. Mines*, (8d Ed.) 517, says: "It should also be remembered that the prosperity of a mining country and its inhabitants depends upon the successful efforts of the adventurer. The value of all prop-

erty in the vicinity of mines is inseparably associated with the spirit of adventure. The miner, therefore, should not be harassed in his operations by claims of an unsubstantial or imaginary character, for the benefits he confers generally far surpass the injuries he may commit." In *Mason v. Hill, Blanch. & W. Lead. Cas.* 697, and notes, the exception as to mineral products is also made: "But the right to throw refuse into a natural stream, or discharge into it water which has been used for the precipitation of minerals, and rendered noxious, may be acquired by prescription, custom, or user. The same rule applies to smelting and washing processes." *Id.* 721, and authorities there cited. In this country the severity of the English rule is still further relaxed. "If one builds a dam upon his own premises, and thus holds back and accumulates the water for his benefit, or if he brings water upon his premises into a reservoir, in case the dam or the banks of the reservoir give way, and the lands of a neighbor are thus flooded, he is not liable for the damage without proof of some negligence on his part." *Losee v. Buchanan*, 51 N. Y. 477, and authorities cited. "As a general proposition, it is safe to say that the owner of land has a right to make reasonable use of his property, and that right extends as well to an unlimited distance above the earth's surface as to an unlimited distance below." *Garland v. Towne*, 55 N. H. 57. The right to flowing water is a right incident to property in land; and while it is a right common and equal to all through whose land it runs, yet as one of the gifts of Providence each proprietor has a right to a just and reasonable use of it as it passes through his land. What is such a just and reasonable use may often be a difficult question, depending on various circumstances. *Elliot v. Railroad Co.*, 10 Cush. 193. Sewage and waste material may be cast into streams if material injury is not thereby caused. The right of one proprietor to have the stream descend to him pure must yield in a reasonable degree to the right of the upper proprietors, whose occupation of their own lands, and whose use of the water for mill, manufacturing, domestic, or other purposes, will tend to make the water more or less impure. So it is of public importance that proprietors of useful manufacturing should not be held responsible for slight injuries, or even some degree of interference with agriculture. In regard to some waste deposits in such streams, there would seem to be no question. The uniform practice, the convenience, and, in some instances, the indispensable necessity, would seem sufficient to decide such cases. *Gould, Waters*, § 220.

In *Health Department v. Purdon*, 99 N. Y. 237, 1 N. E. Rep. 687, which was an action to enjoin the sale of adulterated tea, it was said that "courts will not in all cases interfere by way of injunction to restrain the continuance of an illegal trade, the abatement of a nuisance, or the prosecution of a dangerous employment. Its power, however, to do so in case of the exercise of any trade or business which is

either illegal or dangerous to human life, detrimental to health, or the occasion of great public inconvenience, is not only conferred by the provisions of the statute, but belongs to the general powers possessed by courts of equity to prevent irreparable mischief, and obviate damages for which no adequate remedy exists at law." In that case it was found that, although the teas were adulterated, yet there was no sufficient evidence that the use of the teas was dangerous to human life or detrimental to health, and therefore the injunction was refused. In *Owen v. Phillips*, 73 Ind. 284, it was attempted to enjoin the re-erection of a flouring mill which had been burned, the claim being made that the mill was a nuisance, and that it could not be operated without becoming a nuisance; that the smoke and cinders made the water of plaintiff's cisterns and wells foul and impure; and that the noise, smoke, dust, dirt, and offensive odors caused by the running of the mill essentially interfered with plaintiff's enjoyment of life and property. The following instruction in that case was objected to by the plaintiffs because the court modified it by inserting the words "materially and essentially:" "If the jury find from the evidence that the personal enjoyment of the plaintiffs in their residence has been and will be materially and essentially lessened by either the noise, smoke, dust, dirt, cinders, horses, mules, or teams, caused by the running and use of said mill, then the allegations of the complaint have been sustained." The instruction, as so modified, was, however, approved by this court, the court adding that "a lawful business may be so conducted as to become a nuisance, but, in order to warrant interference by injunction, the injury must be a material and essential one;" quoting, also, with approval from the opinion rendered by Cooley, J., in *Gilbert v. Showerman*, 23 Mich. 448, that in such cases "minor inconveniences must be remedied by actions for the recovery of damages, rather than by the severe process of injunction." See, also, *Bowen v. Mauzy*, 117 Ind. 258, 19 N. E. Rep. 526. "The granting or refusal of an injunction rests in each particular case in the sound discretion of the court. An injunction ought not, therefore, to be granted when it would be against good conscience, or productive of great hardship, oppression, or injustice, or of public or private mischief." *City of Logansport v. Uhl*, 99 Ind. 531, and authorities there cited.

The natural right to have the water of a stream descend in its pure state must yield to the equal right of those above. Their use of the stream for mill purposes and the other manifold purposes for which they may lawfully use it will tend to render it more or less impure. The water may thus be rendered unfit for many uses for which it had before been suitable; but, so far as that condition results from reasonable use of the stream in accordance with the common right, the lower riparian proprietor has no remedy. When the population becomes dense, and towns or villages gather along its banks,



the stream naturally suffers still greater deterioration. Against such injury, incident as it is to the growth and industrial prosperity of the community, the law affords no redress. So in cities and towns, with their numerous inhabitants and diversified business, with their mills, shops, and manufactories, with their streets and sewers, all the products and means of a high civilization, it would be impossible that the pure streams that flow in from the farmsides should remain uncontaminated; and those that live upon the lower banks of such streams must, for the general good, abide the necessary results of such causes. *Merrifield v. City of Worcester*, 110 Mass. 216. That it is not, under all circumstances, an unreasonable or unlawful use of a stream to throw or discharge into it waste or impure matter, and that whether, in any given case, such use would be reasonable or not, is a question for the jury. See *Ang. Water Courses*, (7th Ed.) § 140d.

In the case before us the stream flowed through the heart of the city of Martinsville before it reached the lands of appellee. Will it be said that there is any liability for contamination from the refuse of the city? Must it be that one who lives on the lower lands on the banks of a stream shall forbid forever the founding of a city on the lands above, forbid the grading of streets, the building of sewers, the erection of mills, factories, hospitals, or other means of livelihood, comfort, and convenience of the inhabitants? A case in many of its features resembling that now before the court is the well-considered case of *Coal Co. v. Sanderson*, 113 Pa. St. 126, 6 Atl. Rep. 453. That was a mining case, and the chief question was as to the liability of the mine owners for the flowage of foul water from the mine into a stream which was the natural watercourse of the basin in which the mine was situated. The plaintiff in that case, Mrs. Sanderson, had purchased a tract of land in the city of Scranton, on Meadow brook, near its mouth. The existence of the stream, the purity of its water, and its utility for domestic and other purposes, it is said, was a leading inducement to her purchase of the land. She erected a house, threw dams across the brook to form a fish and ice pond and to supply a cistern, and the water was forced by hydraulic pressure from the cistern to a tank in the house, and was used for domestic purposes and for a fountain. The plaintiff alleged in her complaint that the large volume of mine water which the defendant company poured into the brook above had corrupted the stream to such an extent as to render it totally unfit for domestic use; that the fish were destroyed, the pipes corroded, and her entire apparatus for utilizing the water rendered worthless. She brought her action to recover damages for such pollution of the stream. In the course of the opinion the court says: "It must be conceded, we think, that every man is entitled to the ordinary and natural use and enjoyment of his property. He may cut down the forest trees, clear and cultivate his land, although in so doing he may dry

up the sources of his neighbor's springs, or remove the natural barriers against wind and storm. If, in the excavation of his land, he should uncover a spring of water, salt or fresh, acidulated or sweet, he will certainly not be obliged to cover it again, or to conduct it out of its course, lest the stream, in its natural flow, may reach his neighbor's land. \* \* \* In sinking his well he may intercept and appropriate the water which supplies his neighbor's well. *Acton v. Blundell*, 12 Mees. & W. 324; *Wheatley v. Baugh*, 25 Pa. St. 528; *Halde-man v. Bruckhart*, 45 Pa. St. 514. Or, if his own well is so close to the soil of his neighbor as to require the support of a rib of clay or of stone on his neighbor's land to retain the water in the well, no action will lie against the owner of the adjacent land for digging away such clay or stone, which is his own property. *Whart. Neg.* 939. So, also, each of two owners of adjoining mines has a natural right to work his own mine in the manner most convenient and beneficial to himself, although the natural consequence may be that some prejudice may occur to the owner of the adjoining mine. *Smith v. Kenrick*, 7 C. B. 515. One mine owner may thus permit water naturally flowing in his own mine to pass off by gravitation into an adjoining or lower mine, so long as his operations are carried on properly and in the usual manner. *Bainb. Mines*, 297. To the same effect are *Wilson v. Waddell*, L. R. 2 App. Cas. 95; *Crompton v. Lea*, L. R. 19 Eq. 115. The defendants, being the owners of the land, had a right to mine the coal. It may be stated as a general proposition that every man has the right to the natural use and enjoyment of his own property, and if, while lawfully in such use and enjoyment, without negligence or malice on his part, an unavoidable loss occurs to his neighbor, it is *damnum absque injuria*, for the rightful use of one's own land may cause damage to another without any legal wrong. \* \* \* 'It is established,' says *Cotton, L. J.*, in *Iron, etc., Co. v. Kenyon*, 11 Ch. Div. 783, 'that taking out mineral is a natural use of mining property, and that no adjoining proprietor can complain of the result of careful, proper mining operations.' In the same case *Brett, L. J.*, says: 'The cases have decided that where that maxim ("*sic utere tuo ut alienum non laedas*") is applied to land and property, it is subject to a certain modification; it being necessary for the plaintiff to show not only that he has sustained damage, but that the defendant has caused it by going beyond what is necessary in order to enable him to have the natural use of his own land.' Page 787. \* \* \* The right to mine coal is not a nuisance in itself. It is, as we have said, a right incident to ownership of coal property, and, when exercised in the ordinary manner, and with due care, the owner cannot be held for permitting the natural flow of mine water over his own land into the water course by means of which the natural drainage of the country is effected. \* \* \* The defendants were engaged in a perfectly lawful business, in which they made large expenditures, and in which the interests of the entire community were

concerned. They were at liberty to carry on that business in the ordinary way, and were not, while so doing, accountable for consequences which they could not control. As the mining operations went on, the water, by the mere force of gravity, ran out of the drifts, and found its way over the defendants' own land to the Meadow brook. It is clear that for the consequences of this flow which by the mere force of gravity naturally, and without any fault of the defendants, carried the water into the brook, and thence to the plaintiff's pond, there could be no responsibility as damages on the part of the defendants. \* \* \* It is said the defendants created an artificial water course from their mine to Meadow brook; but this artificial water course was upon their own land, and conducted no more water than, by the natural conformation of the surface, could otherwise have reached it. If it be suggested that the defendants might have extended this artificial water way, in form of a sewer, to some point of safety, it may be asked where, short of the sea, might the sewer be discharged that the same complaint might not be made? \* \* \* Nor do we say that a miner, in order that his mines may be made available, may enter upon his neighbor's lands, or inflict upon him any other immediate or direct injury; but we do say that in the operation of mining in the ordinary and usual manner he may, upon his own lands, lead the water which percolates into his mine into the streams which form the natural drainage of the basin in which the coal is situate, although the quantity as well as the quality of the water in the stream may thereby be affected."

The foregoing case of *Coal Co. v. Sanderson*, and the reasoning of the court, seem to be closely in point with the case at bar. In both cases the owners cause water to rise from the earth, to become foul, and then to be carried by an artificial drain, and discharged into a running stream, the natural water course of the basin or valley in which the water rises, and into which stream the water would naturally flow if left to itself. In both cases the owners were engaged in a lawful and necessary work, of great advantage to mankind at large, and particularly to the community in which they operated; the one in mining out of the earth and distributing coal for heating and industrial uses, and the other also taking out of the earth mineral water for healing and curing the infirm. Both were free from fault or negligence in conducting their business, and in avoiding, so far as possible, all injury to others; the injury in each case being but the necessary incident of a lawful business. In each case there was no other place but the stream for the water to go, so that, if it were unlawful to discharge the water into the stream, then the enterprise itself of necessity would be at a standstill, and a lawful business thus come to an end because it could not be lawfully carried on.

It would seem that the decisions show that when a business is dangerous, unhealthful, or otherwise greatly injurious to a community or to an individual, and it is possible to avoid the injury by a

more careful management, or even, if necessary, by a removal of the works to a more secluded or less objectionable place, then the owners of the noxious business will be mulcted in damages, and, if necessary, restrained by the courts. We have seen that in the case of *Parker v. Larsen*, supra, when it appeared that the defendant could flow water from his artesian wells over his fields without injury to his neighbor, but did not do so, he was enjoined. In the case of *Indianapolis Water Co. v. American Strawboard Co.*, 53 Fed. Rep. 970, where there was a discharge of refuse matter from a strawboard factory into a nonnavigable river used by a water company as a source of supply for furnishing a city with water for domestic and other purposes, it was held that injunction would lie to restrain such pollution of the water supply. In *Kinnaird v. Oil Co.*, 89 Ky. 468, 12 S. W. Rep. 937, defendant had stored petroleum which leaked and percolated through the ground until it reached plaintiff's spring of water. *Gas-Light & Coke Co. v. Graham*, 28 Ill. 73, was a similar case, the offensive substances percolating from the gas works into plaintiff's well. Also *Gas Co. v. Murphy*, 89 Pa. St. 257. Either of two courses could have been followed by the offending defendants in these last three cases. They could improve their works so that the oils would not leak and percolate through the earth to the fouling of the water, or they could remove their works to another locality. Accordingly, damages were assessed in each case for the injury. So of various kinds of dangerous or offensive mills, factories, or other establishments or occupations. If they are conducted in such a manner as to materially and essentially injure adjoining proprietors, the owners may be subject to suits for damages, or, in case the injury is continuous, the business may be enjoined. But in this class of cases either a change in the method of conducting the business, so as to avoid the injury, or else a total removal of the works to another and safer locality, may be had. But the case before us does not belong to this class. Railroads must reach our cities and the marts of trade. They cannot do business elsewhere. Mines and mineral springs, natural gas and oil wells, cannot be removed. They must be operated where they are, or totally abandoned. Where, therefore, a work is lawful in itself, and cannot be carried on elsewhere than where nature located it, or where public necessity requires it to be, then those liable to receive injury from it have a right only to demand that it shall be conducted with all due care, so as to give as little annoyance as may be reasonably expected, and any injury that may result notwithstanding such care in the management of the work must be borne without compensation. It is then a case in which the interests and convenience of the individual must give way to the general good.

The demurrer to the second paragraph of the answer in this case admits the facts stated in the answer to be true. We have, then, to consider the statements of the answer as facts, and in the light of these

facts examine whether the business of appellants is a lawful business, and whether it is carried on with due care, and so as to do no injury to appellee which can reasonably be avoided. From the answer, then, we learn that said artesian well was dug and its waters caused to flow upon appellants' said lands by an association of the citizens of Martinsville, with the assent and approval of appellee. That the waters from said well flowed into a stream, which, after running through said city, passed over the lands of appellee, and for more than a year so continued to flow, with the acquiescence of appellee. That the only means or way of escape of the water from said well is in and along said branch, which is the only natural outlet for the same; and that the increase of the flow of water in said stream was not materially increased by the water from said artesian well. That afterwards, by scientific analysis, and by the use of said water for drinking and bathing, it was discovered that the waters were of great medicinal value, and possessed of curative properties in the healing of persons afflicted with rheumatism, neuralgia, paralysis, kidney affections, and various other diseases; that thereupon, for the purpose of utilizing said waters in the cure of persons so sick and afflicted, appellants erected upon their said lots a bathhouse at a cost of \$10,000, in which they have since continued to treat those affected as aforesaid, using said waters. It would seem from these statements that the business in which appellants are engaged is a lawful one. They sunk, or permitted to be sunk, on their own land, an artesian well. This they had a perfect right to do, and, in addition, it would appear that this work was done with the help of many citizens of the town, and with the acquiescence of appellee as well. Such help and acquiescence, however, were not necessary to make the act of sinking the well lawful. It appears that the stream into which the waters flowed naturally from the well is a spring branch, which passes directly through the city before it reaches either the land of appellants or that of appellee. This stream is not only the natural outlet for the drainage of said land, but is the only means or way of escape of said artesian water. But was it lawful to build a sanitarium for the cure of the sick or to bathe in the waters those afflicted with disease? It was certainly lawful to do so, provided the sanitarium is properly conducted and well managed, so as to do no injury to any person which reasonably and with due care can be avoided. This court has already said: "Hospitals and homes for the sick are very far from being nuisances per se. They are wise and beneficent charities, to be fostered and encouraged by liberal legislation, and not to be suppressed, or even discouraged, by what may seem to be harsh or restrictive laws." *Bessons v. City of Indianapolis*, 71 Ind. 189. But was due care exercised in the construction and management of the sanitarium and in the drainage of the waters therefrom? The answer states "that in erecting said bathhouse, and in using said waters for the healing of persons as

aforesaid, and in all that appellants did in the use of said waters and the draining of the same away, appellants used all proper and possible care to avoid injury, damage, or inconvenience to appellee and all others, and only did such acts as were proper and necessary to be done in the use of said waters for the purposes aforesaid; that, after erecting said bathhouse, appellants placed under ground a drain made of porous tile, to convey the surplus water from said artesian well under ground to the branch above appellee's land, because said branch was the only natural and only convenient outlet for said water." It would seem, therefore, that all due care has been exercised in the premises, and that the business is lawful, and that it is conducted in a lawful manner.

It is a question, also, whether appellee, having stood by and assented to and acquiesced in the expenditure of said sum of \$10,000 in the erection of said bathhouse, is not now estopped from seeking to enjoin the continuation of its use. For over a year before this she had also acquiesced in the flowing of the artesian water into the stream, and now she could hardly be ignorant of the purpose for which the sanitarium was to be used. This court has held that, under certain circumstances, by remaining silent, and allowing acts to be done and expense to be incurred, persons may lose their remedy by injunction, and be compelled to assert their rights at law. *City of Logansport v. Uhl*, 99 Ind. 531, and authorities there cited. In *New Jersey* it was held that if a person "has given his consent, either expressly or impliedly, to the erection of expensive works, he cannot afterwards enjoin their operation, though they prove more annoying or injurious than he anticipated." *Hulme v. Shreve*, 4 N. J. Eq. 118. We think the facts stated in the second paragraph of the answer sufficient. The judgment is reversed, with instructions to overrule the demurrer to the second paragraph of the answer, and for further proceedings not inconsistent with this opinion.

(7 Ind. App. 368)

#### STUDABAKER et al. v. MARKLEY.

(Appellate Court of Indiana. June 21, 1893.)

##### INSANITY—INQUISITION—APPEAL COSTS.

1. The petitioner in a proceeding to have a person adjudged of unsound mind has no such right that he can appeal from a judgment of sanity.

2. The fact that costs are adjudged against the petitioner gives him no right to appeal from the judgment as a whole.

3. That one may have the question of costs reviewed, he must have moved to retax or modify the judgment.

Appeal from circuit court, Wells county; H. B. Saylor, Judge.

Proceedings by Ellen J. Studabaker and others to have Malinda Markley adjudged of unsound mind. From a judgment of sound mind, petitioners appeal. Dismissed.

Dailey, Mock & Simmons and Wilson & Todd, for appellants. A. N. Martin, for appellee.

LOTZ, J. The appellants commenced this proceeding under section 2545, Rev. St. 1881, to have the appellee adjudged a person of unsound mind. The appellee appeared to the proceeding, and filed an answer in denial of the petition. The clerk of the court also filed an answer, as required by statute. The issue joined was tried by a jury impaneled under the direction of the court. A verdict was returned in favor of appellee. Appellants made a motion for a new trial, which was overruled, and the court then rendered judgment as follows: "It is therefore adjudged by the court that Malinda Markley is a person of sound mind, and is a resident of Wells county, and that defendant recover her costs herein expended." From this judgment the appellants prosecute this appeal.

The only error assigned is that of overruling the motion for a new trial. No formal motion to dismiss the appeal has been made, but appellee contends that no appeal in favor of the appellants will lie from the judgment rendered. An appeal is the removal of a cause from an inferior to a superior tribunal. It is a process of civil-law origin, and removes the cause entirely, subjecting the fact, as well as the law, to a review and retrial. A writ of error is the common-law process for transferring a cause from a lower to a higher court, but it removes nothing for examination but questions of law. *Wiscart v. Dauchy*, 3 Dall. 321. The remedy by appeal was introduced into common-law proceedings by statute. There is no absolute right to an appeal either in law or at equity, but it is a remedy that may be given or withheld by statute. Where there is no right to appeal at all, the appellate court has no jurisdiction, and will dismiss the appeal on its own motion. *Elliott's App. Proc.* § 131. The proceeding to have a person adjudged of unsound mind, and place his person and property in the custody of another, is an extraordinary one. A court of equity is the ultimate guardian of the person and property of the unfortunate insane. Whatever disposition is made of either must receive the sanction of the court. No responsibility of greater gravity, no higher or more important duty, rests upon any public officer than that which the law imposes upon the chancellor in guarding and protecting the interests of those charged with being of unsound mind. The proceeding instituted against the appellee is one of peculiar equitable cognizance. Such proceedings should be scrutinized with the greatest of care by the presiding judge, for by them great wrongs are liable to be perpetrated under the forms of law. Experience demonstrates that they are too often invoked to prevent the alienation of property by deed or devise, when the owner manifests an intention to prefer the objects of his or her affection. If the proceedings be unfounded, they are liable to work an irreparable injury to the person charged. The reputation and business capacity may suffer as a consequence. The wisdom of the law authorizing such proceedings cannot be assailed, but its abuse cannot be too severely condemned. The

petitioner, who institutes the proceeding, is not a real party in interest. It is a matter of no special concern to him that any person be adjudged of unsound mind; while to the court and to the public it may be a matter of great solicitude. It is not the function of the petitioner to take upon himself the management of the proceeding. His position is analogous to that of a friend of the court. The statute, it is true, imposes upon him liability for costs in the event the proceeding shall prove unfounded. This liability is imposed to prevent him from acting hastily, maliciously, or in a meddlesome manner, in apprising the court of the necessity of exercising its functions. After the proceeding is instituted, his duty is done, and that of the court begins. After the proceeding has once been commenced, his interest is so remote that he cannot even dismiss it at his own costs without the consent of the court. *Galbreath v. Black*, 89 Ind. 300. His vigilance should be confined to ascertaining the probable fact which sets the court in motion. When the court begins to move, its vigilance will be exercised, so that the interests of both the public and the person charged will be impartially protected. The proceeding, strictly speaking, is *ex parte* in its character. It is true that, in a qualified and limited sense, it may be said to be *adversary*; but, when it is said to be *adversary*, it is not meant that the petitioner is the adverse party. From an adjudication which is adverse to or deprives the person charged of any substantial rights, he may appeal, and to this extent the proceeding may be said to be *adversary*. *Cuneo v. Besson*, 63 Ind. 524; *Galbreath v. Black*, supra; *Ruhlman v. Ruhlman*, 110 Ind. 314, 11 N. E. Rep. 294. It is also true that in *Galbreath v. Black*, supra, and *Ruhlman v. Ruhlman*, supra, the supreme court entertained appeals from proceedings instituted under this statute in favor of the petitioner, but in both cases the appeal brought in question only the judgment for costs, and the merits of the controversy were not in question; nor was the question of the right to appeal raised. The court, in each case, decided adversely to the petitioner, so that the same result was reached as if the appeal had been dismissed. We do not consider these cases in point, or as authority upon the right to appeal. It has long been the established rule, subject to no exception, that the right to relief by appeal from a final judgment exists only in favor of a party whose substantial rights have been prejudiced by the judgment appealed from. *Combs v. Draining Co.*, 3 Metc. (Ky.) 72; *Stout v. Railroad Co.*, 41 Ind. 149. The persons who are entitled to an appeal are those who have some legal interest which may, by the decree of the court, be either enlarged or diminished. *Hemmenway v. Corey*, 16 Vt. 225. Only such questions can be reserved for the appellate court as affect the merits of the litigation, and only by a party injured by the action of the lower court. *Pierce v. West*, 29 Ind. 266. The appellants can neither gain nor lose by any judgment that might be rendered by this court, so far as the subject-

matter of the controversy is concerned. Surely, the real party in interest should not be compelled to litigate with a mere volunteer in a lawsuit. The merits of every legal controversy are those that grow out of the issues joined. The appellants are not actually parties to the issue; much less can they be said to have any substantial interest in the controversy. It would be a travesty upon legal proceedings to say that a party who has no actual interest in the controversy may litigate or prosecute an appeal. We think the clear intention of the statute is that, whenever a judgment has been rendered in favor of the person charged, after the chancellor, with the aid of the jury, has reached a conclusion in favor of sanity, the proceeding should be at an end, and that no appeal from such a determination is contemplated or can be allowed. We are supported in this view by the fact that, if there be a finding in favor of the person charged, in the next week or the next day, if he exhibit symptoms of unsoundness of mind, another proceeding may be instituted against him. There is no occasion for such appeal. The rights of all can be secured by a second proceeding. The interest of the accused and the interest of the public require, and we think the evident purpose of the statute is, that such a judgment is a finality, from which no appeal will lie to any court. If this conclusion is correct, this court is without jurisdiction to entertain an appeal from the merits.

But it may be said that this appeal lies from the judgment for costs. This leads to the inquiry, have the appellants such an interest in the costs as will entitle them to maintain an appeal? Costs are the expense of an action recoverable from the losing party; an allowance for the expense incurred in conducting the suit. They are but an incident to a lawsuit. As was well said in *Curran v. Coal Co.*, 63 Iowa, 94, 18 N. W. Rep. 698: "The questions in controversy are put in issue by the pleadings. As an incident of the controversy, certain costs are taxed under the statute against the losing party, as compensation to the officers for service rendered or witnesses who have testified. But the question as to who shall pay these costs is not the subject of controversy between the parties. The suit is brought and prosecuted for the enforcement and protection of a right involved, or for the redress of a wrong complained of, and not for the recovery of such costs as may accrue in its prosecution." *Jane's Appeal*, 57 Pa. St. 428. Costs are given or withheld by statute. *Nowling v. McIntosh*, 89 Ind. 593; *Russell v. Cleary*, 105 Ind. 502, 5 N. E. Rep. 414. At the time this proceeding was instituted, the costs were not in existence. They only arose as the litigation progressed. They are not in any sense the subject of the controversy. A mere interest in costs gives no right to appeal in respect to the subject-matter. *Reid v. Vanderhayden*, 5 Cow. 720. The appeal in this case is from the judgment as an entirety. We can readily conceive how a party to this proceeding might be wronged by an improper taxation or judgment for

costs, but because he may be injured in this respect does not give him the right to appeal from the judgment as an entirety. If he wishes to bring in review the action of the court below, he must move to retax or to modify the judgment, and bring the action of the court into the record by a bill of exceptions. *Bayless v. Glenn*, 72 Ind. 5; *Quill v. Gallivan*, 108 Ind. 235, 9 N. E. Rep. 99; *Forsythe v. Kreuter*, 100 Ind. 27. Where no objection is made in the trial court to the form of the judgment, and no motion made to modify or correct it, its sufficiency will not be considered on appeal. *Teal v. Spangler*, 72 Ind. 380; *Floore v. Steigelmayer*, 76 Ind. 479. In the case at bar, there was no motion to retax the costs or to modify the judgment. Not having objected to the action of the court in rendering judgment for costs against them, it must be presumed that the appellants appeal from the judgment on the merits only. *Ruhlman v. Ruhlman*, supra; *Insurance Co. v. Gibson*, 104 Ind. 336, 342, 3 N. E. Rep. 892. As the appellants have no interest in the merits, they have no standing in this court. Appeal dismissed, at costs of appellants.

(7 Ind. App. 322)

**MERIDIAN NAT. BANK OF INDIANAPOLIS v. FIRST NAT. BANK OF SHELBYVILLE.**

(Appellate Court of Indiana. June 24, 1893.)

**CHECK PAYABLE TO FICTITIOUS PAYEE — CERTIFICATION — RIGHTS OF BONA FIDE HOLDER.**

Were a check is drawn, payable to a person under a fictitious name, in payment for property which it afterwards appears he has stolen, and the bank at which it is payable certifies the check, a bank which subsequently cashes such check, on its being indorsed by the payee with his fictitious name, acquires a valid title thereto, which it can enforce against the certifying bank; it appearing that, though the payee acted all through under a fictitious name, yet the check was received by the identical person to whom its drawer intended to deliver it, and was by him indorsed in the name in which it was issued to him, and he, as was intended by the drawer, received the benefit of it. 33 N. E. Rep. 247, affirmed.

**On rehearing.**

**GAVIN, C. J.** Counsel for appellant have filed quite an earnest petition for rehearing, in which they assail the proposition of the original opinion, that the appellee, if a bona fide assignee, by indorsement, for value, took the certified check freed from any equities existing between the original parties. They assert the opinion to be in direct conflict with the case of *Parke v. Roser*, 67 Ind. 501. We have examined the case carefully, as we did on the former hearing, and are unable to see the slightest conflict between the holding in this case and the decision in that. There no such question as here presented was under consideration. That case simply holds that the certifying bank does not guaranty the genuineness of the body of the check, following *Marine Nat. Bank v. National City Bank*, 59 N. Y. 67. This was the only question before that court for its determination. A careful examination of the brief of counsel for ap-

pellant shows that they themselves did not controvert its liability, if the appellee was a bona fide holder for value, and by indorsement. Their claim was that there was no legal, valid indorsement, and that, therefore, the check was subject to equities; relying upon *Friend v. Bank*, 76 N. Y. 352, and kindred cases. To show their position upon this subject, we quote from their brief somewhat in addition to what was set out in the original opinion: "It follows, therefore, that Stockton, Gillespie & Co. could countermand payment at any time, of this check, so long as it remained out in the hands of the thief or any other person taking it with notice; or, to put the proposition from the other side, until the check comes in due course of business to the hands of a bona fide holder for value, without notice, neither the maker nor the banker can be compelled to pay a check given for stolen cattle, or otherwise invalid." In support of their claim, appellant's counsel quoted also the following from the case of *Bank v. Bingham*, (N. Y. App.) 23 N. E. Rep. 180: "It is too well settled by authority, both in England and in this country, to permit of questioning, that the purchaser of a draft or check, who obtains title without an indorsement by the payee, holds it subject to all equities and defenses existing between the original parties, even though he has paid full consideration, without notice of the existence of such equities and defenses. [Citing very many cases.] The reasoning on which this doctrine is founded may be briefly stated as follows: The general rule is that no one can transfer a better title than he possesses. An exception arises, out of the rule of the law merchant, as to negotiable instruments. It is founded on the commercial policy of sustaining the credit of commercial paper. Being treated as currency in commercial transactions, such instruments are subject to the same rules as money. If transferred by indorsement, for value, in good faith, and before maturity, they become available in the hands of the holder, notwithstanding the existence of equities and defenses which would have rendered them unavailable in the hands of a prior holder. \* \* \* The bank did certify that it had the money; would retain it, and apply it in payment, provided the check should be indorsed by the payee. If the check had been transferred to plaintiffs by indorsement, the defendant would have had no defense, not because of the doctrine of estoppel, but upon principles especially applicable to negotiable instruments." Our own supreme court, in the case of *Born v. Bank*, 123 Ind. 78, 24 N. E. Rep. 173, referred to in the original opinion, expressly says that the certifying bank becomes bound for the payment of the check it certifies; there being in that case no question involved as to the genuineness of the check, in all its parts. This shows, as in fact do all the cases, that the literal interpretation given by counsel to some of the argumentative language used in the case of *Parke v. Roser*, supra, is not justified. The decision in the original opinion was intended to be, and we still think was,

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kept strictly within the facts of this particular case, going no further than was required in order to dispose of the merits of the cause. After careful consideration, we are still satisfied that the proposition announced, of which complaint is made, is in harmony with the authorities cited, and the many cases upon which they are founded. The petition for rehearing is therefore overruled.

(7 Ind. App. 361)

#### TOWN OF NAPPANEE v. RUCKMAN.

(Appellate Court of Indiana. June 22, 1893.)

MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALKS — PLEADINGS — LOCATION AND DESCRIPTION OF DEFECT — NEGATIVING CONTRIBUTORY NEGLIGENCE—VARIANCE—MEASURE OF DAMAGES—EXCESSIVE DAMAGES.

1. In an action for injuries sustained from a defective sidewalk, an averment that plaintiff was walking "along the sidewalk" when injured is equivalent to alleging that she was on the sidewalk.

2. In such case, the averment that the injury occurred "in front of lot No. 370" in a certain addition to the town, in connection with another averment that it was on the north side of the street known as "Market Street," is a sufficient designation of the location of the defect.

3. In an action for injuries from a defective sidewalk the complaint alleged that plaintiff "stepped her foot in a hole or cavity in said walk, beneath a tipping board or boards, where the board or boards of said walk were loose, and not nailed or fastened to the sills or sleepers beneath; that when two persons were walking thereon one or more of said boards would cast or tip his or her companion; and then and there and thereby her foot was caught, and that wholly by reason of her foot being so caught in said hole, cavity, or defective place in said sidewalk she was thrown violently to the ground." Held to sufficiently show the character of the defect in the walk to withstand a general demurrer.

4. In an action for injuries received from a fall on a defective sidewalk, which was caused by the tilting of a plank by plaintiff's companion stepping on it, it is not necessary to allege that plaintiff's companion was free from contributory negligence.

5. The complaint alleged that "defendant knew of and had notice of the identical hole and defective place in said sidewalk where plaintiff was injured, as aforesaid, a sufficient length of time before the injury occurred to have repaired" the same. Held a sufficient averment of defendant's knowledge of the defect, in the absence of a motion to make more specific.

6. The complaint alleged that plaintiff was injured by stepping with her foot in a hole or cavity in the sidewalk, beneath a tipping board, where the same was not fastened to the sleepers beneath. The evidence tended to show that plaintiff struck her foot against the end of a section of the plank walk while the same was raised momentarily by the weight of the person who was walking with her, and who had stepped on the opposite end of the loose section, thereby causing plaintiff to trip and fall. Held, that there was no variance which could have misled defendant.

7. In an action for injuries from a fall on a defective sidewalk, plaintiff is entitled to compensation for mental and physical suffering, loss of time, and expenses she would incur in the future, as well as for those already incurred.

8. Where plaintiff sustained permanent injury, impairing, if not entirely destroying, the use of her right arm, and from which the jury might have found that she had become a cripple for life, a verdict for \$1,000 is not excessive.

Appeal from circuit court, Elkhart county; J. M. Vanfleet, Judge.

Action for personal injuries by Sarah Ruckman against the town of Nappanee. Plaintiff had judgment, and defendant appeals. Affirmed.

Osborn & Zook, for appellant. Wilson, Davis & Wilson, for appellee.

REINHARD, J. The appellee sued the appellant and recovered a judgment for an injury sustained by a defective sidewalk on one of appellant's streets. The court overruled a demurrer to the complaint. Among the alleged infirmities of the complaint are the indefiniteness of the averments as to the location and description of the alleged defective place in the walk, and the exact whereabouts of the appellee, whether on or off the said walk, at the time of the occurrence of the injury. It is urged that the allegation that appellee was walking "along the sidewalk" is not equivalent to a statement that she was "on the sidewalk" when she was injured. We do not regard the objection as tangible. To say the least, the construction of the language contended for would be an extremely technical one. Nor do we regard the complaint bad for uncertainty in designating the location of the defect. If accuracy is required in this regard, the averment that the injury occurred "while in front of lot No. 370, in Rosenberg's first addition in said town," was sufficient, when taken in connection with the other averments that it was on the north side of the street known and designated as "Market Street." As to the character of the defect in the sidewalk, it is alleged that the appellee "stepped her foot in a hole or cavity in said walk, beneath a tipping board or boards, as hereafter alleged, where the board or boards of said walk were loose, and not nailed or fastened to the sills or sleepers beneath; that when two persons were walking thereon one or more of said boards would cast or trip his or her companion, and then and there thereby her foot was caught; and that wholly by reason of her foot being so caught in said hole, cavity, or defective place in said sidewalk, she was thrown violently to the ground," etc. We think this description of the defect sufficient in substance to withstand the attack made by the demurrer. It is true the averment is somewhat indirect and indefinite, and it may be conceded that the entire complaint is far from being a model of artistic pleading, but we do not regard it so void of substance as to lack the essential elements. We think it sufficiently appears from the complaint that there was a defect in the sidewalk consisting of a loose board or boards, which, when stepped upon at one end, would, on account of its position and looseness, suddenly tilt, so that a person walking on said sidewalk immediately behind or by the side of the person so stepping upon the loose board or boards was in danger of having his foot caught beneath the tilting plank or planks, and be thrown to the ground. We think it further appears that the appellee was injured by the tilting of the board or

boards, and by having her foot caught upon the same, while attempting to walk upon the sidewalk. Indefiniteness alone is not a cause for sustaining a demurrer upon the ground of the want of sufficient facts to constitute a cause of action, but the defect, if it be such, must be reached by motion to make more specific and definite. *Railway Co. v. Hixon*, 110 Ind. 225, 11 N. E. Rep. 285; *Ludlow v. Gravel Road Co.*, 101 Ind. 176; *Turnpike Co. v. Pomphrey*, 59 Ind. 78; *Adamson v. Shaner*, 3 Ind. App. 448, 29 N. E. Rep. 944; *Sluyter v. Insurance Co.*, 3 Ind. App. 312, 29 N. E. Rep. 608. While municipal corporations are not insurers of those who travel over their streets and sidewalks, it is their duty to keep such streets and walks in a reasonably safe condition for use, and if they negligently fail to do this they are liable to persons injured by reason of the defective condition of such streets and walks. *City of Ft. Wayne v. Patterson*, 3 Ind. App. 84, 29 N. E. Rep. 187; *City of Logansport v. Dick*, 70 Ind. 65; *Town of Albion v. Hetrick*, 90 Ind. 545; *City of Indianapolis v. Emmelman*, 108 Ind. 531, 9 N. E. Rep. 155; *City of Goshen v. England*, 119 Ind. 368, 21 N. E. Rep. 977.

It is further urged against the complaint that it does not sufficiently show the freedom of appellee from contributory fault. There is an averment that the injury was incurred without any fault or negligence on her part, and this general allegation is sufficient, unless the facts pleaded affirmatively show that the injured party's negligence contributed to the injury. *Railway Co. v. Hawkins*, 1 Ind. App. 213, 27 N. E. Rep. 331. The facts averred do not show negligence on the part of the appellee. But the appellant contends that there should be a further averment that those who were with the appellee on the sidewalk when she was injured were likewise free from contributory fault. This was not necessary. As a general rule, if the injured party is himself free from fault, the negligent defendant will be liable, although the negligence of some third party may have contributed to the injury. The only exception to this rule is where the person whose fault has contributed to the negligence was subject to the control or direction of the person injured, or was so identified with him in a common enterprise as to become responsible for his acts, which it is not claimed was true of the appellee's companions who caused the board sidewalk to tilt as they stepped upon it. See *Town of Knightstown v. Musgrove*, 116 Ind. 121, 18 N. E. Rep. 452; *Miller v. Railway Co.*, 128 Ind. 97, 27 N. E. Rep. 339.

It is further urged that the complaint fails to charge sufficiently that the appellant had knowledge or notice of the defect. The averment upon this point is "that the defendant knew of and had notice of the identical hole and defective place in said sidewalk where plaintiff was injured, as aforesaid, a sufficient length of time before said injury occurred to have repaired said defective place before said 23 day of April, 1891." We think this averment sufficiently brings home to the appellant knowledge or notice of the defect. It is true that the better mode of



pleading would have required a specific statement of the length of time before the accident during which appellant was in possession of such knowledge, but we think, if the statement was too indefinite, it should have been reached by motion to make it more specific.

Error is also predicated upon the overruling of the appellant's motion for a new trial. It is contended that a variance exists between the complaint and proof in this: that the charge in the complaint was that appellee stepped with her foot in a hole or cavity in the sidewalk, beneath a tipping board or boards, where the board or boards were loose, and not nailed or fastened to the sills or sleepers beneath; while the evidence tends to show that appellee struck her foot against the end of a section of the plank walk while the same was raised momentarily by the weight of those persons who were walking in company with appellee, and who had stepped upon the opposite end of said loose section, thereby causing the appellee to trip and fall. We do not regard the difference as amounting to a fatal one. The law looks at the substance, and not at the shadow, of things. If, literally, the boards were not loose from the sleepers or sills, it is equally true that the section of plank walk against which the appellee struck her foot, and which included the board upon which her foot was caught, was "loose" and "unfastened" in a sense, so as to allow it to tip up at one end when stepped upon at the other; and with the walk in this condition it must also have been true that there was a "cavity" beneath the tipping boards. We do not see how the appellant could have been misled by the description in the complaint when the evidence is applied to it. We think the evidence in this particular sufficient to support the averment of the complaint.

Appellant complains of certain instructions given to the jury. We have examined these instructions, and can discover no error in them. They state the law fully and fairly, and do not invade the province of the jury. The criticism upon the third instruction, which is to the effect that, if the jury find for the plaintiff, she would be entitled to compensation for mental and physical suffering, loss of time, and expenses she would incur in the future, as well as for those already incurred, is not well founded. We are of the opinion that the instruction states the law correctly. *Railroad Co. v. Newell*, 104 Ind. 264, 3 N. E. Rep. 836.

It is finally contended that the motion for a new trial should have been granted on account of excessive damages. The amount recovered was \$1,000. There is evidence tending to show that the appellee sustained a permanent injury, seriously impairing, if not entirely destroying, the use of her right arm. There was evidence from which the jury might well have found that the appellee had become a cripple for life, and was damaged in that amount. Where this is the case, the appellate court cannot reverse on account of excessive damages. Moreover, in actions of the character of this one, the judgment will

not be disturbed on appeal unless the amount is so grossly excessive as to induce the belief that the jury acted from prejudice, partiality, or corruption. *Sturgeon v. Sturgeon*, 4 Ind. App. 232, 30 N. E. Rep. 805; *Railway Co. v. Collara*, 73 Ind. 261. We have examined all the questions presented, and find no reversible error. Judgment affirmed.

(7 Ind. App. 280)

### PUTERBAUGH v. PUTERBAUGH.

(Appellate Court of Indiana. June 24, 1893.)

CLAIMS AGAINST DECEDENT'S ESTATE—ACTION FOR SERVICES—BREACH OF CONTRACT.

1. In an action against an estate for services rendered the intestate, the complaint alleged that plaintiff, when young, entered the family of deceased, his uncle, and worked without compensation till he was 21 years old, under an agreement between plaintiff's father and deceased that the latter would raise plaintiff as his son, and provide for him by his will, which he failed to do, and that plaintiff's services were worth \$5,000. *Held*, that it was error to charge that, if plaintiff rendered the services with the expectation of being made an heir of deceased, and such expectation was founded on the conduct of deceased, a promise to pay the reasonable value of the services would be implied, since the instruction would be misleading without an explanation as to whether the conduct was such as would justify the plaintiff's expectation. 33 N. E. Rep. 808, affirmed.

2. The second count alleged that plaintiff lived till he was 26 years old with deceased, who then contracted to convey to him 80 acres of land if plaintiff would assist in building a house on the land, and occupy it, and divide the crops with deceased, which contract plaintiff performed, but deceased, dying, failed to convey the land; that plaintiff sued defendant, as sole heir of deceased, to quiet title to the land, and obtained judgment that two-thirds of the land were his and one-third belonged to defendant as heir, and that by reason of the failure of deceased to convey the land he had lost title to one-third thereof, valued at \$1,667, which was due to him from the estate. *Held*, that the complaint is not open to the objection that, the contract pleaded containing no warranty, no action for the breach thereof could be maintained, since the action is not on a covenant of conveyance, but on a contract to convey, which always carries an implied warranty of good title. 33 N. E. Rep. 808, affirmed.

(On rehearing.)

DAVIS, J. Counsel for appellant have filed a lengthy and an earnest petition for a rehearing in this case. We cannot, within reasonable limits, fully again review all the questions therein discussed. Suffice it to say that as to the first paragraph the court was not required to pass upon any other question than the one on which the case was reversed. If the judgment on that paragraph had been affirmed, then we should have considered and decided every material question presented. Although we discussed the questions arising in the record on the first paragraph, in some respects, more at length than was necessary, yet it occurs to us there should be no difficulty in reaching a correct conclusion as to what has been decided in relation thereto in the original opinion. As to this paragraph, the judgment was re-

versed because of error in giving the third instruction. We failed to discover any prejudicial error in any of the other instructions so far as disclosed by the record as it comes to us on this appeal, but what we have said concerning these instructions does not necessarily imply that they may be correct statements of the law of the case on another trial. Neither have we decided that the evidence was sufficient to sustain the verdict on this paragraph. If the case is retried on that paragraph, appellee will have to prove to the satisfaction of the jury, under proper and correct instructions of the court as to the law applicable and pertinent to the case, that the alleged services of appellee were rendered either under an express contract, or under sufficient of the circumstances mentioned and set out in the first paragraph as are necessary to raise the presumption of an agreement to pay therefor. Owing to the family relation existing between the parties, the law does not imply a promise to pay for the services because of the rendition thereof. The presumption is that appellee was not entitled to compensation for such service. It is incumbent on him to prove such facts and circumstances as will be sufficient to overcome this presumption and to raise the counter presumption of an agreement on the part of his uncle to pay for such services. If this is not done he must necessarily fail.

It is insisted that in any event the agreement of Henry Puterbaugh to convey the 80 acres to Horace, his entry into possession, the improvements made thereon, and the payment in full by him of the agreed price, did not create any obligation which he could enforce against the estate of Henry. We cannot agree with counsel that as to the inchoate interest of Margaret in the real estate the contract and acts of Horace averred in the second paragraph did not and could not amount to such performance as to take the case from the operation of the statute, and therefore, as to one-third of the land, Horace is wholly without remedy, and that he is not entitled to recover the purchase price he paid therefor, or the value of the land of which he had been deprived. The contention of counsel is "that the predominant idea and principle running through the Indiana cases is that liability can only arise from positive stipulation, and that, in the absence of fraud, no implied covenants are imported into any agreement in relation to lands." In this case, however, there was, if we may use the expression, a "positive stipulation," under the allegations of the complaint, on the part of Henry, to convey the 80 acres of land to Horace. It is strenuously urged that the court erred in holding that, where the vendor fails to carry out his contract to convey a portion of the real estate sold, under the circumstances alleged in the second paragraph of the complaint in this case, the vendee may recover in damages the value of the portion of the land not conveyed. It is insisted that we have announced some propositions contrary to the law as it exists in the decisions of this state. In *Bethell v. Bethell*, 92 Ind.

325, the action was on the covenants in the deed. The court there said: "It is the general rule that in cases where there is no covenant and no fraud a vendee cannot recover, although there is a complete failure of title." In *Stratton v. Kennard*, 74 Ind. 302, S. executed his note to executors of J. for real estate conveyed to him by them. In a suit on the note it was held that, in the absence of covenants of warranty or for title, the defendant could not plead failure of title as a defense to the note. In *Johnson v. Houghton*, 19 Ind. 359, it was held that on the assignment of a land-office certificate issued by the government there was no implied warranty of the title. In *Atherton v. Toney*, 43 Ind. 211, the decision was that the assignee of an equity of redemption, who accepts a deed without covenants, takes it charged with the mortgage debt. In *Johnson v. McCabe*, 37 Ind. 535, a deed for a patent right had been executed, in which there was no warranty. As a defense in a suit for the purchase money the defendant relied upon an alleged breach of the warranty. The court held that the purchaser was bound by the deed. Other similar cases are cited, which either relate to conveyances that have been perfected by deed or to conveyances of personal property. These cases, as we view them, are not in point here. In *Sheets v. Andrews*, 2 Blackf. 274, the purchaser recovered in the court below. The judgment was reversed because the action was commenced without demand having been made. The court said, however, in relation to the measure of damages, as *gratis dictum*, in conclusion: "It appears to us that where no fraud is alleged the purchase money, with interest, should be the measure of damages, whether the breach complained of be of covenant, of seisin, or of warranty contained in conveyance, or whether it be, as in the present case, of a covenant to convey." In *Blackwell v. Board of Justices*, Id. 143, the board was authorized and required by the act of the legislature in changing the county seat to convey by deed in exchange for lots in Palestine other lots in Bedford, the new county seat. Blackwell complied with the requirements, and demanded a deed, which was refused. The court held the county bound by the legislative acts, "as if they were the express stipulation of its constituted authorities. They form a valid contract on a valuable consideration;" and that the plaintiff had a right of action, and that "the measure of damages is the consideration or purchase money, with interest." In that case the consideration was held to be the value of the lots in Palestine prior to the depreciation thereof on account of the passage of the act for the relocation of the seat of justice. In *Adams v. Rose*, in a suit on a contract and bond for conveyance, in which property had been accepted in payment of the purchase price, on failure to convey the plaintiff recovered the amount so paid, with interest. The defendant appealed. No question as to amount of recovery seems to have been raised. The court, in affirming the judgment, said: "The measure of damages in such case is the purchase

money and interest." 30 Ind. 380. See, also, Wood v. Bibbins, 58 Ind. 893; Fowler v. Johnson, 19 Ind. 207; Shryer v. Morgan, 77 Ind. 479; Junk v. Barnard, 99 Ind. 137. In the last case cited the defendant appealed, and it was held that damages assessed by the jury on the basis of the purchase money with interest were not excessive. None of the cases cited by counsel are analogous to this case. In the case of Martin v. Merritt, 57 Ind. 34, it was held that the measure of damages on account of the failure of the wife to convey was the value of her interest in the real estate. See Worth v. Patton, (Ind. App.) 31 N. E. Rep. 1130. There is a distinction between actions to recover damages for breach of a contract which cannot be enforced and on valid contracts. In the first class of cases the measure of damages is the purchase price or value of services, and in the other the actual damages or value of property may be recovered.

Counsel also contend that in other jurisdictions the great weight of authority supports the proposition that in such cases the measure of damages for the failure of title, arising out of contract to convey, in the absence of fraud, is the value of the purchase price, and not the value of the land. Among the decisions cited and relied upon is the case of Tracy v. Gunn, 29 Kan. 508, in which Judge Brewer says: "If it were an original question, we think the doctrine announced in that case (Lyster v. Batson, 6 Kan. 420) and the various cases which it follows might well be criticised; for why should the good faith of the vendor diminish the actual damages which the vendee has sustained by reason of the breach of the contract?"

To undertake to discuss all the questions so ably presented, and to review and analyze all the authorities cited by the learned counsel in their excellent and exhaustive petition and brief, would unduly extend the limits of this opinion. Although we have carefully considered and have been much impressed with the earnest and ingenious argument of counsel, we are not able to agree with them as to the law applicable to this case. It is not so difficult, ordinarily, to determine what the principles of the law are as it is to make the correct and proper application thereof to a given state of facts. The general rule deducible from the decisions on which our conclusion is based is that when the vendor has made a sale under the belief that he had title, and it is found he cannot make title, the measure of damages is the purchase price, with interest; but if the vendor, knowing that he has not in himself a perfect or complete title, under the expectation that he can get the title, or that his wife will join with him in the conveyance, agrees to sell and convey real estate, and is disappointed in failing to secure the title, or by his wife refusing to join with him in the conveyance, he is liable in damages, though he acted in good faith, for the value of the lands, or the interest therein which he fails to convey. Dustin v. Newcomer, 8 Ohio, 49, and notes and authorities cited herein and in original opinion. An opinion as to the law must be construed with reference to the

facts on which it is based. All that is necessary for us to decide in this case is to determine the principles applicable to the facts before us, and it will suffice to say that on the facts alleged in the second paragraph of the complaint we adhere to the opinion that under the terms of the contract Henry Puterbaugh became and was liable to convey the entire 80 acres to Horace, and that because of the failure to so convey, under the circumstances therein alleged, his estate is responsible in damages for the value of the interest of his wife, Margaret, which Horace has not, on full compliance on his part, been able to secure. The petition for rehearing is therefore overruled.

(8 Ind. App. 112)

CINCINNATI, L., ST. L. & C. RY. CO. v. GRAMES.<sup>1</sup>

(Appellate Court of Indiana. June 21, 1893.)

**NEGLECTANCE—SPECIAL VERDICT—JUDICIAL NOTICE—BILL OF EXCEPTIONS—MOTIONS.**

1. The appellate court takes judicial notice of who the judges of the courts of general jurisdiction of the state are, and when their terms of office expire.

2. A bill of exceptions, signed after the expiration of the term of the judge who tried the case, should be signed by his successor.

3. The filing of a motion by defendant for new trial pending a motion by plaintiff for judgment on the verdict is not a concession that, unless a new trial is granted, plaintiff is entitled to judgment on the verdict.

4. In an action for negligence, where there is a special verdict, it is for the jury to find the facts merely, and for the court to determine whether these facts show negligence or contributory negligence.

5. For an engine to approach a crossing without ringing its bell as required by statute constitutes negligence authorizing recovery by one injured by the engine at the crossing without contributory negligence.

6. A special verdict found that plaintiff, with a companion in a team, on approaching a railroad having two tracks, 8 feet apart, the further one of which was concealed from view, except at the crossing, by the houses which came within a few feet of the track, and by box cars standing on the rear track, through which was a passageway of only 16 feet, stopped the team 50 feet from the track for a minute, and looked and listened for a train; that they then approached the track at a walk, all the time looking and listening, one for trains coming in one direction and the other in the opposite direction; that they heard and saw nothing to indicate the presence of an engine till the horse was struck by a train moving 30 miles an hour. *Held*, that plaintiff was not guilty of contributory negligence.

Ross, J., dissenting.

Appeal from circuit court, Boone county; J. A. Abbott, Judge.

Action by William Grames, Jr., against the Cincinnati, Indianapolis, St. Louis & Chicago Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

John T. Dye, Elliott & Elliott, and Baker & Daniels, for appellant. P. H. Dutch, J. G. Adams, and A. C. Harris, for appellee.

ROSS, J. The appellee brought this action to recover damages for personal injury

<sup>1</sup> Motion for leave to withdraw petition for rehearing granted, 37 N. E. 421. See 34 N. E. 714. Rehearing denied.

ries sustained by being struck by one of appellant's trains at a point in Thorntown where Main street intersects appellant's railroad. The cause was tried by a jury, and at the request of the appellee they returned a special verdict, upon which the court, after overruling a motion made by appellant for a new trial, rendered judgment for the appellee. To the ruling on the motion for a new trial, and in rendering judgment on the verdict in favor of appellee, the appellant at the time excepted, and these are the only errors assigned in this court.

Several questions of practice, touching the regularity of the record, have been urged by counsel for appellee in their brief, which it is necessary to consider before taking up for consideration the errors assigned by appellant. The record discloses that the issues were formed, trial had, motion for a new trial made and overruled, judgment rendered for the appellee, and time granted appellant to file bill of exceptions, by and before the Honorable T. J. Terhune, sole judge of the twentieth judicial circuit; that within the time allowed by the court the appellant presented to the Honorable J. A. Abbott, then sole judge of said judicial circuit, his bill of exceptions, which was duly signed by him, and filed as a part of the record in this cause. This court judicially knows who the judges of the courts of general jurisdictions of the state are, and when their terms of office expire; hence it knows that Judge Abbott was the successor of Judge Terhune. A person who has been judge, and presided as such at the trial of a cause, has no power to sign a bill of exceptions, and make the same a part of the record in such cause, after he has ceased to be judge. *Smith v. Baugh*, 32 Ind. 163; *Ketcham v. Hill*, 42 Ind. 64; *Railway Co. v. Rogers*, 48 Ind. 427; *Reed v. Worland*, 64 Ind. 216.

There is nothing in the contention of appellee's counsel that appellant has waived the right to call in question the action of the court in rendering judgment on the verdict in favor of appellee by filing a motion for a new trial, while the motion of appellee for a judgment was pending, and without waiting for the ruling thereon. The sustaining of the motion of the appellee for a judgment on the verdict did not bar the right of the appellant to apply for a new trial, and by the filing of the motion for a new trial it did not waive its right to an exception to the ruling of the court in sustaining and rendering judgment in favor of the appellee on his motion therefor. The filing of the motion for a new trial by appellant was not equivalent to a concession that, unless a new trial was granted, the appellee was entitled to a judgment on the verdict.

The special verdict returned by the jury is very voluminous, and, besides repeating the same facts, has embodied in it both legal conclusions and part of the evidence. The material facts found, so far as we are able to determine them, are as follows: That on and previous to the 31st day of August, 1887, the appellant was a railroad corporation owning and operating a line of railroad running from north to south

through the town of Thorntown, in Boone county, Ind., intersecting Main street in said town, which street was one of the principal thoroughfares thereof, and infrequent use; and that said town contained a population of about 1,700 persons. That Main street was 100 feet wide, and ran east and west, and intersected appellant's railroad almost at right angles. That at such intersection appellant's railroad consisted of a main track and a side track. The side track, which was about eight feet distant from the main track, and on the west side thereof, extended both north and south of Main street. That on said day there were several box cars standing on the side track, two of which—one on each side of Main street—extended out into the street; the one on the south side projecting into the street up to a plank crossing 16 feet wide, which was placed about the center of the street. That on both sides of the street, from within a few feet of appellant's railroad, and west thereof, were buildings, which obstructed the view of persons approaching the railroad from the west, and very materially interfered with their hearing trains approaching from either direction. That on said day the appellee, who was nearly 14 years of age, in good health, and of ordinary intelligence, and possessed of "perfect eyesight and hearing," in company with his brother, who was 22 years of age, came into Thorntown from the east at 10 o'clock in the forenoon, "with a load of wheat on a farm wagon drawn by two horses," driving westward along Main street, crossed over appellant's railroad tracks, and saw the situation and surroundings of the crossing and the position of the box cars, which were then standing on the switch in said street. That in a short time they started to return along Main street, and to recross appellant's tracks, and that when about 50 feet distant from the tracks they stopped their team, and looked and listened for approaching trains, and could not see and did not hear the approach of any. That they stopped for one minute, and while so stopping with said team, and just before and at the time of starting their team towards the railroad crossing, 50 feet distant from where they then were, Richard Grames, the brother, who was and had been driving the team, spoke to the appellee, directing him to keep a watch to the north side, and listen for the locomotives, engines, and cars, while he looked and listened for the locomotives, engines, and cars on the south side. That while the appellee and his brother were sitting on the seat in the wagon, with the horses standing still at said point, and before starting the team of horses, he and his brother looked and listened for the approach to said crossing of any locomotive engine and cars upon appellant's railroad track. That neither the appellee nor his brother heard or saw any locomotive, engine, or cars approaching said crossing, or signal given, or noise of an approaching train, and did not see any signal of warning given by any flagman at the crossing, or any warning given by any one that a locomotive, engine, or cars were approaching the crossing. That immediately after

so looking and listening they drove said team of horses and wagon easterly on said Main street to said railroad track at said crossing. That in approaching the railroad crossing from the place of stopping to look and listen, appellee's brother drove said team in a walk, and at no time between said point of stopping and said crossing did he drive faster than a walk. That continuously from the time of starting 50 feet west of the said crossing the appellee and his brother looked and listened for the approach of any locomotive, engine, or train of cars to said crossing on said railroad track up to the time the horses drawing said wagon had passed upon appellant's main track at said crossing. That neither appellee nor his brother saw or heard the approaching locomotive, engine, or train of cars approaching said crossing. That neither appellee nor his brother, in so approaching said crossing, could have seen or heard the approach of appellant's locomotive, engine, or cars by the exercise of their senses of sight or hearing. That as they were driving said team across appellant's track, and while the horses were upon the main track, a train coming from the south, and running at the rate of 30 miles per hour, ran against and upon said team of horses and the wagon in which appellee and his brother were sitting, injuring appellee, etc. That if the box car which projected into the street had not been standing on said side track at said crossing, the appellee and his brother could have seen and heard appellant's locomotive engine and cars approaching the crossing before driving their team of horses upon either the side or main track at said crossing, and in time to have stopped their team before driving upon the main track. It is further found that no whistle was blown or bell rung on said engine before or while approaching said crossing; neither was there any signal of any kind given of the approach of said engine and cars to said crossing; and that, if appellant's servants had caused the whistle to be blown or the bell to be rung, appellee and his brother could have heard it in time to have avoided the injury. It is also found that other streets in said town cross said railroad.

As already stated, the verdict contains many repetitions of the same facts, intermingled with which are extracts from the evidence, as well as many conclusions of law, and for that reason it has been a matter of much difficulty to give a clear statement of the facts. That part of the finding after the jury find that no bell was rung or whistle blown on appellant's engine, where they find that if the bell had been rung or the whistle blown the appellee would have heard them and would have avoided the injury complained of, are conclusions. The law presumes that when a person is apprised of danger, he will not voluntarily throw himself in its way. In determining the legal effect of the facts found we can consider only the ultimate facts, disregarding evidentiary facts, as well as conclusions of law, embraced in the special verdict. "A special verdict is that by which the jury find the facts only, leaving judgment

thereon to the court." Section 545, Rev. St. 1881. Ultimate facts only are to be found and set out in a special verdict, and not evidentiary facts, evidence, mixed questions of law and fact, or legal conclusions. *Railway Co. v. Spencer*, 98 Ind. 186; *Railway Co. v. Bush*, 101 Ind. 582; *Cook v. McNaughton*, 128 Ind. 410, 24 N. E. Rep. 361, and 23 N. E. Rep. 74; *Perkins v. Hayward*, 124 Ind. 445, 24 N. E. Rep. 1033. "A special verdict is where the jury find the facts of the case, leaving the ultimate decision of the cause upon those facts to the court; concluding conditionally that if, upon the whole matter thus found, the court should be of opinion that the plaintiff had a cause of action, they then find for the plaintiff, and assess his damages; if otherwise, then for the defendant." 3 Bl. Comm. 378; *Boote, Sult at Law*, 158. "It is of the very essence of a special verdict that the jury should find the facts on which the court is to pronounce judgment according to law." *Bird v. Appleton*, 1 East, 111; *Rex v. Huggins*, 2 Ld. Raym. 1584. In *Railway Co. v. Adams*, 105 Ind. 151, 5 N. E. Rep. 187, the court says: "The purpose of a special verdict is to avoid the mistakes that the jury may make in the application of the law to the facts. When a special verdict is demanded, the jury are to find the facts, and the court declares the law upon the facts." It is settled, therefore, that when the jury are to return a special verdict they shall find and set out in their verdict the facts, omitting therefrom legal inferences and evidentiary facts. It devolves upon the court very often to instruct the jury what are facts, and whether it is necessary to embody in a special verdict the facts relative to a certain question; and this leads us to determine whether or not certain questions, among which are the questions of negligence and contributory negligence, are facts to be found and set out in such a verdict.

It was right and proper for the jury in this case to find and set out in their verdict whether or not the bell was rung or the whistle blown on appellant's engine, and whether or not, if the bell had been rung and the whistle blown, appellee could have heard them; but they had no right to conclude that he would have heard them, and, having heard them, would have avoided the injury. It was for the jury to determine from the evidence not only what the appellant's servants did or failed to do in the operation of its train, but also to find what the appellee did and what he failed to do before going upon the railroad track; but it was wholly beyond their province to say what the appellee would have done under different circumstances. The question at issue was not what he might or would have done under different circumstances, but what did he do under the circumstances in this case. When a traveler on a highway is injured at its intersection with a railroad by being struck by a train, the fault is *prima facie* his own. (*Railway Co. v. Hammock*, 113 Ind. 1, 14 N. E. Rep. 737;) and the law assumes that he actually saw what he could have

seen had he looked, and heard what he could have heard had he listened, (*Cone v. Railway Co.*, 114 Ind. 328, 16 N. E. Rep. 638;) and a special verdict, which shows a person to have been injured at such a point, in order to hold the railroad company answerable therefor, must show facts that will warrant the court in concluding as a matter of law not only that the injury was inflicted by reason of the negligence of the railroad company, but that the injured person was free from fault contributing thereto.

Some confusion apparently exists in the decisions of the courts of last resort in this state as to when it is proper for a jury to determine the questions of negligence and contributory negligence. It is settled, however, that the question of negligence is either purely a question of law or a question of mingled law and fact, and that it is never a question purely of fact. In the case of *Railway Co. v. Goddard*, 25 Ind. 185, the supreme court says: "The court, at the request of the plaintiff, submitted to the jury the following special interrogatories, to which they returned the answers annexed: 'Was not the defendant guilty of negligence in placing the freight car on the side track on the street, thereby obstructing the same?' To which the jury answered, 'Yes.' 'Was not the defendant guilty of negligence in not placing some visible signal at or near the southwest corner of the woodshed, to indicate the approach of the backing train, to prevent collision?' To which the jury answered, 'Yes.' These interrogatories, we think, should not have been submitted to the jury. The answers to them do not constitute a special verdict under the statute. They were probably intended to be submitted under the last clause of section 336 of the Code, (2 Gav. & H. 205,) which provides that the court, in all cases, when requested by either party, shall instruct the jury, if they render a general verdict, to find specially upon particular questions of fact, to be stated in writing, which special finding is to be recorded with the verdict. These interrogatories do not conform to the statute. They do not ask the jury to find upon any particular questions of fact. They simply assume that certain facts existed, and ask the jury if they do not constitute negligence. The question of negligence is ordinarily a mixed one of law and fact, but when the facts are found then their legal consequences constitute purely a question of law for the court, and not for the jury. If the jury had been asked to find specially whether the defendant had placed a freight car on the side track on the street, thereby obstructing the same, and whether the company had placed a visible signal at or near the southwest corner of the woodshed to indicate the approach of the backing train, to prevent collision, and the jury had answered the first in the affirmative and the second in the negative, these would have been facts specially found by the jury; and then it would have devolved upon the court to determine as a question of law whether the facts so found by the jury constituted such negligence as to

make the defendant liable for the injury complained of."

In *Railway Co. v. Hunter*, 33 Ind. 335, it was said: "But while negligence is, in general, a mixed issue of law and fact, yet it is equally true that when the fact which it is claimed constitutes negligence is found its legal character and consequences become a matter of law."

In *Railway Co. v. Spencer*, supra, Judge Elliott says: "Conclusions of law in special verdict are without force, and a general statement that an act was negligently done is but a conclusion of law. The facts showing how the act was done are essential, for without them the court cannot ascertain or pronounce the law. All the authorities agree that the law is exclusively for the court in cases where special verdicts are returned; but, if it be held that a general statement of negligence is good, then nothing at all is left to the court, for the jury have determined both the law and the facts. To allow this would be to permit the jury to usurp the functions of the court, and decide the whole case. In that event the court would be without power and without functions, and this surely cannot be the law. If the jury's decision, stated in general terms, that an act is negligent, is sufficient, then what need for a court? All that would be necessary, if that were the law, would be to take a special verdict embodying the jury's opinion. Something is to be done by the court in every case of a special verdict, and that something is to declare the law upon the facts found; but if we hold that the jury's general statement that an act was negligent is sufficient, we affirm the converse of this, because, by so holding, we declare that the verdict of the jury settles everything, the law as well as the facts, leaving the court nothing to do except make the mere formal entry of judgment. We understand it to be a fixed principle that the court does rule upon all questions of negligence. If it were otherwise, there would be no element of law in such a case. Everything would be pure matter of fact; nothing would be matter of law. It would be strange, indeed, if in any case a judgment could be had without the application of rules of law; and in all civil cases the law comes from the court. It has been said scores and scores of times that negligence is generally a mixed question of law and fact, and it has also been often said that, where the facts are undisputed, and the inferences to be drawn from them unequivocal, it may be a question of law. \* \* \* If it be true—as undeniably it is—that the question is always either one of law or one of mixed law and fact, then it must be true that in all cases the court must pronounce the law. In the case of a special verdict it is only possible to do this by action upon the facts stated in the verdict. Where a general verdict is sought, the court instructs the jury as to the law of negligence, and thus pronounces the law of the case; but in cases where a special verdict is asked the law is pronounced, not in instructions to the jury, but upon the fact stated by the jury. If the jury, for themselves, state the law,

then the court is a mere passive spectator; at most a mere moderator. In general verdict the law enters as a factor, because the jury are required to decide the case 'according to the law and the evidence;' but in special verdicts they simply state the facts. It is clear that unless all the material facts are stated in the special verdict the court cannot declare the law, and the result is that the law is not declared at all, or is declared by the jury. We have said that when the facts are found the legal character and consequences are matters of law for the court, and we now give our authority for this statement. In a recent work it is said: 'And though negligence is generally a mixed question of law and of fact, yet when the fact from the existence of which it is claimed that the negligence flows is found by the jury to be true, then its legal character, and the consequences flowing therefrom, become a matter of law for the court.' 2 Ror. R. R. 1030.

In *Purcell v. English*, 86 Ind. 84, Elliott, J., says: "When the cause of action declared on is negligence, the court may direct a verdict for the defendant in cases where the evidence wholly fails to make out a prima facie case. It is true that the question of negligence is generally one of mingled law and fact, but there are cases where the question is purely one of law."

In *Railway Co. v. Watson*, 114 Ind. 20, 14 N. E. Rep. 721, and 15 N. E. Rep. 824, Elliott, J., says: "The question of negligence is never one exclusively of fact. The jury find the facts, but if from the facts one inference only can be drawn, and that is that there was negligence, it must be so adjudged as matter of law; or conversely, if it can be clearly affirmed as matter of law that there was no negligence, the court must so declare. In no case where negligence is the issue does the court entirely abdicate its power, for, as to the law, it must always rule, although in some instances the jury ultimately decide whether there is or is not negligence, but in every case the court must declare the law."

In *Braunen v. Gravel Road Co.*, 115 Ind. 115, 17 N. E. Rep. 202, the court says: "In the case before us the facts were found by the jury, and hence, as to whether appellant, upon those facts, was or was not negligent, is a question of law for the court."

In *Railroad Co. v. Ostrander*, 116 Ind. 264, 15 N. E. Rep. 227, and 19 N. E. Rep. 110, it was said: "It has practically become a legal maxim in this state that negligence is a mixed question of law and fact, and is a question of law where the facts are undisputed, and the inferences to be drawn from them unequivocal. But no question of negligence, as a legal proposition, arises until the facts from which negligence is supposed to have resulted are in some manner established."

In *Railroad Co. v. Walborn*, 127 Ind. 142, 26 N. E. Rep. 207, Coffey, J., says: "Ordinarily, negligence is a mixed question of law and fact, but it has often been held by this and other courts that generally, where the facts are undisputed, the question of negligence becomes one of law."

In the case of *Korrady v. Railway Co.*,

131 Ind. 261, 29 N. E. Rep. 1060, the court says: "The appellant complains of a ruling of the trial court declining to permit an interrogatory to go to the jury. That interrogatory reads thus: 'Is it not a fact that Korrady was not negligent in crossing Wide alley where he did, if he did not know said engine was approaching at a speed of more than ten miles an hour?' The complaint is not well founded. The appellant had a right to elicit the facts, but had no right to ask for a general conclusion, intermingling matters of fact with matters of law."

This leads us to inquire, when is the question of negligence one of law and fact to be determined by the jury, and when purely a question of law to be decided by the court? Whether or not the question of contributory negligence on the part of the plaintiff or of negligence on the part of the defendant in a given case is one to be determined by the court as a question of law or by the jury under the instruction of the court as a question of mixed law and fact is always an important, and often a very difficult, question to determine. As Elliott, J., in *Perkins v. Hayward*, supra, says: "One of the most perplexing questions in the wide range of the law is whether a statement embodies a mere conclusion or contains a recital of an ultimate fact. The line between conclusions and ultimate facts is so shadowy and indistinct that it is often almost impossible to discover and follow it."

"Negligence, like ownership, is a complex conception. Just as the latter imports the existence of certain facts, and also the consequence (protection against all the world) which the law attaches to those facts, the former imports the existence of certain facts, (conduct,) and also the consequence (liability) which the law attaches to those facts." Holmes, Com. Law, 115. And again, on page 120, he says: "Where a judge rules that there is no evidence of negligence, he does something more than is embraced in an ordinary ruling that there is no evidence of a fact. He rules that the acts or omissions proved or in question do not constitute a ground of legal liability; and in this way the law is gradually enriching itself from daily life, as it should." "The question of legal liability is therefore one of negligence, and its consideration demands, first, a determination of what negligence is. To reach this we are not to look solely at a man's acts, or his failure to act. The term is relative, and its application depends on the situation of the parties and the degree of care and vigilance which the circumstances reasonably impose. That degree is not the same in all cases. It may vary according to the danger involved in the want of vigilance." Cooley, Torts, 751. "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do." Alderson, B., in *Blyth v. Waterworks Co.*, 11 Exch. 784. Judge Wharton, in his work on Negligence, (section 3,) says: "Negligence, in



its civil relations, is such an inadvertent imperfection, by a responsible human agent, in the discharge of a legal duty, as produces, in an ordinary and natural sequence, a damage to another." And Boswell, in his *Law of Personal Injuries*, (section 91,) says: "Negligence, whether on the part of the plaintiff or of the defendant, may be defined as the want of ordinary or reasonable care in respect of that which it is the duty of the party to do or to leave undone." The word "negligence," however, in its use by text writers as well as courts, does not always stand for or include all the elements embraced in what is considered this "complex conception;" and we must not consider that when it is said, either in the text-books or the opinions of the courts, that the question of negligence is a question of mixed law and fact, or in others where it is said to be a question of law, that it is intended as announcing a legal principle applicable alike in all cases, but the sense in which the word "negligence" is used in the particular case may be ascertained and determined from the particular facts and circumstances with which used, and we may thus avoid apparent confusion of thought. "But another, and perhaps the chief, cause of the difficulty of determining in a given case whether the conclusion as to negligence is one of law or of fact arises from another source, which we will now consider. The conception of negligence, as we have seen, involves the idea of a duty to act in a certain way towards others, and a violation of that duty by acts or conduct of a contrary nature. The duty is imposed by law either directly, by establishing specific or general rules of conduct binding upon all persons, or indirectly, through legal agreements, made by the parties concerned. It is with duties not arising out of contract that we are here concerned. There is further involved in the legal conception of negligence the existence of a test or standard of conduct with which the given conduct is to be construed, and by which it is to be judged. The question whether the given conduct comes up to the standard is frequently called the question of negligence. The result of comparing the conduct with the standard is generally spoken of as negligence, or the finding of negligence. Negligence, in this last sense, is always a conclusion or inference, and never a fact in the ordinary sense of that word." *Farrell v. Railroad Co.*, (Conn.) 21 Atl. Rep. 875. Where the law directs the precise conduct required under given circumstances, the standard by which such conduct is judged is found in the law. For instance, in many cases decided in this as well as other states the rule of law has been declared that a person's conduct shall be measured by what an ordinarily prudent man should have done under like circumstances. This general rule, however, has been prolific of many misapplications, arising not so much from a misunderstanding as to the degree of care to be exercised as the failure to know who defines the measure of the duty, and determine whether or not the acts of the party

meet the legal obligation imposed, the jury or the court.

In many well-considered cases it has been held that while the law prescribes the degree of care and determines whether or not the facts proven are sufficient in law to satisfy the requirements of the law, it is always for the jury to determine from the evidence what facts have been proven. In fact, by most of the courts of last resort in this country as well as in England has it been decided, and most rigidly adhered to, that it is for the court to say to the jury what facts, if proven, constitute negligence; and it is then for the jury to say whether or not such facts have been proven. And this rule seems to be the correct and proper rule, for, were it otherwise, either that the court should have the right to draw the inferences of fact or the jury to determine the measure of duty, the greatest aim of justice, namely, that the rule of duty by which one's conduct shall be measured as declared by the law on the one hand and the right to have the acts of omission or commission determined by one's peers, would be entirely eradicated, and, if left entirely to the jury, they would not only determine the facts, but they would declare the measure of duty, or recognize or eradicate the duty, as they should see fit; while, if the court were to be permitted to determine the facts proven, it would authorize the court to set up its judgment as against that of 12 others equally sensible and competent to determine what facts have been proven by the evidence. The supreme court of Illinois, however, has decided that an instruction to the jury that certain facts, if proven, constitute negligence, is erroneous. *Pennsylvania Co. v. Frana*, 112 Ill. 398; *Myers v. Railway Co.*, 113 Ill. 386, 1 N. E. Rep. 899. If the inference of negligence is one to be drawn by the jury, it is their province to draw it free from limitation or restriction imposed by the court; and their determination of the question is final, and not subject to review, either by the court before whom the cause is tried or the appellate court on appeal, because their opinion of what a man of ordinary prudence would or would not do under the circumstances is the rule of decision in that case. They would then conclude not only what an ordinarily prudent man should and would do under the circumstances, but they would determine whether the person in the particular case did or omitted to do what they have concluded is the measure of duty for an ordinarily prudent person under the circumstances. Relieved of all consideration of what he actually did and omitted, they would simply be required to determine whether or not he was an ordinarily prudent man. Such a perversion of the rules of law which define the duties of all persons, whether ordinarily prudent or otherwise, cannot be sanctioned. "The main object is to ascertain the facts. When they are ascertained, the question of negligence is for the court." *Doggett v. Railroad Co.*, 78 N. C. 305. And the first requisite in establishing negligence is to show the existence of the duty which it is supposed has not been performed. If negligence cannot be imputed

except a duty has been violated, (and we assume that without the violation of a duty, either by omission or commission, negligence cannot exist,) then the law alone defines the duty, and it is not for the jury to say whether or not a duty exists. Hacknsy, J., in *Railway Co. v. Schmidt*, (decided May 17, 1893,) 33 N. E. Rep. 774, says: "Our embarrassment has been in determining how far the finding of the jury, by the general verdict, was an adjudication of negligence as a question of fact, and as to the privilege of the court to determine whether the facts were such as that negligence, as a question of law, might be inferred therefrom. It is often a difficult question to determine the line dividing the privilege of the jury from the power of the court in determining what facts constitute actionable negligence." Bishop, in his work on Non-Contract Law, (section 444,) after referring to the different rules of law as established by the different courts, says: "In spite of the rule that the question of negligence is for the jury, the other rule, which requires the judge to pass upon the admission of evidence, its effect, and the sufficiency of the allegations, renders it necessarily a matter of law whether or not in a given case a particular act or omission is negligence." In this state, a party bringing an action to recover damages occasioned by the negligence of another may be required to allege specifically the acts or omissions upon which negligence is predicated, (*Pennsylvania Co. v. Dean*, 92 Ind. 459;) and when the facts are pleaded the court determines whether or not they constitute actionable negligence. (*Weis v. City of Madison*, 75 Ind. 241; *Railway Co. v. Schmidt*, 106 Ind. 73, 5 N. E. Rep. 684, and cases cited.) And from the same facts found by a jury in a special verdict the court must of necessity draw the inference of negligence or want of negligence. If the court must determine as a question of law whether or not the facts pleaded constitute negligence, it is also the duty of the court to determine, where those same facts are found in a special verdict, whether or not negligence shall be inferred. Were it otherwise, the court, in passing upon a pleading, would determine that a given state of facts constituted negligence, and on the trial of the cause the jury from the same facts might conclude that the inference of negligence did not arise. In *Faris v. Hoberg*, (decided April 20, 1893,) 33 N. E. Rep. 1028, Hackney, J., says: "Numerous authorities are cited by the appellant to the proposition that, in a case involving negligence, the court is not at liberty to take such questions from the jury, but must leave them to the jury for decision. These cases all belong to that class where a question of fact is controverted, and that question is one necessary to plaintiff's recovery, or essential to the defendant's proper defense. None of them hold that the jury is the exclusive judge of the existence or nonexistence of negligence as an ultimate fact. A moment's reflection will show the error of a rule which would deprive the court of the right to determine whether a given state of facts, uncontroverted, does or does not constitute action-

able negligence. When the facts are submitted to the court upon demurrer to a complaint, the court exercises the power of determining whether such facts, if proven, will constitute actionable negligence. When, under the practice prevailing, the jury does not return a general verdict, but returns findings of fact by special verdict, the court must determine whether the facts so found are sufficient to warrant the conclusion of the existence of negligence."

If any apparent inconsistency exists in the law as announced in this state, it is not that it is improperly stated, but rather because principles are announced as general which have but a limited application. In a number of recent cases, in which general verdicts were returned, the following general legal proposition has been announced, viz.: That in cases where negligence is the issue, and the facts are undisputed, and but one inference can be drawn therefrom, the court may draw that inference; but where the facts are controverted, or where more than one inference may be reasonably drawn from the facts, the question is generally one for the jury, under proper instructions from the court. *Rogers v. Leyden*, 127 Ind. 50, 28 N. E. Rep. 210; *Railroad Co. v. Walborn*, supra; *City of Franklin v. Harter*, 127 Ind. 446, 26 N. E. Rep. 882; *Shoner v. Pennsylvania Co.*, 130 Ind. 170, 28 N. E. Rep. 616, and 29 N. E. Rep. 775; *Elchel v. Senhenn*, 2 Ind. App. 203, 28 N. E. Rep. 193. And Elliott, J., in *City of Franklin v. Harter*, supra, uses this forcible language: "As the question in cases where a municipal corporation is sought to be held liable for injuries caused by a defect in a street is one of negligence, it is seldom that the court can determine the question as one of law, for in by far the greater number of cases the question is a complex one, in which matters of law blend with matters of fact. In all such cases the duty of the court is to instruct the jury as to the law, and that of the jury is to determine whether, under the law as declared by the court, there is actually negligence. Nor does this general rule fail in all cases where the facts are undisputed, since the rule has long been settled in this state that where an inference of negligence may or may not be reasonably drawn from admitted facts the case is ordinarily for the jury under proper instructions, but where only one inference can be reasonably drawn from the facts the question of negligence or no negligence may be determined by the court as one of pure law. The rule, as we have outlined it, is the law of this state, and must be so accepted, notwithstanding expressions occasionally found in some of the cases which seem to indicate a different doctrine. It would overthrow a long line of cases to deny the rule, and it would also lead to the subversion of sound and salutary principles. In the old as well as in the recent cases the doctrine we here declare has been strongly and explicitly asserted, and to that doctrine we give an unwavering and unhesitating adherence, disapproving all statements which seem to deny its soundness." The principle declared in these cases is applicable in the cases announced, which were cases where

general verdicts were returned; and the same principle of law applies in all cases of that nature, but it has no application in cases where special verdicts are returned by the jury. When a special verdict is required, no instructions are given to the jury as to the law of the case, (*Railway Co. v. Buck*, 116 Ind. 566, 19 N. E. Rep. 453, and cases cited;) and this is so for the reason that when the facts have been found the court will apply the law to such facts in determining the rights of the parties. The statute provides for special verdicts for the express purpose of taking from the jury the duty of applying the law to the facts. This is to avoid a misapplication of the law to the facts, and to prevent, as far as possible, any purpose on the part of the jury, either through sympathy or prejudice, from bending the facts to the law in order that a favored litigant may succeed. We think the correct principle, applicable alike in cases where either a general or a special verdict is returned by the jury, is announced by *Olds, J.*, in the case of *Rush v. Mining Co.*, 131 Ind. 135, 30 N. E. Rep. 904, where he says: "It is the province of the jury to weigh evidence where there is evidence from which two conclusions may reasonably be drawn, but it is the province of the court to determine whether or not there is or is not evidence supporting any particular fact or theory of a case; and, if there is no evidence authorizing a reasonable inference of such fact or theory essential to a recovery, or sufficient to create a reasonable difference of opinion in the minds of impartial men sitting in judgment on the case, then it is the duty of the court to instruct the jury to return a verdict against the party having the burden of establishing such material facts essential to a recovery. If, however, the evidence is such as that impartial men may differ as to the conclusion to be drawn from the evidence, then the court must submit the question to the jury. Such we believe to be the well-established rule of the law. Jurors cannot, without evidence reasonably authorizing an inference of negligence, arbitrarily declare there was negligence. Neither can they, in the face of undisputed facts, showing conclusively that a party was guilty of negligence contributing to an injury, declare that he was free from contributory negligence." In cases where the jury are to return a general verdict, it is settled that if the facts are undisputed, or where but one inference of fact can be drawn from the evidence, the court may instruct the jury, as a matter of law, whether or not such facts constitute negligence; but if the evidence is conflicting, or the inferences of fact to be drawn from the evidence are such that two minds, equally sensible and impartial, may differ as to the inferences of fact to be drawn from the evidence, the question of negligence should be left to the jury, under proper instructions from the court. In such cases it devolves upon the court to say, as matter of law, what amounts to negligence or contributory negligence, and upon the jury to say, as matter of fact, in the light of the instructions of the court, whether or not the evidentiary facts proven establish the ultimate facts

which the court has instructed constitute negligence or contributory negligence. In many cases has this question been decided, so that it seems settled beyond all question. *Beach, Contrib. Neg.* § 161; *Railway Co. v. Collarn*, 73 Ind. 261; *Car Co. v. Parker*, 100 Ind. 181; *Woolery v. Railway Co.*, 107 Ind. 381, 8 N. E. Rep. 226; *Evans v. Express Co.*, 122 Ind. 362, 23 N. E. Rep. 1039; *Board v. Chipps*, 131 Ind. 56, 29 N. E. Rep. 1066; *Eichel v. Senhenn*, *supra*. When a jury is to return a special verdict they should find and return facts only. They have no right to embody in a special verdict either the evidence, legal conclusions, opinions, or mixed questions of law and fact; and when they have found the facts they have no right to conclude whether or not the defendant was guilty of negligence, or the plaintiff guilty of contributory negligence. Were it otherwise, the jury would be the exclusive judges of what constitutes negligence, and the court could only render judgment upon the verdict for the party in whose favor the jury have concluded. If they have a right in a special verdict to draw the conclusion of negligence or want of negligence, that inference must be a fact to be found and embodied in the verdict, while the facts upon which the inference is based would be merely evidentiary facts, and should not be embodied in the verdict. But, as we have decided negligence is never a question purely of fact, it cannot be found as a fact in a special verdict.

Whether a party has been negligent under certain circumstances includes two questions, namely: First, whether a particular thing has been done or omitted. This is a pure question of fact. And, second, whether the doing or the failure to do this thing was a legal duty. This is a pure question of law. *Railway Co. v. Jackson*, 8 App. Cas. 193. As the court said in *Railway Co. v. Spencer*, *supra*: "Conclusions of law in a special verdict are without force, and a general statement that an act was negligently done is but a conclusion of law. The facts showing how the act was done are essential, for without them the court cannot ascertain or pronounce the law." In *Railway Co. v. Bush*, *supra*, which was an action to recover damages for personal injury received by being struck by a train at a highway crossing, the jury returned a special verdict, and, on appeal, *Zollars, C. J.*, speaking for the court, says: "At the close of the verdict are conclusions by the jury that appellee was not guilty of contributory negligence, and that the injury was the result of carelessness and negligence on the part of appellant. These conclusions are conclusions of law that the jury could not make, and hence must be disregarded in deciding as to the sufficiency of the verdict." In *Telegraph Co. v. McDaniel*, 103 Ind. 294, 2 N. E. Rep. 709, *Elliot, J.*, says: "We put our decision upon the ground laid down by the supreme court of Pennsylvania in a case not unlike the present. It was said by that court: 'The cases are numerous that upon an undisputed state of facts it is the province of the court to pass upon the question of defendant's

negligence.' *Koons v. Telegraph Co.*, 102 Pa. St. 164. The rule stated in the case cited is the rule of this court. *Railway Co. v. Spencer*, 98 Ind. 186. These cases, it is true, speak of the negligence of the defendant; but negligence is negligence, whether on the part of the plaintiff or of the defendant; and the rule as to how it is to be determined, and by whom, is the same in the one case as in the other." In the case of *Conner v. Railway Co.*, 105 Ind. 62, 4 N. E. Rep. 441, the jury returned a special verdict, and, after setting out the facts proven, concludes as follows: "(12) That the conduct of the plaintiff on the occasion of the injury was ordinarily prudent and cautious under the circumstances, and that he did not wholly contribute to said injury by any fault or negligence on his part, but that said injury was caused mostly by the agent of the defendant driver of said car." Judge Mitchell, in passing upon the sufficiency of the facts found, says: "In determining the legal value and quality of the facts found the paragraph above set out is not to be regarded as a finding of facts. It contains nothing more than inferences or conclusions drawn by the jury upon the precedent facts, and upon these it was not the province of the jury, in their special verdict, either to express opinions or draw conclusions. In framing and returning a special verdict the whole duty of the jury is discharged when they have found and set forth in an orderly and intelligent manner all the principal facts which were proven within the issues submitted to them. \* \* \* When upon an issue involving negligence the principal or ultimate facts are determined by the jury, it then becomes the function of the court to decide, as a question of law upon the facts found, whether or not the party to whom negligence is imputed was negligent. A civil case cannot be conceived of in which it is the province of the jury by special verdict to determine the facts, and also to draw inferences in the nature of legal conclusions upon the facts found. When the jury find and return a special verdict, it must then be considered that the facts in that case are no longer in dispute. They are ascertained and settled by the special verdict. Unless it can be maintained that the inference or conclusion which may be drawn from all the ascertained and undisputed facts is also a fact, it must follow that it is not the province of the jury to draw inferences or state conclusions. It is settled by decisions so numerous that we need not cite the cases that, where the facts are undisputed, it is the province of the court to settle the question of negligence as a question of law. This must be so in the nature of things. If it is otherwise, there is a class of cases in which, upon the undisputed facts, the court is capable of reaching a conclusion, or of determining whether such facts constitute negligence or not. As in cases where the question is whether, upon an ascertained state of facts, the conclusion of fraud, conversion of goods, payment, or probable cause for the institution of a suit may be drawn, so, where the question is whether negli-

gence has intervened when the facts are ascertained by the instrumentality selected for that purpose, the court must determine whether in law negligence can be predicated upon the facts ascertained. \* \* \* Concede that in some sense negligence is, as it is sometimes said to be, a mixed question of law and fact, it cannot be so after the facts are ascertained. In cases involving negligence, as in all other civil cases, a point must be reached at some time when the facts and the law are to be considered as separate and distinct, when the litigants have the right to invoke the judgment of the court, and require it to determine whether, upon the facts as they are agreed to be, the law declared that negligence intervened. Such a point, we think, is arrived at when the jury have agreed upon and returned to the court in a special verdict the principal contested facts in issue." In *Railway Co. v. Balch*, 105 Ind. 93, 4 N. E. Rep. 28, it was said: "A special verdict is a finding of the facts only. In this the jury have nothing to do with the law. The court does not instruct them as to the law, but in the rendition of the judgment applies the law to the facts found by the jury." In *Woolery v. Railway Co.*, supra, Mitchell, J., again says: "It was the exclusive province of the jury to ascertain the facts, and apply them, when ascertained, to the law, and return their general verdict accordingly. In doing this, however, they were to be guided by proper instructions from the court as to the law of the case. In that connection it was the duty of the court to instruct the jury what facts within the issues in the case, if established by the proof, would or might, under the circumstances, constitute contributory negligence, leaving to the jury the duty of discovering whether such facts and circumstances were proved or not. Simply to have told the jury that the plaintiff must have been free from contributory negligence, without stating what facts might constitute contributory negligence, would have been to leave the jury without any direction whatever in respect to the legal effect of the facts in the case. The practical result of the doctrine contended for would be to submit both the law and the facts to the determination of the jury. It cannot be maintained that a civil case can arise in which the court is incompetent to declare the law upon the facts, when the facts are either admitted or satisfactorily proved. Where the essential facts are ascertained in any case, the litigants have a right to call upon the court to declare the law. *Wannamaker v. Burke*, 111 Pa. St. 423, 2 Atl. Rep. 500. If the court can do nothing more than deal in abstract generalities in its charge, then in every case involving negligence the jury are left at sea,—a law unto themselves. It is the duty of the court, in every case in which a general verdict is to be returned, to instruct the jury as to the force and legal effect of the facts which may have been proved within the issues." In *Perkins v. Hayward*, supra, Elliott, J., says: "It is well settled that a special verdict must find the facts, and state

neither conclusions of law nor mere matters of evidence; and, as we have seen, what is true of a special verdict is true of a special finding." In *Railway Co. v. Burger*, 124 Ind. 275, 24 N. E. Rep. 981, Coffey, J., says: "A finding that one of the parties has been guilty of negligence has often been held by this court to be a mere statement of a conclusion." When the facts are found or undisputed, it is for the court to determine as a question of law whether or not they constitute negligence. *Railroad Co. v. Eves*, 1 Ind. App. 224, 27 N. E. Rep. 580; *Railway Co. v. Goddard*, supra; *Railway Co. v. Spencer*, supra; *Railway Co. v. Balch*, supra; *Woolery v. Railway Co.*, supra.

The principal, and oftentimes the only, questions of law in an action brought to recover damages for personal injuries are the questions of negligence on the part of the defendant and of contributory negligence on the part of the plaintiff; and if they were to be left to the determination of the jury there would be nothing for the court to do. Where the jury is to return a special verdict, the court should not instruct them as to what does nor does not constitute negligence or contributory negligence, because they have no right to apply the law to the facts to determine whether or not negligence exists; neither have they a right to know that if they find a given state of facts the court, in applying the law, will infer negligence. *Toler v. Keiber*, 81 Ind. 383; *Railway Co. v. Frawley*, 110 Ind. 18, 9 N. E. Rep. 594; *Railway Co. v. Hart*, 119 Ind. 273, 21 N. E. Rep. 753; *Stayner v. Joyce*, 120 Ind. 99, 22 N. E. Rep. 89; and *Sprinkle v. Taylor*, 1 Ind. App. 74, 27 N. E. Rep. 122. It is simply their province to find the ultimate facts, not knowing what legal inference the court may draw therefrom when the law is applied. From ultimate facts but one legal conclusion can be drawn. In the trial of a cause the evidentiary facts may all be admitted, from which more than one inference of an ultimate fact may be drawn, in which case it is always the province of the jury to draw the inference of the existence of the ultimate fact; and when the ultimate facts are found the court concludes the law. The questions of negligence and contributory negligence are not ultimate facts, but are legal conclusions drawn from the ultimate facts. *Railroad Co. v. Eves*, supra; *Hankey v. Downey*, 3 Ind. App. 325, 29 N. E. Rep. 606; *Railway Co. v. Bush*, supra; *Pennsylvania Co. v. Marion*, 104 Ind. 239, 3 N. E. Rep. 874; *Conner v. Railway Co.*, supra; *Woolery v. Railway Co.*, supra; *Railroad Co. v. Ostrander*, supra.

In approaching the crossing, as found by the jury, without blowing the whistle or ringing the bell on the engine, as required by the statute, the appellant was guilty of negligence, and if the appellee was injured by reason thereof, and without fault on his part contributing thereto, he would be entitled to recover. *Railroad Co. v. Walborn*, supra. But the failure of the railroad company to do what the statute directs does not excuse one who approaches a railroad crossing from exercising the care and taking the precaution which the law enjoins upon him. *Mann v.*

*Stockyard Co.*, 128 Ind. 133, 26 N. E. Rep. 819; *Cadwallader v. Railway Co.*, 128 Ind. 518, 27 N. E. Rep. 161; *Thornton v. Railway Co.*, (Ind. Sup.) 31 N. E. Rep. 185.

The only question left to be determined is whether or not the appellee was guilty of contributory negligence. Do the facts found show a failure to perform a duty imposed by law? The burden rests upon the appellee to show affirmatively that he has performed every duty imposed upon him by the law, before the court can say that he did not contribute to his injury. *Hathaway v. Railway Co.*, 46 Ind. 25; *Railroad Co. v. Brannagan*, 75 Ind. 490; *Lyons v. Railroad Co.*, 101 Ind. 419; *Railway Co. v. Greene*, 106 Ind. 279, 6 N. E. Rep. 603; *Stockyard Co. v. Mann*, 107 Ind. 89, 7 N. E. Rep. 893; *Railway Co. v. Hedges*, 118 Ind. 5, 20 N. E. Rep. 530; *Railway Co. v. Howard*, 124 Ind. 280, 24 N. E. Rep. 892, and cases cited; *Miller v. Railway Co.*, 128 Ind. 97, 27 N. E. Rep. 339. For, as Mitchell, C. J., in the case of *Railroad Co. v. Butler*, 103 Ind. 31, 2 N. E. Rep. 138, says: "In such an occurrence he is one of the independent actors, charged with duties correlative with the duties of the railroad company. He is able and he must show whether his duty was performed. Thousands of persons pass safely over a given crossing over which thousands of trains are run, under every variety of circumstances, before one is injured; and therefore it may be said a presumption arises that the crossing may be safely passed by all those who observe such care as prudent persons ordinarily observe. Out of the thousands who crossed, the one who sustained injury is the exception. Because the thousands who crossed in safety are supposed to represent the ordinary course of conduct better than the one, a presumption of fact is indulged that he, too, would have passed in safety had he observed the caution which prudent men ordinarily observe under like circumstances. This presumption is at least sufficient to require from him an explanation of his relation to the occurrence, and an affirmative showing that the circumstances were such, and his conduct such, that he was not in fault; and as his own conduct and his relation to the occurrence are peculiarly known to himself, and may be unknown to the railroad company, the requirement is a reasonable one." It is incumbent upon a traveler on a highway, riding in a wagon, and about to cross a railroad track, who cannot see or hear an approaching train on account of obstructions which are known to him, to use greater precaution to protect himself from injury than where the view is unobstructed, and the opportunity for using the senses of sight and hearing unimpaired. The greater the danger, the greater the precaution required of him. He must not only do what an ordinarily prudent man would do under like circumstances, but he must exercise such care and diligence as are commensurate with the danger which confronts him. *Railway Co. v. Shuckman*, 50 Ind. 42; *Nave v. Flack*, 90 Ind. 205; *Board v. Dombke*, 94 Ind. 72; *City of Indianapolis v. Cook*, 99 Ind. 10; *Railway Co. v. Butler*, 103 Ind. 31, 2 N. E. Rep. 138;

**Town of Gosport v. Evans**, 112 Ind. 133, 13 N. E. Rep. 256; **Griffin v. Railway Co.**, 124 Ind. 326, 24 N. E. Rep. 888. And a person going along a highway, who drives upon a railroad track at a place known to him to be peculiarly dangerous because of the obstructions which impair and hinder the free use of his senses of sight and hearing, simply relying upon the servants of the railroad company performing their duty in blowing the whistle and ringing the bell, does not show himself, in the eyes of the law, to have been diligent and prudent; for, as the distinguished Judge Sharwood in **Railroad Co. v. Beale**, 73 Pa. St. 504, says: "If the traveler cannot see the track by looking out, whether from fog or other causes, he should get out, and, if necessary, lead his horse and wagon. A prudent and careful man would do this at such a place. There never was a more important principle settled than that the fact of the failure to stop immediately before crossing a railroad track is not merely evidence of negligence for the jury, but negligence per se, and a question for the court."

In the case of **Seefeld v. Railroad Co.**, 70 Wis. 216, 35 N. W. Rep. 278, the court, after reviewing many cases cited, says: "The rule to be deduced from these cases is this: If the view of a traveler on the highway approaching a railroad crossing is so obstructed that he cannot see an approaching train in time to stop his team before colliding with it, if he knows that a train is due at such crossing at or about such time, and if he is unable to hear the approaching train when his team is in motion, whether by reason of the force or direction of wind, or of noises in the vicinity, made by his own wagon, or other causes, ordinary care requires him to stop his team while he may do so, and listen for the train." In **Brady v. Railroad Co.**, 81 Mich. 616, 45 N. W. Rep. 1110, it appeared that the plaintiff was driving a team attached to a lumber wagon on a highway towards the defendant's railroad; that intervening objects obscured a view of the track so that he could not see a train approaching until within 20 or 25 feet of the crossing, and then only when the train was but a short distance from the crossing. He was familiar with the crossing, and, in addition to the view being obscured, a mill in the vicinity made considerable noise. He drove his team upon the crossing without stopping, just before going upon the track, to look and listen, and was injured; and the court held that it was not sufficient that plaintiff looked and listened for the train as he drove along, but he should have stopped his team and listened; and the court, concluding its opinion, says: "A greater duty was imposed upon the plaintiff in the present case by the fact that he knew the crossing to be a dangerous one. He knew its condition, and that he would be unable to see the train until arriving at the crossing. He had no right to close his ears, and drive along without stopping, when he must have known that the noise of his wagon and of the mill would shut off the sound from the approaching train." In the case of **Haas v. Railroad Co.**, 47

Mich. 401, 11 N. W. Rep. 216, the facts were that the deceased, while driving along a highway approaching where it crossed the appellee's railroad, and when about three rods from the crossing stopped his team, and looked and listened, and then proceeded on his way to the crossing, where he was struck and killed by a passing train. Judge Cooley, speaking for the court in passing upon the facts, says: "The peculiar risks of the crossing imposed upon the decedent the duty of special caution also; and, as he knew that a regular train was due at the crossing at about that time, he was under the highest possible obligation to observe such precautions as would be needful to avoid a collision. We may concede that the railroad company failed to sound the bell, but this did not relieve the decedent from the duty of taking ordinary precautions for his own safety; and what ordinary prudence would demand must be determined on a view of all the circumstances. It is vain to urge or to pretend that ordinary precautions were made use of in this case. To move forward briskly, as the decedent did, from a point whence an approaching train would not be seen, at a time when it was known by him that a train was due, and not to pause until the train was encountered, was so far from being ordinary prudence that it approached more nearly to absolute recklessness." See, also, **Railroad Co. v. Righter**, 42 N. J. Law, 180; **Wilds v. Railroad Co.**, 29 N. Y. 315; **Gorton v. Railway Co.**, 45 N. Y. 660; **Canal Co. v. Bentley**, 66 Pa. St. 30; **Hense v. Railway Co.**, 71 Mo. 636; **Turner v. Railroad Co.**, 74 Mo. 602; **Marty v. Railway Co.**, 38 Minn. 108, 35 N. W. Rep. 670; and **Fletcher v. Railroad Co.**, 149 Mass. 127, 21 N. E. Rep. 302. While a traveler on a highway may presume that the employees of a railroad company will obey the law, and give the required warning, yet those in charge of the train may assume that the traveler will take every precaution commensurate with the danger he is about to encounter, and will avoid going upon the track in front of the train. The court, in **Hathaway v. Railway Co.**, supra, says: "Although the negligence of the defendant was a cause, and even the primary cause, of the occurrence, yet the occurrence would not have happened without a certain degree of blamable negligence on the part of the plaintiff." A railroad crossing is a place of danger, and one who does not exercise every sense or faculty to protect himself from possible injury, before attempting to cross, cannot be said to have exercised due care. Self-preservation is the first and greatest law of nature, and ordinarily it will lead to the employment of all the precautions which the situation naturally suggests to an individual in danger of harm. It implies not only the doing of those things which an ordinarily prudent man would do under like circumstances, but the doing of every practicable and available thing within his power which the law says he should do; and it is no excuse that he did all that an ordinarily prudent man would have done under like circumstances, unless the things done were all the law declares an ordina-

rily prudent man should have done. It is the law that measures the duty, for a prudent man may do that which the law forbids, or he may omit to do that which the law enjoins, nevertheless the doing of the one or the omission of the other is negligence. The most prudent men are not always exempt from carelessness, and, when actually negligent, the law attaches the same consequences to their conduct as to similar conduct in others. *Railway Co. v. Hunter, supra*; *Pennsylvania Co. v. Marion, supra*.

In this case, the appellee and his brother, when 50 feet distant from the track, stopped, looked, and listened, and from that point the horses approached and went upon the railroad track in a walk, the appellee looking and listening for approaching trains. That when and where they stopped they could neither hear nor see an approaching train on account of obstructions. It is also found that the appellee saw the situation and surroundings of the crossing, and, while the appellant was guilty of negligence in placing the cars in the street, it was appellee's duty to approach the crossing under the apprehensions that a train was liable to come any moment; and while he had a right to presume that those in charge of the engine would obey the law by giving warning of its approach, the law nevertheless required that he obey the instincts of self-preservation, and not thrust himself into a situation of danger, knowing that he could not see or hear a train approaching, except those in charge of the train give the statutory signals. When a crossing is so dangerous that for one to attempt to cross is equivalent almost to courting injury, he cannot recover if, knowing the danger, he assumes the responsibility, and attempts to cross and gets injured. "Where there is danger, and the peril is known, whoever encounters it voluntarily and unnecessarily cannot be regarded as exercising ordinary prudence, and therefore does so at his own risk." *Ray, Neg. Imposed Duties, p. 129*. In *Town of Gosport v. Evans, supra*, the court says: "One who knows of a dangerous obstruction in a street or sidewalk, and yet attempts to pass it when, on account of darkness or other hindering causes, he cannot see so as to avoid it, takes the risk upon himself. For a much greater reason does he take the risk upon himself if, seeing an obstruction, and knowing its dangerous character, he deliberately goes into or upon it, when he was under no compulsion to go, or might have avoided it by going around." As heretofore stated, the fact that he was injured raises the presumption that the fault was his own, and it was for him to rebut that presumption. The facts found show that this was a street in a populous part of the town, and that where it crossed appellant's railroad the obstructions were such that to cross it one took great risk. Whether or not he was justified in taking the risk must depend upon the circumstances. He cannot shut his eyes to dangers which are apparent, and, if injured, recover therefor. "A person is bound to use the senses and exercise the

reasoning faculties with which nature has endowed him. If he fails to do so, and is injured in consequence, neither he, in life, nor his representatives after his death, can recover for resulting injuries." *Stewart v. Pennsylvania Co., 130 Ind. 242, 29 N. E. Rep. 916*. In *Shoner v. Pennsylvania Co., supra*, *McBride, J.*, says: "When a traveler approaches a railroad with the intention of crossing it, he is bound to know that to attempt to cross near and in front of a moving train involves more or less of danger. If he is so heedless of his personal safety that he braves the danger, or so careless that he does not use the senses nature has given him to look and listen, that he may learn if there is danger, only one inference—that of negligence—can be drawn from his conduct." The facts do not show that at any point nearer than 50 feet from appellant's track the appellee stopped and looked and listened. In the case of *Thornton v. Railway Co., supra*, the court says: "While the plaintiff was not required to enter into a calculation of the comparative speed of a traveler walking towards a railroad track and a train of cars passing along that track at ordinary speed, he must, as a matter of common observation, have known that while he would walk 153 feet the train would cover a considerable distance; sufficient, at least, to require him to look for its approach at some point during his journey. He had no right to look from a given point, and then close his eyes and pass upon the track." It is a matter of common knowledge, hence is judicially known, that a train of cars moving along a railroad track necessarily make a noise. That noise of itself is a warning to those about to go upon the track to look out, and guard against dangers. It is therefore the duty of one, before going upon the track, to listen for the sound which necessarily follows a moving train, and, if there are any obstructions which interfere with his hearing readily, he must stop and listen. *Railway Co. v. Stommel, 128 Ind. 35, 25 N. E. Rep. 863*. And it is not always sufficient that he do so when 100 or 50 feet away from the track, but he must do so at the last opportunity before going upon the track, when by so doing he could have heard. In the case of *Railway Co. v. Stommel, supra*, the court says: "We are at a loss to understand what difference it could make as to the caution to be used by the appellee's servant whether there was or was not a statute requiring the giving of signals. It was his duty to stop and look for an approaching train, if there was any point within a reasonable distance from the crossing from which he could observe a train approaching; and, if no train was to be seen, it was his duty, when nearing the crossing, to stop and listen for the sound which ordinarily follows a moving train; and a statute requiring signals to be given, though violated, does not excuse this vigilance." And *Coffey, J.*, in *Mann v. Stockyard Co., 123 Ind. 139, (144,) 26 N. E. Rep. 819*, says: "When it is said that a person approaching a railroad crossing must look and listen attentively for approaching trains, it is not to be understood that



he may look from a given point, and then close his eyes; but it is to be understood that he must exercise such care as a reasonably prudent person, in the presence of such a danger, would exercise to avoid injury. The courts cannot close their eyes to matters of general notoriety, and to matters of every-day observation. We must know that a train of cars passing over iron or steel rails at a speed of thirty miles an hour does not do so without noise. \* \* \* As a rule, it is not necessary to stop and listen and look where approaching danger can be otherwise ascertained, but one approaching such crossing must exercise such care as will enable him, under the circumstances, to inform himself of the extent of the danger attending the crossing the track, if he can reasonably do so." A majority of the court (the writer of this opinion not included) are of the opinion that the facts found by the jury, disregarding conclusions as well as evidentiary facts set out in the verdict, are sufficient to warrant the court in inferring that the appellee exercised care commensurate with the danger encountered, and therefore was not guilty of contributory negligence, and that the appellee was entitled to judgment thereon.

Appellant insists that the court below erred in permitting a witness, called by appellee, to testify concerning a conversation had with one Wheatley concerning the removal of the appellant's cars which were standing in Main street. We are unable to see wherein this evidence, even if material, could have been prejudicial to the appellant. The appellant had no right to block the street with its cars, and it required no notice to remove them to make it guilty of negligence in having them there. We find no error in the record for which the judgment should be reversed. Judgment affirmed.

(159 Mass. 437)

**NASH et al. v. MINNESOTA TITLE INSURANCE & TRUST CO.**

(Supreme Judicial Court of Massachusetts, Suffolk. July 24, 1893.)

**DECREE—STATEMENT OF OPINION—STATEMENT OF FACT—WHAT CONSTITUTES—REPRESENTATIONS AS TO VALUE OF LAND AND TITLE—QUESTIONS FOR JURY—EVIDENCE.**

1. Defendant, a corporation, by its president, wrote to the owner of certain land, to be used in the sale of mortgage bonds, stating, inter alia, that "we have in our possession the original documents printed in the advertisements of your bonds secured by mortgage to this company as trustee upon the H. tract in this city. We indorse the estimates of value contained therein, made by" certain persons named, "all of whom are known as men of integrity and sound judgment touching local real-estate value." "We are of the opinion that" it "is adequate security for the amount of your proposed loan." *Held*, that such statements purport to be mere opinions, and, though false, actions for deceit will not lie in favor of persons to whom they were made for the purpose of inducing them to invest in bonds secured by the mortgage therein referred to.

2. Such letter also stated: "That we consider the title good in you will appear from the

fact that we have engaged to issue our policies of title insurance to the several holders of your mortgage bonds to the aggregate amount of \$150,000, fully protecting such holders against loss or damage arising from any defect in said title or prior incumbrance thereon." *Held*, that such representation purports to be a statement of fact, which was intended to produce the belief among purchasers of bonds, to whom it was shown, that the title was perfect, and, if false, renders defendant liable to such purchasers as bought relying thereon.

3. In actions for deceit by purchasers of such bonds on account of such representation it appeared that there was a prior mortgage of \$30,000 on the land; that it had been arranged by the owner that defendant should reserve in its hands bonds to the amount of \$40,000 as a protection against such mortgage; and that defendant's president probably regarded policies of title insurance to be issued by it as a perfect protection to the bondholders. *Held*, that the representation was false, since a bond secured by a second mortgage with a policy of title insurance is not the same as a bond secured by a first mortgage.

4. In such actions defendant is liable only to purchasers of bonds from the owner of the land to whom the letter was addressed, and not to those who afterwards bought of such purchasers, since the letter was not intended to aid the first purchasers in selling to others.

5. One of plaintiffs, K., who bought of such owner, testified that he submitted the letter and printed circulars to his customers, including all of plaintiffs; that it was suggested that if it could be arranged so as to make these bonds payable to order, so they could indorse them to defendant and transmit them by mail for collection, as they had been accustomed to transmit mortgage coupons they had taken from it, they would like some of the bonds; that the owner of the land subsequently reported to witness that that could be done; that he paid for the bonds on delivery, and that his commission was taken out before payment. It appeared that defendant issued its policy of title insurance to each purchaser by name (as is inferred) on being paid one dollar for each policy after the first. *Held*, that the question whether plaintiffs other than K. bought direct from the owner of the land through K. as agent or bought of K. was for the jury.

6. Where there was evidence that all of plaintiffs, or persons acting for them, read such letter, the question whether or not the false representations therein induced them to buy was for the jury.

7. It appeared that defendant was legitimately acting as trustee for bondholders under such mortgage, for which it was paid; that it was engaged in the business of insuring titles to real estate, and that it was paid for issuing such policies on the title to the land in question. *Held*, that defendant had the power to bind itself by representations in regard to such title.

8. The president and trust officer of defendant, who issued the letter, had authority to bind the company by such representations.

9. Where the only representations declared on were those contained in the letter, portions of an advertisement by the owner of the land, containing other representations, were properly excluded as evidence.

10. It was not error to exclude also a letter from defendant's president, written five months after the letter containing the false representations was written, and which did not necessarily relate to knowledge or opinions which the writer had when he signed the first letter, especially since it contained no reference to the matter of fact about which the only actionable false representation was made.

Report from superior court, Suffolk county.

Thirteen actions (tried together) by E. M. Nash and others against the Minnesota Title Insurance & Trust Company for false representations as to the value of and title to certain real estate situated in the city of Minneapolis. There was a verdict in each case directed by the court in favor of defendant, and the cases were reported to the supreme court for determination. Verdicts set aside.

R. M. Morse and J. M. Keith, for plaintiffs. A. A. Strout, W. H. Coolidge, and E. L. Rand, for defendant.

**KNOWLTON, J.** This is an action for deceit, which was one of thirteen cases tried together, founded on alleged false representations of the defendant contained in a letter as follows: (Printed heading of the corporation.) "Minneapolis, Minn., Feb. 16, '90. Mr. George W. Davis, Minneapolis, Minn.—Dear Sir: We have in our possession the original documents printed in the advertisements of your bonds secured by mortgage to this company as trustee upon the Hedderly tract in this city. We indorse the estimates of value contained therein made by Messrs. Marsh and Bartlett, I. C. Seeley, Jones, McMullen & Co., and E. A. Harmon, all of whom are known as men of integrity and sound judgment touching local real-estate value. That we consider the title good in you will appear from the fact that we have engaged to issue our policies of title insurance to the several holders of your mortgage bonds to the aggregate amount of \$150,000, fully protecting such holders against loss or damage arising from any defect in said title or prior incumbrance thereon. From our knowledge of the mortgaged property, and from its situation and prospects, we are of the opinion that the mortgaged property is adequate security for the amount of your proposed loan. Yours, very truly, Minnesota Title Insurance & Trust Company. J. U. Barnes, President." Mr. George W. Davis, to whom the letter was addressed, made a mortgage to the defendant as trustee to secure the payment of 200 bonds signed by himself, and amounting in the aggregate to \$150,000. These bonds were designed to be sold in the market for the benefit of one Hedderly, who had conveyed to Davis the land covered by the mortgage for an expressed consideration of \$300,000, and the defendant was to hold the mortgage as security for the benefit of bondholders. The documents referred to in the first sentence in the letter were certificates giving estimates of the value of the mortgaged property, signed by Marsh and Bartlett and the other persons mentioned in the next sentence. These estimates gave the value of the land as about \$250,000. There were nearly 10 acres of this land, situated on the Mississippi river in the city of Minneapolis. About one acre of it was on the grade of a street adjacent to it, and of the remainder about one-half was the bed of a quarry which had been excavated 50 feet below the level of the street, and the other half was low land along the river, which was

covered with water in times of flood. On this low land were some very cheap houses, occupied by tenants. There was evidence tending to show that the whole tract was not worth more than from \$20,000 to \$50,000; that Davis was a person of no pecuniary responsibility; and that the making of the bond and mortgage was part of a scheme of Hedderly and Davis to defraud such persons as might purchase the bonds. Each of the several plaintiffs bought some of these bonds, having first read the letter above quoted, and an advertisement, printed by Davis, recommending the property, and containing copies of the several certificates of value referred to in the letter. This letter was prepared by one Fish, who was counsel and trust officer of the defendant, and was signed by the defendant's president, who also had the general supervision of its business. There was much evidence tending to show that these officers did not believe that Hedderly and Davis were acting otherwise than in good faith, or that the property was insufficient security for the bonds. On the other hand, there was evidence on which the plaintiffs relied as tending to show that the defendant's officers Fish and Barnes must have believed that the land was of much less value than the amount of the bonds, and that the most important statements of the letter were untrue.

In actions of this kind it is a familiar rule that there can be no recovery unless the representations were known by the defendant to be false, and were made with intent to deceive, or were made as of the defendant's own knowledge, when he did not know them to be true. It is also a well-established rule that statements which purport to be mere opinions, as distinguished from statements of facts, cannot be made the foundation of a recovery. *Furnace Co. v. Moffatt*, 147 Mass. 403, 18 N. E. Rep. 168; *Carroll v. Hayward*, 124 Mass. 120, 122; *Holst v. Stewart*, 154 Mass. 445, 28 N. E. Rep. 574; *Belcher v. Costello*, 122 Mass. 189; *Gordon v. Butler*, 105 U. S. 553; *Derry v. Peek*, L. R. 14 App. Cas. 337; *Le Lievre v. Gould*, [1893] 1 Q. B. Div. 491; *Holbrook v. Connor*, 60 Me. 578. One of the false representations contained in this letter purports to be a statement of a fact, and it was known by the defendant's officers to be untrue. The statement in regard to the title, while it was not a direct affirmation that there was no incumbrance on the property, was intended to produce the belief among purchasers of the bonds that the title was perfect, and it was rightly understood as a representation to that effect. *Powers v. Fowler*, (Mass.) 32 N. E. Rep. 166. The bonds secured by the mortgage on their face purport to be first mortgage bonds. The representation was false, for there was a prior mortgage of \$30,000 on the property, as the defendant's officers well knew. It had been arranged that the defendant should reserve in its own hands bonds to the amount of \$40,000 as a protection against this mortgage until it should be paid, and very likely the defendant's president and trust officer re-

garded the policies of title insurance which were to be issued as a perfect protection to the bondholders. But a bond secured by a second mortgage with a policy of title insurance is not the same as a bond secured by a first mortgage. Through the insolvency of the insurer, or for some other reason, the bond may prove to be of little or no value. This representation was evidently intended to mislead upon a material point, and it can be availed of by any one to whom it was made who was induced by it to make a purchase.

The other representations contained in the letter purport to be merely expressions of opinion. The defendant, by its president, concurred in the estimates of value contained in the certificates, and said that the makers of the certificates were "known as men of integrity and sound judgment touching local real-estate value." There was no evidence at the trial that these persons were not known as men of integrity, and the weight of the evidence was that they were of good repute in regard to their judgment upon the value of ordinary real estate. But the plaintiff must have known that an estimate of value of land, or a statement in regard to the reputation of a real-estate expert, was a mere matter of opinion upon a subject about which absolute knowledge could not be expected. In most cases it would be impossible to prove that one was knowingly and willfully false in giving such an opinion, and this is one of the reasons for refusing to enter upon inquiries of this kind in the trial of a case like the present. It would be unjust to convict one of fraud on a mere expression of opinion upon any evidence which can ordinarily be introduced, and for that reason, as well as because common prudence forbids implicit reliance on such expressions, we have the general rule that false statements of opinion are not actionable. The doctrine stated in *Medbury v. Watson*, 6 Metc. (Mass.) 246, recognizing a distinction in some cases between a representation made by a vendor of property and one made by an apparently disinterested third person, should not be extended to a case like the present. We accordingly decide that the defendant is liable only for the false representation in the letter in regard to the title, and for that only to those of the plaintiffs to whom it was made, and who were induced by it to invest in the bonds. The letter is addressed to George W. Davis, but the evidence shows that it was intended to be used by him in selling the bonds. He was expected to show it to those who might become purchasers, and to use it as an inducement to them to purchase. The representations were made to all persons to whom it was shown by him as much as if it had been addressed to them by name. *Windram v. French*, 151 Mass. 547, 24 N. E. Rep. 914; *Hunnewell v. Duxbury*, 154 Mass. 288, 23 N. E. Rep. 267; *Peek v. Gurney*, L. R. 6 H. L. 377. There can be no doubt on the evidence that the plaintiff James M. Keith is one to whom the representations were made, and who had a right to rely upon them, whether his purchase was of a large

or a small number of the bonds. But we are of opinion that the letter was not intended to be used by purchasers of bonds from Davis, to aid them in selling the bonds to others. A use of the letter for such a purpose would be unauthorized, for the letter was not written to go with the bonds, and to be passed from one to another, as often as the bonds should be transferred. The evidence given in the report on this branch of the case is not very satisfactory. It would seem as if the parties and the presiding justice were giving attention more particularly to other parts of the case. The ruling was that the defendant was not liable to any of the plaintiffs. The evidence seems to indicate that Davis sold to but one of the plaintiffs, James M. Keith, or perhaps only to him and J. D. Keith, L. J. Keith, and William B. Garritt; but upon the report, which is indefinite on this point, we fear we shall be doing injustice if, in granting a new trial, we should hold as to any of the plaintiffs that there was no evidence that their dealings were with Davis through James M. Keith as agent. It is said in the report "that the defendant issued its policy of title insurance to each purchaser of said bonds upon being paid one dollar for each policy after the first." There is nothing before us to show the form of these policies, but we infer that they were issued to purchasers of bonds by name. There is evidence that these plaintiffs received such policies, and in this perhaps there is something to indicate that the title to the bonds passed from Davis directly to them. James M. Keith testified that he submitted the letter of the defendant and the printed circulars to various of his customers, including all the plaintiffs. He also said: "It was suggested that if it could be arranged so as to make these bonds payable to order, so that they could indorse them to the defendant, and transmit them by mail for collection, the same way they had been accustomed to transmit the mortgage coupons they had taken from the company, then they would like some of the bonds. Davis subsequently reported to him that that could be done." It would appear, therefore, that the papers were shown to the other plaintiffs before any bonds were bought. He also testified that he paid for the bonds on delivery, and that his commission was taken out before payment. We think there was evidence for the jury in favor of all the plaintiffs on the question whether they bought their bonds of Davis through James M. Keith as an agent. If they did, the representations contained in the letter were made to them. If, on the other hand, Davis first sold the bonds to James M. Keith, and Keith sold them on his own account to the other plaintiffs, his use of the letter in dealing with them was unauthorized by the defendant, and they cannot maintain their actions.

We are also of opinion that there was evidence for the jury in favor of all the plaintiffs on the question whether the false representations of the defendant induced them to buy. In regard to some of the

plaintiffs this evidence was clear and strong, while as to others it was largely inferential; but the testimony was that they all, or those acting for them, read the letter. The letter was of a kind which, in all its parts, would be likely to influence them towards a purchase, and the jury might have found as to each of the plaintiffs that it was an important inducement to an investment.

We are of opinion that the corporation might bind itself by a representation in regard to the title of the property. In the first place, it was legitimately acting as the trustee for the bondholders under the mortgage, and was paid for that service. In that capacity it might properly do anything fairly incidental to the business in which it was acting in the interest of both the mortgagor and the holders of the mortgage bonds. Secondly, it was in the business of insuring titles to real estate, and was paid for issuing policies of insurance on this title. Making representations in regard to the title was so far incident to the principal undertaking for which it was paid that it might properly make such representations to those who were about to take bonds. *Morville v. Society*, 123 Mass. 129; *King v. Investment Co.*, 76 Iowa, 11, 39 N. W. Rep. 919. We are also of opinion that the president and trust officer, who together issued the letter, and who had sole charge and management of business of this kind, under the authority of the directors, might bind the company by this representation in regard to the title. It certainly was within the apparent, and, we think, also within the real, scope of their authority. *Holmes v. Falls Co.*, 150 Mass. 535, 23 N. E. Rep. 305; *McNeil v. Chamber of Commerce*, 154 Mass. 277, 28 N. E. Rep. 245; *Fishkill Sav. Inst. v. Fishkill Nat. Bank*, 80 N. Y. 162.

Page 3 of the advertisement was rightly excluded. The only representations declared on by the plaintiffs were those contained in the letter, and these representations refer only to specific matters, and not to the advertisement generally. The letter contains no representation which is in any way applicable to page 3 of the advertisement. The questions of the defendant's counsel to the witness Davis after the exclusion of page 3 of the advertisement did not make that page competent. They referred only to a certain writing on the cover of the advertisement, and they had no relation to anything contained in page 3.

The latter letter from Barnes was also rightly excluded. It was written on July 5, 1890, about five months after the letter given to Davis. It does not necessarily relate to knowledge or opinions which the writer had when the letter of February 6th was signed. Moreover, it has no reference to the matter of fact about which the actionable representation was made in the letter of February 6th, but only to the value of the security, which, in the original letter, was referred to by way of estimate and opinion. In the opinion of a majority of the court the entry should be, verdicts set aside.

(140 Ill. 27)

WINSTANLEY et al. v. GLEYRE et al.<sup>1</sup>

(Supreme Court of Illinois. June 19, 1893.)

PARTNERSHIP—WHAT CONSTITUTES—FRAUDULENT CONVEYANCE—RIGHTS OF PARTNER.

1. An agreement between the owner of land and others whereby the latter agree to subdivide and plat the land and advertise it for sale, all at their own expense, and the owner agrees to convey the land to purchasers found by the other parties, the proceeds, after first paying the owner \$50,000, to be equally divided between all the parties, constitutes them copartners.

2. After the owner has received \$50,000 from the sale of part of the land, the residue of the land is partnership property, the sale of which for the benefit of the copartners may be enforced by a court of equity.

3. Sales of parts of the land made by the owner for an inadequate consideration to one of the parties to the agreement and to the owner's sister, who is the wife of another party, are fraudulent as against the other partners.

Appeal from circuit court, St. Clair county; George W. Wall, Judge.

Bill by Henry G. Gleyre and Ferdinand A. Gleyre against Elizabeth Winstanley and others. Decree for complainants. Defendants appeal. Affirmed.

The other facts fully appear in the following statement by BAILEY, C. J.:

This was a bill in chancery, brought by Henry G. Gleyre and Ferdinand A. Gleyre against Elizabeth Winstanley, Josephine Fuchs, John W. Renshaw, and Caroline Renshaw. The bill alleges that on the 25th day of January, 1890, the several parties complainant and defendant, with the exception of Caroline Renshaw, entered into an agreement in writing under their respective hands and seals, and duly acknowledged by them, the provisions of which were as follows:

"This agreement, made and entered into this 25th day of January, 1890, by and between Elizabeth Winstanley, of the county of St. Clair, and state of Illinois, party of the first part, and Josephine Fuchs, John W. Renshaw, H. G. Gleyre, and F. A. Gleyre, parties of the second part, witnesseth that, whereas, the said party of the first part is desirous of selling the land hereinafter described, and the said parties of the second part have agreed to make the efforts, undertake the management, and incur the expense relative to said sale hereinafter mentioned: Now, therefore, the said parties of the second part, in consideration of the power of attorney hereinafter given them for the sale of the land hereinafter described, and their interest therein, as hereinafter expressed, do covenant and agree to and with the said party of the first part that they will have surveyed, subdivided, and platted into lots, with appropriate streets and blocks, duly recorded in the proper office of the county, a plat of the subdivision thereof, all the land hereinafter described, and will also with promptness and dispatch, as soon as the land is properly laid off, which they undertake shall be done with all reasonable speed, advertise said land for sale.

<sup>1</sup> Reported by Louis Boiesot, Jr., Esq., of the Chicago bar.

The advertisements shall be by public notice in appropriate newspapers, by hand bills, pamphlets, and other usual methods of attracting public attention to contemplated sales. The said parties of the second part further covenant and agree to use their best efforts in the management for its sale and the disposal of said property. All expenses of every sort connected with the surveying, platting, and advertising said land, and every expense connected with the sale thereof, to be borne by the parties of the second part.

"In consideration of the premises, the said party of the first part has constituted, nominated, and appointed, and does by these presents irrevocably constitute, nominate, and appoint, the said parties of the second part her true and lawful attorneys, for her and in her name and stead to grant, bargain, and sell, convey and confirm, in fee simple absolute, to such parties and their heirs forever, as to them may seem fit, on the terms hereinafter stated, all the following real estate, lying in the county of St. Clair, and state of Illinois, more particularly described as follows, to wit, lots nine, ten, sixteen, seventeen, eighteen, nineteen, and lot lettered A, of the first subdivision of Cahokia, except two acres in lots nine and ten, upon which her residence now stands, which she reserves for her homestead. The said parties of the second part are authorized and empowered to sell said land, or any part thereof, in such quantities or areas as to them may seem best, with the restriction only that none of said land shall be sold at a less rate than three hundred dollars for every acre, and in that proportion for every fraction thereof. Sales to be made for cash, or one third in cash and the remainder secured by mortgage in the usual form, and payable in one, two, and three years, or sooner, with interest on the reserved payments at not less than six per cent. per annum.

"Before any of the parties herein mentioned, except the said party of the first part, shall be entitled to any of the proceeds of the sale of said land, the said party of the first part shall be paid out of the said proceeds the sum of \$50,000. After the said party of the first part shall have been paid the sum of \$50,000, then all the surplus over and above the sum of \$50,000 shall be divided equally as follows: One-fifth to said party of the first part, and one-fifth to Josephine Fuchs, one-fifth to the said John W. Renshaw, one-fifth to Henry G. Gleyre, and one-fifth to the said Ferdinand A. Gleyre. The said party of the first part, until she shall have been paid her full \$50,000, shall be entitled to all cash received from such sales, and, if she shall so elect, shall be entitled also to all notes for reserved payments, until her full \$50,000 shall have been so paid her in money or in notes; but, if she declines to receive the notes arising from any such sales, then it is agreed by the parties hereto that said notes shall be held by John W. Renshaw for the parties herein mentioned, in proportion to their respective interests as herein set forth. All said notes taken for the reserve payments on the purchase money of the land herein

described shall be made payable to the order of John W. Renshaw. When said notes shall be collected the amounts arising therefrom shall be applied to the payment of any amount due the said party of the first part on the \$50,000 hereby secured her on said land, if said land shall realize \$50,000, and the remainder shall be paid one-fifth to said party of the first part, one-fifth to Josephine Fuchs, one-fifth to the said John W. Renshaw, one-fifth to the said Henry G. Gleyre, and one-fifth to the said Ferdinand Gleyre.

"The said parties of the second part are hereby authorized to deliver the purchasers from them under this power of attorney deeds with the ordinary statutory or other covenants of warranty, and the said party of the first part hereby ratifies and confirms all that the said parties of the second part may do in the premises and under the powers hereby conferred upon them, and the said party of the first part binds herself by this instrument to execute any deed desired from her by any party purchasing from said second parties, confirming sales made by them under these powers. The election of said party of the first part to accept any notes above referred to, as contemplated to be taken for the reserved payments, shall be evidenced by her accepting any of said notes from said John W. Renshaw by his indorsement and delivery thereof to her. It is agreed that the powers hereby conferred upon the parties of the second part can be exercised by the majority of them. Any two of said parties are authorized and empowered to execute all deeds and to make all sales, with the same force and effect as if all the said parties of the second part were acting."

Subsequently, on the 6th day of February, 1890, a supplemental agreement was executed by the same parties, under their hands and seals, and duly acknowledged, which provides as follows: "Whereas, the party of the first part agrees and firmly binds herself to sign all deeds for lots or parcels of land presented to her: Now, therefore, the parties of the second part hereby waive their right and power given them in the power of attorney in the said foregoing contract, as far as relates to the signing of deeds, except in the case of serious illness or death, the said foregoing contract with full force and effect as if this supplementary agreement had not been written."

The bill sets out the foregoing contract and supplemental contract in extenso, and alleges, in substance, what the complainants have in all respects carried out the contract, so far as they could without the co-operation of all the parties thereto, and have expended large sums of money in laying out the tracts of land therein described, and have advertised the land for sale in a most profuse manner, and at large expense, and, among other things tending to bring the land to public notice, they have caused a colored map thereof to be prepared, of which 2,500 copies have been printed and circulated; that since the making of the contract, Elizabeth Winstanley, with the assistance of defendant John W. Renshaw, has sold and conveyed

a large portion of the land, but how much the complainants cannot state, and has received in payment therefor a sum in excess of \$50,000; that Renshaw, who has managed the property for Elizabeth Winstanley, has neglected to furnish the complainants a statement of the amount of land sold and the sum realized therefor, although often requested so to do; that the complainants have at different times negotiated sales of different portions of the land at favorable prices, but that Renshaw and Mrs. Winstanley have refused and failed to cause deeds to be executed in accordance with the sales thus negotiated; that Mrs. Winstanley has made sales without consulting the complainants, at less than could have been obtained for the land; that, combining and confederating with John W. Renshaw and Caroline Renshaw, she being the wife of John W. Renshaw, and the sister of Mrs. Winstanley, Mrs. Winstanley has made conveyances of portions of the land to Caroline Renshaw,—that is to say, on August 19, 1890, she conveyed to her three certain blocks of the land subdivided for a pretended consideration of \$3,600, and on June 9, 1890, she also conveyed to Caroline Renshaw another block for a pretended consideration of \$3,500, and also, January 22, 1891, she made to her a pretended conveyance of seven blocks and parts of two other blocks in the subdivision for a pretended consideration of \$15,000; that those conveyances were not made in good faith, and were without consideration, and that the value of the land thus conveyed was much in excess of the pretended considerations named in the deeds, and they were made for the purpose of defrauding the complainants and of depriving them of their just profits arising from the sale of the lands at their true value; that Mrs. Winstanley also on August 18, 1890, conveyed to defendant Josephine Fuchs, who is also her sister, for a pretended consideration of \$4,500, two and one-half blocks in the subdivision, and it is also charged that such conveyance was made without sufficient consideration, and in fraud of the rights of the complainants. The bill prays for an accounting, and that the pretended sales to Caroline Renshaw and Josephine Fuchs be set aside; that Mrs. Winstanley be enjoined from conveying any more of the lands except with consent and approval of the complainants; that a receiver be appointed to take charge of the business of the parties covered by the agreement, with instructions to sell such portions of the land as have not been sold, and such as have been conveyed, but not in good faith; and for such other and further relief as the nature of the case may require, and as to equity may appertain. The defendants answered, admitting the execution of the contracts as alleged, but otherwise denying the equities of the bill.

At the hearing, which was had on the pleadings and proof, evidence was introduced tending to prove performance of the contract on the part of the complainants as alleged, and, among other things, that they, together with defendants Renshaw and Fuchs, caused the land in question, consisting of about 200 acres, with the ex-

ception of 65 acres, which were omitted by consent of all the parties, subdivided and platted under the name of "Winstanley Park;" that they also caused maps of the subdivision, showing the blocks, lots, streets, and alleys, to be made and distributed as advertisements, and that by signboards, newspaper advertisements, and otherwise the lands were offered to the public for sale, and that they also advanced a portion of their share of the expenses; that Mrs. Winstanley afterwards, with the assistance of Renshaw, but without consulting the complainants, sold and conveyed the 65 acres not platted, and various portions of the land embraced in the subdivision, to various parties, for the aggregate sum of \$49,946; that she had also entered into a contract with her two sisters for the sale to them of three lots in the subdivision for \$600, a contract which the court by its decree confirms, making the total amount with which Mrs. Winstanley is chargeable \$50,546; that she has also made to her sisters the several conveyances charged in the bill, and that such conveyances were not in good faith, nor for an adequate consideration; that Caroline Renshaw and Josephine Fuchs have each sold and conveyed to bona fide purchasers some portions of the lands so conveyed to them, the sum thus realized by Josephine Fuchs being \$2,086.50, and that realized by Caroline Renshaw being \$5,400. It also appears that Caroline Renshaw has erected a dwelling house and placed other improvements on certain of the lots conveyed to her, the value of the lots so improved being \$800, and she was accordingly charged in the decree with that sum, and her title to the lots improved was confirmed. The total amount with which Mrs. Winstanley and her two sisters are thus shown to be charged is \$58,832.50. It also appears that Mrs. Winstanley has advanced the sum of \$1,000 towards defraying the expenses of platting and advertising, for which she is entitled to credit. The decree finds, in substance, that the contracts in question constituted the parties thereto partners in the enterprise of platting, subdividing, advertising, and selling the lands, Mrs. Winstanley to receive the first \$50,000 received from the sales, the other four contracting parties to pay the expenses incident to platting, advertising, and selling the land, and the five to share equally in the net profits after the \$50,000 was paid. It is accordingly decreed that the partnership thus created be dissolved, and that the assets of the firm be distributed between the partners according to their respective interests. The sales from which the \$58,832.50 had been realized, having been made to innocent purchasers, were confirmed, and the conveyances to Caroline Renshaw and Josephine Fuchs, except as above indicated, were set aside. Caroline Renshaw and Josephine Fuchs were each ordered to pay to the partnership the sums in their hands realized from sales, and Mrs. Winstanley is also ordered to pay over the amount in her hands after deducting \$50,000. Out of the moneys thus paid in, Mrs. Winstanley is to be paid the \$1,000 advanced by her for the payment of expenses, and that

amount is charged to the other parties, after crediting them with the sums advanced by them respectively for the payment of expenses. The surplus on hand collected from Mrs. Winstanley, Mrs. Renshaw, and Mrs. Fuchs, after adjusting the account for expenses, is ordered to be divided equally between the five partners, and the master is ordered to sell the lands and lots undisposed of, and distribute the proceeds one-fifth to each of the parties to the contract. From this decree the defendants to the bill have appealed to this court.

L. H. Hite, for appellants. G. & G. A. Koerner and Fred B. Merrills, for appellees.

BAILEY, C. J., (after stating the facts.) There can be no doubt, we think, that the contract set out in the pleadings created between the parties thereto the relation of partnership in the enterprise of subdividing, platting, advertising, and selling the 200 acres of land belonging to Mrs. Winstanley. Mrs. Winstanley was to receive \$50,000 out of the moneys first realized from sales, and the other four contracting parties were to defray the expenses incidental to the carrying out of the enterprise, and the five were to share equally in the moneys arising from sales after the \$50,000 was paid Mrs. Winstanley. This gave to each community of interest in the profits of the enterprise. We think the court below was justified in holding that the conveyances of considerable portions of the land to Mrs. Fuchs and Mrs. Renshaw were fraudulent and void as against the other contracting parties, and in setting those conveyances aside, and treating the lands thus conveyed as partnership assets. The prices at which those conveyances were made are clearly shown by the evidence to be much less than the actual market value of the lands conveyed, and the grantees are so related to the other parties in interest that they cannot be permitted in that way to obtain an advantage over the other parties. Mrs. Fuchs is a party to the contract, and is consequently one of the partners, and Mrs. Renshaw is the wife of another partner, and a sister of Mrs. Winstanley. A partner is, by virtue of the partnership relation, incapacitated to purchase or deal in the partnership property for his own benefit, but his purchase must be held to be in trust or for the benefit of the copartnership. This principle alone disposes of the right of Mrs. Fuchs to claim title under the conveyance to her adverse to the other parties to the contract. Mrs. Renshaw, though not herself a party to the contract, is the wife of the managing partner. Her husband is shown to have been the chief adviser and principal agent of Mrs. Winstanley in making these as well as other conveyances of the lands in question. These facts, as well as her relationship to Mrs. Winstanley, necessarily subject her dealings with the partnership property to a very close and searching scrutiny, and even throw upon her the burden of showing good faith and an adequate consideration. We think the evi-

dence clearly warrants the finding of the court below that her title was not acquired in good faith and for a sufficient consideration, and that she stands in no better plight than her husband would have done had he taken the title in his own name.

Counsel make the point that the partnership is only in the profits of the enterprise, and therefore that the firm has no interest in the lands themselves, and that the lands, not being partnership assets, were subject to be disposed of by Mrs. Winstanley as she saw fit, leaving in the other partners the mere right to call her to account by an action at law for a breach of her contract. In this view we are unable to concur. After the payment to Mrs. Winstanley of the \$50,000 provided by the contract, the residue of the land remaining unsold became partnership assets. The partners then had the right, by the terms of the contract, to have the land so remaining sold, and upon such sale to have the entire proceeds distributed as partnership profits. Under these circumstances, the land itself was in equity the property of the firm, and is to be treated in all respects as partnership assets; and the court properly decreed its sale and the distribution of the proceeds on that basis. We find no error in the decree of which the appellants have cause to complain, and it will accordingly be affirmed.

(146 Ill. 40)

#### JUDD v. ROSS et al.<sup>1</sup>

(Supreme Court of Illinois. May 3, 1893.)

EXECUTORS AND ADMINISTRATORS—APPOINTMENT—PRESUMPTION—SALE OF LAND—RES JUDICATA—LACHES.

1. The omission, in a petition for letters of administration, to state, as required by the statute of 1845, the names of the heirs, and the probable amount of the decedent's personal estate, does not deprive the county court of jurisdiction to appoint an administrator upon such petition.

2. Where one who is neither a relative nor a creditor of the decedent is appointed administrator at a term of court which begins within, and ends after, the 75 days reserved by the statute of 1845 for applications by relatives and creditors, and it does not appear on what day the appointment was made, it will be presumed, on collateral attack, that the appointment was made after expiration of the 75 days.

3. A decree of a county court directing an administrator to sell land to pay certain specified debts against the estate is conclusive as to the validity of such debts, as against the heirs who are parties to the application for leave to sell.

4. A delay of more than seven years after an intestate's death before proceeding to subject his land to sale to pay his debts does not bar the right to have the land sold therefor, where there are only 60 acres of land, of all of which the widow is in possession during such seven years, having been assigned dower in the entire tract, and having also an estate of homestead in 40 acres thereof, and where proceedings to sell are instituted speedily after her death, since in such case a sale during her lifetime would probably not avail the creditors. *Bursen v. Goodspeed*, 60 Ill. 280, followed.

<sup>1</sup>Reported by Louis Boisot, Jr., Esq., of the Chicago bar.



**Appeal from Jefferson county court; William T. Pace, Judge.**

**Petition of Charles H. Judd, administrator, against Frank P. Ross and others, for leave to sell his intestate's estate. Petition dismissed, and the administrator appeals. Reversed.**

**C. H. Patton and Albert Watson, for appellant. Geo. B. Leonard, for appellees.**

**CRAIG, J.** This was a petition in the county court of Jefferson county, by Charles H. Judd, administrator de bonis non of the estate of Patrick Ross, deceased, against Frank P. Ross et al., children and heirs at law of Patrick Ross, deceased, for leave to sell real estate to pay debts. It was set out in the petition that Patrick Ross died intestate, in Jefferson county, April 8, 1864. Petitioner was appointed administrator de bonis non October 5, 1892. James Sherley, former administrator, was discharged January 4, 1864, leaving no personal assets undisposed of. Debts allowed and unpaid amount to \$660.90, besides interest. (Other claims will be limited to expenses of administrator. Decedent died owner of certain real estate in said county, all of which was sold by former administrator to pay debts, except what was set off to widow as dower, viz.: N. W.  $\frac{1}{4}$  N. W.  $\frac{1}{4}$  section 22, and E.  $\frac{1}{4}$  S. W.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$  section 27, all in township 4 S., range 4 E. of third P. M., 60 acres. Deceased left, him surviving, Minerva A. Ross, widow, (now deceased,) and children and heirs at law, (all now living,) as follows, viz.: Eliza J. Wilkey, Rachel Lovin, Margaret Sherley, Lena Heck, Leta Easley, Anna Fisher, Frank P. Ross, and Patrick B. Ross. Prays for order to sell real estate above described to pay debts of intestate. Exhibit A to petition, (list of claims filed and allowed as of fourth class, amounts paid thereon by former administrator, and balance of principal due thereon:)

	Allowed.	Paid.	Bal. of Prin. Unpaid.
Total	\$1,404 41	\$748 50	\$660 90

The defendants, children and heirs of Patrick Ross, deceased, answered the petition, admitting the death of Patrick Ross and pretended appointment of James Sherley as administrator, and filing of inventory, appraisement bill, and sale bill, all as alleged. Deny that court had jurisdiction to appoint Sherley, or to act. Aver that Ross left enough personal estate to pay his debts. Deny correctness of Exhibit A. Aver claims filed were fraudulent, barred by statute of limitations when filed, and are now barred by statute. Aver claims were never made judgments against estate; that land in petition described might have been sold subject to dower more than seven years before petition filed; that dower lands were abandoned by widow in 1882, and have since been in open and notorious possession of defendants. On the hearing on the pleadings and evidence the court entered a decree dismissing the petition, and the administrator, the petitioner, appealed.

The first question presented involves the legality of the appointment of James Sherley as administrator of the estate of

Patrick Ross, deceased. Letters of administration were issued, as it is claimed, by the clerk of the county court of Jefferson county, 47 days after the death of Ross; and it is said that Sherley was not entitled to letters, for the reason he was not next of kin, and did not have the relinquishment of the persons who were, nor was he a creditor, nor did he file a petition stating the names of the heirs. Section 55 of chapter entitled "Wills," Rev. St. 1845, which was in force when the letters were granted, provides: "Administration shall be granted to the husband upon the goods and chattels of his wife, and to the widow or next of kin to the intestate or some of them if they will accept and are not disqualified; but in all cases the widow shall have the preference, but if no widow or other relative shall apply within sixty days the court of probate may grant administration to any creditor; and in case no application be made by a creditor within fifteen days next ensuing the lapse of the said term of sixty days administration may be granted to any person." Section 64 of the same statute provides, where application is made within the 25 days by any person not entitled to letters as husband, widow, next of kin, or creditor, the court of probate, before granting administration, shall cause such applicant to produce satisfactory evidence that the person or persons having the preference have relinquished their prior right thereto.

As respects the filing of a petition, the record shows that James Sherley filed with the clerk of the county court an affidavit that Patrick Ross died intestate April 8, 1864, in Jefferson county. This was doubtless intended as a petition for letters, and it may be so regarded. It seems to comply with the statute, except that it fails to state the names of the heirs, and the probable amount of the personal estate of deceased, but this defect would not deprive the court of jurisdiction to act.

The objection that the administrator, James Sherley, was not a relative nor a creditor of the deceased, and was appointed before the expiration of 75 days from the death of Ross, presents a more serious question. The record shows that the widow relinquished her right to letters of administration, but there was no relinquishment by the next of kin, who was entitled to administer within 60 days after the death, nor was there a relinquishment by creditors, who have 15 days after the expiration of the 60 days. Sherley, being neither a creditor nor relative of the deceased, was not, strictly, entitled to letters of administration until the expiration of 75 days, unless the widow and next of kin and creditors had before that time relinquished the right. But the record before us fails to show that Sherley was appointed administrator by the county court before the 75 days from the death of Ross expired; and, in the absence of that fact from the record, we will presume he was not appointed before the statute authorized the appointment. It does appear that Sherley appeared before the county clerk on May 25, 1864, and filed an affidavit of the death of Patrick Ross intestate, and

filed a relinquishment from the widow; that the clerk took from Sherley a bond, and issued to him letters. But no action was taken by the court on the doings of the clerk until the June term of said court, 1864, which did not convene, under the statute then in force, until the third Monday of June. During that term of court, but at what date the record fails to show, the court approved the bond filed by Sherley as administrator, and also approved the letters of administration which had been issued, and ordered them recorded. Under these orders of the court, Sherley became clothed with power to act as administrator, and, if not made until after the 23d day of June, the 75 days having then expired, Sherley was entitled to the appointment of administrator; and in the absence of proof to the contrary it will be presumed that the order of the court confirming the appointment was not made until authorized by the statute.

It is next insisted that the claims contained in Exhibit A to the petition are not valid claims against the estate, and that they are barred by lapse of time. It appears from the record that James Sherley, the former administrator, filed a petition to the October term, 1886, of the county court of Jefferson county, against the widow and children of Patrick Ross, deceased, who are defendants in the petition in this case, for leave to sell real estate to pay debts. A list of claims allowed against the estate was attached to the petition as an exhibit, and they are the same debts involved in this case. The children and heirs of Patrick Ross (the present defendants) were duly summoned. On the hearing the court found that the list of claims attached to the petition were valid and subsisting claims against the estate; that there was a deficiency of assets to pay debts of \$1,798.18. The court also found that Patrick Ross died seised of E.  $\frac{1}{4}$  N. E.  $\frac{1}{4}$  section 21, and S. W.  $\frac{1}{4}$  N. E.  $\frac{1}{4}$  section 27, and N. W.  $\frac{1}{4}$  N. W.  $\frac{1}{4}$  section 22, —in all, 160 acres,—worth \$1,600, in Jefferson county, Ill. The court appointed commissioners to assign dower to Minerva A. Ross, widow, in the lands, and the commissioners, after viewing the premises, assigned to her, as dower, N. W.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$  section 22, and E.  $\frac{1}{4}$  S. W.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$  section 27, all in township 4 S., range 4 E. of third P. M.,—60 acres. The report of the commissioners was approved, and the remaining 100 acres of land was ordered sold to pay the debts of the deceased. In the former application for leave to sell real estate to pay debts, these defendants were parties defendant. The administrator of the estate was petitioner. The former proceedings were therefore between the same parties. The claims involved in that case and in this are the same. Their validity was passed upon and determined. No new claims are here involved. The question of the validity of the claims is therefore res judicata; and the heirs, the present defendants, cannot again call in question the validity of the claims which were determined valid in the former application for leave to sell real estate.

The only remaining question to be considered is whether the creditors whose

claims were allowed against the estate have lost the right to enforce payment by sale of real estate, by delay and lapse of time. It will be observed that the 60 acres of land which the petitioner now seeks to obtain a decree to sell was set off to the widow as her dower. The 40-acre tract was the homestead of Patrick Ross when he died, and the estate of homestead became vested in his widow after his death. From the time the land was set off to the widow, she occupied, in person or by tenant, until her death, in 1892. As soon as the widow died, and the land became released from the dower of the widow, and her homestead rights, by her death, this proceeding was instituted to subject the land to sale to pay the unpaid balance due upon the debts of the deceased. The statute has not provided a period of limitation, within which an administrator must file a petition to sell lands to pay debts; but, in analogy to our statute of limitations relating to the lien of judgments, the period of seven years has been adopted as the proper time within which the application should be made. This may be regarded as the general rule, but if the delay is satisfactorily explained the mere lapse of time will not bar an application for leave to sell land to pay debts. Here the land having been set off to the widow as dower, and 40 acres of the 60 incumbered with the right of homestead, and being in the occupancy of the widow, by herself and tenants, was a sufficient reason why proceedings were not instituted to subject it to sale by an administrator. Had it been subjected to sale, incumbered as it was with the widow's dower and homestead, nothing would have been realized from the 40-acre tract, and the other 20 acres would not have sold for more than would, in all probability, pay the costs. The proceeding would therefore have resulted in no benefit to any one. The creditors would have secured nothing, and the land would have been sacrificed. Had the land been forced to sell at auction, incumbered as it was, it could not have been sold for more than a nominal sum. Moreover, no person has acquired any interest in the land by purchase from the heirs, or otherwise; but, on the other hand, it remains now in the same condition as it did at the death of Ross. Under such circumstances, as was held in *Bursen v. Goodspeed*, 60 Ill. 280, we think the delay was explained, and it should not work a bar to a proceeding to sell the land after the claim and right of homestead had been extinguished. The decree of the county court will be reversed, and the cause remanded.

(50 Ohio St. 394)

NEININGER et al. v. STATE.

(Supreme Court of Ohio. June 13, 1893.)

BASTARDY—ACTION ON RECOGNIZANCE—REFORMATION—PRACTICE.

1. A written instrument executed by a surety, which by mistake fails to express the actual agreement and intention of the parties, may be reformed upon parol proof, like other written instruments, and then enforced against the surety.

2. A recognizance conditioned that the ac-

cused in a proceeding in bastardy shall appear at the next term of the court of common pleas and answer the accusation, and abide the order of the court thereon, may be forfeited after trial and verdict of guilty if he then fail to appear and perform the order and judgment of the court.

3. There being no rule day prescribed by statute for answer to an amended petition, the time which may be allowed for filing the answer is within the discretion of the court; and when no other time is fixed by the court, setting the case for trial on a specific day is, in effect, an order that the issue be made up by that time.

(Syllabus by the Court.)

Error to circuit court, Belmont county.

Action on a bond by the state of Ohio against Frederick Neininger and others. Plaintiff had judgment, and defendants bring error. Affirmed.

The other facts fully appear in the following statement by WILLIAMS, J.:

Margie Coss, an unmarried woman, made complaint in writing, under oath, before F. C. Robinson, a justice of the peace of Pease township, Belmont county, charging Ado Kyne with the paternity of her illegitimate child. The accused was arrested upon a warrant issued on the complaint, and taken before the justice, who, after the examination required by the statute, directed the accused to enter into a recognizance payable to the state of Ohio in the sum of \$300, with sufficient surety, for his appearance at the next term of the court of common pleas of that county, to answer the accusation, and abide the order of the court thereon. Frederick Neininger and John F. Kyne offered themselves as sureties, and, as such, entered into a recognizance with the accused, in accordance with the provisions of the statute and the order of the justice. In entering the recognizance on his docket, where it was signed by the parties, the justice by mistake inserted the name of the complainant as Margie Kyne, instead of Margie Coss. The following is a copy of it, as it was signed:

"The State of Ohio, Belmont County—ss.: Be it remembered that on this 27th day of December, A. D. 1887, Frederick Neininger and John F. Kyne personally appeared before me, F. C. Robinson, a justice of the peace of Pease township, in said county, and jointly and severally acknowledged themselves to owe and be indebted unto the state of Ohio, for the use and benefit of Pease township, in said county, the sum of three hundred dollars, to be levied of their goods and chattels, lands and tenements, upon this condition: That the said Ado Kyne shall personally appear before the court of common pleas to be holden in and for the county aforesaid, on the first day of the next term thereof, and continue from day to day, and then and there answer unto a complaint of bastardy made by Margie Kyne against him, and abide the order of the court thereon, then this recognizance to be void; otherwise to be and remain in full force. Ado Kyne. [Seal.] Fred. Neininger. [Seal.] John F. Kyne. [Seal.]

"Taken and acknowledged before me the day and year aforesaid. F. C. Robinson, Justice of the Peace."

The accused did not appear at the next term of the court of common pleas, and the cause was tried in his absence, resulting in a verdict of guilty, upon which judgment was rendered, charging him, as the reputed father of the child, with its maintenance, in the sum of five hundred dollars, to be paid to complainant in installments as therein provided, and requiring him to give security to perform the order and judgment of the court, which he failed to do, whereupon the recognizance was forfeited. Afterwards the action below was commenced in the court of common pleas of Belmont county against the sureties to recover the amount of the recognizance. In an amended petition subsequently filed, the facts hereinbefore stated are alleged. It is also averred that the defendants intended to, and in fact did, enter into the recognizance for the appearance of the accused to answer the complaint of Margie Coss; that there was no complaint of Margie Kyne, nor such a person, when the recognizance was executed; and that the defendants, well knowing the facts, and to obtain the release of Ado Kyne from the custody under which he was then held on the complaint of Margie Coss, agreed to and did become sureties for him, on the recognizance, thereby binding themselves that he would appear in the court of common pleas, and there answer to the accusation made by Margie Coss, and perform the judgment of the court thereon; and by so becoming his sureties obtained his release from the custody under which he was then held on her complaint. The amended petition prays for the reformation of the instrument by correcting the mistake in the name of the complainant, and then for judgment upon it. The defendants filed a general demurrer to the petition, which was overruled. They then answered, denying its allegations. Upon the trial the court found for the plaintiff, decreed the reformation, and rendered judgment accordingly. That judgment was affirmed by the circuit court, and to reverse both judgments this proceeding in error is prosecuted.

James M. Rees and N. K. Kennon, for plaintiffs in error. J. C. Heinlein and Ross J. Alexander, for defendant in error.

WILLIAMS, J., (after stating the facts.) The principal question presented is whether a written instrument, which by mistake fails to express the agreement of the parties, may be reformed, and then enforced against a surety. The plaintiffs in error contend that it cannot, and for that reason they claim the court of common pleas erred in overruling their demurrer to the amended petition, and awarding the relief it demanded against them. This court in a number of decisions has strictly adhered to the rule that the liability of a surety cannot be extended by implication beyond the terms of his contract. In *State v. Medary*, 17 Ohio, 554, it was held that the sureties on a bond conditioned for the faithful performance by the principal of his duties as a member of the board of public works were not liable for his defalcation as an acting commissioner under the appoint-

ment of the board. In *McGovney v. State*, 20 Ohio, 93, which was an action at law on an executor's bond conditioned for the faithful administration of the estate of James Findley, the court held that the sureties were not liable for the maladministration by the executor named of the estate of Joseph Findley, and that the bond could not by parol evidence be made applicable to the estate of Joseph Findley. It was decided in the case of *Myers v. Parker*, 6 Ohio St. 501, that an appeal bond which recited that the appellant had taken an appeal from the judgment of the court of common pleas to the supreme court of the county, and the condition of which was that he would pay the amount of the condemnation money in the supreme court in case a decree should be entered therein in favor of the appellee, did not bind the sureties for the payment of a judgment of the district court, which at the date of the bond had superseded the supreme court. In neither of these cases, however, was the reformation of the written instrument sought, nor were the allegations necessary to entitle the parties to that remedy made by the pleadings. The same may be said of all the cases cited by counsel for the plaintiffs in error. We have been unable to find any reported decision in which the question here presented has received the consideration of this court. It is well settled that written contracts and other instruments of writing may be reformed when, through fraud or mistake, they fail to express the actual agreement and intention of the parties, and that the fraud or mistake may be established by parol evidence. That doctrine has been fully maintained in numerous cases in this state. The remedy has been administered even where the mistake was in the legal effect of the terms of the instrument, and but for the statute of frauds there would appear to be no reason why the contracts of sureties should not be subject to the remedy, the same as other written instruments. The obligation of the surety rests upon a consideration as adequate as that of the principal; for, though he receive no pecuniary or other benefit for his undertaking, credit is extended to the principal, and advantages are obtained by him, upon the faith of the surety's engagement. But as the statute requires a promise to answer for the debt or default of another to be in writing, and signed by the party to be charged therewith, in order to be binding, it is contended that to permit the writing to be reformed in any material part upon parol proof of a mistake would be to establish a verbal contract, and make it obligatory upon the surety, contrary to the provisions of the statute. If that is a valid objection to the reformation of a contract executed by a surety, it must be equally so to the reformation of any other contract embraced in the statute of frauds; for it is obvious the objection applies with equal force to all contracts that are within its provisions. The statute is not less explicit in its requirement that contracts for the conveyance of any interest in lands shall be in writing, and signed by the party, than it is that those of a surety or

guarantor shall be of that character. Indeed, it is expressed as to both classes of contracts in the same language, and in the same section. And if those of either class cannot, on account of the statute, be reformed, it follows that those of the other cannot; but, if either may be, then so may the other. The statute presents no greater or different obstacle in the one case than in the other. It has long been the settled law of this state that contracts concerning lands, and even deeds and mortgages by which they have been conveyed, may be reformed on the ground of mistake, and upon parol proof, by correcting misdescriptions, including lands omitted by mistake, enlarging or restricting the character of the estate, inserting or qualifying covenants and conditions, and in other respects. In *Davenport v. Scovill*, 6 Ohio St. 459, it was held that a mortgage might be reformed so as to include land not described in it, and then enforced against the same. In the case of *Clayton v. Freet*, 10 Ohio St. 545, a deed which conveyed an estate in fee simple was so reformed as to convey a life estate to the grantee, with remainder to her children; and a deed, defective for want of an acknowledgment, was reformed, by enlarging a life estate into a fee simple, and a conveyance decreed accordingly, in the case of *Ormsby v. Longworth*, 11 Ohio St. 653. Other instances in which like relief has been awarded may be found in *Hunt v. Freeman*, 1 Ohio, 491; *Evants v. Strode*, 11 Ohio, 480; *Webster v. Harris*, 16 Ohio, 490.

With respect to the reformation of contracts within the statute of frauds, Mr. Pomeroy, in section 866 of his work on *Equity Jurisprudence*, says: "The doctrine in all its breadth and force is maintained by courts and jurists of the highest ability and authority, which hold that, whether the contract is executory or executed, the plaintiff may introduce parol evidence to show mistake or fraud whereby the written contract fails to express the actual agreement, and to prove the modifications necessary to be made, whether such variation consists in limiting the scope of the contract or in enlarging and extending it so as to embrace land or other subject-matter which had been omitted through the fraud or mistake, and that he may then obtain a specific performance of the contract thus varied; and such relief may be granted although the agreement is one which by the statute of frauds is required to be in writing. This view, in my opinion, is not only supported by the overwhelming preponderance of judicial authority, but is in complete accordance with the fundamental principle of equity jurisprudence." In *Story's Equity* (section 164) the rule is broadly stated that equity will administer the remedy of reformation "on the ground of mistake" as fully against a surety or guarantor as against the principal party; and such is the current of authority. In *Wiser v. Blachly*, 1 Johns. Ch. 607, it was held that "when the intention is manifest, this court will always relieve against mistakes in agreements, and that as well in the case of a surety as in any other case." There a guardian's bond

payable to the people was corrected to run to the ward. In the case of *Olmsted v. Olmsted*, 38 Conn. 309, the court held that, "when the contract of a surety does not express the agreement or intention of the parties, to the injury of the obligee, and that is clearly made to appear, equity will reform the instrument as well against the sureties as the principal." It has been decided by the supreme court of Missouri that "courts may reform bonds, both as against the principals and sureties; but to authorize such step the evidence must be unequivocal to show the existence of the mistake, and its precise character." *State v. Franks*, 51 Mo. 98. And to the same effect are many cases, among them *Smith v. Allen*, 1 N. J. Eq. 55; *Armistead v. Bowman*, 1 Ired. Eq. 117; *Sikes v. Truitt*, 4 Jones, Eq. 361; *Butler v. Durham*, 3 Ired. Eq. 589; *Huson v. Pitman*, 2 Hayw. 504; *Clute v. Knies*, 102 N. Y. 377, 7 N. E. Rep. 181; *Prior v. Williams*, 3 Abb. Dec. 624; *Brandt*, Sur. § 141. After a careful and somewhat extended examination of the question, we have arrived at the conclusion that a written instrument executed by a surety, which by mistake fails to express the actual agreement and intention of the parties, may be reformed upon parol proof, like other written instruments, and then enforced against the surety; and such mistake and the actual agreement may be established by parol proof. But the evidence must be of that clear and convincing character which leaves no reasonable doubt either of the mistake or the terms of the agreement.

The plaintiffs in error further claim that their demurrer to the amended petition should have been sustained because it appears from its averments that the recognizance was not legally forfeited, the forfeiture not having been made until after the verdict. The recognizance was conditioned, as the statute requires, that the accused should appear and answer the accusation made against him, and abide the order of the court. The provision of the statute is that, "if the accused fail to appear at the term of the court to which he is recognized, his recognizance shall be forfeited." The verdict was rendered and judgment entered at the term to which the accused was bound to appear, and we see no reason why the forfeiture could not be made any time during the term. The important condition of the recognizance is that the accused shall abide the order of the court. When that is performed, its purpose is substantially accomplished; and his appearance is material only to enable the court to enforce its judgment against him, by committing him, as the statute provides, upon his failure to furnish security for the sum he is adjudged to pay for the maintenance of the child. If he appear and defend at the trial, but fail to appear and perform the judgment of the court, there is a breach of the recognizance, for which it may be forfeited; and that breach can only occur after trial and verdict. We think, therefore, that the objection urged by the plaintiffs in error to the forfeiture of the recognizance, that it was not made until after the verdict was rendered, is not a valid one.

It is also contended that the court erred in requiring the plaintiffs in error to go to the trial too soon after the amended petition was filed. It was filed, as the record shows, on the 1st day of December, 1888, and against their objection the cause was set for trial on the 8th day of the same month. Their claim is that they were entitled to the same time in which to answer the amended petition that is allowed by law for answer to an original petition, which, it is claimed, gave them until and including the third Saturday after the pleading was filed, for answer; and especially should they have been allowed that rule, it is said, because no other time for answer was fixed by the court. The court is authorized to permit amendments of pleadings, before or after judgment, in furtherance of justice, on such terms as may be proper, "by inserting other allegations material to the case," and in many other respects. Rev. St. § 5114. An amended petition, which contains all or part of the allegations of the original petition, with others that are material, is a form of amendment permitted by the statute, and a mode often adopted; and, as the statute has prescribed no rule day for answer to such a pleading, nor to an amendment in any form, the time within which an answer may be filed to a pleading of that kind is within the discretion of the court. Where no other time is fixed by the court, setting the case for trial on a specified day is, in effect, an order that the issues be made up by that time; and it appears they were made up in this case before the trial commenced. Judgment affirmed.

(134 Ind. 649)

STATE ex rel. MORRIS, County Auditor, v. FRAZIER et al.  
(Supreme Court of Indiana. June 14, 1893.)  
MARRIED WOMAN—MORTGAGE TO SCHOOL FUND—VALIDITY.

Where a married woman makes application in her own name for a loan from the school fund, and, joined by her husband, gives the statutory note and mortgage on her separate estate to secure the loan, and is paid the proceeds of the loan, she cannot, in an action by the state to foreclose the mortgage, set up as a defense that she signed the note and mortgage merely as surety for her husband.

Appeal from circuit court, Henry county; J. W. Study, Special Judge.

Action by the state, by its relator Joshua I. Morris, auditor of Henry county, against Mary E. Frazier and William R. Frazier, to foreclose a mortgage executed by defendants to plaintiff to secure the repayment of a loan of the common-school funds. From a judgment for defendant Mary E. Frazier, plaintiff appeals. Reversed.

John M. Morris, for appellant.

COFFEY, J. This was an action by the appellant against the appellees in the Henry county circuit court to foreclose a mortgage executed by the appellees to the state of Indiana, to secure the repayment of a loan of the common school funds of the state. The cause was tried by the

court, resulting in a special finding of the facts in the case, with the court's conclusions of law thereon. Upon these findings and conclusions of law, a judgment was rendered for costs in favor of the appellee Mary E. Frazier. It appears from the facts found, among other things, that the appellees now are, and were at the date of the mortgage in suit, husband and wife. The land covered by the mortgage is the separate property of the wife. Mary E. Frazier alone signed and swore to the statement of her title, and she and her husband both signed the statutory note and mortgage. The auditor of the county issued the warrant to her, payable to her alone. She presented it to the county treasurer, and he gave her a check to the bank for the amount of the loan. She drew the money on the check, and delivered it over to her husband, William R. Frazier. The court finds that she signed the note and mortgage as surety for the husband, but there is no finding that the county auditor had any knowledge of that fact. Upon these facts, the court stated, as conclusions of law, that the appellee Mary E. Frazier was not liable on the note, and that the mortgage in suit was not a lien upon her land.

In its conclusions of law, we think the Henry circuit court erred. The case of *Snodgrass v. Morris*, 123 Ind. 425, 24 N. E. Rep. 151, and the case of *Lloyd v. Morgan Co.*, (Ind. Sup.) 34 N. E. Rep. 311, are decisive of the question involved in this case. The money was paid over to the appellee Mary E. Frazier, and, if she lost it by paying it over to her husband, it was the result of her own folly, for which the state is not responsible. The common school fund is a fund dedicated to the use of educating the children of the state, and can be used for no other purpose. It does not belong to the county auditor, and those who borrow it are bound to know that the duties of the auditor in relation to such fund are fixed by statute. In this case the auditor has done his duty, and has paid the money to the person furnishing the security for a repayment of the loan, and the state can in no wise be affected by a secret understanding between the appellee and her husband that she was simply his surety. Nor do we think the case would be different if the auditor had been informed of the understanding between the appellee and her husband. She was bound to know that, if she borrowed this fund from the state, she was compelled to repay it. If the officer with whom she was dealing failed in any wise in the discharge of his duty, to her injury, the remedy should be sought against him, and not against the state. As the appellee Mary E. Frazier received the money which it is sought to recover in this action, and agreed to repay it, there would be neither equity nor conscience in requiring the state to lose it. The statute which prohibits married women from becoming surety was intended as a protection, and was never intended to shield them in the perpetration of a fraud. We are of the opinion that a married woman who signs the statement required by statute to obtain a loan of the school funds cannot

avoid a repayment of the loan on the ground that she signed the statutory note and mortgage as surety for her husband. Such being our conclusion, it follows that the circuit court erred in its conclusions of law in this case. Judgment reversed, with directions to the Henry county circuit court to restate its conclusions of law in accordance with this opinion, and to render judgment against the appellee Mary E. Frazier for the amount of the note in suit, with the interest thereon to the date of such judgment, and to render a decree foreclosing the mortgage in suit.

(134 Ind. 651)

## EBERHART v. STATE.

(Supreme Court of Indiana. June 13, 1893.)

## RAPE—RESISTANCE—EVIDENCE.

Defendant, a quack, pretending to cure by charms, after several times visiting a girl 13 years old, who had for 2 years had epileptic fits, was placed in a room with her, at his instance, by her ignorant and credulous parents, where, on the fifth night, he called her to his bed, telling her that he had something to tell her which would cure her. Her testimony that she tried to make him quit, but he would not, was uncontradicted. *Held*, that there was not a failure to show sufficient resistance because she made no outcry, and concealed the crime committed on her.

Appeal from circuit court, Clinton county; S. H. Doyle, Judge.

Lewis Eberhart was convicted of rape, and appeals. Affirmed.

W. R. Moore and W. K. Peter, for appellant. O. E. Brumbaugh and Joseph Combs, for the State.

HOWARD, J. The appellant was indicted for the crime of rape, was tried therefor, and found and adjudged guilty. It is contended that the evidence does not sustain the verdict. The prosecuting witness, Lottie G. Mohler, was 13 years of age, past, and for 2 or 3 years had been subject to epileptic fits. Her father was a day laborer, while both father and mother were ignorant and credulous to an extreme degree, though apparently well-miuded persons. The girl herself had not gone to school since she had been afflicted with epilepsy, and had gone out nowhere, except when accompanied by her father. Appellant was a pretended traveling doctor, and about 50 years of age. He had traveled over parts of Illinois and Michigan, as well as in this state, professing to cure diseases by charms or spells, but not laying claim to any great medical knowledge. The parents of the prosecuting witness were advised to make trial of his powers to relieve her of her malady, and called him to treat her, during one of his visits to the neighborhood. His first treatment was to take her to a private room, and tie a string of woolen yarn around her person, charging her to tell no one what he had done. She did not tell this to her mother, and the mother did not want to know what the doctor had done when she learned that he told the girl not to tell. This was in December, 1892. In January, and also in February, he came again, and the treatment was re-

peated. Before the February visit he wrote the following letter to the mother:

"Perth, Ind., Feb. 1st, 1892. Mrs. Mattie Mohler: This night I received your letter, and would say it would be necessary for me to see her again, and sleep in the same room with her now and then. You will see the change, for I make it a point to operate on these cases the third time after night, and, if possible, when the spell is on. It is possible that I may see you before Saturday night, and have a room to ourselves. Yours, truly, Lewis Eberhart.

"Try and get out of her what makes her cry. I am of a notion that her disease is a curse. Does she make any religious profession, or not? Look for me, and ask her if she is very anxious to see me, or not. I will use Latin phrases altogether on behalf of her. Yours, L. E."

The parents consented to this astounding proposition. The prosecuting witness slept in a small room down stairs on a couch, while the doctor slept in the same room on a bed. The rest of the family slept upstairs. On the fifth night that they so slept in the same room, he waked her up, after she had been some time asleep, and called her to his bed, saying he had something to tell her that would cure her of her fits. As soon as she reached his bed, she testifies, he pulled her in, and committed the crime charged; she trying, as she says, "to make him quit, but he would not do it." Her mother and sister-in-law found evidence of the truth of her statement, although at first she refused to tell, because, as she says, the doctor forbade her to say anything about it.

Appellant's counsel say that the crime is not proved because there was no outcry at the time, and there was concealment for a few days afterwards. In *Anderson v. State*, 104 Ind. 467, 4 N. E. Rep. 63, and 5 N. E. Rep. 711, it is said: "The nature and extent of resistance which ought reasonably to be expected in each particular case must necessarily depend very much upon the peculiar circumstances attending it; and it is hence quite impracticable to lay down any rule upon that subject, as applicable to all cases involving the necessity of showing a reasonable resistance. *Ledley v. State*, 4 Ind. 580; *Pomeroy v. State*, 94 Ind. 96; *Com. v. McDonald*, 110 Mass. 405; 2 Bish. Crim. Law, § 1122." In the case of *Ledley v. State*, supra, the court said: "What seemed inconsistent in her conduct might have been accounted for, in the minds of the jury, by that species of moral duress which the evidence tends to show that the prisoner exercised over her. She was young,—only sixteen,—and seemingly artless, wholly inexperienced, and by no means intelligent. \* \* \* Under such circumstances, his influence over her must have been great. \* \* \* The jury saw the witnesses and the parties. They have come to a conclusion which, in our view of the case, is perhaps supported by the evidence. \* \* \* Unless we respect such verdicts, there would be little hope of bringing the guilty to punishment." Bish. Crim. Law, supra, says: "Some of the cases, both old and modern, are quite too favorable to the

ravishers of female virtue, and ought not to be followed, on this question of resistance. \* \* \* The better judicial doctrine requires only that the case shall be one in which the woman 'did not consent.' Her resistance must not be mere pretense, but in good faith." In *Huber v. State*, 126 Ind. 185, 25 N. E. Rep. 904, the court held that "the rule does not require that the woman shall do more than her age, strength, and the attendant circumstances make it reasonable for her to do in order to manifest her opposition." *Pomeroy v. State*, 94 Ind. 96, was a case in many respects similar to that before us. In that case the prosecuting witness, who was 21 years of age, was afflicted with epileptic fits, and Pomeroy was an itinerant doctor, who said he could cure her, and, in pretending to treat her as physician, accomplished her ruin. She, too, made no outcry at the time, but the court says: "If the jury believed, as they might well have done, under the evidence, that the appellant, as a physician, obtained possession and control of Rebecca's person, under her mother's command, \* \* \* and that she never in fact gave her consent, through fraud or otherwise, \* \* \* then it seems to us that the appellant was lawfully convicted of the crime of rape." *Queen v. Flattery*, 2 Q. B. Div. 410, referred to in the same opinion, was also similar to the case before us. In the case at bar the prosecuting witness was a child but little over the age of consent, as then fixed by law, and under such age, as now fixed by our more humane statute. She was an epileptic, and had been so afflicted for about two years. In obedience to the direction of her parents, she was placed in the power of the charm doctor, who had wormed himself into her confidence, and into that of her almost equally feeble-minded parents. Her uncontradicted statement shows that she did not give her consent, and that she "tried to make him quit, but he wouldn't." The appellant claimed to exercise great influence over her, and the evidence showed that she obeyed him implicitly, as one who was to cure her of her malady. Weak in intellect and credulous, as she was, both from disease and from heredity, and subjected for months to the will of her pretended physician, it is rather a matter of surprise that she offered any resistance to him. The crime committed by appellant was not only rape, as the jury found, but of a most aggravated character; and the jury would have been justified, from the evidence, in inflicting the most severe penalty.

The eighth instruction asked by appellant was properly refused by the court. We think it clear, from what has been already said, that a charge would have been improper which assumed that under the circumstances the prosecuting witness ought to have made an outcry that would have waked her parents upstairs. Nor do we think the evidence would justify that part of the instruction which assumed that appellant was received by the family on friendly terms, on one occasion, after the commission of his crime. What we have said before applies also to this last feature of the instruction refused.



The motion to suppress the depositions of James Burke and others was properly sustained. The order of the court directing that such depositions should be taken provided that they should be taken at the town of Perth, Ind., while the certificate of the notary shows that they were taken at the town of Carbon. The notice, as copied in the record, leaves it uncertain whether they should be taken at Perth or at Carbon.

Appellant also contends that he should have been allowed to call and cross-examine the prosecuting witness after the case of appellee had been closed. The court permitted appellant to make the prosecuting witness his witness, for the purpose of eliciting any further evidence she might be able to give. This was all he was entitled to. Appellee's witnesses could not be cross-examined after appellee's case was closed, and without the consent of appellee and of the court. We have found no available error in the record.

The judgment is affirmed.

(135 Ind. 8)

SWAIN v. FULMER et al.

(Supreme Court of Indiana. June 16, 1893.)

MUNICIPAL CORPORATIONS—SEWERS—ASSESSMENT  
—NOTICE—VALIDITY.

1. Acts 1893, p. 61, § 8, provides that whenever the board of public works of any city shall order the construction of a sewer it shall cause a notice of the adoption of the resolution ordering the work to be published in some daily newspaper in the city once a week for two weeks; that such notice shall name a date after the last day of publication at which the board will hear remonstrances from persons affected thereby; that, if the order is confirmed, the board shall publish another notice once a week for two weeks, giving the boundary lines of the area to be drained and assessed, and naming a day after the last day of publication at which remonstrances from persons interested will be heard. *Held*, that such section is not open to the objection that it does not give sufficient notice to an affected property owner, or opportunity to him to be heard.

2. An assessment for the cost of a sewer may be levied on the lands benefited according to their area without regard to their value.

Appeal from circuit court, Marion county; E. A. Brown, Judge.

Action by George G. Swain against Leander A. Fulmer and others to enjoin defendants from performing work under a contract with the city of Indianapolis. From a judgment for defendants, entered upon an order sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Chas. M. Cooper, for appellant. Elliott & Elliott and A. C. Harris, for appellees.

COFFEY, J. Section 8, Acts 1893, p. 61, of an act concerning cities, provides, among other things, that whenever the board of public works shall order the construction of any local sewer or drain it shall cause the necessary drawings and specifications for such work to be prepared and filed in such office, and shall cause a notice of the adoption of the resolution ordering the work to be done to be published in some daily newspaper of general

circulation in such city once a week for two weeks. Such notice shall name a date after the last day of publication at which such board will receive and hear remonstrances from persons interested in or affected thereby. On the date set the board shall consider such remonstrances, if any, and thereupon take final action confirming, modifying, or rescinding their original resolution. Such action shall be final and conclusive on all persons. If such original resolution be confirmed or modified, the board is required to cause a notice to be published in such city once a week for two weeks, informing the public and contractors of the general nature of the work, and of the fact that the drawings and specifications are on file in the office of the board, and calling for sealed proposals for such work by a day not earlier than 10 days after the first of said publications. Whenever such sewer or drain shall, from its size and character, be intended and adapted not only for use by the owners of abutting property along the line of such sewer or drain, but is also intended and adapted to receive sewerage from collateral drains already constructed, or which may be constructed in the future, then the board of public works shall prepare a map which will give thereon the exact course of said proposed sewer and its appurtenances, and which will clearly show by boundary lines the total area or district to be drained and to be assessed for the construction of said sewer. It shall prepare all necessary profiles, drawings, and specifications for such work, which map, profile, drawings, and specifications shall be placed on file in the office of said board. It shall also publish a notice of the adoption of the resolution ordering the work to be done, and shall describe in such resolution and in such notice the boundary lines of the district or area intended to be drained by such sewer, and to be assessed for the cost of the same; and such publication of the adoption of said resolution shall constitute a legal notice to all owners or holders of property, or persons having valuable interests therein, within the bounds of the district or area described, that such property in said district or area will be assessed for the construction of such sewer. The publication is required to be made in some daily newspaper published in the city once each week for two weeks, and shall name a date after the last day of publication at which the board will receive or hear remonstrances from persons interested in or affected by the construction of the sewer. On the date set the board is required to consider the remonstrances, if any are presented, and take final action confirming, modifying, or rescinding its original resolution. Such action is made final and conclusive on all property holders in the district intended to be drained and assessed. Section 10 of the same act provides that whenever, in the opinion of such board, any sewer or drain ordered to be constructed, or any enlargement of one already constructed, shall, from its size and character, be intended and adapted not only for use by abutting property holders along the line of such drain or

sewer, but is also intended and adapted for receiving sewage from collateral drains already constructed, or which may be constructed in the future, then and in that case such board shall make a division of the cost of such work. So much of said cost as shall be equivalent to the construction of an adequate local sewer, not adapted to receive sewage from collateral drains or sewers, shall be paid for exclusively by the abutting property holders, in the same manner and to the same extent as local sewers are paid for by them. The excess of cost over and above what would be equivalent to the cost of a local sewer shall be assessed against each piece of property in the district or area to be drained in the proportion its area bears to the total area of the district, including abutting property holders as well as the holders not situated on the line of such drain or sewer. Acting under these statutory provisions, the board of public works of the city of Indianapolis, on the 1st day of March, 1893, passed a resolution having in view the construction of a large sewer designed to carry an unusual quantity of water, and to drain by collateral drains or sewers a large area in the city, consisting of property not abutting upon the line of the proposed sewer. All the notices provided for by the statute were given, and such proceedings were had as resulted in a contract with the appellees for the performance of the work. The appellees being engaged in the construction of the sewer, the appellant, who owns property liable to be assessed to pay for the work, but not abutting on the line of the sewer, seeks to enjoin them from the performance of further work, upon the alleged ground that the statute above referred to violates the constitution of the state, and is, for that reason, void. To his complaint for an injunction the circuit court sustained a demurrer, from which decision he appeals to this court.

His contention is that the statute is unconstitutional for the reasons: First, that the notice provided for by the statute is insufficient, incomplete, and is equivalent to an entire absence of notice; second, that the mode prescribed for assessing the benefits is arbitrary, unequal, and unjust, having no reference to the cash value of the property to be assessed. It is well settled that a statute which provides for the imposition of a burden upon the property of the citizen, without notice to him, and without an opportunity to be heard, is invalid. To warrant the imposition of such a burden, notice and an opportunity to be heard must be provided for either by the statute authorizing such burden, or by some other statute. But the kind of notice, and the manner of giving it, are matters of purely legislative discretion and control. In *re Village of Middleton*, 32 N. Y. 196; *Tidewater Co. v. Coster*, 18 N. J. Eq. 518; 2 Dill. Mun. Corp. § 802a; *Millis*, Em. Dom. § 98. Where a statute provides for constructive notice, as by publication, such notice is sufficient. *Elliott, Roads & S.* § 152; 2 Dill. Mun. Corp. § 804; *Scott v. Brackett*, 89 Ind. 413; *Carr v. State*, 103 Ind. 548, 3 N. E. Rep. 375. The contention of the appellant to the effect that each

property holder to be assessed must be named in the notice cannot be sustained. It would be difficult, if not impossible, for the board of public works, in a large territory to be drained, covered by a populous city, to ascertain the names of all persons owning or having an interest in the property to be assessed. The requirement contended for by the appellant has never, to our knowledge, been deemed necessary. The notice provided for by this statute, and the opportunity to property holders to be heard, seem to us to be ample and wholly unobjectionable. It seems to be an admitted fact that no system of assessments for local improvements can be devised which will be absolutely perfect, and which will, in all cases, secure perfect equality and exact justice. The most that can be expected is that a system, when devised, shall approximate as nearly as may be under the circumstances to equality proportionate to the benefits received among those to be assessed. The assumption by the appellant that the statute under immediate consideration creates a system which is arbitrary, unequal, and unjust, because the property is not assessed in proportion to its cash value, is, we think, erroneous. If all the property within a given area stands in equal need of drainage, the benefits received by each parcel of equal area will generally be equal. It is true that some property of less value than other property in the same district may receive greater benefit, because its small value may arise from the difficulty of draining it, while the other property may be more valuable because it does not need drainage. But where all the property within a given district stands in equal need of drainage, we can conceive of no more equitable mode of assessing the benefits derived from such drainage than to assess it according to the area possessed by each owner. Such a mode of assessment has often been sustained by the courts. Upon this subject Judge Dillon says: "Whether the expense of making such improvements shall be paid out of the general treasury, or be assessed upon the abutting property, or other property specially benefited, and, if in the latter mode, whether the assessment shall be upon all property found to be benefited or alone upon the abutters, according to frontage or according to the area of their lots, is, according to the present weight of authority, considered to be a question of legislative expediency, unless there is some special restraining constitutional provision upon the subject." 2 Dill. Mun. Corp. § 752; *Id.* § 761. In the case of *Johnson v. Duer*, (Mo. Sup.) 21 S. W. Rep. 300, an assessment according to area, and without regard to value, to pay the benefits derived from the construction of a sewer, was sustained. This system of assessment was also sustained in the following cases: *City of St. Joseph v. Farrell*, (Mo. Sup.) 17 S. W. Rep. 497; *Wallace v. Shelton*, 14 La. Ann. 498; *McGehee v. Mathis*, 21 Ark. 40; *Daily v. Swope*, 47 Miss. 367; *City of St. Louis v. Oeters*, 36 Mo. 456. The case of *Thomas v. Gain*, 35 Mich. 155, seems not to be in line with the weight of authority upon this subject, but even that

case does not hold that the benefits derived from the construction of a sewer may not be assessed according to the area of the lots owned by those benefited. In the course of the opinion in that case the learned judge who wrote it says: "In what has here been said it is not intended to decide or to intimate that a sewer tax may not, under some circumstances, be lawful, though apportioned by the area of the lots assessed." The statute under consideration in this case differs widely from the statute considered in the case of *Thomas v. Gain*, *supra*. In our opinion, the statute under consideration is not subject to the constitutional objections urged against it and it is a valid legislative enactment. It follows from this conclusion that the circuit court did not err in sustaining the demurrer of the appellees to the appellant's complaint in this case. Judgment affirmed.

(134 Ind. 665)

### In re LEACH.

(Supreme Court of Indiana. June 14, 1893.)

#### ADMISSION TO BAR—RIGHTS OF WOMEN.

1. Const. art. 7, § 21, and Rev. St. 1881, § 962, providing that every person of good moral character, being a voter, shall be entitled to admission to the bar, and shall, on application, be admitted, on prescribed conditions, do not exclude women from the practice of law; there being no common-law inhibition, and it being provided by Const. art. 1, § 23, that no privileges shall be granted to any citizen which shall not, on the same terms, belong to all citizens.

2. There being no rules provided for the admission of women to the bar, the court has power to prescribe them.

Appeal from circuit court, Greene county; J. C. Briggs, Judge.

Application of Antoinette D. Leach for admission to the bar. Application denied. Petitioner appeals. Reversed.

John S. Bays, for appellant.

HACKNEY, J. The petitioner made an application in the lower court for admission as a member of the bar of said court, to practice as an attorney at law therein. The special finding of the court discloses that the petitioner, a citizen of this state, is a woman over the age of 21 years, and of good moral character; that she possesses sufficient knowledge of the law to qualify her to practice in the courts of this state; and that she sought the required oath as a member of said bar. Upon the facts stated the court found, as a conclusion of law, that the petitioner, not being a voter, should be denied such admission. The appeal herelu presents the question of the correctness of this conclusion.

It is said that the lower court based its conclusion upon section 21, art. 7, of the state constitution, which is as follows: "Every person of good moral character, being a voter, shall be entitled to admission to practice law in all courts of justice." In addition to this provision of the constitution, the legislature has enacted that "every person of good moral charac-

ter, being a voter, on application, shall be admitted to practice law in all the courts of justice," (Rev. St. 1881, § 962,) and providing a procedure in establishing the right of such persons to be admitted to practice. It will be observed that neither the constitution nor the statute is a limitation upon the right to membership. In each instance, as far as we have quoted, the right of the voter, of good moral character, is secured. We do not doubt the right, by constitution or by legislative enactment, to prescribe the qualifications necessary to membership in the legal profession, and to define the method of securing such membership; but what we now maintain is that, from neither the constitution nor the legislative enactment, do we find that women are excluded from such membership. While voters, of good moral character, are granted admission, upon application and proper evidence, there is no denial of such right to women. If the right is not denied by the constitution and laws of the state, we should next inquire if it is denied by that part of the common law made by the constitution a part of the law of this state. We have searched in vain for any expression from the common law, excluding women from the profession of the law. Custom and the usages of Westminster Hall granted permission to men. Some of the early statutes of England granted the privilege to men who, upon examination by the justices, were found to be "good and virtuous, and of good fame," and when they should be "sworn well and truly to serve in their offices, and especially that they make no suit in a foreign country." But the letter of such statutes did not exclude women. The custom and usages of Westminster Hall were incident to the prevailing order of society,—that to the domestic sphere, only, did the functions of womanhood belong; that woman had, and could have, no legal existence, apart from her husband; that she could not engage in business on her separate account, could make no contract without the consent of her husband; that her separate earnings belonged to her husband; that woman, from the delicacy of her nature, was unfitted for the activities of the sphere occupied by men. Such of these fictions as became a part of the law of this country are rapidly disappearing, and few if any of them exist in Indiana. It need not be considered whether we have adopted the customs and usages of Westminster Hall as a part of our common law. If they were the incidents of these fictions, they have vanished with the fictions. The other learned professions of this state are open alike to the sexes. There is no reason for an exception of the legal profession. If nature has endowed woman with wisdom, if our colleges have given her education, if her energy and diligence have led her to a knowledge of the law, and if her ambition directs her to adopt the profession, shall it be said that forgotten fictions must bar the door against her? Whatever the objections of the common law of England, there is a law higher in this country, and better suited to the rights and liberties of American citizens,

—that law which accords to every citizen the natural right to gain a livelihood by intelligence, honesty, and industry in the arts, the sciences, the professions, or other vocations. This right may not, of course, be pursued in violation of law, but must be held to exist as long as not forbidden by law. We are not unmindful that other states—notably, Illinois, Wisconsin, Oregon, Maryland, and Massachusetts—have held that, in the absence of an express grant of the privilege, it may not be conferred upon women. In some instances the holding has been upon constitutional provisions unlike that of this state, and in others upon what we are constrained to believe an erroneous recognition of a supposed common-law inhibition. However, each of the states named made haste to create by legislation the right which it was supposed was forbidden by the common law, and thereby recognized the progress of American women beyond the narrow limits prescribed in Westminster Hall. As was said by the supreme court of the United States in *Cummings v. Missouri*, 4 Wall. 321: "The theory upon which our political institutions rest is that all men have certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to every one, and that in the protection of these rights all are equal before the law." Before the law this right to a choice of avocations cannot be said to be denied, or intended to be abridged, on account of sex. Certainly the framers of our constitution intended no such result, and surely the legislature entertained no such purpose. Instead of such results having been intended in this state, we find the constitution declaring that such rights are inalienable. Article 1, § 1. Bearing in mind these inalienable rights, it is not possible for us to believe that the constitution was adopted, and the legislation enacted, in reliance upon any supposed rule of the common law which would exclude women from the enjoyment of any of such rights. We cannot believe that the law of this state was intended, by fixing the qualification for legitimate avocations of one class of citizens, to entirely exclude another class. The constitution of the United States provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of a citizen." Our constitution and laws were enacted, presumably, in obedience to this command of the federal constitution. If not in disregard of this command, we cannot presume that it was intended to prescribe a qualification for the admission of men, and to enforce the supposed rules of the common law for the exclusion of women, thereby abridging their privileges as citizens. Instead of any such disregard for the rights of citizens, we find that the state constitution (article 1, § 23) provides that "the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens." Citizenship belongs to women, and it will not be

denied that they are within the letter and the spirit of this provision. We do not cite these provisions of the federal and state constitutions for the purpose of establishing conflict, nor for the purpose of giving them new interpretation, but for the purpose of exhibiting the fallacy of that contention which holds the absence of legislation securing the right of women to practice in courts of justice as disclosing the reliance of the legislature upon common-law rules excluding her from so practicing. The fact that the framers of the constitution, or the legislators, in enacting our statute, did not anticipate a condition of society when women might desire to enter the profession of law for a livelihood cannot prevail as against their right to do so independently of either. As said by the supreme court of Connecticut, in considering this question: "If we hold that the construction of the statute is to be determined by the admitted fact that its application to women was not in the minds of the legislators when it was passed, where shall we draw the line? All progress in social matters is gradual. We pass almost imperceptibly from a state of public opinion that utterly condemns some course of action to one that strongly approves it. At what point in the history of this change shall we regard a statute, the construction of which is to be affected by it, as passed in contemplation of it?" In re Hall, 50 Conn. 131. Our position is not that the constitutional and legislative grants of power to practice were adopted with a view to including women, but that such provision simply affirmed the right of the voter, without even an implied denial of it to women. Whatever disabilities existed as to married women, under the common law, they did not affect the rights of unmarried women; and now that married women are under no legal disability, in this state, as to the choice of honorable pursuits, both are to be considered as occupying the same position before the law. The fact that neither has chosen the legal profession before, in this state, is no reason for holding that neither may do so; and, as further said in the case last quoted from: "We are not to forget that all statutes are to be construed, so far as possible, in favor of equality of rights. All restrictions upon human liberty, all claims for special privileges, are to be regarded as having the presumption of law against them, and as standing upon their defense, and can be sustained, if at all, by valid legislation, only by the clear expression or clear implication of the law." In re Thomas, 27 Pac. Rep. 707, the supreme court of Colorado held that, in the absence of any statutory or constitutional inhibition, women are entitled to practice in the courts of justice.

Since the constitution and the acts of the legislature admit voters upon conditions prescribed, and since we hold that women may receive admission to the bar, it may be important to inquire, by what rule of qualification shall women be admitted? Under our constitution, judicial power is vested in the courts; and as attorneys are officers of the court, are sub-

ject to the rules of practice in the court, and owe to the court admitting them a proper degree of rectitude, the power exists, as one of the inherent privileges of the court, and as necessarily incident to its control over the membership of its bar, to prescribe all reasonable rules for the admission of persons desiring to practice; such rules, of course, not conflicting with the constitution and laws of the state. So far, therefore, as to the admission of women, it is the privilege of the court to prescribe such rules as to character and learning as may be deemed proper. We conclude that the circuit court erred in refusing the appellant admission to the bar of said court, and the judgment thereof is reversed, with instructions to restate its conclusions of law, and for further proceedings in accordance with this opinion.

(7 Ind. App. 407)

**MIDLAND RY. CO. v. GASCHO et al.**

(Appellate Court of Indiana. June 23, 1893.)

**RAILROAD COMPANIES—FAILURE TO FENCE TRACKS—ERECTION OF FENCE BY LANDOWNER—ACTION TO RECOVER EXPENSE—SUFFICIENCY OF COMPLAINT.**

1. In an action by landowners against a railroad company to recover the expense of fencing its right of way, which defendant had failed to fence as provided by Act April 13, 1885, a complaint which alleges that plaintiffs gave written notice to defendant of their intention to enter on said lands to fence the same is sufficient on demurrer, under section 2 of such act, (Elliott's Supp. § 1073,) which provides that such notice shall be served on "the nearest freight receiving and shipping agent employed by the company or person controlling and operating said railroad."

2. Where the only question presented arises from the action of the court in overruling a demurrer to the complaint, and such notice is not a part of the complaint, and is not an exhibit thereto, the question whether the service of the notice by reading merely, as shown by the return thereon, is a serving of a written notice, is not presented.

3. Act April 13, 1885, § 1, (Elliott's Supp. § 1077,) requires railroad companies to fence their tracks within certain specified times, "provided" that they need not fence such tracks through unimproved lands, etc. *Held* that, in an action by landowners against a railroad company to recover the expense of fencing its tracks where it had failed to fence, the complaint need not negative the proviso which relieves defendant from fencing, as it is a matter of defense for the company.

4. An allegation that the road was not fenced when such act requiring railroad companies to fence their tracks was passed, and that after the act was passed defendant failed to fence its track, sufficiently shows that the road was not fenced at the time notice was served on the company.

5. Where such complaint avers that defendant had owned and operated its line of railroad through the county in which the land is situated for several years past, it sufficiently shows the completion of the road more than 12 months prior to the service of the notice as required by such act.

6. Under Rev. St. 1881, § 376, providing that in the construction of a pleading for the purpose of determining its effect its allegations shall be liberally construed, with a view to substantial justice between the parties, the complaint in such action cannot receive a strict and technical construction.

Appeal from circuit court, Hamilton county; D. Moss, Special Judge.

Action by Henry Gascho and others against the Midland Railway Company to recover the expense of fencing defendant's right of way at a place where defendant failed to fence. From a judgment for plaintiffs, defendant appeals. Affirmed.

W. R. Crawford, for appellant. Shirts & Kilbourne, for appellees.

GAVIN, C. J. This was an action brought by appellees to recover the expense of building a fence along appellant's road, which ran through their land. The only question presented is that the court erred in overruling the demurrer to the complaint. The complaint was filed July 15, 1891, and alleges that the appellant, a duly-organized corporation, had for several years last past owned and operated its line of railroad through the county of Hamilton, in said state, and owned and operated it at the time of the commencement of the action; that the appellees were, and for many years had been, the owners in fee simple of certain tillable lands in said Hamilton county, describing them; that said railroad track was laid out across and over and upon said land; that said company's road had been built thereon and was then being operated by said company; that the right of way over and upon said land had not been fenced when the act approved April 13, 1885, was passed, and that after the passage of said act said railroad company failed and refused to fence said right of way; that on the 23d of September, 1890, the appellees gave notice to said railroad company, in writing, of their intention to enter upon said lands for the purpose of fencing the same, which notice was duly served by the sheriff of said county. It is further alleged that appellees afterwards built a proper fence, and duly served a sworn and itemized statement of the expense thereof upon appellant's agent, and demanded payment thereof more than 60 days prior to the commencement of the suit, and payment had been refused, etc. The complaint is based upon the act of April 13, 1885, of which section 1, being section 1077, Elliott's Supp., provides "that any railroad corporation, lessee, or assignee, or receiver, or other person or corporation, running, controlling or operating, or that may hereafter construct, build, run, control or operate any railroad into or through this state, shall, within twelve months from the day of taking effect of this act, as to those already completed, and within twelve months from the date of the construction and completion of any part of a line of road hereafter constructed, erect, build, construct and thereafter maintain fences, which may be constructed of barbed wire, on both sides of such railroad throughout the entire length, completed within the state of Indiana, sufficient, \* \* \* provided, however, that such railroad corporation or other person operating the same shall not be required to fence such railroad track through unimproved and uninclosed lands, and the provisions of this act shall not apply to

such parts and portions of any such railroad which runs through unimproved and uninclosed lands, but when such lands become improved and inclosed on three sides, the same shall apply, and such railroad corporation or person operating the same shall be required to fence the same under the provisions of this act within six months from the date of such inclosure." The following section, 1073, provides that if the company fails to fence as required above, the landowner shall have the right (after giving 30 days' notice, in writing, of his intention so to do, to be served upon the nearest freight receiving and shipping agent employed by the company or person controlling and operating said railroad) to enter on the right of way, and build the fence. After proper demand and refusal by the company to pay, the landowner may sue the company as has been done here. The several objections to the complaint urged by appellant will be considered in their order of presentment.

This statute is not to be regarded as penal, but as remedial, in its nature; and is therefore entitled to a liberal construction in favor of the accomplishment of the object sought,—the fencing of the right of way, and the protection thereby of both the farmers and the travelling public. Such a construction, however, by no means dispenses with, but requires, a substantial compliance with the statute.

It is objected that the complaint does not show notice given to the nearest agent of the company. The allegation is that they gave written notice to the railroad company, which was duly served by the sheriff of the county. This allegation we deem sufficient on demurrer. If appellant desired that it be made more definite and particular, its remedy was by a motion to make morespecific. The action is not founded upon the notice any more than an action for possession of realty by a landlord is founded upon the notice to vacate. The notice was therefore neither a necessary nor a proper exhibit to the complaint. Although the notice is copied in the record, it does not even purport to be a part of the complaint. The question urged by counsel, that the return to the notice shows a service by reading merely, which, as he urges, would not be serving a written notice, is not presented. We are required to consider the complaint only, and this alleges that appellees did give a written notice.

It was unnecessary for appellees in their complaint to negative the proviso which relieves the company where the land is uninclosed. By the first part of the statute the right to require a fence is given generally and absolutely. By the subsequent clause a proviso is added for the benefit of the company. It is for the company, as matter of defense, to bring itself within this proviso. In section 202, Bliss, Code Pl., this rule is laid down: "So, in an action upon a penal statute, if the proviso be in a separate section, or a substantive clause, it is matter of defense, and should be left to the other party. \* \* \* But when there is a clause for the benefit of the pleader, and afterwards follows a proviso which is against him, he

shall plead the clause, and leave it to his adversary to show the proviso." This principle is sustained by *Hewitt v. State*, 121 Ind. 245, 23 N. E. Rep. 83; *State v. Maddox*, 74 Ind. 105. The case of *Railway Co. v. Lannert*, 1 Ind. App. 102, 27 N. E. Rep. 324, does not touch upon this proposition. The allegation that the road was not fenced when the act of 1885 was passed, and that, after its passage, appellant failed to fence it, is sufficient to show that the road was not fenced at the time of giving the notice.

The averment that appellant had owned and operated its line of railroad through the county of Hamilton for several years past shows sufficiently the completion of the road for more than 12 months prior to serving the notice.

Counsel for appellant insists strenuously on a strict and technical construction of this complaint. Our statutes, however, (section 376, Rev. St. 1881,) contain this provision: "In the construction of a pleading, for the purpose of determining its effect, its allegations shall be liberally construed with a view to substantial justice between the parties." Keeping this object in view, we have examined all the objections to the complaint presented by counsel, and do not find it subject to any of them. Judgment affirmed.

DAVIS, J., did not participate in this decision.

(7 Ind. App. 43)

#### STORMS v. LEMON.

(Appellate Court of Indiana. June 22, 1893.)

ACTION FOR SERVICES—SUFFICIENCY OF EVIDENCE—EXCESSIVE DAMAGES—COMPETENCY OF WITNESS.

1. In an action for services, there was evidence that plaintiff and her husband took defendant's father to board; that he became afflicted with a gangrenous foot; and that, on defendant's promise to pay her what it was reasonably worth, plaintiff nursed and waited on the patient for about three weeks, and provided for him until his death. *Held*, that a verdict for \$125 is not excessive, though plaintiff was not a trained nurse, and was without any other experience than that which comes to the average woman, 36 years of age.

2. It was not error to permit plaintiff, after describing the services rendered, to testify as to their value.

3. Nor was it error to permit plaintiff's husband, after detailing the character of the services, and the extent to which they were required, to testify to their value, against the objection that "the witness has not shown any special knowledge on the subject."

4. In such case it is not necessary that a witness should be an expert, to enable him to testify to the value of such services, the weight of his testimony being for the jury.

5. Where a party is not prevented from making an objection to a question at the proper time, and the question indicates the subject-matter, an objection made after a responsive answer is given, by a motion to strike out the answer, is unavailing.

6. Where evidence is ruled out the ruling will not be held erroneous merely because the objection on which it was excluded was too general to have raised any question on behalf of the objector, had his objection been overruled.

7. In such action it was not error to admit evidence as to the condition of plaintiff's house

after the patient's death, by reason of his sickness, and the work required to restore it to a habitable condition.

Appeal from circuit court, Montgomery county; J. F. Harney, Judge.

Action by Sarah C. Lemon against Emma Storms for services in nursing and attending defendant's father during his last sickness. From a judgment entered on the verdict of a jury in favor of plaintiff, for \$125, defendant appeals. Affirmed.

D. C. Wilson and R. P. Davidson, for appellant. F. M. Goldsberry and Crane & Anderson, for appellee.

GAVIN, C. J. Appellee sued appellant for work and labor performed, at her request, in nursing and attending upon the appellant's father during his last sickness. A motion for a new trial raises the only question in this court. The causes for the motion are—First, that the amount of the recovery is excessive; second, that the verdict is not sustained by the evidence.

Appellee's evidence tends to prove that appellee and her husband were living as tenants on appellant's farm, and took her father to board. He became afflicted with a gangrenous complaint, which first attacked his toe, and worked upward upon his foot and limb, causing it to decay and slough off; emitting most foul, and almost unbearable, odors, and oftentimes requiring exceedingly frequent rebandaging. Appellee, upon appellant's promise to pay her what it was reasonably worth, cared for and waited on the patient for about three weeks, assisting him in the operations of nature, dressing his foot, and in all ways providing for him. The work required was most disagreeable, and attended with some hazard. The pain suffered by the patient was so severe as to cause him to tear off the bandages, and also the flesh from the foot. One of the neighbors testified that the stench permeated the whole house, and, upon the night he died, neighbors sitting on the outside of the house were compelled to move around, as the wind changed, to avoid the odors coming from the house. Without going further into details, we are of opinion that there was evidence to support the finding, and also to justify the jury in allowing the sum given, although appellee was not a trained nurse, and was without any other experience than comes into the life of the average woman who has arrived at the age of 36.

Several objections are presented, arising upon the introduction of the evidence, which we will consider.

There was no error in permitting appellee to testify as to the value of her services, after she had described them to the jury. It is said in *Mercer v. Vose*, 67 N. Y. 56: "I can conceive of no case where one who has himself rendered a service to another will not himself be competent to give evidence as to its value. Knowing the precise nature of the service rendered, he must have some knowledge of its value, and he is thus competent to give his opinion. It may not be worth much. Its weight, however, is for the jury."

Appellee's husband was permitted to

testify as to the value of her services. The objection made thereto in the court below, which is the only one to be considered here, was that "the witness has not shown any special knowledge on the subject." He had recounted in detail the character of the services rendered, and the extent to which they were required. It was, perhaps, intended to raise by the objection the question as to whether witness had shown such a knowledge of values of such services as to render him competent to testify thereto. The services rendered by appellee did not pretend to be those of a professional trained nurse, of unusual skill and capacity. She was merely an ordinary farmer's wife, with such skill and capacity and experience in sickness as ordinarily belong to an average woman. There was no claim for special skill and training, but simply for reasonable compensation, taking into consideration the character and amount of the service performed. It was not necessary that one should be an expert, and have special experience, to enable him to be competent as a witness. Every man who has arrived at years of maturity must, in the course of nature, have had more or less experience in caring for the sick, or seeing it done; and when one has seen such services, as they are being rendered, he is competent to give the facts, and then his opinion as to the value of such services, the weight to be given to the opinion being determined by the jury. In many instances, before a witness can give an opinion, he must be shown to have some special aptitude, skill, or knowledge of the subject; but there are some things coming ordinarily within the observation of all men, as to which any man will be entitled to give his opinion. Thus, opinions as to time, speed of ordinary moving objects, and distances, are received without any proof of special knowledge or skill on the part of witnesses. In 1 Greenl. Ev. § 440, note, it is said: "So as to the marketable condition and value of property, and many other questions where it is not practicable to give more definite knowledge, opinions are received. In some cases these opinions must come from experts, who have acquired special skill in detecting the connection between certain external symptoms and their latent causes; and in other cases all persons are supposed to have such knowledge and experience as to entitle their opinions to be weighed by the jury." "It has been held that no question of science is involved, and that a person need not be an expert to give an opinion as to a moving train." *Railroad Co. v. Jones*, 108 Ind. 551, 9 N. E. Rep. 476; *Railroad Co. v. Van Steinburg*, 17 Mich. 99. "The rule is well settled that upon questions of value the opinions of ordinary witnesses may be received." *Grave v. Pemberton*, 3 Ind. App. 73, 29 N. E. Rep. 177. The court says in *Holton v. Board*, etc., 55 Ind. 194: "But the rule is that any witness who knows the facts personally may give an opinion, stating also the facts upon which he bases the opinion." Many facts were given by the witness, and no objection was made in the court below upon the ground that the opinion



sought was not limited to the facts recited. *Turnpike Co. v. Andrews*, 102 Ind. 138, 1 N. E. Rep. 364. In *Chamness v. Chamness*, 58 Ind. 301, it is said: "The appellant complains because the court, over his objection, allowed certain witnesses, who were not experts, to testify as to the value of board. There is no error in this. It does not require a knowledge of any particular science, art, or skill to testify as to the value of board." In *Board v. Chambers*, 75 Ind. 409, the court says concerning the evidence of certain physicians: "They may have had some knowledge of the value of such services, without knowing anything at all about what others were charging for like services." This principle, that some matters are of such ordinary and common occurrence that all men will be presumed to have some knowledge thereof, is supported by authorities outside of our own state. In *State v. Johnson*, 1 Mo. App. 219, we find this statement: "No rule requires any special qualification of an expert to estimate the value of household goods in common use." In *Tubbs v. Garrison*, 68 Iowa, 44, 25 N. W. Rep. 921, the plaintiff and his wife testified to the value of certain household goods. To the objection to their evidence the court responds: "It is insisted, to be sure, that they were not competent witnesses because it did not appear that they were acquainted with the value of such property. But the property was ordinary household goods. It was such as all householders were accustomed to buy; and, while they may not be the best judges of the value, we think they may be presumed to have such knowledge upon the subject as to render them competent to testify upon it." Concerning the value of a gun, the supreme court of Mississippi says in *Cooper v. State*, 53 Miss. 39: "In the nature of things, the value of this sort of property, in such common use, can be estimated by almost every person in the community. It is not like paintings or precious stones, of which experts alone can form an intelligent judgment, but is rather like that class of merchandise and commodities, of the value of which most persons have knowledge." In *Ritter v. Daniels*, 47 Mich. 617, 11 N. W. Rep. 409, it was held competent to prove the value of a man's services by three witnesses, for two of whom he had worked, and one of whom had worked with him. Similar objections are urged as to other evidence introduced; but under the law, as we have found it to exist, we are of opinion that there was shown sufficient knowledge of the matter under consideration to justify the court in admitting the evidence.

Exception is taken to certain evidence concerning the relations existing between appellee and her husband and Dr. Fickle, a witness for appellant. An examination of the record discloses that in each instance the objection was made after the question was answered. Such objections are unavailing. A party cannot wait until the answer comes, and then, after taking his chances for a favorable answer, object, and move to strike out, if it be unfavorable. This rule holds good where

the party has not been prevented from making his objection at the proper time, and where the question indicates the subject-matter, and the answer is responsive to it. Under other circumstances a different rule might govern, where a proper motion to strike out is made. *Brown v. Owen*, 94 Ind. 31; *Bingham v. Walk*, 128 Ind. 173, 27 N. E. Rep. 483; *Newlon v. Tyner*, 128 Ind. 466, 27 N. E. Rep. 168, and 28 N. E. Rep. 59. We may add that we are of opinion that the answer could not, in this case, have worked any material injury to appellant, in any event. The objection to the evidence concerning a straw tick is in the same condition as those last mentioned. Where evidence is ruled out the ruling cannot be held erroneous merely because the objection upon which it was excluded was too general to have raised any question on behalf of the objector, had his objection been overruled. No reason is given by counsel to sustain the competency of the evidence rejected. We must therefore presume that it was incompetent, and in that event there was certainly no error in rejecting it.

We do not find any error in admitting evidence as to the condition in which appellee's house was left by reason of the sickness of the patient, and the work required to restore it to a habitable condition after his death. These were, at least, circumstances admissible to throw light upon the character of the services required by the sick man in his lifetime.

We have examined all the questions presented and discussed by counsel, and have found no cause justifying a reversal. Judgment affirmed.

(7 Ind. App. 350)

#### OHIO & M. RY. CO. v. HILL.

(Appellate Court of Indiana. June 22, 1893.)

RAILROAD COMPANIES—INJURIES TO PERSON ON TRACK—PLEADINGS—NEGATIVE CONTRIBUTORY NEGLIGENCE—EVIDENCE—RES JUDICATA—DAMAGES—CONDUCT OF JURY.

1. In an action for the injury of a person by defendant's negligence, the general averment that the injury was caused without fault of the person injured is sufficient, unless it clearly appears in the complaint that there was contributory negligence.

2. Plaintiff's decedent was injured by a switch engine while crossing parallel tracks used for switching, and in an action therefor it appeared that as decedent approached the crossing a passenger train stood on the north track, with the rear end resting on the avenue east of the crossing, and that the switch engine stood on the south track west of the crossing, near the line of the avenue; that decedent looked towards the engine, and saw that it stood in the same position it was when he passed nearly an hour before, and stepped on the track, directing his attention to the passenger train, to see whether it was about to move; that the engine suddenly started without signal, and without a light thereon, (it being in the evening and nearly dark,) and struck decedent before he could cross or retreat. Held, that a judgment for plaintiff was sustained by the evidence.

3. In an action for the death of plaintiff's decedent, alleged to have resulted from defendant's negligence, a decision on appeal that the evidence set out in the record does not warrant

a recovery is not *res judicata* as to plaintiff's rights, where the evidence on a second trial shows a different state of facts.

4. Where the evidence shows that decedent was 54 years of age, of good habits, and was an industrious carpenter, who supported his family well, a judgment of \$3,500 is not excessive, though there was no evidence as to how much he was able to earn.

5. The fact that the jury took to their room, with other papers, the verdict and judgment on a former trial, does not constitute reversible error, where it is shown that the same were not seen by the jurors.

Appeal from circuit court, Clark county; C. P. Ferguson, Judge.

Action by Matilda Hill, administratrix of the estate of David Hill, deceased, against the Ohio & Mississippi Railway Company, to recover for the death of decedent. Plaintiff had judgment, and defendant appeals. Affirmed.

For report on former appeal, see 18 N. E. Rep. 461.

J. K. Marsh, Ramsey, Maxwell & Ramsey, and Edward Barton, for appellant. F. B. Burke, for appellee.

DAVIS, J. On the first trial, appellee recovered verdict and judgment for \$3,030. There was an appeal to supreme court. *Railway Co. v. Hill*, 117 Ind. 56, 18 N. E. Rep. 461. On return of the case to the lower court the pleadings were amended and issues reformed, and a second trial resulted in a verdict and judgment in favor of appellee for \$3,500.

The errors assigned are: "(1) The court erred in overruling the demurrer to the first paragraph of the complaint; (2) the court erred in overruling the demurrer to the second paragraph of the complaint; (3) the court erred in overruling the demurrer to the third paragraph of the complaint; (4) the court erred in overruling the motion to require the third paragraph of the complaint to be made more specific; (5) the court erred in overruling the motion for a new trial."

The 1st, 2d, 3d, and 4th errors assigned may be considered together. The contention of counsel for appellant is that no facts showing the negligence complained of are pleaded, and that it is not alleged in what manner causing the locomotive to pass rapidly over the side track and switch, and failing to give the signals, caused the injury to the deceased. As to those objections it is sufficient to say that an examination of the complaint discloses that negligence on the part of appellant is charged in general terms as the proximate cause of the injury, and the facts in relation thereto are so fully pleaded as to constitute a good cause of action.

It is further urged, in substance, that the facts which are relied on to show that the decedent exercised proper care should be specially pleaded, and that the general averment that he was not in fault is not sufficient. It has often been decided that the general averment, in such cases, that the injury was caused without any fault whatever on the part of the deceased, is sufficient, unless it clearly appears from the facts pleaded in the complaint that the person injured was

guilty of contributory negligence. Each paragraph of the complaint is sufficient to withstand the demurrer. There was no error in overruling the motion to make the third paragraph more specific.

It is next insisted that the verdict of the jury is not sustained by sufficient evidence. The evidence tends to prove that the Ohio & Mississippi Railway, running north and south, and the Jeffersonville, Madison & Indianapolis Railway, running east and west, cross at right angles in the city of Jeffersonville. The two railways, at the time of the injuries which constitute the basis of this action, were connected by a double-tracked Y about 1,100 feet in length, extending from the west side of the O. & M. to the south side of the J., M. & I. The tracks of the Y crossed Illinois avenue, a public street, which runs north and south, diagonally, upon a grade above the surface of the balance of the street. The tracks of the Y were so separated that persons might ordinarily walk between them, but this could not be done at the point where the accident occurred when trains were on both tracks. It had been customary for years for the J., M. & I. to bring freight cars over from Louisville on its main track, and throw them in upon the Y, to be taken up by the O. & M., and removed to its main track, and placed in its trains. This was done by means of a switch engine passing back and forth over the Y, but its duties did not require it to go as far west as Illinois avenue, unless it was for the purpose of protecting the crossing. When the cars were thus being brought over by the J., M. & I., and thrown in upon the Y tracks, its passenger trains could not go out over the main track. Illinois avenue was crossed by the Y tracks within about 25 feet of Hill's house, and between his house and Ninth street, which was within 90 feet of Hill's house. That the Ninth street depot is about 500 feet east from the intersection of Ninth street with Illinois avenue. That on the evening in question a switch engine was standing on the south track of the Y, heading west from the avenue, and with its east end about 5 feet west of the west line of the avenue, and that it had been standing there about 50 minutes before Hill was injured; and that a passenger train was standing on the north track of the Y, empty, waiting an opportunity to back over on the bridge to Louisville. That the rear end of said train was resting on Illinois avenue, and extending from the east side of said avenue to within about 10 feet of the west side of the same. This train was about 250 feet long, and was headed around towards Broadway, with the curve of the switch in a southeast direction, and had been standing in that position about one hour. About 800 feet of the Y extended south east of Illinois avenue. Such were the positions of the passenger train and switch engine when Hill reached his house in the evening, and when he left it immediately before his collision with the switch engine on the 1st of September, 1885. After having had his supper, he left his house, about 7 o'clock in the evening, for

the purpose of going to the Ninth street depot, and passed through his front gate, turning north up the avenue towards the Y tracks. It was then about dark, but the switch engine and the passenger train could readily be seen from his house. Hill for a long time had known of the custom and methods of the company at that point, and was thoroughly familiar with the situation. When Hill approached the Y on his journey, and as he reached the top of the fill at the track, the evidence tends to prove that he looked towards the switch engine, and saw it standing in the same position in which it was when he went home to supper. He then stepped on the track, directing his attention towards the passenger train, and proceeded, with the apparent intention of crossing the Y on the avenue, in the space in the rear of the passenger train, which was not obstructed. Just about this time the J., M. & I. threw a freight car in upon the Y track nearest to his house, and, in order to avoid a collision, there being a down grade towards the avenue, the switch engine was suddenly and rapidly started and moved, without signal or warning, there being no light thereon, across Illinois avenue. On account of the down grade, the momentum of the cars was sufficient to carry them to a point about 100 feet east of Illinois avenue, where it was the custom to hitch on to them with the engine. About the time the engine was started on this occasion Hill seems to have observed it was moving, and on account of the fact that the passenger train was at this point in the street in front of him he appears to have concluded he could not with safety proceed forward, and therefore he was seen to turn and make an effort to get off the track, but did not fully succeed. One foot seems to have been on the track when the engine struck him, inflicting the injuries from which he died in a few hours thereafter.

The parties were equally conversant with the situation and surroundings. The company had the right to cross the avenue with the engine. Hill had the right to cross the tracks on his journey up the street. It was the duty of the company to give signal or warning before crossing the avenue with the engine. It was the duty of Hill to use his faculties of seeing and hearing, and to exercise care in proportion to the danger likely to be encountered in crossing the tracks on that occasion. The company was clearly guilty of actionable negligence in suddenly starting and rapidly moving the engine across the avenue, without light, and without signal or warning. The vital question on this branch of the case is, was Hill guilty of contributory negligence? As he approached the track the engine was standing in the same position it had occupied for nearly an hour. It is true the engine was liable to start in the direction of the avenue at any time, and it was therefore incumbent on Hill, before he entered upon the track, to ascertain whether it was moving. This he appears to have done. As the engine was standing still when he reached the track, he certainly had the

right to attempt to cross. It is also true that the persons in charge of the engine had the right to presume that any one going north along said street across the tracks would exercise due and proper care, and Hill likewise had the right to assume that the engine would not be started backwards over the crossing without giving the proper signal. As he was crossing the track,—whether on a straight line or obliquely is not clear, and is not material,—he appears to have looked to ascertain whether the passenger train, in the rear of which he was about to pass, was moving, or likely to move in that direction before he could get across. This was the situation of Hill and the position of the train and engine, when the engine, without warning, was suddenly started towards him. Hill was undoubtedly in a perilous place, and what he observed, thought, and did can only be determined from his action as observed by others. He evidently noticed that the engine had started in his direction, and whether there was any hesitation on account of fright occasioned by sudden and unexpected danger, or whether he was for an instant in doubt as to whether he should retreat or go forward is unknown; but it appears that he did immediately make an effort to retrace his steps, and get off the track. He was in no danger so long as the engine and train remained standing. He was not required to forego travel on and along the street because the engine and train were resting thereon, or in close proximity thereto. Having with due caution rightfully entered upon the track, of what act of negligence, either of omission or commission, was he guilty, under the circumstances, which contributed to his injuries? When did his position become dangerous? Certainly not so long as the engine was standing still. It is true, if he had not entered upon the track he would not have been hurt; but, inasmuch as he had the right to cross, this act, if done in the exercise of due care, cannot be said to constitute contributory negligence. The greater part of the street was obstructed by the passenger train, and he had necessarily to cross in such manner as to pass around the rear end of that train. The fact that, in the light of what we now know and understand of the situation and circumstances, it may appear that he ought, in the exercise of diligence, to have been able, in the distance it was necessary for him to go after the engine started, and the distance the engine had to move before it reached him, to have reached a place of safety before he was struck, is not a correct test. The question is whether he exercised, in the emergency with which he was then confronted, such diligence as a man of ordinary prudence should have used, without time for calculation or reflection, under the same circumstances. We are not prepared to say as a matter of law on the facts and circumstances disclosed by the evidence that he was guilty of contributory negligence in attempting to cross the tracks, or that he failed to exercise due care and diligence in his efforts to get out of the way of the engine. There is some evidence, at least, from which the

jury had the right to infer, if they gave it full credence, that Hill, under all the circumstances, exercised such diligence as a man of ordinary care and prudence should have exercised on the instant in such a dangerous emergency; and after careful attention to the able and interesting oral argument of learned counsel, and on diligent reading and examination of the record and briefs, our conclusion is that we should not, under the long-established and well-recognized rule which prevails in this state, reverse the judgment of the court below on the evidence.

It is next strenuously urged that the former judgment in the supreme court on appeal is a bar to the consideration of this appeal on its merits, because the evidence is substantially the same as on the first appeal. It may be conceded that this court will take judicial notice of the record in the supreme court on the former appeal; that the bill of exceptions containing the evidence given on the first trial is a part of the record of which this court will take judicial notice; that the principles of law established on the former appeal, so far as applicable, remain the law of this case through all its subsequent stages, and must be adhered to, whether right or wrong, not only in the trial court, but in this court, on a second or any subsequent appeal. The question, then, arises as to what is the result of the application of these principles to the case in hand. On the former trial the evidence was taken in longhand, and incorporated into a bill of exceptions. The facts which the evidence fairly tended to establish are, we assume, correctly set out in the opinion of the court hereinbefore cited. On such facts the supreme court adjudged that appellee could not recover. That conclusion is binding on this court on this appeal, and on the same state of facts the result would necessarily be the same. On the second trial the evidence was taken by a shorthand reporter, and his transcript thereof, written out in longhand on typewriter, is incorporated in and forms a part of the bill of exceptions in the record in this case. This evidence, giving appellee the favorable construction thereof to which she is entitled under the rule enunciated by Judge Zollars in the former opinion, fairly tends to prove the facts hereinbefore stated. On such facts we adjudge that the law is with appellee. It is, however, earnestly insisted by counsel for appellant, as hereinbefore stated, that the evidence on the two trials was substantially the same, and therefore it is urged that this court is bound to draw the same inference of fact therefrom as was drawn by the supreme court on the former appeal. Without deciding what the result would be if the transcripts of the records clearly disclosed that the evidence on the two trials was the same, it will suffice to say on this branch of the case that a comparison of the evidence introduced on the two trials shows that on the second trial the evidence is more comprehensive and satisfactory than it was on the former trial. The evidence, for instance, of the witness Holloway on the former trial is in narrative form, and covers one page. On this trial

it covers seventeen pages. The record on the former trial does not disclose when the witness first saw Hill, or in what manner he approached or entered upon the track, or that he looked before he attempted to cross, or whether the engine was standing still or moving when he reached the track, and is in fact in all respects indefinite and uncertain as to what occurred on that occasion; while on this trial the witness fully describes the situation and surroundings and what he saw, stating, among other things, in substance, that the engine was standing still when Hill went upon the track, and that it did not start until Hill had reached or passed the middle of the track; and that Hill, when he reached the track, and before going onto it, stopped and looked at the engine when it was standing; and that the engine, when he was on the track, started towards him very fast, without warning; and that Hill turned around, and made an effort to get off the track, and was partly successful, but that one leg was caught before he could entirely succeed. That the evidence in the record on this appeal fairly tends to prove the facts as hereinbefore summarized is not controverted. The contention is that the statement of facts in the former opinion, whether right or wrong, must, so far as this appeal is concerned, be taken as true. Conceding that the facts as stated in that opinion are as favorable to appellee as she could ask on the evidence set out in that record, we are of the opinion that the evidence in the record on this appeal is so much clearer and stronger as to warrant the inferences we have drawn therefrom, and that appellant cannot successfully invoke the doctrine of *res judicata* as the basis for a favorable decision on this appeal.

Hill was 54 years of age, and left a widow and eight children surviving him; and he was a man of good habits, and a good and industrious carpenter, who was always at work, and supported his family. There was no evidence as to what he was able to earn, and it was insisted that the damages assessed are excessive. The damages assessed are perhaps full and ample, but are not, in our opinion, excessive.

The court instructed the jury, in substance, that it was the duty of Hill, when he approached the railroad crossing for the purpose of going upon it, to "look and listen." It is insisted this was erroneous, because the instruction did not go further, and say it was also his duty to "stop" at the proper time and place. This objection, in view of the evidence, the surroundings, and knowledge of appellee, is not well taken. When the location of the engine or train is not known, the traveler should stop, look, and listen, but when, as in this case, the engine was within about 25 feet of him, there was no necessity to stop. No error has been pointed out in the instructions given or refused.

It is also claimed that without authority of the court, and without the knowledge or consent of appellant, the verdict of the jury on the former trial was, with the papers in the case, taken by the jury to their room, and that this constitutes

reversible error. The jury make affidavit that the verdict, if taken to their room, was not seen, read, or commented upon by either of them, and that they did not see it, or know of its existence. On the showing made we fail to see in what manner the appellant has been prejudiced by what appears to have been an inadvertence, for which neither appellee nor any one else, so far as the record discloses, seems to have been responsible.

We find no error in the case that would warrant the reversal of the judgment of the trial court. Judgment affirmed.

(7 Ind. App. 338)

**PENNSYLVANIA CO. v. BURGETT.**

(Appellate Court of Indiana. June 24, 1893.)

**MASTER AND SERVANT—NEGLIGENCE—DEFECTIVE MACHINERY—KNOWLEDGE OF DEFECTS.**

In an action by an employe for personal injuries caused by a defective hand wagon in use about defendant's works, the jury was authorized to infer, from the evidence and instructions, that plaintiff had, prior to the injury, learned of the alleged defects. *Held*, that it was error to also charge, in the absence of notice to defendant of such defects, that plaintiff had a right to presume that the wagon was in a reasonably safe condition, and that, though he had known it was out of repair, he had a right to presume that defendant would use reasonable diligence in repairing it. *Lotz, J.*, dissenting.

On rehearing. Petition overruled.

For report of decision on appeal, see 33 N. E. Rep. 914.

**DAVIS, J.** The learned counsel for appellee have filed an able and earnest petition and brief for rehearing in this case, which we have carefully examined and considered. There is evidence in the record tending to prove that, prior to the accident, appellee, in the discharge of his duties, had been accustomed to assist other employes in the operation of the hand wagons, in hauling iron in and about appellant's works. Whether he had been in the habit of using the particular wagon in question does not clearly appear. The fair inference from the evidence, however, is that the several workmen in appellant's shops did not use the same wagon on different occasions. There were a number of the wagons, and we gather from the evidence that they respectively used whatever wagon was the most convenient when desired. The language used in the instruction implies that counsel for appellee understood there was evidence tending to prove that he had used, or seen others use, the wagon in question, as the result of which he had obtained knowledge of the alleged defects and unsafe condition referred to in the instruction. There was also evidence tending to prove that the defects of which complaint is made were open, visible, and easily seen in the operation of the wagon. Now, it is true, as contended by his counsel, that appellee was employed to assist, and not to inspect. It was no part of his duty to keep the wagons in repair, or to see that they were kept in repair. The rule is that, as to appliances the employe

works with, the law requires him to know such defects as he ought to see by the exercise of diligence in his employment, and it does not require him to know or ascertain the defects in connection with which he is not obliged to labor. In this case, however, under the evidence and the instructions, the jury was authorized to infer that appellee had, within three weeks prior to the accident, in the discharge of his duties, in assisting in the operation of the wagon, obtained knowledge of the alleged defects therein; and in view of such knowledge, under the facts and circumstances disclosed by the evidence, in the absence of notice of such defects to appellant, appellee had no right to indulge in the presumption that the wagon had been repaired, but when he became aware of its unsafe condition, as indicated in the instruction, (and justified, by inference, at least, from the evidence,) he was chargeable with notice of such defects, and in the subsequent use thereof, by himself, or by others in proximity to him, it was his duty to exercise care in proportion to the danger likely to be encountered. What we have said in the original opinion, and also herein, is only intended to apply to the facts in this case. There is not so much difference between the views of counsel and our own as to the general rules of law which govern in such cases, but we do not agree in their application to the facts in hand. *City of La Fayette v. Ashby*, (Ind. App.) 34 N. E. Rep. 238. We adhere to the conclusion that the instruction was erroneous and prejudicial, and therefore the petition for rehearing is overruled.

**LOTZ, J.** I think the petition should be granted.

(7 Ind. App. 239)

**KILEY et al. v. MURPHY.**

(Appellate Court of Indiana. June 24, 1893.)

**COURTS—JURISDICTION—INDIANA APPELLATE COURT.**

The appellate court has jurisdiction of an appeal from a judgment in an action to review a judgment, of which it would have had jurisdiction if an appeal had been taken therefrom.

On rehearing. Denied.

For former report, see 34 N. E. Rep. 112.

**ROSS, J.** The appellants filed a motion, which they denominate a "motion to vacate judgment and remand cause," in which it is urged that this "court has no jurisdiction of appeals from judgments of review," the supreme court alone having such jurisdiction. Motions such as this is denominated are unknown to the practice in this court, after the case has been decided; but we will recognize it as a petition for a rehearing, and so consider it. The judgment reviewed by the court below was rendered in an action brought by the appellee against the appellants to recover a balance of about \$1,100 due upon an account for broken stone sold and delivered by him to them. Upon a trial of the cause the jury returned a special verdict assess-

ing appellee's damages at \$608.80. Upon the special verdict, the court, instead of rendering judgment in favor of the appellee, gave the appellants judgment. The original action being simply an action to recover money, and the amount in controversy being less than \$3,500, if an appeal had been taken from that judgment this court, alone, would have had jurisdiction of such appeal. The appellee, however, instead of taking an appeal, sought a review of the judgment for errors apparent on the face of the record. Proceedings brought to review a judgment are merely an incident to, and part of, the original action, and not a separate and independent action. If this court had jurisdiction, had an appeal been taken from the original judgment,—which cannot well be questioned,—proceedings to review would not divest it of that jurisdiction. Petition overruled.

(8 Ind. App. 232)

KOONS v. CLUGGISH et al.<sup>1</sup>

(Appellate Court of Indiana. June 23, 1893.)

STATUTES—REPEAL BY IMPLICATION—MUNICIPAL IMPROVEMENTS.

Since Act 1889, (Elliott's Supp. §§ 812-822,) providing for the improvement of streets in cities and towns, and payment therefor, "and repealing all conflicting acts," covers the entire subject-matter of, and is in many respects inconsistent with, Act 1869, (Rev. St. 1881, §§ 3364-3366,) the older act is repealed by implication.

Appeal from circuit court, Henry county; E. H. Bundy, Judge.

Action by Robert Cluggish and others against Cynthia A. Koons to recover for a street improvement. Plaintiffs had judgment, and defendant appeals. Reversed.

Brown & Brown, for appellant. M. E. Forkner and W. E. Jeffreys, for appellees.

DAVIS, J. In and prior to April, 1891, the appellant was the owner of a parcel of land containing one acre, situate in the town of Mooreland, Henry county, Ind. The street on which said real estate fronts was improved during that year by appellees as contractors, under order of the board of trustees of said town. The assessment against appellant's real estate on account of said improvement amounted to \$61.56. The description indicates that the real estate was unplatted, and extended back more than 150 feet. We have not deemed it necessary to set out the substance of the averments in the complaint. Suffice it to say, the theory of the complaint is that by reason of the improvement of the street, under the provisions of the act of 1869, appellees acquired a lien on all of said real estate, and that they were entitled to a foreclosure of the lien against the real estate, and to personal judgment against appellant. It is not necessary to consider or discuss at this time the question whether appellees, under the act of 1869, were entitled to personal judgment. The record discloses that there was no foreclosure of the lien, and that personal judgment was rendered

against appellant for the amount of the assessment. This appears to have been done without objection or exception.

The first error discussed by counsel is that the court below erred in overruling appellant's demurrer to the complaint. The main and controlling question which is presented by this assignment for our consideration is whether the act in force April 27, 1869, in relation to the improvement of streets in towns, was repealed, by implication, by the act providing for the improvement of streets in cities and towns, approved March 8, 1889. It is conceded by counsel for appellees that the street improvement which forms the basis of this action was made under the act of 1869, (sections 3364-3366, Rev. St. 1881. If that act was repealed, by implication, by the act of 1889, the complaint is insufficient. Elliott's Supp. §§ 812-822, inclusive. The act of 1889 covers the whole subject-matter of the former law, as will be seen by a comparison of the two acts. The act of 1869 required a petition by "a majority of all the resident owners," etc. Section 3364, supra. The act of 1889 requires a petition by the resident "owners of two-thirds," etc. Section 812, supra. Under the act of 1869 the lien of the assessment attached to the entire lot or tract fronting on the street, whether platted or not. Section 3365, supra. On the failure to pay such assessment, it was provided, in the language of the act, that the contractor "may immediately, by suit in any court of competent jurisdiction, recover against such owners of lots or parcels of land the amount of such estimate," and further provides for the sale of such lot or tract on the judgment. Section 3366, supra. Under the act of 1889 the lien attached to the lots or land fronting on the street, but, as to the improvement "along or through any unplatted land," the lien extends "back to the distance of one hundred and fifty feet from such front line," only. Section 814, supra. Under the act of 1869 there was no lien in favor of the town. The lien was in favor of the contractor alone. Section 3366, supra. Under the act of 1889 the lien is in favor of the "incorporated town and contractor." Section 814, supra. The owner may pay the whole or any part of the assessment when the improvement is completed, or on failure so to do the amount so assessed is placed on the tax duplicate. Section 818, supra. The town may pay for the improvement, or any part of it, out of the general revenue of the town. Section 816, supra. Or the town may issue certificates to the contractor, who may foreclose the lien, and collect the assessment. Sections 814, 820, supra.

It will be observed that the act of 1889 is more comprehensive than the act of 1869. The act of 1869 does not provide for any notice in relation to either the petition, improvements, or assessment except "advertising to receive proposals" for the performance of the work. Section 3364, supra. The act of 1889 provides for notice to the property owners, in certain contingencies, at least, before the improvement is made, and also for another notice, in all cases, after the completion of the work,

<sup>1</sup> Rehearing denied. See 43 N. E. 158. Rehearing denied.

and before the assessment is made. Sections 813, 818, Elliott's Supp., (Acts 1891, p. 323, § 2.) See *McEneney v. Town of Sullivan*, 125 Ind. 407, 25 N. E. Rep. 540; *De Puy v. City of Wabash*, (Ind. Sup.) 82 N. E. Rep. 1016.

The title of the act of 1889 contains, among other things, the following: "And repealing all conflicting laws." The only act prior thereto, on the subject of improvement of streets in towns, was the act of 1869. This is the only law which could have been in conflict, in any respect, as to improvement of streets in towns, with the act of 1889. The legislature evidently intended the act of 1889 as a substitute for the act of 1869. The provisions of the two acts are in some respects, as indicated in the foregoing partial review, inconsistent and repugnant. While the new statute, as before stated, covers the same subject-matter as the older statute, and is more specific and comprehensive, the provisions in the later act which are inconsistent with or different from the provisions of the former act cannot, in our opinion, be so reconciled as to permit both to stand. In this connection the statement of Judge Coffey is applicable: "Underlying all the rules for the construction of statutes is the cardinal and general one, that in construing a statute the court will seek to discover, and carry out, the intention of the legislature in its enactment. In the search for that intention the court will look to each and every part of the statute; to the circumstances under which it was enacted; to the old law upon the subject, if any; to the other statutes upon the same subject, or relative subjects, whether in force or repealed; to contemporaneous legislative history; and to the evils and mischiefs to be remedied." *Paving Co. v. Edgerton*, 125 Ind. 455, 25 N. E. Rep. 436. Also, we quote the pertinent language of Judge Niblack in another case: "It is true, as insisted, that repeal by implication are not favored in the construction of statutes. \* \* \* It is, nevertheless, a well-recognized rule of statutory construction, that when a new statute covers the subject-matter of an older statute, and contains some provision or provisions inconsistent with or different from it, the new statute operates as an implied repeal of the older one." *Crowell v. Jaqua*, 114 Ind. 246, 15 N. E. Rep. 242. The rule is thus stated in *Waterworks v. Burkhart*, 41 Ind. 364-383: "It must appear that the subsequent statute revised the whole subject-matter of the former one, and was intended as a substitute for it, or that it was repugnant to the old law. In other words, it must appear that it was the intention of the law-makers to repeal the former law. When that appears, the will of the law-makers is just as manifest as if it had been shown by express words."

We think it is clear that the purpose of the act of 1889 was to prescribe a comprehensive and uniform system of procedure for the improvement of streets in cities and towns, and that the legislature intended the provisions thereof should be a substitute for the former act, and that all

laws in conflict therewith should be repealed. Therefore, when the principles enunciated in the cases cited are applied, we are of the opinion, after careful consideration and mature reflection, that the act of 1869 was repealed, by implication, by the act of 1889. This conclusion is, as we construe it, in harmony with the reasoning of Judge Elliott in the case of *Robinson v. Rippey*, 111 Ind. 112, 12 N. E. Rep. 141, relied on by counsel for appellees. In that case it was insisted that the gravel-road law of March 3, 1877, was repealed by the act of April 8, 1885, but in the latter act there was the following proviso: "This act is not intended to repeal any law now in force for the construction of gravel or macadamized roads." It was there held "that the enactment of the new statute covering the whole subject is an expression of an intention to repeal the old law," but that the rule did not apply where it was unequivocally asserted in the act that there was no intention to repeal the old law. In this case the act of 1889 not only covers the whole subject, but therein, in addition, the intention expressed in the title, for whatever it may be worth,—whether much or little,—that all conflicting laws were repealed. We cannot declare that the law of 1869 was not repealed by the act of 1889 without ignoring the familiar rule above stated, "that the enactment of a new statute, covering the whole subject, is an expression of an intention to repeal the old law," and also disregarding the words in the title supporting this view.

The repeal of the law of 1869 by the act of 1889, by implication, in our opinion, which we state in the language used by the court of appeals of New York, "will not operate as a repeal, so as to effect a duty accrued under the prior law, although, as to all new transactions, the later law will be referred to as the ground of obligation." In re *Prime's Estate*, (N. Y. App.) 32 N. E. Rep. 1091, 1093. See, also, *People v. Wilmerding*, Id. 1099. The statutes conferring power to make assessments for street improvements are strictly construed. *Niklaus v. Conkling*, 118 Ind. 289, 20 N. E. Rep. 797. While it is perhaps true, on the facts stated in the complaint, that appellant, having received the benefits, should, in equity and good conscience, pay for the improvement, yet the court cannot make contracts for parties, nor create a legal or equitable liability. The courts can only afford the remedy where the right exists, by reason of the contract or conduct of the parties, or growing out of some statutory enactment, or created in some other recognized manner. The interest of appellees should have admonished them to ascertain that the proceedings were such as would create a binding obligation on some one to pay for the work, before entering into the contract. *Kiphart v. Railway Co.*, (Ind. App.) 34 N. E. Rep. 375.

The appellees have not brought, and, in view of the conclusions reached, perhaps cannot bring, the case within the rule stated in *Presinger v. Harness*, 114 Ind. 491, 16 N. E. Rep. 495, and other similar cases. All we



now decide, however, is that the complaint does not state facts sufficient to make a cause of action. Judgment reversed, with instructions to sustain demurrer to complaint.

GAVIN, C. J., did not participate in the decision of this case.

(7 Ind. App. 458)

**PHILLIPS v. JOLLISAINT.<sup>1</sup>**

(Appellate Court of Indiana. June 24, 1893.)

**STREET IMPROVEMENTS—PRECEPT—APPEAL—PLEADING—REPEAL OF STATUTE.**

1. On appeal from a precept to enforce an assessment for street improvements, the transcript to the circuit court—which, in such a case, constitutes the complaint—showed that the committee to whom was referred the final estimate recommended that it be allowed, but stated generally that the contractor did not follow the specifications strictly, in every particular. It also showed that the contractor, in his affidavit for a precept, swore that he fully complied with his contract. *Held*, that the complaint did not show that he did not comply with his contract.

2. Under Rev. St. 1881, § 248, providing that the repeal of a statute shall not extinguish any liability thereunder, in the absence of an express provision therefor, and that the statute shall be treated as still in force for the purpose of sustaining any proper action for the enforcement of such liability, Act March 8, 1889, (Acts 1889, p. 237,) repealing former acts on collecting assessments for street improvements, does not repeal the remedy as to existing contracts.

Appeal from circuit court, Floyd county; George A. Bicknell, Judge.

Proceeding by Benjamin Jollisaint against James Phillips to enforce an assessment for street improvements. From a judgment for plaintiff, defendant appeals. Affirmed.

C. D. Kelso, for appellant. Tuley & Hester and C. L. & H. E. Jewett, for appellee.

GAVIN, C. J. On the 24th day of December, 1888, the city of New Albany entered into a contract with the appellee for the grading and improvement of a portion of Thirteenth street, in that city, according to certain specifications, at a fixed price. During the progress of the work, several estimates and assessments were made against the property of the appellant, abutting on the street, but none of them were paid. Upon the completion of the work a final estimate was made, and the property of the appellant was assessed with its proportion of the cost of the improvement. The appellee having sued out a precept for the collection of the amount due on the assessment, the appellant appealed to the Floyd circuit court, where the cause was tried by a jury, resulting in a verdict against him, upon which the court, over a motion for a new trial, rendered judgment.

The assignment of errors calls in question the sufficiency of the complaint. No other question is presented for our consideration.

In this class of cases the transcript certified to the circuit court constitutes the

complaint. It should not be construed with rigid strictness against the contractor, and will stand, unless there is some defect in it which affects the substantial rights of the party objecting to it. *Reeves v. Grottendick*, 131 Ind. 107, 30 N. E. Rep. 889.

It is contended by the appellant that it affirmatively appears by the complaint that the appellee did not comply with his contract, and that for this reason the complaint is bad. This contention is based upon certain language used in the report of a committee to whom was referred the final estimate. This committee recommended that the estimate be allowed, but stated generally that the appellee did not follow the specifications strictly, in every particular. In what respect he departed from them we are not informed; but, as the committee recommended the allowance, it is fair to presume that the departure was in an immaterial matter, and did not in any wise injure the property owners, or lessen the value of the work. But in his affidavit for a precept the appellee swears that he fully complied with his contract with the city. The question for trial in the circuit court related to the compliance or non-compliance of the appellee with his contract. We would not feel at liberty, therefore, to hold the complaint bad, and turn the appellee out of court without a hearing, simply upon the statement of the committee, to the effect that he had not followed strictly the specifications under which he had agreed to do the work of improving the street in front of the appellant's property.

It is further contended by the appellant that it affirmatively appears that the final estimate was made by the city engineer after his term of office expired, but in this we think the appellant is in error. We have been unable to find anything in the record from which such an inference necessarily follows.

Finally, it is contended by the appellant that the act of March 8, 1889, (Acts 1889, p. 237,) repeals all former acts upon the subject of collecting assessments for street improvements, and that for this reason the appellee mistook his remedy when he undertook to collect the amount due him by precept. We cannot agree with appellant's conclusion upon this subject. Even if the act of 1889 may have operated to repeal the body of the act under which this work was performed, still appellee would not thereby lose his remedy for the work performed under his contract, but he was, on the contrary, entitled to proceed to collect whatever sum might be justly due him thereon. It is not the policy of our law to attempt to take away, by legislative enactment, rights which have already accrued. Section 248, Rev. St. 1881, provides: "And the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide; and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or

<sup>1</sup>For opinion on rehearing, see 84 N. E. Rep. 847.

liability." In *Crowell v. Jaqua*, 114 Ind. 246, 15 N. E. Rep. 242, where it was claimed a right to collect a street assessment was lost by the implied repeal of the statute, in which no saving clause was contained, Judge Niblack said of the later statute: "It therefore, impliedly, superseded and repealed the main body of such section 3163, saving only contracts entered into before the passage of this act." In *Palmer v. Stumph*, 29 Ind. 329, it was held that where a contract for street improvement had been made, and precept issued, "his rights under the contract were vested, and the legislature could not deprive him of them." (Our views as to the effect of the repeal of the statute upon appellee's rights, and the effect of the general saving statute, is sustained by *Koons v. Cluggish*, (Ind. App.) 84 N. E. Rep. 651, (decided at this term); *Daggy v. Ball*, (Ind. App.) 34 N. E. Rep. 246; *Crelighton v. Pragg*, 21 Cal. 115; *Harris v. Townshend*, 56 Vt. 716; *Wilson v. Herbert*, 41 N. J. Law, 454; *State v. Boyle*, 10 Kan. 113; *Steamship Co. v. Joliffe*, 2 Wall. 450; *Smith. St. Const.* § 164.

Our conclusion, therefore, is that the complaint was sufficient.

Judgment affirmed.

(7 Ind. App. 357)

#### SANDS v. HATFIELD.

(Appellate Court of Indiana. June 23, 1893.)

MUNICIPAL CORPORATION—STREET IMPROVEMENTS—ASSESSMENTS—ACTION TO COLLECT—SUFFICIENCY OF COMPLAINT—AMENDMENT OF ENGINEER'S REPORT.

1. Where, in an action to collect an assessment for street improvement, under Elliott's Supp. §§ 812-821, as amended by Acts 1891, p. 323, the complaint alleges that, on the petition of more than two-thirds of the resident property owners on the street to be improved, the common council adopted an ordinance for making the improvement asked, by an affirmative vote of more than two-thirds of the members thereof, it shows a sufficient compliance with Elliott's Supp. § 813, which requires a resolution to be adopted by such council, declaring a necessity for the proposed improvement.

2. Where such complaint shows that a notice of the proposed improvement was given property owners, as provided by Elliott's Supp. § 813, as amended by Acts 1891, p. 324, § 2, thereby affording them an opportunity to be heard as to the proposed assessment, it shows facts which constitute due process of law, and conferred jurisdiction on the city to make the assessment.

3. Mere irregularities occurring prior to making such assessment do not render it void.

4. Acts 1891, p. 324, § 2, provides that the common council may "alter or amend" the estimate and report of the city engineer. *Held* that, where one of the property owners on the street where the proposed improvement was to be made was not mentioned in the original report and estimate of the engineer for the assessment of the benefits by reason of the improvements, the council had the authority to so amend the estimate as to include such owner's property, and assess against it the just proportion of the cost.

Appeal from circuit court, Floyd county; George B. Cardwell, Judge.

Action by John R. Hatfield against William Sands to collect an assessment for street improvement in the city of New Albany, under Act 1889, (Elliott's Supp. §§

812-821,) as amended by Acts 1891, p. 323. From a judgment for plaintiff, defendant appeals. Affirmed.

Kelso & Kelso, for appellant. C. L. & H. E. Jewett, for appellee.

DAVIS, J. The appellant has not, in the preparation of the transcript of the record filed in this court, complied with rule 30. He has wholly failed to cause marginal notes to be placed on the transcript, in their appropriate places, indicating the several parts of the pleadings in the cause, the orders of the court, and other matters in the record. Therefore, appellee insists that the appeal should be dismissed. This contention might, with propriety, under the circumstances, be sustained; but we prefer, if we can, to overlook purely technical objections to the transcript, of the character indicated, and to determine, so far as we may be able to ascertain what they are, in the imperfect condition of the record, the questions sought to be presented, on their merits.

The errors assigned are: (1) The complaint does not state facts sufficient to constitute a cause of action; (2) the court erred in overruling the demurrer to the complaint; (3) the court erred in its conclusions of law on the agreed statement of facts; (4) the court erred in overruling the motion for a new trial.

This was a proceeding to collect an assessment for street improvement under the act of 1889, and amendments thereto in 1891. Elliott's Supp. § 812, and Acts 1891, p. 323. The objection urged to the complaint is that it does not aver that a resolution declaring a necessity for the proposed improvement was adopted by the common council of the city of New Albany, in conformity with the provisions of section 813, Elliott's Supp. The complaint alleges, however, that, upon the petition of more than two-thirds of the resident property owners along the line of the street to be improved, the common council adopted an ordinance for the making of the improvement in question, by the affirmative vote of more than two-thirds of the members thereof. This was, in our opinion, a substantial compliance with the statute. Whether the order, if sufficient in terms, was by resolution or ordinance, is immaterial. *Merrill v. Abbott*, 62 Ind. 549. It is true, in such proceedings, that the owner of private property which is about to be assessed for the cost of the construction of the improvement must have notice. The complaint shows that the notice required by section 7 of the original act,<sup>1</sup> as amended by section 2 of the act of 1891,<sup>2</sup> was duly given. The notice, as provided for in the section, gives the owner an opportunity to be heard in respect to the correctness of the charge against his property. Pursuant to this notice,—which, in our opinion, was sufficient, under the statutes on which the proceedings were predicated,—appellant was given an opportunity for a hearing upon said estimate and re-

<sup>1</sup>Elliott's Supp. § 812.

<sup>2</sup>Acts 1891, p. 324.

port. On the facts alleged in the complaint, the notice which was duly given in this case constituted due process of law, and conferred jurisdiction on the city, through its officers, to make the assessment. *Garvin v. Dausman*, 114 Ind. 429, 16 N. E. Rep. 826. Mere irregularities, if any, which occurred prior thereto, would not render the assessment void. *Reeves v. Grottendick*, 131 Ind. 107, 80 N. E. Rep. 889. The complaint states facts sufficient to withstand the demurrer. *McEnaney v. Town of Sullivan*, 125 Ind. 407, 25 N. E. Rep. 540; *De Puy v. City of Wabash*, (Ind. Sup.) 32 N. E. Rep. 1016. There is a radical difference between an agreed case, and a case where there is simply an agreement as to the facts. *Elliott's App. Proc.* § 224. On account of this difference, without extended discussion, it will suffice to say that no question is presented for our consideration by the third error assigned.

The only remaining question arises on the fourth and last error. It is urged in support of this assignment that, because appellant's property was not described in the original estimate and report of the city engineer, the assessment against him is void, and such property should not bear its proportion of the cost of the improvement. It is not claimed that appellant is assessed with an unjust proportion of the cost of the improvement. His contention is that, because of the omission of his property in the original report of the engineer, he is under no obligation to pay any part of such cost. Section 2 of the amendatory act, approved March 6, 1891, provides, in express terms, that the common council may "alter or amend" the estimate and report of the city engineer. It is conceded to be true that appellant was not mentioned in the original report and estimate prepared by the engineer for the assessment or collection of the benefits accruing to property by reason of this improvement, but when the engineer's estimate was referred to the committee of the common council for hearing thereon, and due notice given to all property owners interested in or affected by the improvement, as required by the statute, to appear and make any objection they might have to such estimate, and at such meeting, in pursuance of such notice, it was pointed out that appellant's property had been omitted, and was about to escape the payment of its proportion of the cost of the improvement, it was the duty of the common council to so alter and amend said estimate and report that it would include appellant's property, and to assess against his property the just and proportionate share of the cost of such improvement. What advantage would there be in the right of the property owners to appear, if it was not for the fact that such alterations, amendments, and corrections should be then and there made as would require each to pay his just and equal part of the cost of such improvement? We recognize that such statutes are strictly construed, but in the application of this rule such construction should be reasonable, so as to give force and effect to the intent and spirit of the legislature.

The reason for the notice, and of the power conferred, as provided in this section, evidently, was to give an opportunity to correct such omissions and mistakes, in order that the assessments should be made equal and fair upon the property of all the persons who received and enjoyed the benefit of the improvement. *Koons v. Cluggish*, (Ind. App.) 34 N. E. Rep. 651, and authorities there cited. All this having been duly and properly done, notwithstanding there may have been some irregularities in the preliminary proceedings, we are not able to see in the record, as it comes to us, wherein appellant has any just grounds of complaint. It appears to the court, from the examination we have made of the record, that the merits of the cause have been fairly tried and determined in the court below Judgment affirmed.

(7 Ind. App. 388)

**TAYLOR v. TRUSTEES FIRST CONGREGATIONAL CHURCH AND SOCIETY OF MICHIGAN CITY.**

(Appellate Court of Indiana. June 23, 1893.)

APPEAL—REVIEW—OBJECTIONS NOT RAISED BELOW—HARMLESS ERROR.

1. An objection that the judgment rendered is greater than was demanded in the complaint will not be sustained on appeal, where no motion to modify was made in the court below.

2. Where the record on appeal shows that appellant consented to a reference, and voluntarily appeared before the referee, his objection that the judgment is void because of failure to comply with Rev. St. 1881, § 556, requiring the written consent of both parties to the reference, will not be sustained.

3. The refusal of the court to entertain an affidavit filed in support of a motion for a new trial is harmless error, where the affidavit does not show any facts entitling the moving party to the new trial.

Appeal from circuit court, La Porte county; D. Noyes, Judge.

Action by the Trustees First Congregational Church and Society of Michigan City against John Taylor, Jr. From a judgment for plaintiff, entered upon the report of a referee, defendant appeals. Affirmed.

R. S. Carroll, for appellant. H. B. Tut-  
hill, for appellee.

LOTZ, J. The appellant was the treasurer of the appellee, a church society organized under the laws of this state, and, as such treasurer, had received and disbursed moneys belonging thereto. After he ceased to be such treasurer, appellee brought this action to recover moneys alleged to be due it from appellant. The complaint is in two paragraphs. The first declares upon an account stated. The second declares upon an account for moneys had and received, and with it is filed, as an exhibit, an itemized statement of receipts and expenditures by said appellant. This bill of particulars shows that appellant received as such treasurer the sum of \$1,555.93, and disbursed the sum of \$1,411.11, and that there was a balance of \$144.82 due appellee, for which sum judgment was demanded, and all other proper relief,

The appellant answered (1) the general denial; and (2) a set-off. There was a reply to the second paragraph of answer, and, after issue was thus joined, the record contains the following recitation: "And by agreement this cause is referred to Frederick H. Zahm, who is to hear the evidence, beginning on Tuesday, May 10, 1892, and to continue until the evidence is complete, and to report the facts and conclusions at the next term of this court." The referee filed his report at the following September term of the court, by which it is made to appear that, in accordance with the order of the court, said referee began hearing the evidence on the 10th day of May 1892, and continued for the space of three days; that the hearing was then postponed until about the 12th day of August, at the request of the appellant, to give him an opportunity to procure certain vouchers, upon which day the hearing was concluded. The report further shows that, during the time appellant was acting as treasurer of appellee, he received the sum of \$1,533.28, and disbursed the sum of \$1,368.61, and that there was a balance due appellee in the sum of \$164.67. The referee asked that he be allowed the sum of \$25 for his services. The appellant objected and excepted to this report, assigning as causes for such exceptions (1) that the finding and award was obtained by fraud and collusion, and through undue influence; (2) that the referee improperly refused appellant reasonable time to obtain the evidence of certain witnesses, and improperly refused to hear other witnesses when offered by him; (3) that appellee's attorney acted as attorney for the referee, and that appellee and its attorney influenced his decision, and made his report for him; (4) that the referee exceeded his powers, and improperly executed them, in that he did not take time to hear the evidence. The appellee moved to strike out these exceptions, which motion was sustained by the court, to which ruling the appellant excepted. The court thereupon confirmed the report of the referee, and rendered judgment against appellant in the sum of \$164.67, with costs, and allowed the referee the sum of \$25 for his services. Appellant thereupon filed a motion for a new trial, and offered to file his own affidavit in support of certain causes for said motion; but the court refused to entertain said affidavit, or permit it to be filed, to which action the appellant excepted. There is a bill of exceptions in the record, which contains this affidavit. The assignment of errors brings in review the action of the court in referring the cause to the referee; in striking out appellant's exception to the referee's report; in rendering judgment on the report; in overruling the motion for a new trial, and the refusal to permit appellant to file the affidavit in support of his motion for a new trial.

Appellant has not discussed the questions as they arise from the assignment of errors, but has arranged them into what he denominates three "points," and in disposing of this case we will follow the course laid out by appellant. His first point is that the judgment should be re-

versed because the complaint only demands \$144.82, while the judgment rendered is for \$164.67, and because there is an allowance of \$25 to the referee. The appeal is from the judgment as an entirety. If the judgment is good to the extent demanded by the complaint, it cannot be reversed as an entirety. If the appellant desired to protect himself against the excess over the demand made by the complaint, and of the referee's allowance, he should have called this matter to the attention of the trial court by a motion to modify, and then present the ruling to this court by a bill of exceptions. There was no motion of this kind made in the court below. Appellant's first point is not well taken. *Studabaker v. Markley*, (Ind. App.) 34 N. E. Rep. 606, (decided at this term,) and authorities there cited.

The second point is that the proceedings, commencing with the appointment of the referee, and all subsequent actions by the court based thereon, are void because of the failure to comply with section 556, Rev. St. 1881, which requires the written consent of both parties before a cause can be referred, and because the record does not show that appellant waived his right to a trial by jury, by oral consent entered of record in open court, as required by section 550, Id. The record does show that by agreement the cause was referred. There is nothing in the record to show that the appellant objected to this method of trial. On the contrary, it seems to have been done at his instigation. In all actions where there is an appearance, it is absolutely necessary, in order to present any question to an appellate court, that an exception be taken to the decision of the court. To this general rule there are but two exceptions: (1) Where the court has no jurisdiction of the subject-matter; and (2) where the complaint does not state facts sufficient to constitute a cause of action. As to all other questions that are presented to an appellate court, the foundation of the appeal must be laid in an exception to the ruling of the trial court. The manifest reason for this requirement is that before an appeal can be prosecuted it must appear that the matter was decided by the lower court. If no exception be taken, the objection to the decision is waived, and it will be conclusively presumed against a party, on appeal, that he was consenting to the action of the trial court. This rule extends so far that it precludes the appellant from asserting that there was no written consent to refer the cause. Here the record not only shows that appellant consented to the reference, but that he voluntarily appeared before the referee, and submitted his rights to that method of adjudication. *Goodwin v. Hedrick*, 24 Ind. 121; *Hauser v. Roth*, 37 Ind. 89; *Griffin v. Pate*, 63 Ind. 273; *Sheets v. Bray*, 125 Ind. 33, 24 N. E. Rep. 357; *Work*, Pr. § 1071.

The third point discussed by appellant is the court's refusal to entertain the affidavit of appellant in support of his motion for a new trial. The court having entertained the motion for a new trial, it was its duty also to entertain any affidavit in support thereof that was relevant

and pertinent. We have examined the affidavit, and find that it contains but few, if any, matters that were pertinent to the motion. While the refusal of the court to permit it to be filed was perhaps an irregularity, still it could have made no difference in result, as it did not show any facts which would entitle the appellant to a new trial. There is no reversible error in the record. Judgment affirmed.

(159 Mass. 415)

**PHELPS v. SIMONS et al.**

(Supreme Judicial Court of Massachusetts.  
Hampden. June 23, 1893.)

**HUSBAND AND WIFE — ESTATE BY ENTIRETIES —  
SALE BY HUSBAND — RIGHTS OF PURCHASER —  
RIGHTS OF WIFE.**

1. Where shares of stock are devised to a man and his wife, "and to the survivor of them," and the husband sells the shares, the purchaser acquires only the right to receive the dividends on the stock during the joint lives of the husband and wife, and to the shares in case the husband survives the latter; while the wife, if she survives her husband, will be entitled to the shares, and a court of equity will not compel her to deliver the certificate of such shares to the purchaser. Field, C. J., and Knowlton and Morton, JJ., dissenting.

2. Gen. St. c. 108, § 1, in force when such will was made, and providing that "the property, both real and personal, which any married woman now owns as her sole and separate property, that which comes to her by descent, devise, bequest, or grant, \* \* \* shall, notwithstanding her marriage, be and remain her sole and separate property," has no application in such case, and did not prevent the husband from alienating the wife's interest. Holmes, Barker, and Lathrop, JJ., dissenting.

Case reserved from supreme judicial court, Hampden county; Marcus P. Knowlton, Judge.

Bill by Gilbert W. Phelps against Catharine L. Simons and Simeon B. Simons, her husband, to compel defendant Catharine to deliver to plaintiff a certain certificate of shares of national bank stock sold to him by defendant Simeon B. Heard on bill and answer and the admissions of the parties. Case reserved. Judgment for defendants.

Jas. Bliss, for complainant. J. E. McIntire, for defendants.

**LATHROP, J.** This is a bill in equity against Catharine L. Simons, and Simeon B. Simons, her husband. Sarah C. Simons, the mother of Simeon, died on April 8, 1872. By her will, dated October 31, 1870, which has been duly admitted to probate, she devised and bequeathed the residue of her estate, real and personal, to her "son, Simeon B. Simons, and his wife, Kate L. Simons, and to the survivor of them, and the heirs of such survivor, to have and to hold the same forever." Sarah died possessed, among other property, of 12 shares of the capital stock of the Second National Bank of Springfield. On December 3, 1872, said bank issued a certificate of said shares, in which it is set forth that "Simeon B. Simons, and his wife, Kate L. Simons, and the survivor of them, and the heirs of such survivor," are

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proprietors of 12 shares of the capital stock of said bank. The answer of the defendant Catharine, which is found to state the facts correctly, sets forth that she has possession of said certificate, "which was left in her possession several years since by her said husband." On October 15, 1891, Simeon B. Simons, by an instrument in writing, undertook to sell said certificate, and the 12 shares of stock represented thereby, to the plaintiff, for a valuable consideration. He also, by the instrument, appointed the plaintiff his attorney to make the transfer. The bank refused to make the transfer until the outstanding certificate was delivered up, and Catharine refused to deliver up the certificate. The prayer of the bill is that Catharine be ordered to produce the outstanding certificate, and to deliver the same to the plaintiff. In 1870, when this will was made, and in 1872, when it was admitted to probate, the General Statutes were in force; and it was provided by chapter 108, § 1, that "the property, both real and personal, which any married woman now owns as her sole and separate property, that which comes to her by descent, devise, bequest, gift, or grant, \* \* \* shall, notwithstanding her marriage, be and remain her sole and separate property." Mr. Justice HOLMES, Mr. Justice BARKER, and the writer of this opinion think that, under this statute, Simeon B. Simons had no power to alienate his wife's interest, believing that the case of *Pray v. Stebbins*, 111 Mass. 219, 4 N. E. Rep. 824, which relates to the validity of a lease made by a husband while the joint tenancy continued, has no bearing on the question. The same justices also think that, whatever may be the effect of the various statutes then in force as to the estate which the husband and wife took, the wife was entitled, as between herself and her husband, to one-half to her separate use. See *Mander v. Harris*, 27 Ch. Div. 166; *Jupp v. Buckwell*, 39 Ch. Div. 148. But the other justices are of opinion, on the authority of *Pray v. Stebbins*, that Gen. St. c. 108, § 1, does not apply, and we proceed to consider the case irrespective of the statutes relating to married women.

At common law, a devise to husband and wife vested in them an estate by entireties; not strictly a joint tenancy, but as said by Mr. Justice Wells, in *Wales v. Coffin*, 13 Allen, 213, 215, "one indivisible estate in them both, and the survivor of them." See, also, *Pierce v. Chace*, 108 Mass. 254; *Pray v. Stebbins*, ubi supra; *Donahue v. Hubbard*, 154 Mass. 537, 28 N. E. Rep. 909; *Morris v. McCarty*, (Mass.) 32 N. E. Rep. 938. While the husband has the entire right to the use and benefit of the estate during coverture, (*Pray v. Stebbins*, ubi supra,) he cannot alienate it. Thus, in *Fox v. Fletcher*, 8 Mass. 274, where land was devised to a husband and wife, the wife who survived her husband was held entitled to maintain a real action against a grantee in fee of her husband. So in *Donahue v. Hubbard*, ubi supra, it was said by Mr. Justice Allen: "The peculiar feature of this kind of estate is that each is secure against an impairment of rights through the sole act of the other."

The bequest in this case is to the husband and his wife, "and the survivor of them, and the heirs of such survivor." A conveyance in this form, at common law, to persons not husband and wife, would give a joint estate for life, and a contingent remainder to the survivor. Cruise, Dig. tit. 18, c. 1, § 2; 1 Greenl. Cruise, 364a; Co. Litt. 191a. In re Harrison, 3 Anstr. 836; Vick v. Edwards, 3 P. Wms. 372; Hannon v. Christopher, 34 N. J. Eq. 459. The plaintiff admits that at common law a bequest to husband and wife vests in them an estate by entireties. See Gordon v. Whieldon, 11 Beav. 170; Atcheson v. Atcheson, Id. 485. He contends, however, that as, at common law, a husband may dispose of his wife's personal property as he pleases, he has the same right where the property is held by entireties. None of the cases which he cites for this position support it. There is no doubt that shares of stock may be bequeathed to a wife for life, with remainder to B. In such a case, at common law, the husband could dispose of only the life interest of his wife in the shares; and, where the shares are left by will to a husband and wife, the latter takes a life interest with her husband, and a remainder contingent on her surviving him. With the latter a court of equity will not permit him to meddle. In Atcheson v. Atcheson, 11 Beav. 485, where a legacy was left to a husband and wife, it was held that the wife's right to it by survivorship was entitled to protection; and it was ordered that the legacy be carried to the joint account of the husband and wife, with a direction to pay the dividends to the husband during their joint lives, with liberty, on the death of either, for the survivor to apply. In Moffatt v. Burnle, 18 Beav. 211, a bequest was made to A. and his wife, for their lives, with remainder over, and it was held that the husband and wife took, not in joint tenancy, but for their joint lives and the life of the survivor. In Ward v. Ward, 14 Ch. Div. 506, where a husband and wife held an annuity by entireties, it was held that the whole of it was, during their joint lives, liable to the husband's debts, but the order was only to pay during the life of the husband. See, also, Godfrey v. Bryan, 14 Ch. Div. 516; Craig v. Craig, 3 Barb. Ch. 76, 105.

It follows, in the opinion of a majority of the court, that Mrs. Simons will be entitled to the shares of stock should she survive her husband. The mere fact that the husband placed the certificate in the possession of his wife gave her no additional rights. Cummings v. Cummings, 143 Mass. 340, 9 N. E. Rep. 730. The result is that the plaintiff is entitled to the dividends on the stock during the joint lives of the husband and wife, and is entitled to the shares in the contingency of the husband surviving his wife. If, however, the wife survives her husband, she is entitled to the shares absolutely.

As the bank has not been made a party to this suit, no order can be passed directing it to do anything; and, as the wife has an interest in the shares, there is no ground for directing her to deliver the certificate to the plaintiff, as the case now

stands. If, before a final decree is entered, the plaintiff desires to amend his bill by making the bank a party, and to have a trustee appointed to hold the shares in accordance with this opinion, he may apply to a single justice for this purpose.

So ordered.

The CHIEF JUSTICE and Justices KNOWLTON and MORTON think that the statutes enabling married women to take, hold, and manage and dispose of real and personal property as if they were sole do not apply to the estate or title by entireties of husband and wife in personal property any more than in real property. Pray v. Stebbins, 141 Mass. 219, 4 N. E. Rep. 824. They also think that the will vested in the husband and wife a title by entireties in the shares in question. It follows that the power over the shares is to be settled by the common law. By that law the husband became upon marriage the absolute owner of all the wife's chattels in possession. Legg v. Legg, 8 Mass. 99; Com. v. Manley, 12 Pick. 173. Upon reducing her choses in action to possession, he became the absolute owner of them also. Hayward v. Hayward, 20 Pick. 517. If he did not reduce them to possession, and she survived him, she took them by virtue of her survivorship. Hayward v. Hayward, supra. If, therefore, these shares had belonged absolutely to the wife, the husband could have disposed of them at common law as he has done, and thus would have extinguished completely the wife's right of survivorship. But the shares were not the wife's. The title to them was in the husband and wife by entireties. The whole of the title was in the husband, as well as in the wife. Her right of survivorship cannot possibly be greater when the whole title is in her husband, as well as in herself, than when it is solely in herself. No case to which we have been referred holds that at common law the wife has a right of survivorship in a chose in action either belonging solely to herself or to her husband and herself by entireties, which is incapable of extinguishment by the husband in his lifetime. On the contrary, it was said, in substance, in Atcheson v. Atcheson, 11 Beav. 485, which is relied on by the majority of the court, and which was a case of a legacy to a husband and wife, that her right to the whole as survivor was dependent on the fact that it had not been disposed of by the husband in his lifetime; and in Ward v. Ward, 14 Ch. Div. 506, it was distinctly held that the wife's right as tenant by the entirety of an annuity given to herself and husband during their joint lives was not property of the wife out of which a settlement could be made under direction of the court for her benefit. The cases in regard to the husband's right over the wife's real estate, or over real estate belonging to himself and wife by entireties, must stand on admittedly different ground, and can furnish no guide in a case like this. No doubt, when an assignee in insolvency of the husband or his creditors comes into equity to compel a conveyance of the wife's choses in action, the court may require a provision for the wife to be made out of the

property which they seek to reach, even to the extent, perhaps, of requiring the whole property to be applied to her benefit. Such was the case of *Davis v. Newton*, 6 Metc. (Mass.) 543. It may also be true that, where a husband and wife are possessed of personal property per my et per tout, a court of equity will, for good reasons, protect the wife's right of survivorship by preventing the husband, before he has done so, from disposing of the property during their joint lives. Such was the case of *Ward v. Ward*, 14 Ch. Div. 506. Neither of those cases applies here. The wife's title by the entirety with her husband was not her separate property; and the husband has conveyed to the complainant, by an absolute conveyance, for a valuable consideration, the whole title to the shares in question, as he has the right to do at common law. The wife's right of survivorship has been extinguished by the conveyance of the husband. It is conceded that the mere fact that the certificate was placed in her possession by her husband gave her no additional rights. We think that there should be a decree in favor of the complainant.

(50 Ohio St. 444)

# LEONARD et al. v. KEBLER'S ADM'R.

(Supreme Court of Ohio. June 20, 1893.)

## ASSIGNMENT—VALIDITY—DELIVERY.

1. Delivery is essential to the validity of an assignment.

2. K., being about to take his own life, drew up and signed an instrument purporting to convey to L. and two others named therein, as security for debts by him owing to them severally, certain articles of personal property, also notes and choses in action which were then held by another as collateral security for a debt. The instrument was not executed in pursuance of any arrangement with the persons named therein, or either of them, and was without the knowledge of either. It was inclosed in an envelope addressed to L., who was a relative of K., and then a member of his family. In another envelope, addressed to her, was a letter of farewell, and the two envelopes were surrounded by a rubber band. K. had, after the signing of the papers, several opportunities to deliver them to L., but did not do so, nor speak of them. After he had taken the poison, and when he was unable to speak, and nearly unconscious, L. entered his room, and, finding the papers lying by his side on the bed, took them into her possession, and read them. K. had no knowledge of this. He did not regain consciousness, and died some four hours afterwards. *Held*, that the persons named in the instrument took no title to the property described by reason of the attempted assignment.

3. K. and R. were partners as lawyers. On and prior to June 23, 1887, K. had become indebted to R. for money loaned about \$13,000, on a portion of which R. held an assignment of 10 railroad bonds of \$1,000 each as security. Part of the money was loaned to enable K. to repay money which, as he told R. at the time, he had received, as a member of the firm, from third persons, to invest for them, and had converted to his own use. On the date above named K. executed and delivered to R. an assignment of 25 railroad bonds, and a warranty deed of land. Ten of these bonds were the ones before mentioned, 13 were in the possession of bankers as collateral on a claim held by them against K., and 2 were in the hands of another. K. was also indebted to R. on firm account for

fees, etc., received by him in excess of his share, which was known to R., but (no statement of the partnership account having been made) the exact amount was not known. At the time of the delivery of the assignment and deed K. said to R. that he had been unable to make up the statement yet, but he was indebted to R. on the firm account, and added: "Whatever may be coming to you on a settlement of our affairs—I am going to get up this statement, and whatever is coming to you on settlement of partnership affairs, I want to secure you against. I want to make you perfectly secure. Naturally, you think that I have not done exactly what was right here, and I want to show you that I want you to feel absolutely secure and safe in every way, and I have drawn up this assignment. I want you to hold that as security for the money you have advanced, and for whatever is coming to you, until we have a full settlement of our partnership affairs,—on settlement of the partnership matters." R. took the assignment and deed, saying, "All right." The partnership was dissolved, by mutual consent, September following, but no statement was made, nor final settlement of partnership affairs had. The deed was filed for record with the county recorder November 23, 1887, about 9 o'clock, A. M., and on the same day, about 1 P. M., K. died. K.'s estate is insolvent. In an action by the administrator of K. to determine the right of R. under his assignment and deed, *held*, the assignment and deed were intended as security, not only for such amount as was due to R. for money loaned, and balance due on fee account, but as indemnity to protect from liability for acts of K. regarding partnership transactions; and the property so conveyed is to be subjected to the payment of any obligation that may be due from the estate of K. to R. upon final settlement of all partnership affairs, including as well liability arising from misuse, if any, of the money of clients of the firm, by K., as balance accruing upon adjustment of fee account.

(Syllabus by the Court.)

Error to circuit court, Hamilton county.

Action by William J. Coppock, administrator, against Henrietta D. Leonard and others. From the judgment rendered, defendant Leonard and others bring error. Affirmed in part.

The other facts fully appear in the following statement by SPEAR, J.:

The action below was brought December 22, 1887, by William J. Coppock, as administrator of Charles A. Kebler, deceased, against Henrietta D. Leonard, Adolf Hartdegen, and Mary S. Russell, plaintiffs in error, and Frederick G. Roelker and others, as creditors of the deceased, and the firm of S. Kuhn & Sons, to determine adverse claims of the plaintiff and the said creditors to certain notes, bonds, and other securities described in the petition, in the possession of S. Kuhn & Sons, and held by them in trust, subject to a small claim in their favor. Since the filing of the petition in error the claim of Henrietta D. Leonard has been arranged, and is therefore not further considered. Adolf Hartdegen's claim was, in substance, that during the month of August, 1887, he deposited with Kebler \$3,800, to be by him invested for defendant, which sum Kebler then converted to his own use. In consideration of said indebtedness, on November 23, 1887, Kebler sold, assigned, and transferred to defendant all the personal property described in the petition. He prayed an order for delivery of the



property to him, and, if sold, then that the debt due him be paid from the proceeds. Mary S. Russell's claim was, in substance, that the law firm of Kebler & Roelker, of which deceased was a member, while acting as attorneys for her, became indebted to her in the amount of \$3,290, and that, in order to discharge the same so far as possible, Kebler, as a member of the firm, sold and assigned to her, by written instrument dated November 23, 1887, the different pieces of personal property described in the petition. She asked a sale; that her rights might be protected; and for all proper relief. F. G. Roelker's claim, set up by cross petition, was founded upon an assignment by Kebler to him of 25 bonds, of \$1,000 each, of the Cincinnati, Georgetown & Portsmouth Railroad Company, and a warranty deed conveying lands known as "the homestead lot," both executed and delivered to him June 23, 1887, (the land being part of that described in plaintiff's petition in case No. 79,812, pending in said court,) his contention being that the assignment and deed were given as security for certain indebtedness owing to him by Kebler, and as indemnity against liability for certain acts of Kebler in regard to the money of clients of the firm, the particulars of which transactions were concealed by Kebler in his lifetime from Roelker. Facts bearing upon this claim are stated in the opinion. By order of court the two suits brought by Coppock, administrator, were consolidated. Replies were filed by plaintiff, the cause tried in the common pleas, and thence appealed to the circuit court. That court, upon trial, (making separate findings of fact and law,) found that the debts existed as claimed respectively by the plaintiffs in error, but otherwise found against them, and dismissed their cross petition. It also found the amount due Roelker as claimed, and that he had a lien for that amount, but otherwise found against him, and decreed accordingly. The present action is brought by the plaintiffs in error, and by Roelker by cross petition in error, to obtain a reversal of the judgment of the circuit court. Additional facts appear in the opinion.

Stephen Coles and F. T. Cahill, for plaintiff in error A. Hartdegen. Avery & Holmes, for plaintiff in error Mary T. Russell. Kittredge & Wilby, for plaintiff in error F. G. Roelker. Wilby & Wald, for defendant in error, Coppock.

SPEAR, J., (after stating the facts.) The claims of Adolf Hartdegen and Mary S. Russell rest upon the same facts, and may be considered together. Whether or not these parties have a standing in court on their cross petitions depends upon the legal effect of a paper purporting to be an assignment, dated November 22, 1887, signed by Charles A. Kebler, of which the following is a copy: "Cincinnati, November 23, 1887. In consideration of \$9,000.00, owed by me to Henrietta D. Leonard, I sell, assign, and transfer to Henrietta D. Leonard all my household furniture, useful and ornamental, books, silverware, pictures, linen, carpets, and everything con-

tained in my house on the Reading road, including jewelry and everything else. Also my two horses,—one at pasture, one in my stable,—carriage, buggy, wagon, harness, cows, and everything contained in said stable, except the pony and appurtenances, which belong to my son John. Also a certain promissory note made by W. S. Rix, or his wife, to my order, for about \$200. Also a certain note to my order for \$500.00, made by C. A. G. Adae. (The mortgage of John M. Strobel for \$2,500.00, on which \$1,000 has been paid, belongs to her. Kuhn has it.) Also all my right and interest in and to the Cincinnati, Georgetown and Portsmouth Railroad Co., twenty-five bonds of said road owned by me, and my interest in its stock, after the debts for which they (the bonds) are pledged are paid. I also sell, assign, and transfer to the said Henrietta D. Leonard any other collateral owned by me and not needed by S. Kuhn & Sons to pay the \$5,030 note, for which twelve bonds of the said road and certain mortgage notes are held as collateral. I also sell, assign, and transfer, all for said first-named consideration, all my office furniture, law books, safe, and all other articles owned by me at or pertaining to my law office, No. 5 West Fourth street, Cincinnati, Ohio, to said Henrietta D. Leonard; also a certain note and mortgage made by T. Lewis Brown to my order for \$4,138.10, now held by S. Kuhn & Sons as collateral for two of my notes for \$500 each. After the above debt of \$9,000 has been satisfied, I sell, assign, and transfer to Adolf Hartdegen anything or everything above transferred, or the proceeds of the same, and in consideration of \$3,800 I owe her, and until said proceeds have paid \$3,800. After said H. D. Leonard and Adolf Hartdegen have been paid in full, I sell, assign, and transfer to Mary S. Russell any and all articles or proceeds left until my indebtedness to her is paid. Witness my hand and seal this November 23d, 1887. [Signed] Charles A. Kebler. [Seal.]"

The findings of the circuit court show that prior to the execution of this paper Mrs. Henrietta D. Leonard had intrusted Kebler, as her attorney and agent, with money to invest for her, and that at the time of signing the paper he had of her money, for this purpose, about \$9,000. He was insolvent, and at the time contemplated suicide. The instrument was not executed in pursuance of any arrangement with the assignees named, or either of them, and was without the knowledge of either of them. The paper was, before 5 o'clock of the morning of November 23, 1887, by Kebler inclosed in an envelope, addressed by him to Mrs. Leonard, then a relative and member of his family; and in another envelope addressed to her was a letter of farewell, the two envelopes being surrounded by a rubber band. After the execution of the papers Kebler had several opportunities for delivering them to Mrs. Leonard, but did not do so, nor did he speak to her about them. About 8:30 o'clock A. M., Kebler took prussic acid, from the effects of which, about 1 in the afternoon, he died. Before his death, but while he was under the influence of the

drug, and almost unconscious, being about 9 o'clock A. M., Mrs. Leonard entered his room, and found the papers mentioned lying by his side on the bed, and took them into her possession, and read them while he was still alive; but he had no knowledge of it then nor afterwards, and never gave actual consent thereto. The instrument was intended by Kebler for Mrs. Leonard, for her benefit and that of Adolf Hartdegen and Mary S. Russell, in order to replace or make good to them the amount owing to each, but he did not intend that Mrs. Leonard should receive the same until after his death. Under these facts the circuit court held (*Coppock v. Kuhn*, 3 Ohio Cir. Ct. R. 600,) "that such paper was never, either actually or constructively, delivered by Kebler to the assignees named therein, or to either of them, and that he did not intend to deliver it during his life,—that he did not part with the dominion thereof while he was conscious,—and that the assignees took no title to such property and choses in action, by virtue of such instrument." We affirm this holding. "Delivery is the final step necessary to perfect the existence of any written contract." 1 Daniel, Neg. Inst. § 63; 3 Washb. Real Prop. (4th Ed.) 282; *Phipps v. Hope*, 16 Ohio St. 586; *Williams v. Schatz*, 42 Ohio St. 47; *Gano v. Fisk*, 43 Ohio St. 462, 3 N. E. Rep. 532; *Flanders v. Blandy*, 45 Ohio St. 108, 12 N. E. Rep. 321. And the rule is not changed by reason of the fact that the instrument is based upon a consideration. *Canfield v. Ives*, 18 Pick. 263; *Mills v. Gore*, 20 Pick. 28; *Young v. Guilbeau*, 3 Wall. 636; *Leigh v. Horsum*, 4 Me. 28; *Chamberlain v. Hopps*, 8 Vt. 94; *Elmore v. Marks*, 39 Vt. 538; *Boyd v. Slayback*, 63 Cal. 493; *Pulse v. Miller*, 81 Ind. 192.

As to the claim of defendant Roelker, the finding shows, among other things, that he and Kebler had been partners in the practice of law at Cincinnati. On and prior to June 23, 1887, Kebler had become indebted to Roelker, for money loaned, about \$13,000, and as collateral security for \$3,000 of it, 10 of the railroad bonds described in the cross petition had been pledged, and were in Roelker's possession. Part of this money was loaned to enable Kebler to repay money which, as he told Roelker at the time, he had received from third persons for the firm for investment, and had converted to his own use. In September, 1887, the partnership was dissolved. No settlement of the affairs of the firm was made between the members, nor has any final settlement yet been made. On the 23d day of June, 1887, Kebler executed and delivered to Roelker the assignment of railroad bonds (25 in all) set up in his cross petition; also the warranty deed of land therein described. Thirteen of the bonds were in the hands of Kuhn & Sons, as collateral, and the remaining two in the hands of H. G. Roelker. The deed was filed for record in the recorder's office of Hamilton county November 23, 1887, at 9 o'clock A. M. At the time of the delivery of the assignment and the deed no statement had been made of, nor did Roelker know the exact state of, the partnership account, though he then knew that

Kebler was indebted to him on firm account. At the time of the delivery by Kebler to Roelker of the assignment and deed, as shown by the testimony of Roelker, who was the only witness as to what arrangement was made between them concerning the same, or as to what was said or done at the time of the delivery thereof, Kebler said, in relation thereto, no other person being present, that "he (Kebler) was not able to make up the statement yet, and that the books of the firm had not been closed, but that he was indebted to me (Roelker) on the firm account;" and he (Kebler) said also as follows, as stated by said Roelker: "Whatever may be coming to you on a settlement of our affairs— I am going to get up this statement, and whatever is coming to you on settlement of the partnership affairs, I want to secure you against. I want to make you perfectly secure, and naturally you think that I have not done exactly what was right here, and I want to show you that I want you to feel absolutely secure and safe in every way, and I have drawn up this assignment. I want you to hold that as security for the money you have advanced, and for whatever is coming to you, until we have a full settlement of our partnership affairs,—on settlement of the partnership matters." Roelker then took the deed and assignment, and said, "All right," and this was all that was said by either.

The foregoing constitute the material facts relating to the transaction, as found by the court. Then follows a finding respecting testimony given by Roelker on cross-examination. But these statements are in answer to questions which are not given, nor does the finding purport to give all he said on cross-examination, upon the subject. We cannot, therefore, conclude that such answers as are given ought to have the effect of impairing the force either of the claim made by Roelker in his answer and cross petition, or of Kebler's language, which the court finds was in fact used by him; and the question in dispute must be determined alone upon the findings of fact which appear in the record. The court further found that subsequent to the death of Kebler divers persons made demand, and have brought or threaten suit, against Roelker, claiming to have had dealings with Kebler, acting and professing to act as the partner of Roelker, whereby, as is claimed by said parties, the said partnership and said Roelker became and are indebted to them and each of them for moneys misappropriated by Kebler in an amount aggregating more than the value of the security transferred to Roelker as above stated. Roelker had no knowledge thereof until after the death of Kebler. Thereupon the court found as conclusion of law that Roelker had, by reason of the assignment and deed, a lien on the bonds and on the real estate for a sum aggregating \$14,965.50, with interest, as and for moneys loaned, and for fees, etc., received by Kebler in excess of the amount due him, but that the conveyance and the assignment of said bonds, or either of them, were not executed and delivered to Roelker to secure or indemnify him, nor were they in-

tended to secure or indemnify him, against any loss or claim by reason of the misappropriation of moneys by Kebler acting and professing to act as the partner of Roelker; and that Roelker has no lien upon or right to hold said real estate and bonds as security or indemnity for any demand for which Roelker may have become liable as a member of the law firm of Kebler & Roelker, or of any firm of which the two were members, by reason of the misuse of the money, if any, of the clients of the firm by Kebler. The question, therefore, upon this branch of the case is whether or not the security held by Roelker should be limited only to the indebtedness found by the circuit court, or extended to cover the liability of Roelker for the acts of Kebler with third persons, dealing with him as a member of the firm, as set up in the answer. This court is not called upon to review the findings of fact, nor to review the evidence, nor to weigh it. The facts are found, and we are concerned only with the proper legal conclusion which follows. The assignment and deed gave to Roelker the legal title to the property transferred, from which followed the right of possession to the real estate, and to such of the bonds as were not actually delivered to him, by satisfying the prior lien of those who held them. What was said and done at the time of the delivery of the assignment and deed showed that those papers were to be regarded as mortgages, and to be held as security. The evidence which established these facts also supplied the terms of the defeasance. These terms, as embraced in the findings, show that Kebler intended the property as security for whatever might be coming to Roelker upon a settlement of the partnership affairs, and that he was to hold the property as security until they should have a full settlement of partnership affairs. The mortgages partook, therefore, of the nature of indemnity, as well as security. The language contains no ambiguity, but is broad and plain; and it is not the duty of the court, as it seems to us, to search for extraneous facts for the purpose of belittling or impairing the effect of the security which the words of the defeasance imply.

The allusion to a "statement" by Kebler evidently had reference to a statement of the then condition of the partnership account with reference to fees, rents, etc., and did not include the idea of misappropriation of funds of clients; and, had Kebler stopped there, it would follow, as claimed by the administrator, that the security was intended to make good (besides the borrowed money) only such obligations as might appear upon an adjustment of that account when made up. But Kebler went further. His language indicates that he was conscious he had done that which was wrong. This he had, before that time, confessed to Roelker, and he well understood that Roelker might feel uneasiness in regard to the risks incident to their partnership relation. As Kebler had done wrong as to one client, it might result that he had or might as to others, though Roelker had knowledge only of the one case, and apparently did

not anticipate further negligence or misuse of funds. Each could not have failed to realize that liability would attach to Roelker for firm obligations contracted by Kebler, and that, while one was solvent and responsible, the other was involved, and, in all probability, irresponsible. Then, too, Kebler's language imports appreciation of Roelker's kindness to him, and gratitude for it, and it would be but natural that he would want to give, as Roelker, had he possessed knowledge of the exact facts, would want to receive, security and indemnity sufficient to cover not only liabilities actually then known, but any which might later be shown to exist. To ignore this feature of the transaction is to give no effect whatever to the words, "naturally you think that I have not done exactly what was right here," and "I want to show you that I want you to feel absolutely secure and safe in every way," and "to hold that as security for whatever is coming to you, until we have a full settlement of our partnership affairs,—on settlement of the partnership matters." It would be impossible for Roelker to be "safe in every way," unless he were protected from Kebler's wrongful transactions as to the funds of clients of the firm, nor could the property prove a security for whatever should be coming to Roelker upon a settlement if the idea of indemnity for that risk were excluded. There is nothing to indicate that Roelker countenanced or encouraged the acts of Kebler from which the liability now the subject of dispute arose, and therefore it would be neither wrong nor immoral for him to be protected against Kebler's shortcomings, of whatever character, which involved liability to him. It seems evident, therefore, taking into account all that was said and done and understood, that the purpose of the security was to cause Roelker to feel secure, and to make him secure in reality. Kebler did not undertake to limit the pledge to any special form of obligation, nor to such as might be then known to Roelker, nor, indeed, to such as then might be ascertainable. And we think the legal effect of the transaction is to embrace within the security whatever might, upon a settlement of all the partnership affairs, appear to be due from Kebler to Roelker. The extent of the right to resort to the pledge was to be ascertained when a settlement should be had; not before. Whatever appeared then to be due the property so pledged was to be subjected to pay.

No argument is needed to show that, if any of the claims made by those who charge that Kebler, as a member of the firm, had used their money, are sustained, Roelker will be liable, and Kebler's estate obligated to reimburse him, and that this obligation would be one arising out of the partnership matters; for, if the demand of such a creditor is in the nature of partnership business for the purpose of fixing liability on Roelker, it is equally a partnership matter for the purpose of a settlement of partnership affairs. No final settlement of partnership affairs can, therefore, be made until these disputes are disposed of. The claim of the administrator is that

Roelker shall now give up his security, after satisfying the debt found by the circuit court; and the effect of it, if sustained, will be to compel Roelker to satisfy such demands of creditors as may be found against the firm, and deprive him of all security for reimbursement. This demand, we think, is unreasonable, and against the very letter, as well as the spirit, of the condition of defeasance. The question is made directly between the administrator and Roelker. The administrator can assert no title which Kebler could not, if living; and he ought not to stand in any better position in this attempt to enforce such demand than would Kebler. And the proposition that Kebler could not be heard to make such an unconscionable claim needs only to be stated to meet with universal acceptance. We have no occasion to dispute the correctness, as a general proposition, of the rule advanced by counsel for the administrator, that a covenant will be restricted in its application to that which was within the contemplation of the parties. But such principle cannot, we think, apply to a mortgage of property given to indemnify against loss to the extent of limiting it to such liabilities only as were known to the mortgagee where he does not stand equally, as to means of information, with the mortgagor, and when the language of the pledge is inconsistent with such limitation. Beyond this the rule does not affect this case, because, as we think, it was fairly within the contemplation of the parties that Roelker should hold his security until a full settlement of all partnership affairs had been had, with the right then to subject the property to his indemnity from all liability arising from Kebler's acts relating to partnership business; and as matter of law it is not of consequence whether or not the particular acts were, at the time of the taking of security, known or anticipated. The judgment of the circuit court, as regards the contention of plaintiffs in error, will be affirmed. As to that of Roelker, it will be modified in accordance with this opinion.

(50 Ohio St. 498)

### SCHUCK v. STATE.

(Supreme Court of Ohio. June 20, 1893.)

#### INTOXICATING LIQUORS—SALE ON "ELECTION DAY."

The "election day" mentioned in section 6948, Rev. St., is a whole day of 24 hours; and the keeper of a place where spirituous, vinous, or malt liquors are habitually sold and drunk is required to keep such place closed during the whole 24 hours of the day of any election.

(Syllabus by the Court.)

George Schuck, having been convicted of a violation of the liquor laws, moves for leave to file a petition in error to review the judgment. Petition denied.

The defendant below, George Schuck, was indicted in the court of common pleas of Wayne county, under section 6948, Rev. St., for failing to keep his barroom, where

he sold intoxicating liquors, closed on election day, the 8th of November, 1892. A plea of not guilty was entered by him. Upon the trial of the case he was found guilty, and adjudged to pay a fine of \$25, and be imprisoned one day. A motion for a new trial was made and overruled, and exceptions taken. A motion is now filed in this court for leave to file a petition in error to reverse the judgment of the court of common pleas.

McClure & Smyser and H. R. Smith, for the motion. A. D. Metz, Pros. Atty., opposed.

BURKET, J. It seems to be conceded that the defendant is guilty as charged in the indictment, unless the court below erred in its charge to the jury as to what constitutes "election day," under the statute, (section 6948.) The part of the charge complained of is as follows: "Now, if you find from the evidence in the case that the 8th day of November, 1892, was a day designated by law upon which either national, state, or county officers were to be elected, I say to you that the 8th day of November means the whole of that day, and election day means the whole day of the 8th day of November; that is, that the day begins at midnight at twelve o'clock, and continues until midnight at twelve o'clock. It is the full day of twenty-four hours, and that day does not consist of only twelve hours, from six o'clock in the morning until six o'clock in the evening. If you should find that after six o'clock in the evening the defendant kept his barroom open, contrary to the provisions of this act, or failed to keep it closed,—if you should find that after six o'clock, after the polls were closed, at any time before midnight of that day, he failed to keep his barroom closed,—then he would be guilty." Section 6948 reads as follows: "Whoever sells or gives away any spirituous, vinous, or malt liquors on any election day, or, being the keeper of a place where any such liquors are habitually sold and drunk, fails on any election day to keep the same closed, shall be fined not more than one hundred dollars and imprisoned not more than ten days." The words in the original act passed on this subject were, "on the day of any election." Those words and the words of the present section mean one and the same thing,—a whole day of 24 hours. We think, therefore, that the court of common pleas was right in its construction of this section of the statute, and also in its charge to the jury. The evident intention of the legislature in the enactment of this statute was that intoxicating liquors should not be sold or given away on election days, and that places where liquors are habitually sold and drunk should be closed on such days, during the whole day of 24 hours. No other construction can fairly be given to the statute as it now stands, and if it is desirable to have its operation confined to the 12 hours during which the ballots are cast the appeal must be to the legislature, and not to the courts.

Leave refused.

(185 Ind. 128)

**MICHENER v. BENGEL et ux.<sup>1</sup>**

(Supreme Court of Indiana. June 15, 1893.)

**BONA FIDE MORTGAGES—CONSIDERATION—CONSTRUCTIVE NOTICE.**

1. Within Rev. St. 1881, § 2931, declaring a conveyance not recorded within 45 days after its execution fraudulent and void as to subsequent mortgagees in good faith and for a valuable consideration, a mortgage given under an agreement at the time of a sale that the purchase-money notes should be secured on certain land is for a valuable consideration, and not to secure a pre-existing debt, though it is not executed until two months after the giving of the notes.

2. A deed from B. and his wife to her two brothers of an undivided one-third interest in certain land, being her interest as heir of E., and a deed from the two brothers to B. conveying an undivided two-thirds in certain other land, being their interests as heirs of E., are not constructive notice to one taking a mortgage from B. and his wife to secure a debt of B. that a prior deed of the property had been made to the wife by her brothers.

Appeal from circuit court, Tipton county; L. J. Kirkpatrick, Judge.

Suit by James B. Michener against George C. Bengel and wife to foreclose a mortgage. Judgment for defendants. Plaintiff appeals. Reversed.

Blackledge, Shirley & Moon, for appellant. W. R. Oglebay and Geo. W. Spahr, for appellees.

**HOWARD, J.** William B. Eshleman, Orris P. Eshleman, and their sister, the appellee Vandellina E. Bengel, inherited from their parents, Jeremiah Eshleman and his wife, Catherine, 80 acres of land in Tipton county, Ind. On August 15, 1885, the three children agreed upon a division of said land. William B. and Orris P. took a deed from Vandellina E. for 50 acres on the north side of the 80 acres, and Vandellina E. took a deed from them for the remaining 30 acres. The deed given by Vandellina E. was signed by her under the name of Elizabeth M. Bengel, and was also signed by her husband, the appellee George C. Bengel. The deed to Vandellina E. Bengel was delivered to her, but was never placed on record. On August 29, 1885, William B. and Orris P. Eshleman executed and delivered to the appellee George C. Bengel a quitclaim deed for an undivided two-thirds of said 30 acres, and this latter deed was placed on record. On June 14, 1887, George C. Bengel and his wife, Vandellina E. Bengel, mortgaged said 30 acres to the appellant to secure the payment of three promissory notes given to appellant by said George C. Bengel for certain machinery purchased of appellant by said Bengel. After the maturity of the notes, the appellant brought suit to collect the debt and foreclose the mortgage on two-thirds of said real estate. To appellant's complaint the appellee Vandellina E. Bengel filed her answer in four paragraphs, and also filed her cross complaint in three paragraphs, setting up that all the land so mortgaged was her own separate estate; that she was the wife of George C. Bengel; that the debt secured was the individual debt of her said husband; that she executed said mortgage solely to secure said debt, and

praying that the title to the land be quieted in her. In the third paragraph of said appellee's answer she alleged that on August 15, 1885, she and her said brothers met and agreed upon partition of the said 80 acres inherited from their parents; that for the purposes of partition, and to divide the land among themselves, and upon no other consideration, she, her husband uniting with her, conveyed 50 acres off the north side of said land to her said brothers, "and on the same day, at the same time and place, to carry out the partition agreed upon, and as consideration for said deed," her said brothers conveyed to her the said remaining 30 acres; that afterwards, without her knowledge or consent, the said deed to her was torn up and destroyed, and on the 29th day of August, 1885, her said brothers conveyed to her husband the undivided two-thirds of said 30 acres, which last deed was placed upon record. The cause was submitted to a jury, who rendered a general verdict for the appellant against the appellee George C. Bengel for the amount of the debt due appellant, and a general verdict for the appellee Vandellina E. Bengel on her cross complaint, quieting her title to all of said 30 acres.

The only error assigned by appellant is the overruling of his motion for a new trial. The first reason given in support of the motion for a new trial is that the verdict is not sustained by sufficient evidence. The appellee Vandellina E. Bengel testified that she did not know that the deed given to her in partition was destroyed, and a deed made to her husband in its stead, until after the execution of appellant's mortgage. At the time that the appellee George C. Bengel made the contract with appellant to purchase the machinery he represented to appellant that the 30 acres was his own property, and agreed to secure the debt by a mortgage on the land. Appellant testified that he did not know, at or before the time of the execution of the mortgage, that the appellee Vandellina E. Bengel was the owner of any part of said land until after examining the record of deeds, when he discovered that George C. Bengel was the owner of only two-thirds of it, as shown by the deed received by him from William B. and Orris P. Eshleman. Section 2931, Rev. St. 1881, provides that "every conveyance or mortgage of lands, or of any interest therein, and every lease for more than three years shall be recorded in the recorder's office of the county where such lands shall be situated; and every conveyance or lease, not so recorded in forty-five days from the execution thereof, shall be fraudulent and void as against any subsequent purchaser, lessee, or mortgagee in good faith and for a valuable consideration." The appellee Vandellina E. Bengel did not put her deed upon record within the time required by law, nor before the time of the making of said mortgage. By section 5117 of the same statutes, while a married woman may take, acquire, and hold real or personal property as if she were unmarried, yet it is provided "that she shall be bound by an estoppel in pais, like any other person." That appellant was a mortgagee in good

<sup>1</sup>For opinion on rehearing, see 34 N. E. Rep. 816.

(aith and for a valuable consideration we have no doubt, although this is denied by appellees, who contend that, as the notes were given April 15, 1887, while the mortgage was executed June 14th thereafter, therefore the mortgage was one to secure a pre-existing debt. Such a case was that of *Busenbarke v. Ramay*, 53 Ind. 499. But in this case, at the time of purchase of machinery by George C. Bengel from appellant, it was a part of the agreement that such mortgage should be given to secure the debt created by such purchase. The contract of purchase, notes, and mortgage were all parts of one transaction. Appellant had no actual notice of the partition deed to appellee Vandelina E. Bengel. It remains to be considered whether he had constructive notice of the existence of such deed. The only evidence before the jury from which such constructive notice could be drawn were the partition deed from George C. Bengel and Elizabeth M. Bengel to William B. and Orris P. Eshleman for one-third of 50 acres on the north side of the 30-acre tract in suit, and the deed from William B. and Orris P. Eshleman to George C. Bengel for two-thirds of said 30 acres. Both of these deeds trace title through Jeremiah Eshleman; the first conveying the interest of Elizabeth M. Bengel in said 50 acres as heir of said Jeremiah Eshleman, and the second conveying the interests of William B. and Orris P. Eshleman in said 30 acres, also as heirs of said Jeremiah Eshleman. The mortgage on the 30 acres was made in the names of "George C. Bengel and V. E. Bengel, his wife." Appellees contend that the deeds so in evidence were constructive notice to appellant of the existence of the partition deed to Vandelina E. Bengel. The jury answered several interrogatories. The following bear upon this issue: "Did the records of Tipton county show at the time the real-estate mortgage sued upon was executed that George C. Bengel owned two-thirds of the mortgaged real estate? Yes. J. N. Richards, Foreman." "Did James B. Michener know at the time he accepted said mortgage that Vandelina E. Bengel owned or claimed to own said land? We suppose he did. J. N. Richards, Foreman." "Did said George C. Bengel obtain the property for which the notes in suit were given by promising to secure and securing the notes given therefor by executing a mortgage on said land as well as certain personal property described in the chattel mortgage in suit? Yes. J. N. Richards, Foreman." "Did James M. Michener sell said property to him on the faith of his ownership of two-thirds of said land? We are not sure whether he did or not. J. N. Richards, Foreman." From the first and third of these answers it appears that the jury were of opinion that the records in the recorder's office showed the land to be owned by George C. Bengel, and that he obtained the goods by promising to execute and by executing a mortgage on the land. From the second and fourth answers it would seem that the jury were uncertain whether the evidence showed that the appellant had any knowledge of any title or claim to said land by Vandelina E. Bengel. The

second and fourth answers might perhaps be reconciled with the general verdict, but the other two could not. To say nothing of the circumstance that Vandelina E. Bengel appears under the name of Elizabeth M. Bengel in the only deed in evidence referring to her, and that she so appeared as grantor to land different from the land in suit, it seems clear that there was not enough in either or both of these deeds to amount to notice to appellant that George C. Bengel was not the owner of the two-thirds of the 30 acres. Even if appellant should note the fact that both tracts of land were derived from the common ancestor, yet he might well believe that the conveyances were made, as they stood recorded, with the consent and acquiescence of all parties concerned. The Eshleman brothers, who made the deed to George C. Bengel, both testified that they so made the deed believing that it was in accordance with an arrangement between Bengel and his wife; and, notwithstanding the statements of appellees themselves, it would seem from all the evidence that the deed was so made with the consent and knowledge of Vandelina E. Bengel. Certainly, from the records in the recorder's office, and from the representations made to him by George C. Bengel, who appeared by the record as the owner at the time the mortgage was taken, the appellant had every reason to believe that George C. Bengel was then the owner of the land. The appellant was therefore a mortgagee in good faith, and for a valuable consideration. Appellees, in contending against this view, claim that the evidence is not in the record. In this, we think, they are in error. While the clerk's certificate is somewhat informal as to showing the filing of the longhand manuscript of the evidence, as required by section 1410, Rev. St. 1881, yet we think the certificate is substantially sufficient, as held in *Wagoner v. Wilson*, 108 Ind. 210, 8 N. E. Rep. 925. Having reached the conclusion that the verdict is not sustained by the evidence, it will be unnecessary to consider the other questions discussed by counsel. The judgment is reversed, with instructions to grant a new trial, and for other proceedings not inconsistent with this opinion.

(139 Ind. 268)

# BOARD OF CHILDREN'S GUARDIANS OF MARION COUNTY v. SHUTTER.<sup>1</sup>

(Supreme Court of Indiana. June 15, 1893.)

INFANTS—GUARDIANSHIP—APPOINTMENT—JURISDICTION—PROCESS—HABEAS CORPUS.

1. The circuit court has, independently of statute, jurisdiction of the subject of the guardianship, custody, and control of minors.
2. In a proceeding for the appointment of a guardian of an infant, service of process on her parents will give jurisdiction of her person, without service on her.
3. Errors and irregularities in a proceeding for the appointment of a guardian cannot be inquired into on habeas corpus.

Appeal from superior court, Marion county; A. B. Taylor, Judge.

Application of Gertrude Shutter for writ of habeas corpus against the Board of Children's Guardians of Marion County,

<sup>1</sup> Rehearing denied.

Ind. From a judgment for petitioner, respondent appeals. Reversed.

Chas. Martindale, Clinton L. Hare, Wm. P. Fishback, W. P. Kappes, Byron K. Elliott, and Wm. F. Elliott, for appellant. Frank McCray, and Samuel Ashby, for appellee.

McCABE, J. The appellee applied to the court below for a writ of habeas corpus against appellant, charging it with unlawfully restraining her of her liberty. An exception to the amended return to the writ by appellant was taken by appellee, and sustained by the trial court, to which ruling appellant excepted; and failing to further amend its return, and electing to stand thereon without further pleading or action, it was adjudged that the alleged holding and detention of the appellee was without authority of law, etc. The return, after reciting in detail the appointment of all the members of the Board of Children's Guardians by the circuit court of Marion county, from the organization of the board to that time, giving the names of all the present members, as well as their predecessors, reads as follows: "That acting as such corporation as aforesaid, of which the parties whose names have been hereinbefore set forth are members, said corporation, on the 1st day of March, 1893, in the January term for the year 1893 of the Marion circuit court, filed in said court a petition as follows: 'In the Matter of Gertrude Shutter, Infant. Petition for Custody. To the Honorable Judge of the Marion Circuit Court: The Board of Children's Guardians of Marion County, a corporation existing under, and acting by virtue of, the laws of Indiana, respectfully petition the court, and say that Gertrude Shutter is a female child, thirteen years of age; that the father of said child is Shade A. Shutter, residing at Jeffersonville, Ind.; that the mother of said child is Bell Shutter, residing at 249½ W. South street, within Marion county, Ind.; that the child is in the actual custody and control of her mother, the said Bell Shutter; that the father of said child has abandoned his family; that said mother is in constant habits of drunkenness, and low and gross debauchery; that said child is neglected, and kept in associations which tend to her corruption and contamination. Wherefore, the Board of Children's Guardians of Marion County petitions the court to order that said child be committed to the custody and control of said board. [Signed] The Board of Children's Guardians. By Nathaniel A. Hyde, President. C. L. Hare, Attorney for Petitioner.' This petition was duly verified. That the court, having inspected the petition, ordered that the writ for the custody of said child be issued thereon, and that the same be served upon Bell Shutter, the mother of said child, in Indianapolis, and Shade A. Shutter, at Jeffersonville, Clark county, Ind., and directed that said minor child should be kept in the keeping of said board until the final order of the court upon said petition. That said writs were issued thereon, and the said Gertrude Shutter was taken by the sheriff of Marion county

on said writ, and delivered to the defendant, said corporation. That said petition was set for hearing on the 11th day of March, 1893, and notice thereof was ordered to be given to said Bell Shutter and Shade A. Shutter, the parents of said child. That on the 4th day of March, 1893, by agreement of both parties, said Marion circuit court proceeded to hear and determine said cause on said petition; and having heard the evidence, and being sufficiently advised, said court entered in said cause the following order and decree, to wit: And afterwards, to wit, on Saturday, the 4th day of March, 1893, the same being the 54th judicial day of the January term, 1893, of the Marion circuit court, the following additional proceedings were had in this cause: Comes the Board of Children's Guardians of Marion county, Ind., by C. L. Hare, its attorney, and comes also Shade A. Shutter, in person, and by J. F. McCray, his attorney, and defendant, Bell Shutter, in person, comes also; and now, by agreement of all parties, notwithstanding the return day of the writ issued herein, this cause is submitted to the court for trial, finding, and determination, and the evidence and argument of counsel heard; and the court, having seen and inspected the petition herein, and being fully advised, finds that the allegations of said petition should be sustained, that said Gertrude Shutter is a female child of the age of thirteen years, and that she should be given to the custody of the Board of Children's Guardians. It is therefore considered and adjudged by the court that the said Gertrude Shutter be, and she is hereby, given to the custody of the Board of Children's Guardians of Marion county, Ind." The return further shows that there was a motion for a new trial in said cause overruled, and a motion to modify the order was also overruled. The return further shows this judgment of said circuit court remains in full force, unmodified, unreversed, and not appealed from. If that judgment is valid, the return was good, and the superior court, in general term, erred in affirming the judgment in special term adjudging the return insufficient.

It is earnestly insisted by appellee that the judgment of the circuit court, in awarding her custody and control to appellant, was void, because it is asserted the act approved March 3, 1893, (Acts 1893, p. 282,) under which the circuit court proceeded, is in conflict with several provisions of the state constitution. It is maintained with earnestness and ability for appellee that "all judgments had and rendered under a law that is unconstitutional are void, and are as if no proceeding or judgment had been had or rendered." Concede that proposition, and yet counsel's contention is not established. If the law which gives the sole power or jurisdiction to the court to render the judgment is unconstitutional and void, and if, without such a law in force, the court would have no power to render the judgment in question, then, the law being void, the judgment depending wholly on such void law would also be void. Where, however, the court has jurisdiction to adjudicate upon the subject, derived from other sources than the sup-



posed void statute, even though it may attempt to follow that statute, it does not necessarily follow that its judgment is void. A judgment founded on a statutory bond, depending for its validity wholly on the statute, which is unconstitutional and void, is not void, and cannot be collaterally impeached because the statute is unconstitutional and void. *Cassel v. Scott*, 17 Ind. 514. If the circuit court had jurisdiction over the subject and the parties, though it committed the greatest irregularities and errors, its judgment cannot be collaterally impeached therefor, as this proceeding attempted to do. *Davidson v. Koehler*, 76 Ind. 398; *Sauer v. Twinning*, 81 Ind. 366; *State v. Morris*, 103 Ind. 161, 2 N. E. Rep. 355. The circuit court was a court of general jurisdiction. If it was not clothed with all the jurisdiction of the English court of chancery, it is within a branch of the equity powers of the circuit courts of this state that they have the superintendence of infants, idiots, and lunatics. *McCord v. Ochiltree*, 8 Blackf. 15. The power to appoint guardians for infants, idiots, and lunatics, conferred by the statute, is merely declaratory of the power they already possessed. *Garner v. Gordon*, 41 Ind. 92; *Child v. Dodd*, 51 Ind. 484; *Nealis v. Dicks*, 72 Ind. 374; *Board, etc., v. Rogers*, 55 Ind. 297; *Erskine v. Whitehead*, 84 Ind. 357; *McKenzie v. State*, 80 Ind. 547; *McGlennan v. Margowski*, 90 Ind. 150; *Bryan v. Lyon*, 104 Ind. 227, 3 N. E. Rep. 880. We therefore hold that the circuit court had ample power to deal with, and adjudicate upon, the subject of the guardianship, custody, and control of minors. The circuit court, therefore, had jurisdiction of the subject.

It is earnestly contended that the circuit court acquired no jurisdiction over the person of the appellee, the minor whose custody and control was determined by the adjudication. If that is true the judgment would be void, the same as if jurisdiction over the subject was wanting. The ground upon which this contention is based is that there was no notice or process served on the infant, notifying her that such an adjudication, affecting her, was to take place. No notice appears to have been served upon her, except taking her into custody by the appellant before the hearing of its petition. But there was process served on her mother and father, and a full opportunity afforded them to be heard against the granting of the petition, and they appeared at the hearing. But it is ably contended that that is not sufficient to confer jurisdiction over the person of the child. In some of the states no other notice than notice to parents, or, if no parents, next of kin, is required, to enable courts to appoint a guardian. Counsel for appellee have referred us to a large number of cases holding that a summons must be served on an infant, the same as an adult, or the judgment will be void as to such infant; and in that class of cases it will be equally so if the infant was but a week old, and would be as unconscious of the reading of the summons to it as a block of wood; and yet the law imperatively requires the service of such a summons on such an infant, in that class

of cases, as much as upon an adult, or the adjudication will be void for want of jurisdiction over the person. But the class of cases they have referred us to, and that we have been discussing, is such only as where the judgment sought, or the adjudication to be had, is to deprive the infant of some property right, or to injuriously affect such minor in its rights of property. In that respect its rights are precisely the same as an adult. Hence it must have the summons read to it, precisely the same as an adult, though it does not understand a word of it. Its right to control its own actions is not like an adult. It is subject either to parental control, the guardian's control, or the control of the court or chancellor, in the absence of parent or guardian, on account of its lack of discretion and knowledge sufficient to guide its own actions for its own best interests. Hence, in a proceeding for the appointment of a guardian for it, the principle of the cases above referred to has no application whatever, where it is under 14 years of age. Such an appointment does not deprive it of any of its rights of property, or injuriously affect its rights in that regard. It is but an officer of the court, appointed to wield the power of an arm of a court of equity, and no notice to the infant is required. *Kurtz v. Railroad Co.*, (Minn.) 51 N. W. Rep. 221; *Appeal of Gibson*, (Mass.) 28 N. E. Rep. 296; *Reynolds v. Howe*, 51 Conn. 472. We therefore conclude that the circuit court had jurisdiction of the person of the infant, and the subject-matter of the adjudication. It may have erred at every step of those proceedings. We do not decide that it did, or did not, because such errors and irregularities cannot be inquired into on a writ of habeas corpus. *Rev. St. 1881, § 1119*; *Wentworth v. Alexander*, 66 Ind. 39; *Kinningham v. Dickey*, 125 Ind. 180, 24 N. E. Rep. 1048; *Turner v. Conkey*, (Ind. Sup.) 81 N. E. Rep. 777; *Smith v. Hess*, 91 Ind. 421; *Lowery v. Howard*, 103 Ind. 440, 3 N. E. Rep. 124; *Davis v. Bible*, 33 N. E. Rep. 910, (at last term.) Such errors, if any were committed, must be relieved against, just as in any other adjudication, by appeal, bill of review, or any method known to the law for relief against an erroneous judgment.

The conclusion we have reached not only finally disposes of this case in this court, but also in the court below, without deciding anything whatever about the constitutionality of the statute, so ably and exhaustively discussed by counsel on both sides. Under such circumstances, our duty does not require us to enter upon that field of investigation. *Cummings v. Stark*, 84 N. E. Rep. 444, (at this term.) The judgment is reversed, the cause remanded, with instructions to overrule the exceptions to the amended return.

(7 Ind. App. 393)

JOHNSON et al. v. McNABB et al.

(Appellate Court of Indiana, June 24, 1898.)

DAMAGES—OBSTRUCTION OF DITCH—COMPLAINT—PROOF—VARIANCE—INSTRUCTIONS.

1. Under *Rev. St. 1881, §§ 391, 392*, providing that no variance shall be material unless it

has misled the adverse party to his prejudice, and that, when the variance is not material, the court may direct the facts to be found according to the evidence, or may order an immediate amendment without costs, it is error for the court, in an action to recover damages for the obstruction of a licensed "tile" ditch, after refusing to allow plaintiffs to amend their complaint by striking out the word "tile" to conform to the proof, to charge that plaintiffs were not entitled to recover unless defendants licensed and obstructed a "tile" ditch.

2. It was error to refuse to charge that plaintiffs, in order to show the alleged license, need not show that the tile was in fact laid in the ditch, if it was, in compliance with such license, dug and ready for the tile; and that the material thing is whether license was given to construct a ditch across defendants' lands, and whether such ditch was constructed, and not whether tile were to be or were in fact laid in it.

Appeal from circuit court, Steuben county; S. A. Powers, Judge.

Action by George K. Johnson and others against Theodore McNabb and others to recover damages caused by the obstruction of a ditch on defendants' land. From a judgment entered on the verdict of a jury in favor of defendants, plaintiffs appeal. Reversed.

F. S. Roby, for appellants. Best & Bratton and W. W. Snyder, for appellees.

DAVIS, J. This is an appeal under the provisions of sections 630, 631, Rev. St. 1881. The reserved questions are duly presented in a clear, distinct, and brief manner by proper bill of exceptions. Appellants' complaint is in two paragraphs. In the second it is alleged that appellees had some time prior to the institution of the action, for a good and sufficient consideration, licensed the construction of a tile drain across the lands owned by them, upon the faith of which license work had been done and money expended by appellees and others interested therein in the construction of such drain, and that appellees had wrongfully obstructed the same, and thereby caused the water to overflow appellants' land, to their damage, etc. No question has been raised as to the sufficiency of either paragraph of the complaint. A careful reading thereof convinces us that each paragraph of the complaint states facts sufficient to constitute a good cause of action. The statements and recitals in the bill of exceptions show that evidence was introduced on the trial which reasonably and fairly tended to establish each and every material allegation contained in the second paragraph of the complaint, unless there is in one respect a fatal variance between the pleading and proof. It appears, in the respect referred to, that evidence was introduced tending to prove a license for the construction of an open ditch upon and over the lands of appellants, instead of a tile ditch. In other words, the license was granted, the ditch was constructed, and afterwards obstructed, substantially in every particular in manner and form as alleged and described in the complaint, with the exception that said ditch or drain was an open, and not a tile, ditch or drain. Instead of proving a license to construct a tile drain, the evidence estab-

lished a license to construct an open drain. The gravamen of the action was to recover damages because of the unlawful obstruction of a drain, which caused appellants' lands to overflow. The vital questions affecting the substantial rights of the parties were whether appellees had granted the license, whether the drain had been constructed on the faith of such license, and whether it had been wrongfully obstructed by appellees to appellants' injury. It appears that after the evidence had all been heard, and before the argument of counsel had begun, appellants asked leave and moved the court in writing to allow them to amend the second paragraph of the complaint "by striking out the word 'tile' where the same occurs in connection with the description of the drain alleged to have been licensed by defendants," for the purpose of conforming the complaint to the proof. The motion was overruled, and proper exceptions reserved. Appellants thereupon asked the court to give the jury the following instructions: "It is averred in the complaint that the defendants licensed certain persons to construct a tile ditch or drain across the lands owned by them. You are instructed that the plaintiffs, in order to show such license, need not show that the tile was in fact laid in said ditch, if it was, in compliance with such license, dug and made ready for such tile. The material thing is whether license was given to construct a ditch across defendants' lands, and whether such ditch was so constructed, and not whether tile were to be laid in said ditch, or were in fact laid therein." The court refused to give this instruction, and proper exception was reserved. The court, at appellees' request, gave the following instruction: "If you find from the evidence that there was no natural water course across the lands of defendants at the time of the construction of the drain mentioned in plaintiffs' complaint, then you cannot find for the plaintiffs in this case, unless you find that defendants gave a license for the construction of a tile drain across their lands, and that in pursuance of such license such a tile drain was constructed on or across defendants' lands, and that without right defendants have obstructed such tile drain, to plaintiffs' damage." Exception was reserved to the giving of this instruction.

The record, as we understand it, discloses a state of facts which would have justified the trial court in granting appellants leave to amend the complaint by striking out the word "tile." We do not, at this time, see how such an amendment could have affected or prejudiced the rights of appellees; but if such an amendment, when made, had been in any respect to their disadvantage, the court would, doubtless, on proper application, have set aside the submission, and continued the cause at appellants' costs. Whether the ruling of the court in refusing to permit appellants to make the amendment desired is shown to have been such an abuse of the discretion of the trial court as to warrant a reversal, we need not, in the view we have taken of the

case, determine. Conceding, without deciding, that there was no error in this ruling, we pass to the consideration of the other questions presented.

In order to entitle appellants to recover it was incumbent on them to prove by a preponderance of the evidence to the satisfaction of the jury, under proper instructions of the court, the essential facts alleged in their complaint, which included, among others, the following: (1) A license; (2) the construction of the ditch; (3) its wrongful obstruction. The evidence is not in the record, and it is not our province to form or express any opinion as to the merits of the controversy, but the bill of exceptions fully and fairly, in our judgment, presents for our consideration the material question as to whether the court erred in the instructions given and refused. The statute, in our opinion, is decisive of the case. It is provided in section 391, Rev. St. 1881, that "no variance between the allegations in a pleading and the proof is to be deemed material unless it have actually misled the adverse party to his prejudice, in maintaining his action or defense upon the merits." In this connection, also read the next section, which provides: "Where the variance is not material, as provided in the last section, the court may direct the facts to be found according to the evidence, or may order an immediate amendment, without costs." Section 392, Rev. St. 1881. When the allegations of the complaint to which proof is directed are unproved, not in some particular or particulars only, but in their general scope and meaning, then the case is not one of variance, but is a failure of proof. Section 393, *Id.* The ruling of the trial court, as indicated by the instructions given and refused, was based on the theory that appellants could not, under any circumstances, recover, unless they had proved the obstruction by appellees of a tile drain constructed under license of appellees. In the opinion of the court, whether it was a tile or open drain was the vital and controlling question. In substance and effect the court said to the jury that, although they might believe that appellees had granted the license to construct an open drain, and that such drain had been constructed on the faith of the license, and that it had been wrongfully obstructed by appellees, and that appellants had been injured thereby, yet appellants could not recover, because of the allegations in the complaint that such drain was a tile drain. The court should not have said to the jury that, "notwithstanding appellants have fully proven to your satisfaction all the other facts essential to a recovery by them, a verdict should be returned against them solely because of the fact that the drain was an open one, instead of a tile ditch." It is conceded there was no evidence whatever in relation to a tile ditch, and the record discloses that because of the fact that all of the evidence related to an open ditch the trial court was of the opinion that appellants were not under any circumstances entitled to recover in this action. In this conclusion we believe the court was in error. A reasonable and fair construction

of the recitals in the bill of exceptions relative to the evidence shows that there was evidence introduced on the trial tending to prove the allegations of the complaint in their general scope and meaning, and the only variance is in the particular referred to, which does not constitute a failure of proof, and therefore, for reasons hereinbefore given, our conclusion is that the court erred in refusing to give the first instruction and in giving the second instruction. See *Steinke v. Bentley*, (Ind. App.) 34 N. E. Rep. 97, (decided at last term,) and authorities there cited. The judgment of the court below is reversed, with instructions to grant a new trial, with leave to amend pleadings, if desired.

(4 Ind. App. 31)

LOUISVILLE, N. A. & C. RY. CO. v.  
ETZLER.

(Appellate Court of Indiana. June 26, 1903.)

APPEAL—TIME OF TAKING.

Where plaintiff, in an action against a railroad company for injuries to stock, dies, and his executrix continues the suit, an appeal from the judgment rendered must be taken under Rev. St. 1881, § 640, relating to appeals in civil cases, and not under sections 2454 and 2455, relating to appeals in matters growing out of a decedent's estate, providing for filing a bond in 10 days and a transcript in 20 days.

Appeal from circuit court, Washington county.

An action was commenced by George J. Etzler against the Louisville, New Albany & Chicago Railway Company for injuries to stock. Plaintiff died, and the action was continued by his executrix, Nancy J. Etzler. Judgment for plaintiff, and defendant appeals. Plaintiff moves to dismiss the appeal. Denied.

For the opinion on the merits of the case, see 30 N. E. Rep. 32.

E. C. Field, C. C. Matson, and W. S. Kinman, for appellant. H. Morris, for appellee.

BLACK, J. This was an action commenced by George J. Etzler against the appellant to recover damages for the killing of one animal and the injuring of another by the locomotive and cars of the appellant, being an action under the statute, (section 4025 et seq., Rev. St. 1881,) the complaint alleging that the animals went upon the railroad track at a point where it was not securely fenced. After the commencement of the action, the appellee, in August, 1889, filed a supplemental complaint and a second paragraph of complaint, alleging in each the death, in 1889, of the plaintiff, said George J. Etzler, testate, at Washington county, Ind., and that the appellee was the duly appointed, qualified, and acting executrix of his will, said supplemental complaint being, like the original complaint, based upon the statute, and said second paragraph alleging said killing and said injury to have been done through negligence. Thus, the appellee became a party and continued the action under the provisions of section 271, Rev. St. 1881. Issues were formed, the

trial of which, by the court, resulted in a finding for the appellee. From the judgment thereupon rendered for the appellee this appeal was taken.

The judgment was rendered on the 2d of January, 1891, and the transcript was filed in the office of the clerk of this court on the 6th of May, 1891, the appeal being perfected as provided in section 640, Rev. St. 1881, being section 635 of the Civil Code. The appellee has moved to dismiss the appeal, assigning as reasons that the appeal bond was not filed within 10 days after judgment; that the transcript was not filed within 10 days after the appeal bond was filed, and within 20 days after judgment; and that the transcript was not filed within 30 days after judgment. The motion to dismiss raises the question whether the appeal could be taken under the provisions relating to appeals in the Civil Code, or should have been taken in the manner specially provided in sections 2454 and 2455, Rev. St. 1881, being sections 228 and 229 of the act relating to decedents' estates, the motion being framed apparently with reference to the provisions of said section 2455, as enacted in 1881, and also as amended in 1885. Acts 1885, p. 194. These sections of said statute concerning decedents' estates are applicable only to appeals from decisions rendered in proceedings provided for in that statute, and have no relation to such a case as the one at bar. *Walker v. Steele*, 121 Ind. 436, 22 N. E. Rep. 142, and 23 N. E. Rep. 271; *Koons v. Mellett*, 121 Ind. 585, 23 N. E. Rep. 95; *Dillman v. Dillman*, 90 Ind. 585; *Wright v. Manns*, 111 Ind. 422, 12 N. E. Rep. 160; *May v. Hoover*, 112 Ind. 455, 14 N. E. Rep. 472; *Simmons v. Beazel*, 125 Ind. 362, 25 N. E. Rep. 344. The appellee's motion to dismiss the appeal is overruled, at her costs.

(3 Ind. App. 239)

**BANK OF WESTFIELD v. INMAN et al.**  
(Appellate Court of Indiana. June 23, 1893.)

#### REHEARING.

A rehearing will not be granted to enable the parties to procure a correction of the record.

On petition for rehearing. Petition overruled.

For former report, see 34 N. E. Rep. 21.

**PER CURIAM.** It is settled by a long line of decisions that a rehearing will not be granted to enable the parties to procure a correction of the record. *Warner v. Campbell*, 39 Ind. 409, *Railway Co. v. Van Houten*, 48 Ind. 90; *Cole v. Allen*, 51 Ind. 122; *State v. Terre Haute & I. R. Co.*, 64 Ind. 297, (303); *Board v. Hall*, 70 Ind. 449, (476); *Mansur v. Churchman*, 84 Ind. 573; *Robbins v. Magee*, 96 Ind. 174, (179); *State v. Dixon*, 97 Ind. 125, (126); *Board, etc., of Marion Co. v. Center Tp.*, 105 Ind. 422, (444.) 2 N. E. Rep. 368, and 7 N. E. Rep. 189; *Elliot, App. Proc.* § 556. By section 3 of the act of February 16, 1893, (Acts 1893, p. 81,) it is expressly provided

that this court shall be governed in all things by the law as declared by the supreme court, and shall not directly or by implication reverse or modify any decision of that court.

Petition for rehearing overruled.

(7 Ind. App. 496)

**ROBBINS v. SWAIN.**<sup>2</sup>

(Appellate Court of Indiana. June 24, 1893.)

**AGREED CASE—APPEAL—WILLS—ADVANCEMENTS—GIFTS.**

1. Where parties act on the theory in the trial court that the case is an agreed case, they will be held to that theory on appeal, though the case may not come within the statute.

2. A will gave \$200 to testatrix's niece. Prior thereto the niece had received money from the testatrix, for which she had receipted "as part of such amount as she may see fit to bequeath to me at her death." After executing the will, testatrix frequently stated that she intended her niece should have \$200 out of her estate at her death. Held, that testatrix had before her death converted the payments evidenced by the receipts into absolute gifts. 32 N. E. Rep. 792, reversed.

Reinhard, J., dissenting.

On rehearing.

**DAVIS, J.** No claim or pleading was filed in the court below, and the rights of the parties are to be determined on the agreed case, under section 553, Rev. St. 1881. Omitting the formal parts, the agreement is as follows: "It is agreed that Charity Middleton, the decedent, made and executed her last will, which has been duly admitted to probate in the Randolph circuit court, a copy of which \* \* \* is filed and made a part of this agreement. That said will was made on the 3d of October, 1874; that afterwards, to wit, on the 27th of February, 1887, the said Charity Middleton made a codicil to her said will, which is probated with it. \* \* \* That the said Charity Middleton died on the 22d day of February, 1890, having made no other will except the will and codicil above mentioned. That said decedent left no children or child surviving her, nor did she leave any husband living. That she left surviving her one brother, William H. Swain, the above-named executor. That the above-named Minerva Robbins is a niece of said Charity Middleton, deceased. That the bequest to the said Minerva Robbins mentioned in the first item of said will has not been paid by the executor or any one else since the death of said decedent, and is still due and owing to her, and should be paid in full, unless the same, or a portion thereof, has been advanced by the payment to said Minerva Robbins by said Charity Middleton, before the execution of said will, of certain moneys, as evidenced by two receipts found in the possession of said William H. Swain at the death of said Charity Middleton, of which receipts the following are true copies: 'March 1, 1868. Received of Charity Middleton one

<sup>1</sup> See 32 N. E. 835.

<sup>2</sup> Rehearing denied.

hundred dollars as part of such amount as she may see fit to bequeath to me at her death. Minerva Robbins.' August 26th, 1899. Received of Charity Middleton thirty dollars as part of such amount as she may see proper to bequeath to me at her decease. Minerva Robbins.' The receipts were taken by the said William H. Swain, who, as the agent of the said Charity Middleton, paid the money for which the first receipt was given to Minerva Robbins, and it is not known whether the said Charity Middleton ever saw them or not. That the receipts were taken in the form that they were at the suggestion of Swain as her agent, and with her knowledge and by her direction, and she knew that they were so taken. That the \$30 receipt was given for a cow which the said Charity gave to the said Minerva. That frequently after making her will, the said Charity stated to different parties that she intended the said Minerva to have two hundred dollars out of her estate at her death." Item first of the will reads as follows: "I give my beloved niece, Minerva Robbins, of Jay county, Indiana, the sum of two hundred (\$200) dollars." The agreement is in all respects in proper form, and duly verified. On the filing of the agreed case, the court rendered judgment in favor of appellant for \$70 only, and appellant, having reserved proper exceptions, duly prosecutes this appeal.

At this point we are confronted with an important preliminary inquiry, which has not been raised by counsel, but which we are required to consider, in order to determine on what basis to proceed in our investigation of the questions involved. It was held by this court on the 18th of September, 1892, in *Henas v. Henas*, (Ind. App.) 31 N. E. Rep. 832, that the court acquires jurisdiction in claims against decedents' estates only in the manner pointed out in the act concerning such estates, and that section 553, *supra*, has no application to claims against decedents' estates; and, in the language of the court, "it could not have been intended that an administrator or executor should be clothed with authority to bind by such agreement the heirs and creditors of the estate he represents." In that case, a claim based on a note executed by the decedent in his lifetime had been filed against the estate. The claim or complaint, after the cause reached the docket of the trial court, was duly amended. Subsequently the parties filed an agreed statement of facts, and the court said: "It follows, we think, that the parties had no authority to submit the cause under section 385, (Elliott's Supp.) even if they attempted to do so, which is by no means clear from the record. The agreed statement of facts must be treated, therefore, simply as evidence." There is a material difference between an agreed case and a case where there is simply an agreement as to the facts. Elliott's App. Proc. § 224. In this connection, and as applicable to the case before us, we quote from the opinion of Judge Elliott in a recent case decided by the supreme court. "Both parties assert that this is an

agreed case under the statute. Upon that theory they submit the case to us, and it was submitted to the trial court upon the same theory. Accepting, without investigation or decision, the statement of both parties that this is an agreed case under the statute, and taking as our guide the rule that parties are bound by the theory which they assume to be the correct one, we shall treat this case as an agreed case. *Carver v. Carver*, 97 Ind. 497, 516; *Railway Co. v. Wood*, 113 Ind. 544, 564, 14 N. E. Rep. 572, 16 N. E. Rep. 197; *Brink v. Reid*, 122 Ind. 257, 23 N. E. Rep. 770. When parties agree upon a theory we cannot with propriety deny their agreement except perhaps when it is plainly necessary to do so in order to prevent manifest injustice." *Booth v. Cottingham*, 126 Ind. 431, 26 N. E. Rep. 84. That was an action against the guardian of a person of unsound mind, growing out of service alleged to have been rendered the ward and his wife by a physician under the administration of a former guardian. The case in hand is not analogous to the case of *Henas v. Henas*, *supra*, and, strictly speaking, this is not an action "for the recovery of any claim against the decedent," within the purview of section 385, *supra*. The decedent at her death was not indebted to appellee. The rights of appellee, if any, arise under the will, and not by virtue of any claim due or not existing at the death of the decedent. This is more in the nature of a proceeding to determine the construction of a will, and the rights of appellee thereunder. Whatever view, however, may be taken of the nature of the action, we have determined to inquire into the questions involved on the theory, as enunciated by Judge Elliott, "that this is an agreed case under the statute." Where the parties act upon the theory in the trial court that the case is an agreed case, they will be held to that theory on appeal, although the case may not come within the statute. Elliott's App. Proc. *supra*. There is no statement or agreement as to what the intention of any of the parties may have been, and the court, on the theory on which the case is submitted and presented, is to determine the intention of the respective parties from the evidence as recited in the agreement, without the aid of any presumption in favor of the judgment of the court below. *Railroad Co. v. Kinney*, 8 Ind. 402; *Building & Loan Ass'n v. Houghland*, 90 Ind. 115; *Day v. Day*, 190 Ind. 460; Elliott's App. Proc. § 226.

It is insisted by counsel for appellant "that the intention of the testatrix must be gathered from the will itself, and cannot in any way be controlled or varied by evidence dehors the will." The general rule undoubtedly is that the will is the last and controlling utterance of the testator, and that the intention of the testator must be ascertained and declared by the court from the words of the will, unassisted by extrinsic evidence. *Chapman v. Allen*, (Conn.) 14 Atl. Rep. 780. Therefore, when a testator, prior to making a will, advances or pays money to one to whom a bequest is made in a subsequent will, without any reference being made in

the will to the previous payment, then, ordinarily, the testator of legal necessity says that he has converted the previous payment into an absolute gift. *Chapman v. Allen*, supra. But it has been held in some cases that the payment by a testator to a legatee will operate as a satisfaction pro tanto of a legacy in a subsequent will, when such payment is received by the legatee under a promise that it should be so applied. *Jacques v. Swasey*, (Mass.) 27 N. E. Rep. 771; *Gray v. Bailey*, 42 Ind. 349. It has also been decided by our supreme court that extrinsic evidence may be legitimately admitted in order to connect the will with the extrinsic facts therein referred to, and to place the court as nearly as may be in the situation occupied by the testator, so that his intention may be determined from the language of the instrument as it is explained by the extrinsic facts and circumstances. *Daugherty v. Rogers*, 119 Ind. 254, 20 N. E. Rep. 779. It is well settled that a receipt may be explained. A receipt is admissible in evidence upon the principle that declarations and admissions of a party may be used against him. 19 Amer. & Eng. Enc. Law, p. 1120. As pertinent to the questions we have to consider, we quote the following from a well-known author: "And as it seems to be considered that, as the question of satisfaction is one of presumption, upon all the circumstances of the case, and quite independent of the construction of the will, or the particular legacy in question, parol proof may be received to confirm or oppose the presumption, the same as upon any other matter of fact." 2 Redf. Wills, § 194. The intention or understanding of the beneficiary in such case does not seem material. The important consideration is the intention of the testator. *Weston v. Johnson*, 48 Ind. 1. See 1 Pom. Eq. Jur. p. 564; 3 Redf. Wills, § 342; 1 Redf. Wills, §§ 233, 234; 1 Rep. Leg. (London Ed.) top p. 367, 2d Ann. Notes, 4; *Richards v. Humphreys*, 15 Pick. 133. Now, what is the result of the application of these principles of the law to the agreement of the parties in this case. The ultimate fact as to the bequest to appellee is stated, but, so far as the defense is concerned, the evidence only is stated. *Elliott's App. Proc.* § 228. If the strict rule governing agreed cases was applied, we should not "give heed to mere matters of evidence." *Elliott's App. Proc.*, supra. It seems clear, however, that the money evidenced by the receipts was given by Charity Middleton to appellant without any intention that it should ever be repaid; but it was evidently understood at the time to be a part of such amount as said Charity might afterwards see fit to bequeath to her. Charity Middleton had the undoubted right at any time during life to change the payments referred to in the receipts to absolute gifts. Several years after the execution of the receipts the will was made, in which \$200 was given to appellant without condition, limitation, or explanation. Frequently after the execution of her will said Charity stated to different persons that she intended appellant to have \$200 out of her estate at her death. The receipts are not stronger than the

parol declarations of the parties to the same tenor and effect would have been. The declarations of Charity made after the execution of the will were as competent against her executor as were the receipts against appellant.

In view of the language used in the will, and her subsequent declarations, can this court say on the evidence embodied in the agreement that she intended that the \$200 mentioned in the will and also in her declarations should be diminished by the amounts stated in the receipts? This may have been her intention at the date of the receipts, but can we say this was her intention when the will was executed, and when the declarations were made? If such was her intention when the will was executed, do her declarations made subsequently indicate that she had changed the previous payments into an absolute gift? Is this extrinsic evidence embraced in the receipts and the declaration of said Charity made after the will was executed, when construed in the light of other circumstances stated in the agreement, sufficient to overcome the presumption that when the will was made said Charity intended thereby to bequeath to appellant \$200 at her death out of her estate? These are some of the queries suggested by the evidence contained in the agreement, but it is not our purpose to consider them seriatim. It is sufficient to say that the burden of proving her claim primarily rests on appellant; that the first item in the will establishes her cause of action, unless that bequest to her is shown to have been satisfied in whole or in part. As to the affirmative defense the burden is on appellee. The appellant is entitled to recover the full \$200 unless the contention of appellee has been established by the evidence. The appellee relies on the receipts to establish such partial satisfaction. If the case stood alone on the will and receipts, without explanation, the appellant would fail as to the \$130; but to overcome the statements in the receipts appellant relies on the subsequent declaration of the testatrix. It is clearly and unequivocally stipulated in the agreement "that frequently after making her will the said Charity stated to different parties that she intended the said Minerva to have two hundred dollars out of her estate at her death." These statements are inconsistent with the theory that she intended the amount specified in her will should be reduced by deducting the previous payments evidenced by the receipts. In order to give effect to the will, which is in harmony with her subsequent declarations, the presumption must be indulged that the testatrix at some time, either before or after the execution of the will, converted the amounts mentioned in the receipts into absolute gifts. On the evidence embodied in the agreement it follows of necessity that if the bequest mentioned in the will was diminished by the amount of the receipts appellant would not receive \$200 out of her estate at her death. In this connection it should be borne in mind that we are not allowed, under the authorities cited, to indulge in this case any presumption favorable to the decision of the court

below, but are required to weigh the evidence as if we were trying the case originally. "The intention of the testator is the important consideration," (Weston v. Johnson, *supra*.) and "question of satisfaction is one of presumption upon all the circumstances of the case," (Redf. Wills, *supra*.) Inasmuch as the burden of showing such satisfaction, in whole or in part, is on appellee, our conclusion, for the reasons stated, is that the evidence set out in the agreement of the theory that this is an agreed case is not sufficient, in our opinion, to authorize the court in holding that the testatrix at her death intended that the \$180 should be deducted from the \$200 bequest. That such was her intention when the will was made is probable, but, however this may be, her subsequent repeated, clear, and unequivocal declarations tend strongly to support the theory that she had at some time after the date of the receipts, prior to her death, converted the previous payments evidenced by such receipts into absolute gifts. (Chapman v. Allen, *supra*;) and, in any event, it is apparent that she, by and through such bequest, understood and intended that appellant, notwithstanding such payments, should have and receive \$200 at her death out of her estate. We have endeavored to examine and discuss the questions which have been argued by counsel, or which have occurred to us, growing out of the agreement, in their different phases, without closely discriminating as to what is mere evidence or what are ultimate facts, but in doing this we are conscious that we have in some respects at least given more attention to what is mere evidence than we were required to do in the view we have taken of the case.

We now return to the further consideration of the question which, in our opinion, is the controlling one, and the decision of which necessarily determines the rights of the parties in this controversy, and to which we have referred in the earlier part of the opinion. If this proceeding is to be regarded as a claim against a decedent's estate within the purview of the statute relating to the settlement of decedents' estates, and the statement set out in the record should for that reason be treated as an agreement of the evidence, then there is, perhaps, no error in the record; but if this is an agreed case under the statute, and is to be treated as such in this court, and the ultimate facts only as therein stated are to be regarded by the court, then, under the authorities cited, and for the reasons hereinbefore given, the judgment of the court below should be reversed. The material question, therefore, is whether the case shall be decided on the basis enunciated by the supreme court in Booth v. Cottingham, *supra*, or whether we shall apply the rule announced by this court in Henas v. Henas, *supra*. There were pleadings in the Henas Case, and the parties entered into an agreement which the court held was simply a statement of the evidence, and which was treated accordingly. In this case, aside from the other distinction, there are no pleadings. This is either an agreed case under the

statute or it is nothing. There was no claim or action pending as the basis for any agreement in relation to the evidence. The parties have at all stages of the proceedings treated this as an agreed case. The controversy was submitted to the court below on that theory, and has been so presented here. The parties have in all respects acted in good faith, and invoke the decision of the court on the record on that theory. If we hold that an executor cannot, under any circumstances, enter into an agreed case with a legatee in order to secure the judgment of the court thereon as to the rights of such legatee, if any, under the last will and testament of the decedent, then it results that the court has no jurisdiction of the subject-matter of the controversy. As applicable to the record and facts before the court in the Henas Case, and the questions therein presented to and determined by the court, there is no reason, so far as this case is concerned, for not adhering to that decision; but the opinion in that case does not control here, because, as applicable to the question we have under consideration in this case, we are of the opinion that administrators, executors, and guardians stand on the same footing, and, in the absence of any objection by some one interested in the determination of the controversy, and in view of the theory relied on by the parties, we are disposed to follow the rule laid down in the case of Booth v. Cottingham, *supra*; section 230, Elliott's App. Proc. The judgment of the court below is accordingly reversed, with instructions to state conclusions of law on the agreed case in favor of appellant for \$200, and to render proper judgment accordingly.

ROSS, J. While I cannot accept all the reasoning contained in the opinion of DAVIS, J., I concur in the result.

REINHARD, J., (dissenting.) For the reasons hereinafter set forth I am not able to agree with a majority of the court as to the result reached in the prevailing opinion. The statement filed in this case as an agreement of the facts should not be treated as an agreed case. In Henas v. Henas, (Ind. App.) 31 N. E. Rep. 832, it was decided by this court that the statute relating to agreed cases does not apply to claims against decedents' estates. The reason for this ruling is that the filing of such claims is governed by special statute, and not by the provisions of the Civil Code; and, as it is beyond the power of an executor or administrator to bind the heirs, legatees, or creditors of the estate for which he is trustee by absolutely admitting the claim over the requirement of the court for additional evidence in support thereof, so it is beyond his power to bind the heirs, legatees, or creditors of the estate by his admissions in an agreed case. If that decision declares the law correctly, there is no agreed case here. It is begging the question to say that this is not, strictly speaking, a claim against an estate, but a proceeding to construe a will. The only order that can be made by the circuit court in this case is one of an al-



lowance against the estate of Charity Middleton, deceased, and to the extent of such allowance the shares of the residuary legatees will be diminished. Nor is it easy to perceive how the case of *Henas v. Henas*, supra, in any manner conflicts with the doctrine enunciated in *Booth v. Cottingham*, 126 Ind. 431, 28 N. E. Rep. 84. In the case last cited it is declared that, if the parties treat the papers filed as an agreed case, although the same may not be such in strictness, they are bound by the theory upon which they acted. This is doubtless good law when applied to ordinary civil actions, but it can have no relevancy to claims such as are involved in the present case. To say that the statute as to agreed cases does not apply to claims against decedents' estates, but that, nevertheless, if an executor or administrator enters into such an agreement and the parties treat it as such, the estate will be bound by it, is an anomaly indeed. If the parties can make an agreed case by treating it as such, they can make one whenever they desire, and claims against estates of dead persons form no exception.

If, then, this is a claim of the character indicated, and the decision in *Henas v. Henas* is to stand as the law, the parties were powerless to make an agreed case, and the paper filed is nothing more than an agreement of what the evidence shall be. Moreover, it is true that the agreed facts in this case are not ultimate facts, but evidentiary facts, for the most part; and the will itself is not set out, but merely referred to in the agreement. If this position is correct, the agreement must be treated by this court as other evidence given in the trial court, and this rule requires us to indulge every presumption in favor of the conclusions drawn by that court upon such evidence. Nor will it do to say that, as there were no pleadings in this case, the paper filed as an agreed statement of facts is nothing if not such, and that the entire procedure is a nullity. The paper filed as an agreed statement of the facts is not a mere cipher, although its contents may not rise to the dignity of an agreed case. The paper contains a statement of the facts relied on by the legatee, and is signed and verified by both the claimant and the executor. No reason appears why such a paper cannot take the place of the succinct statement required by the statute. *Elliott's Supp.* § 385 et seq. The court doubtless had a right to treat the statement as the complaint in the case, and the fact that the executor agreed to it was but an evidence that he admitted the facts stated therein. In my judgment, the court was not concluded by this agreement, but might have required and heard additional evidence, and taken into consideration the will itself, and all surrounding circumstances of the case.

The receipts incorporated in the statements of the parties are as follows: "March 1, 1868. Received of Charity Middleton one hundred dollars as a part of such amount as she may see fit to bequeath to me at her decease. Minerva Robbins." "August 25, 1869. Received of Charity Middleton thirty dollars as a part of such

amount as she may see proper to bequeath to me at her decease. Minerva Robbins." It is stated in the agreement that these receipts were found in the possession of Swain at the time of the death of the testatrix, and, though written by Swain as her agent, and in form as suggested by him, they were taken "with her knowledge and by her direction, and that she knew they were so taken." This being so, it can well be seen how the court below could construe them as an expression of the decedent that the amount represented by them was to be considered as a satisfaction pro tanto of the legacy. Indeed, it is hard to see how the court could have found otherwise, when the will and all the circumstances and facts are construed together. If the receipts contained a simple acknowledgment of the payments therein represented, without stating that they were to be considered as portions of the bequest, no presumption of ademption or satisfaction would arise from them, and the general rule would be applicable that, the will itself being the last expression of the testatrix, any payments made beforehand should be considered as gifts. But it seems from the receipts that the payments of the sums represented by them were made with the express agreements that they were to operate as a satisfaction pro tanto of the bequest. The will itself shows, moreover, that the testatrix had another niece, to whom she also bequeathed \$200; thus indicating that the intention of the testatrix was to place them both upon an equality, and there is no showing made of any advances to the other niece. But it is said that the testatrix, after the making of the will, made statements to the effect that she intended for Minerva to have \$200 out of her estate at her death. Giving these so-called "admissions" their full force, they mean no more than is implied in the language of the will itself. That instrument provided, in effect, that Minerva should have \$200 out of the estate of the testatrix at the time of her death. Her oral statements to the same effect can add no force to the language of the will itself, and they were not inconsistent with her intention, or the intention of both parties, that the amounts for which the receipts were given should be considered in part satisfaction of the bequest. When considered in this light, there is no evidence whatever that the testatrix changed these amounts into gifts outside of the legacy. We think it must be apparent that it was the intention of both the testatrix and the claimant that the latter should have \$200, and not \$350, of her bounty. It is therefore immaterial whether the technical doctrines of ademption may be applied with all their force to the facts in this case or not. The testatrix was under no obligation to bestow any portion of her estate upon the claimant, but could dispose of the same according to her wishes. The important matter in such cases as this is to arrive at the intentions of the testator. These the court below found to be in harmony with the expressions contained in the receipts, and to the effect that \$200 was all she intended to leave her. The court had ample

evidence to base this conclusion upon, and the finding seems to be just and fair under the circumstances of the case. The construction placed upon the evidence by the court below is not inconsistent with the terms of the will, and is the only rational conclusion that can be reached, unless a forced construction is given to the alleged oral declarations of the testatrix. It is insisted by counsel for appellant, and may be conceded, that, as the testatrix in this case does not stand in loco parentis to the legatee, the doctrine of ademption does not apply; but, while a legacy may be deemed by implication when such relationship exists, there is no rule of law that prohibits a legacy from being satisfied by advancements by express agreement, even though the legatee be a stranger. See 3 Amer. & Eng. Enc. Law, p. 70 et seq. I think it appears sufficiently from the facts stated that both the testatrix and the legatee in this case intended that the payments made should operate as a satisfaction pro tanto of the legacy, and that, even if this were an agreed case, the court did not err in so construing the facts, especially as nothing was shown to indicate that the payments were changed into absolute gifts.

The judgment should be affirmed.

(7 Ind. App. 451)

MOELERING v. SMITH et al.<sup>1</sup>

(Appellate Court of Indiana. June 23, 1893.)

MECHANICS' LIENS—EVIDENCE—EXPERT TESTIMONY—REVIEW ON APPEAL.

1. Where, in an action against the owner and the contractor to enforce a mechanic's lien, no appeal is taken by the owner from a judgment for plaintiff, the contractor's contention that the complaint is insufficient to warrant the judgment, in that it seeks to charge the owner with a personal liability by notice, when there is no allegation that a written notice had been given, will not be sustained.

2. Where the issue is the market value of certain stone furnished defendant by plaintiff, evidence is incompetent as to the cost of stripping and quarrying the stone out of the quarry where it was obtained, as such cost does not affect its market value.

3. Where an engineer has been called as an expert to testify as to the quantity of stone in certain walls, it is competent for the opposite party to introduce another engineer to testify as to such quantity, from calculations based on statements given in the testimony of the first engineer.

4. Where, in an action to enforce a mechanic's lien, defendant, to sustain an allegation in his cross complaint that the work was done under a contract of partnership, introduced witnesses who testified that plaintiff, out of court, had stated that the contract was one of partnership, it is reversible error to permit plaintiff to show by a witness that he (plaintiff) had said, in the absence of defendant, that it was not a contract of partnership.

Appeal from circuit court, Wabash county; J. D. Conner, Judge.

Action by Valentine Smith against the Diamond Match Company to enforce a mechanic's lien. William Moelering was admitted as a party defendant. From a

judgment for plaintiff, defendant Moelering appeals. Reversed.

Alvah Taylor and Cawgill & Pettit, for appellant. Kidd & Hunter, for appellees.

REINHARD, J. Smith instituted this action against the Diamond Match Company, as sole defendant, for the enforcement of a mechanic's and material man's lien, alleging in his complaint that he had performed labor and furnished materials in the construction of certain buildings on said company's lands, in Wabash county, Ind., to one William Moelering, who had a contract with said company for the construction of said buildings. Upon his own application, the appellant, the said William Moelering, was admitted as a party defendant. Thereupon appellee Smith filed his amended complaint, in two paragraphs, designated as "2" and "3" paragraphs of such complaint, as against both of said defendants. Moelering and the company filed separate demurrers to each of said second and third paragraphs of complaint, which were overruled.

It is contended—First, that the second paragraph is insufficient for the reason that it is not averred therein that the contract for the labor and materials sued for was with the owner, or his authorized agent; and that, secondly, the third paragraph is bad because it seeks to charge the defendant company with a personal liability by notice, when there is no allegation that a written notice had been given to it. Whatever the proper ruling might be upon these questions, if they had been urged on behalf of the company, it is clear to us that they cannot avail the appellant. The Diamond Match Company, who alone is affected by this ruling, seems to be content therewith, having taken no appeal. The appellant cannot litigate the questions for it. Whether or not the complaint discloses a liability of said company to the plaintiff can in no way concern the appellant, and he is therefore in no situation to complain of the ruling. As these are all the alleged infirmities attempted to be pointed out to the several paragraphs of the amended complaint, and we have discovered none other, we must hold the same sufficient, as to the appellant; and the court, therefore, committed no error in overruling the demurrer.

Upon issues joined between the several parties, the cause was submitted for trial. A jury was called to pass upon certain questions of fact submitted to them upon interrogatories. There was a finding for the appellee Smith, as against both defendants. A motion for a new trial by the appellant alone was overruled, and judgment entered. The overruling of this motion is the next alleged error relied upon for a reversal of the judgment. In the complaint it is alleged, in effect, among other things, that the defendants are indebted to the plaintiff in the sum of \$3,510.50 for materials furnished and labor performed in the construction of said buildings. A bill of particulars, filed with the complaint, shows the following item, as against both defendants:

<sup>1</sup> Rehearing denied.

1889. Oct. 20. To 5,821 perch of  
stone, at 50 cts.. \$2,910 50  
To 120 days' work,  
at \$5.00..... 600 00  
\$3,510 50

As to the defendant Moelering, a credit is entered as follows:

By cash, &c..... \$1,727 57  
Bal. due ..... 1,782 99

We give the above statement from the complaint in order to be able to present the more intelligently the questions made upon the ruling of the court in excluding testimony, viz.: Smith, the plaintiff below and appellee here, testified in his own behalf that he had furnished the defendants the stone, and that appellant had agreed to pay him a reasonable price for the same, and that it was reasonably worth 50 cents per perch. Upon cross-examination the appellant's counsel sought to show by the plaintiff the cost of stripping and quarrying the stone, for the purpose of showing, it is stated, what would be a reasonable price for the stone in the quarry, and that 50 cents a perch was not a reasonable price. This proposed testimony the court excluded, and it is insisted that this ruling was erroneous. We are unable to see how the testimony sought to be elicited by the cross-examination could tend in any manner to elucidate that given in chief. The pertinent inquiry was the market value of the stone. It is not made to appear how the cost of preparing an article for market would affect the value thereof, though we are willing to admit that it would materially affect the profit or loss upon the same. The same quality of stone might cost much more if gotten out of some quarries than it would if taken out of others, but this would not necessarily diminish or increase its value. If the seller is fortunate enough to secure his labor for little or nothing, it will not diminish the value of the article. As well might it be claimed that the fact that an article had been presented to the owner as a gift made it less valuable in the market. Had the appellant been permitted to prove, and succeeded in showing, that the stone cost the appellee but a trifle for stripping and quarrying, that fact might have the effect of confusing the jury; but how it could have enlightened them or the court as to the real value of the article is more than we can comprehend. The court committed no error in sustaining the objection.

Complaint is also made of the ruling of the court in the admission of certain testimony respecting the quantity of stone furnished by the appellee. The point is tersely stated in the brief of appellant's counsel, from which we quote: "For the purpose of ascertaining the amount of stone claimed by plaintiff, he undertook, in his testimony, to give the dimensions of the several stone walls and foundations of the buildings. To meet this testimony the defendant introduced William Fowler, an engineer, who had a part of the time superintended the construction of the buildings, and who, for a like purpose, of ascertaining the amount of stone work in the buildings, had measured the several walls

and parts of stonework in the buildings. In his testimony he gave the measurements of the several stone walls, and was permitted by the court to state, in cubic feet, the contents of the several walls." The plaintiff, on rebuttal, and for the purpose of impeaching witness Fowler, introduced as a witness James W. Shea as an expert, he being also an engineer. Appellant objected to the evidence, and the objection was overruled. It will be seen that witness Shea did not testify as to measurements made by himself, but from statements given him, purporting to have been given by witness Fowler in his testimony. We can see no valid objection to this testimony. Granting that the number of cubic feet to be ascertained from the measurement of the engineer, Fowler, was simply a matter of calculation, we can conceive of no reason why another witness, who is competent, should not be permitted to give the result of such measurements as well as the witness Fowler. If it was wrong for Shea to give the results, it was just as wrong for Fowler. If the jury were competent to make the calculations, the figures of Shea and Fowler could do no harm, for the jury could verify them, and decide for themselves as to their correctness. Moreover, the testimony of Shea was confined to three of the walls, out of a great many. We think his testimony was competent, as that of an expert, to show whether or not the calculations of Fowler were correct. The jury and court heard them both, and could determine which of them was correct, or whether correct in part, and incorrect as to the remainder. The calculation would involve considerable time, labor, and the exercise of some skill in the rules of mensuration, and it was not improper to permit these engineers and mechanics to give in evidence the result of their estimate.

On the trial of the cause, Smith, the appellee, was a witness in his own behalf, and testified about the work done and materials furnished by him, and its value. Appellant had filed a cross-complaint, alleging that the work was done and articles delivered by appellee to appellant under a contract of partnership. To sustain these allegations, he introduced certain witnesses, who testified that said appellee had stated, out of court, in effect, that the contract under which the materials were furnished was one of partnership. Upon the theory that this was an impeachment, Smith was permitted, over appellant's objection and exception, to prove by other witnesses that he (Smith) had, in the absence of appellant, made statements that he was not a partner in the construction of the work in controversy. The appellant urgently insists that the admission of the testimony was reversible error, under the authority of *Turnpike Co. v. Hell*, 118 Ind. 135, 20 N. E. Rep. 703. We are of the opinion that this contention must prevail. We have carefully examined the case cited, and do not see wherein it differs in principle from the case in hand. Ordinarily, a witness may be impeached by proof of statements made out of court, contradictory of those made

upon the witness stand. When this has been done, he may be supported by the party producing him, by introducing testimony showing that at about the same time he also made statements consistent and in harmony with those given on the witness stand. *Coffin v. Anderson*, 4 Blackt. 395; *Daly v. State*, 28 Ind. 285; *Brookbank v. State*, 55 Ind. 169; *Ramey v. State*, 127 Ind. 248, 26 N. E. Rep. 818. The case at bar, however, does not fall within the class of cases to which the foregoing belong. In these cases the persons impeached were not parties to the action, but ordinary witnesses. The statements proved in the present case were self-serving declarations, and these cannot become evidence for the party who makes them, unless made in the presence of the adverse party, when the latter has an opportunity to reply. Judgment reversed.

(50 Ohio St. 460)

### PARSONS v. CITY OF COLUMBUS.

(Supreme Court of Ohio. June 20, 1893.)

#### ASSESSMENTS FOR LOCAL IMPROVEMENTS—CONSTITUTIONAL LAW—POWERS OF MUNICIPALITY.

1. The courts of the state have no power to declare a statute conferring the power of assessment on municipal corporations of a certain grade and class, for the improvement of their streets, invalid, on the ground that the statute does not adequately restrict the power so as to prevent abuse. The duty imposed by section 6, art. 13, of the constitution, is, in this regard, addressed to the conscience and judgment of the legislature, and is not the subject of judicial correction. *Dickman and Burket, JJ.*, dissenting.

2. The act passed May 11, 1886, known as the "Taylor Law," authorizing cities of the first grade, of the second class, to improve their streets in a certain manner, and with certain material, (83 Ohio Laws, 140,) and the act amendatory thereto, passed March 21, 1887, (84 Ohio Laws, 173,) are valid statutes. *Dickman and Burket, JJ.*, dissenting.

3. A property holder on a street cannot, by voluntarily making an improvement in the street, suitable to his own convenience, preclude the city, through its council, from improving it in a manner authorized by statute, and required by the wants of the public and others upon the same street.

(Syllabus by the Court.)

Error to circuit court, Franklin county.

Action by George M. Parsons against the city of Columbus to restrain the making of certain public improvements. There was judgment for defendant on demurrer to the petition, and plaintiff brings error. Affirmed.

Harrison, Olds & Marsh, for plaintiff in error. Paul Jones, City Sol., and John J. Stoddart, for defendants in error.

MINSHALL, J. On May 11, 1886, the legislature passed an act known as the "Taylor Law," conferring authority upon the councils of cities of the first grade, of the second class, "to cause any of the streets or avenues or parts thereof of said city to be paved with granite or other stone block, asphalt or other permanent material, \* \* \* and to provide that said improvement shall be paid for and assessed upon the property abutting on the same in accordance with the various provisions of this supplement and in accord-

ance with the various provisions of law enacted, or hereafter enacted, applicable thereto, and not inconsistent with this act," and, for the payment of the cost and expense, further authorized the issuing of the bonds of the city, to be paid from assessments on the property authorized to be assessed, "to extend over a period of at least eight years, to be provided in the ordinance directing the improvement." The act was amended March 21, 1887, by a provision that section 2270, Rev. St., should not apply to improvements under this act. 83 Ohio Laws, 140; 84 Ohio Laws, 176. On March 26, 1888, the city council of Columbus,—a city of the first grade, of the second class,—(State v. Wall, 47 Ohio St. 499, 24 N. E. Rep. 897,) having taken the necessary preliminary steps, passed an ordinance for the improvement of Town street from Parsons avenue to Parsons' east line, by surfacing the roadway with asphalt, and resetting the curb, the payment of the cost of the improvement by the issuing of bonds, and for the assessment of an amount to meet the bonds equally upon the property "fronting or abutting" on the improvement "by the lot front." On May 5, 1888, the action below was commenced by the plaintiff, George M. Parsons, in the court of common pleas, to enjoin the making of the improvement proposed by the ordinance, on the ground that the improvement was not authorized by the law; that part of the street having, as averred, been already improved by himself in a substantial manner, with "round cobblestones," laid in sand, and pounded solid, on a foundation that had been suitably prepared. A demurrer having been sustained to the petition, it was amended by making various constitutional objections to the validity of the act of the legislature, to which a demurrer was also sustained. A supplement was then filed, setting up the completion of the work, the making of the assessments on his property, and asking that their collection be enjoined. A demurrer to this was also sustained, and an appeal taken to the circuit court, where the same rulings were made on the different pleadings, and the petition dismissed. These rulings are assigned for error here.

1. It seems very clear to us that the improvement that had been made in Town street by the plaintiff prior to the act authorizing cities of the grade and class of Columbus to improve any of their streets and avenues, or parts thereof, with granite or other stone blocks, or with asphalt or other permanent material, did not preclude the city from so improving the part of Town street that had been improved with cobblestone by the plaintiff. So far as appears from the petition, the improvement made by the plaintiff was a voluntary act on his part, and could not, therefore, estop the city, through its council, from making an improvement of the character provided for by the act of May 11, 1886, and assessing the cost thereof on the property abutting on the improvement. However substantial this improvement may have been, it was for the council to determine, in the exercise of the authority given by the act, whether it answered

the requirements of the public at this time, and whether the street should be improved with the material, and in the manner, authorized by the act. It cannot be allowed that one property holder on a street can, by voluntarily making an improvement in the street, suitable to his own convenience, preclude the city from improving it in a manner required by the wants of the public and others upon the same street. The control of the streets is placed in the city, to be exercised for the public convenience; and no citizen can, by any act of his own, impair the authority so conferred.

2. The ground on which the validity of the act of May 11, 1886, is principally challenged, is that it contains no restriction on the power of assessment conferred by it, as required by the constitution. That instrument provides (article 18, § 6) that: "The general assembly shall provide for the organization of cities and incorporated villages, by general laws, and restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent the abuse of such powers." Many of the other states have provisions in the fundamental law of each, substantially, if not identically, the same as our own; and the language of our own seems to have been copied from that of the state of New York. The injunction, it will be observed, applies as well to the power of taxation, of borrowing money, of contracting debts, and loaning their credit, as to the power of assessment, and is no more imperative in the one case than in the others. It has engaged the attention of some of our ablest courts and judges, and all, with a remarkable consensus of opinion, have held that, while it is a most salutary provision, it is addressed to the conscience and judgment of the legislature, and is not a subject for "judicial correction." Judge Dillon, after quoting the language in the constitution of the state of New York, and observing that it is substantially contained in the constitution of several of the states, says: "This obviously enjoins upon the legislature the duty of providing suitable and proper restrictions upon the enumerated powers; but in what these restrictions shall consist, and how they shall be imposed, are subjects left to the discretion or sense of duty of the legislative department, with the exercise of which the courts cannot interfere." 1 Dill. Mun. Corp. § 50. Judge Cooley adopts the same construction, his language being that: "These requirements, however, impose an obligation upon the legislature, which only its sense of duty can compel it to perform. It is evident that if the legislature fail to enact the restrictive legislation the courts have no power to compel such action." Cooley, Const. Lim. 636. See, also, Cooley, Tax'n, 345. The following are some of the cases in the other states in which this provision in the constitution of each has been construed, and held not to confer any power of judicial correction: *Bank of Rome v. Village of Rome*, 18 N. Y. 88, affirmed in *Re Village of Rhinebeck*, 82 N. Y. 621; *People v. Mahaney*, 18 Mich. 482, opinion by Cooley, J.; *Hines v. City of Leavenworth*, 3 Kan. 186;

*City of Newton v. Atchison*, 81 Kan. 151, 1 Pac. Rep. 288; *State v. City of Madison*, 7 Wis. 688; *Weeks v. City of Milwaukee*, 10 Wis. 242. In *Foster v. City of Kenosha*, 12 Wis. 617, the supreme court of Wisconsin has been regarded as holding a somewhat opposite view. But all that the court there decided is that the legislature cannot confer an unlimited power upon a city to raise money by taxation; it must be limited to municipal purposes; and because, in the judgment of the court, the statute it was then considering conferred such unlimited powers, it was held invalid. The case stands alone, and has been virtually overruled by the supreme court of the United States in *City v. Lamson*, 9 Wall. 477, on the ground that it is inconsistent with the previous decisions of the same court, cited *supra*. 1 Dill. Mun. Corp. § 50. But, so far as the case before us is concerned, we need not go beyond the former decisions of this court. *Hill v. Higdon*, 5 Ohio St. 243; *Railroad Co. v. Connelly*, 10 Ohio St. 159; *Maloy v. City of Marietta*, 11 Ohio St. 636; *Walker v. City of Cincinnati*, 21 Ohio St. 14, 46.

It cannot be said that the act in question contains no restrictions upon the power granted to cities of the first grade, of the second class. The power granted is to improve their streets and alleys in a certain manner, and to assess the cost of the improvement upon property abutting upon the same in accordance with its provisions, and "the various provisions of law now enacted \* \* \* and not inconsistent with this act." Now, there are many provisions in the law regulating "assessments in general," not inconsistent with the act, and therefore applicable to improvements made under it. The necessity of the improvement, when deemed necessary, must be declared by resolution, and 20 days' written notice of its passage must be given to owners of property abutting upon it, and the resolution must then be published for not less than two weeks in some newspaper of general circulation in the corporation. Section 2304, Rev. St. As the cost of the improvement is, by the act, to be assessed upon "abutting property," no improvement can be made under it "without the concurrence of two-thirds of the whole number of the members elected to the council," unless two-thirds of the owners to be charged petition in writing therefor. Section 2267. And for a like reason, by section 2264, the council must, by ordinance, set forth specifically the lots and lands to be assessed, which, by section 1695, must be published in some newspaper of general circulation in the corporation before going into effect. By the act itself, assessments are confined to "abutting property;" the bonds issued to pay for the improvement must be made, by the ordinance directing the improvement, to extend "over a period of at least eight years;" and the assessments shall be made payable in equal installments to meet the bonds. It then appears that the power of assessment conferred by this act is subject to many restrictions contained in the act itself, and in the general law on the subject of assessments, that are applicable to it. They may not be as adequate to the prevention of abuses as they should

be, but such inadequacy "lays no foundation for judicial correction." *Hill v. Higdon*, supra. In *Maloy v. City of Marietta*, the validity of an assessment for a street improvement under the towns' and cities' act of May 8, 1852, and its amendments, was questioned on the ground that the legislature, in granting the power, had not so restricted it as to prevent abuse; the principal objection being that it contained no limitation upon the amount that might be assessed. Judge Peck, in delivering the opinion, doubting whether, if the act conferred an unrestricted power, courts could for that reason hold the statute invalid, and in citing the language of Judge Ranney in *Hill v. Higdon*, said: "Be this as it may, the section, while it imposes the duty, leaves to the legislature the power to determine the mode and manner of the restriction to be imposed." And the requirement of the act, that no improvement, the costs of which are to be assessed upon the owners of abutting property, shall be made without the concurrence of two-thirds of the members elected to council, or unless two-thirds of the owners to be charged petition therefor in writing, was held to be a restriction; and, whether adequate or not, the court said, "Further remedy must be left where, we conceive, the constitution has placed it,—in the prudence and sagacity of the lawmaking power." To this we may add what is said by Judge Scott in *Walker v. City of Cincinnati*: "It is very clear that this constitutional mandate cannot be enforced according to judicial discretion and judgment. In the very nature of the case, the power which is to impose restrictions so as to prevent abuse must determine what is an abuse, and what restrictions are necessary and proper." Importance is attached to language used by Judge White in *Cincinnati v. Oliver*, 31 Ohio St., at page 374, "that the granting of the assessment, and the duty of restricting its exercise so as to prevent abuse, are made inseparable by the express provision of the constitution." This is not questioned. But as to where the duty rests, and whether subject to judicial correction, were not presented nor considered in the case. It is also claimed that *Maloy v. City of Marietta* should be overruled, as wrongly decided, and inconsistent with *Chamberlain v. Cleveland*, 34 Ohio St. 551. We do not think that it was wrongly decided, and the claim that it is inconsistent with *Chamberlain's Case* is a misapprehension of that case. The question there considered and passed on by the court was not the validity of the statute, but the validity of the proceedings had under it. The proceedings were held invalid for want of conformity to the law, in apportioning the assessment, and the cause remanded for the making of a new one.

Other objections have been made to the validity of the statute; but, after carefully considering them, we find none that would warrant the court in holding the law to be unconstitutional. Judgment affirmed.

DICKMAN and BURKET, JJ., dissent from the first and second propositions of the syllabus.

(50 Ohio St. 471)

# HAVILAND et al. v. CITY OF COLUMBUS et al.

(Supreme Court of Ohio. June 20, 1893.)

## ASSESSMENTS FOR LOCAL IMPROVEMENTS — APPLICATION OF FRONT-FOOT RULE.

1. In assessing the cost of a street improvement on abutting property by the front foot, regard must be had to what is the real front of the property. This is a question of fact, to be determined by the manner in which it was laid out, or in which it has been built upon, and used and occupied, by the owner.

2. If a lot abuts lengthwise on the improvement, but fronts breadthwise on another street, and not on the improvement, the lot should be deemed as fronting breadthwise on the improvement, and be assessed for the number of feet on the improvement that it would have in such case, and no more.

(Syllabus by the Court.)

Error to circuit court, Franklin county.

Action by one Haviland and others against the city of Columbus and others to restrain the making of certain street improvements. From a judgment for defendants on demurrer to the complaint, plaintiffs bring error. Reversed.

This case was argued and submitted with that of *Parsons v. City of Columbus*, 34 N. E. Rep. 677, and a number of others, on the questions made as to the validity of the statute known as the "Taylor Law," and these questions, having been considered and determined in the report of that case, will not be further considered here. The facts distinguishing it from that of *Parsons*, and requiring a separate report, are stated in the opinion.

E. L. De Witt and C. S. Cherington, for plaintiff in error. Paul Jones, City Sol., and John J. Stoddart, for defendants in error.

MINSHALL, J. The action below was commenced in the court of common pleas, where it was disposed of on a demurrer to the petition, and appealed to the circuit court. The circuit court, as had the common pleas, sustained a demurrer to the petition, and rendered judgment in favor of the city. The error assigned is the ruling of the court on the demurrer, and rendering judgment for the city. It is averred in the petition that the plaintiffs were the owners on March 18, 1889, of lot No. 11 of Nelson's addition to the city of Columbus, situate on the northeast corner of Main street and Miller avenue, fronting 37½ feet on Main street, and extending the same width northwardly along and abutting on Miller avenue 75 feet; that on March 19, 1889, the city council, by ordinance, directed the improvement of Miller avenue from Main to Broad street, under the Taylor law, and thereafter the improvement was made as directed by the ordinance, and on November 4, 1889, the council, by ordinance, assessed the entire cost and expense of the improvement on the abutting property by the foot front, including the property of plaintiffs, which was assessed \$4.49 per foot for its entire length on the avenue, with a credit of a few cents per foot, the aggregate amount assessed, after deducting the credit, being \$725.75; that the lots "abutting and properly fronting" upon the improvement of the avenue—not

lying lengthwise—have a frontage of from 32 to 33 feet on the avenue, and a depth of 150 feet; and that those in the blocks of lots next and near the plaintiffs have a frontage of 32.40 feet, and a depth of 150 feet. They claim the law to be invalid, and further say that under it their lot should only have been assessed "for such a frontage" on the avenue as it would have had, were it of the average depth of lots in the neighborhood,—that is, 150 feet; whereas it has been assessed without regard to the depths of lots or lands, and whether they lie lengthwise, or properly front on the improvement, and wholly without regard to the benefits conferred; that they took no part in promoting the improvement; that the assessment has been placed on the tax duplicate, and the treasurer threatens and intends to collect the same, —and asks that it be enjoined.

Section 2264, Rev. St., applicable to the Taylor law, provides, among other things, that: "In all cases where an improvement of any kind is made of an existing street, alley, or other public highway, the council may decline to assess the costs and expenses \* \* \* or any part thereof \* \* \* on the general tax list, in which event such costs and expenses, or any part thereof, which may not be so assessed on the general tax list, shall be assessed by the council on the abutting, and such adjacent and contiguous, or other benefited lots and lands in the corporation, either, (1) in proportion to the benefits which may result from the improvement, or (2) according to the value of the property assessed, or (3) by the front of the property bounding and abutting upon the improvement, as the council, by ordinance setting forth specifically the lots and lands to be assessed, may determine before the improvement is made." The council in this case adopted the mode of assessing by "the front foot." It is evident, as we think, from the reason and language of the statute, that in so doing it must, in assessing a particular lot abutting on the improvement, have regard to what the front of the lot is. It may abut, and yet not front, on the improvement, for its full length, or any part of it. Hence, where it lies lengthwise on the improvement, as does the lot of the plaintiffs, it should be determined, as a question of fact, whether its full length is its front, or not. If, as a matter of fact, it fronts breadthwise on another street, as we understand from the petition the lot of the plaintiffs does, then, that the system of assessing by the front foot may have a uniform operation upon all the property assessed, it should be deemed or regarded as fronting breadthwise on the improvement, and the assessment on the lot should be for the number of feet it would then have; that is to say, in the case of the plaintiffs, 37½ feet, and no more. It may be said that this is assessing according to a fiction. Admit this to be true, and still it must be remembered that equity many times resides in fictions, and that they have frequently been resorted to for the purpose of working out justice against the hard lines of the law. But, at any rate, the city cannot be heard

to complain, for if we were to apply the strict letter of the statute to the mode of assessing adopted in this case, by the foot front, it might well be questioned whether it could assess a dollar on a lot that does not in fact front, although it may abut, on the improvement. The authority is to assess, not by the abutting, but by the front, foot. Abutting property may, as will be seen by reference to the above section, be assessed in three different modes,—in proportion to benefits, according to valuation, or by the front foot; so that, strictly speaking, no lot could be assessed by the front foot unless it fronted, as well as abutted, on the improvement.

Whatever mode may be adopted for apportioning an assessment for the cost of an improvement, the principle of the rule must apply with uniformity to the property of all who are assessed. Here the principle of the rule adopted is that an improvement upon a certain street benefits the property on it in proportion to the frontage of each lot. While this method may not be as equal in theory as that by a valuation, or as that of an apportionment according to benefits, in practice it is found to be more equitable than either, because of the difficulty of applying the principle of the other methods so as to attain equality. But to make it just and equitable it must conform to the principle upon which it is adopted,—assessment by the front foot, not by the abutting foot, merely. This must, in each case, be a question of fact, and can in most instances be easily determined. Lots usually front breadthwise, and not lengthwise, on a street. But a lot may be built upon, used, and occupied with reference to a street on which it lies lengthwise, and in such case, for the payment of an improvement on the street, should be assessed for its full length, where the mode of apportionment adopted is by the front foot. Where it does not front, but lies lengthwise, upon the improvement, its real front must be taken as the length of the frontage thereon, as to exonerate it entirely would be to carry a principle beyond the limits of reason, for every lot abutting on a street improvement must, as a general rule, be benefited to some extent by it, and should therefore, upon the principle of equality, be made to contribute proportionately to the cost of the work. Judgment reversed, and cause remanded to the circuit court, with direction to overrule the demurrer to the petition, and such further proceedings in accordance with this opinion as may be required by law.

(50 Ohio St. 475)

CHERRINGTON v. CITY OF COLUMBUS  
et al.

(Supreme Court of Ohio. June 20, 1893.)

ASSESSMENTS FOR PUBLIC IMPROVEMENTS.

Section 2283, Rev. St., is not applicable to assessments for street improvements made under the Taylor law, as amended March 21, 1887, (84 Ohio Laws, 178.)

(Syllabus by the Court.)

Error to circuit court, Franklin county.



Action by one Cherington against the city of Columbus and others to restrain the making of certain street improvements. Defendants had judgment on demurrer to the petition, and plaintiff brings error. Reversed.

E. L. De Witt and C. S. Cherington, for plaintiff in error. Paul Jones, City Sol., and John J. Stoddart, for defendants in error.

MINSHALL, J. This case, in addition to the questions presented in that of Haviland v. City of Columbus, 34 N. E. Rep. 679, and the validity of the statute, presents the question whether under the Taylor law, as amended, the same lot can be assessed for the improvement of two different streets or avenues, within the period of five years, in such amounts that the maximum assessment fixed by section 2270, Rev. St., is exceeded. The facts, as averred in the petition, are these: On March 26, 1888, an ordinance was adopted to improve Town street in front of Cherington's lot, No. 18, and on October 29th his lot was assessed for the improvement the sum of \$279.84. The assessed valuation of the lot for taxation was \$240. On May 7, 1888, an ordinance was passed for the improvement of Ohio avenue, on which his lot lay lengthwise, and on December 17, 1888, it was assessed for this improvement by the foot front, amounting to \$1,011.65. Section 2283, Rev. St., provides that "special assessments, whether by the feet front or otherwise, shall be so restricted that the same territory shall not be assessed for making two different streets or avenues, within a period of five years, in such amounts that the maximum assessment therein provided will be thereby exceeded. The limitation referred to is contained in section 2270, Rev. St., fixing the limit at 25 per centum of the value of the property as assessed for taxation. The statute authorizes a city of the first grade, of the second class, to improve any of its streets or avenues in the mode and manner therein provided; and by the amendment of March 27, 1887, it is declared that section 2270 should not apply to any improvement "ordained" under that act. It is then quite plain that the provisions of section 2283, relative to, and based upon, section 2270, are not applicable to the Taylor law. But as the lot of the plaintiff in error is assessed by the front foot for the improvement on Ohio avenue, on which it abuts lengthwise, it is, for the reasons given in Haviland v. City of Columbus, 34 N. E. Rep. 679, reversed and remanded to the circuit court, with direction to overrule the demurrer to the petition, and for further proceedings in accordance with opinion in Haviland v. City of Columbus.

(159 Mass. 460)

HICKEY v. CITY OF WALTHAM et al.  
(Supreme Judicial Court of Massachusetts.  
Middlesex. Sept. 6, 1893.)

MUNICIPAL CORPORATIONS — DEFECTIVE STREETS.

Defendant city, in building a sewer, had dug a trench, and piled the earth on the sidewalk in front of plaintiff's house, obliging her to cross the mound and a plank over the

trench to reach the open side of the street. This condition lasted six weeks. The pile, having been reduced in height by shoveling, and the earth become soft, plaintiff, crossing the top of the pile, felt something give way under her, fell, and broke her ankle. There was no path through the mound, though plaintiff's sister had tried to get the superintendent to make one. Held, that the questions of defendant's negligence and plaintiff's contributory negligence were for the jury.

Exceptions from superior court, Middlesex county.

Action for personal injuries by one Hickey against the city of Waltham and certain contractors. The court below ruled that plaintiff's evidence was insufficient to go to the jury. Plaintiff excepts. Reversed and remanded.

J. F. Cronan, for plaintiff. C. M. Luden, for defendant city of Waltham. R. M. Stark, for the contractors.

HOLMES, J. This is an action for personal injuries, and the case comes before us on an exception to a ruling that the plaintiff was not entitled to go to the jury on her evidence. The evidence tended to show the following facts: The plaintiff lived in a house on the northerly side of Calvary street, in Waltham. The city was engaged in building a sewer in the street, had dug a trench there, and had piled the earth from the trench on the northerly side of the street, covering the sidewalk, and trespassing upon the land in front of the plaintiff's house. The house was set back only six or seven feet from the street, so that the plaintiff was more or less besieged there, and walled in. The southerly sidewalk was open to travel. During the continuance of this state of things, which had lasted for about six weeks, the plaintiff had walked over the mound of earth, crossed the trench by a plank which was laid across it, and had pursued her way on the other side of the street, returning in similar manner. On the evening of the accident the height of the pile had been reduced by shoveling from nine or ten to four or five feet, and the earth was soft. The plaintiff started to cross it as usual, but, just as she was passing the top of the edge, something gave way under her foot, and she fell, and broke her ankle. There was no pathway through the mound, although some effort had been made by the plaintiff's sister to get the superintendent to make one.

On this state of facts, we think that the jury would be warranted in finding that the defendant did not do its whole duty. The street was not closed altogether, but they might find that the plaintiff was shut off from access to the street in an unreasonable manner, and that it was practicable and proper to make a pathway through the mound, so that the plaintiff could cross to the southerly side of the street with comfort and safety. The more doubtful question is whether there was any element of danger in the case which the plaintiff did not know and appreciate. On the whole, we are of opinion that it should have been left to the jury to say whether the plaintiff's conduct was a bar to her recovery. One fact to be considered was the straits in which she had

been placed by the defendant. Then, probably, the condition of the earth was changing. A possible inference would be that recent shoveling had made the mound softer, and more likely to crumble. We regard the case as analogous to *Fitzgerald v. Paper Co.*, 155 Mass. 155, 29 N. E. Rep. 464; *Pomeroy v. Inhabitants of Westfield*, 154 Mass. 462, 28 N. E. Rep. 899.

Exceptions sustained.

(159 Mass. 446)

**NOYES v. MANNING.**

(Supreme Judicial Court of Massachusetts.  
Middlesex. Sept. 6, 1893.)

**POOR DEBTORS—CHARGE OF FRAUD.**

Pub. St. c. 162, § 39, provides that if the magistrate, on examination, is satisfied of the truth of the facts set forth in the debtor's oath and magistrate's certificate, and that the debtor is entitled to his discharge, he shall administer the oath. Section 52 provides that, if the debtor be found guilty on a charge of fraud, he shall have no benefit from the proceedings, but may be sentenced to imprisonment. The magistrate found the debtor's poverty, and administered the oath, but also found him guilty on a charge of fraud filed by a creditor pending the examination, and sentenced him to imprisonment, and attached his certificate. *Held* that, whether the court had a right to administer the oath or not, the debtor was not discharged thereby from the charge of fraud.

Appeal from municipal court of Boston. Application by W. E. Manning, arrested at the suit of M. B. Noyes, to the Boston municipal court for relief as a poor debtor. From a judgment against him for fraud, the debtor appealed to the superior court. Nonsuit granted, but, at the same term, removed. The debtor appeals. Exceptions overruled.

Pending the examination, a charge of fraud was filed by a creditor, that, at the time the debtor contracted the judgment debt, he intended not to pay the same. The presiding judge found that the debtor did not have property above the amount of \$20 which could be taken on execution, and administered the oath, but did find him guilty of fraud, and sentenced him to imprisonment, and attached his certificate thereof under the statute. The debtor appealed from the finding and sentence of the court on the charge of fraud, and recognized for his appearance in the superior court. The defendant personally appeared in the superior court, but neither the creditor nor his attorney appeared, and the creditor was nonsuited. The nonsuit was removed, and the defendant excepted. The defendant asked the court to rule that the administering the oath for the relief of poor debtors in the municipal court to the debtor was a legal discharge from the charge of fraud, and a bar to the proceedings in the superior court, which the court refused to do.

P. J. Casey, for appellant. J. J. Feeley, for appellee.

ALLEN, J. We are all of opinion that the superior court rightly refused to give the ruling which was asked. A majority

of the court is of opinion that under Pub. St. c. 162, §§ 39, 52, the judge of the municipal court had no authority to administer the oath concurrently with his finding the debtor guilty upon the charge of fraud, and that his act of administering the oath under such circumstances was a mere nullity; the case being distinguishable from *Lockhead v. Jones*, 137 Mass. 25, where the oath was not administered until an appeal had been taken from the conviction upon the charge of fraud, and a new application had been made by the debtor after the entry of the appeal. A minority of the court think that, under the decision of *Lockhead v. Jones*, the oath was lawfully administered, but that it, nevertheless, did not have the effect to discharge the debtor upon the charges of fraud. In either view the debtor was properly convicted upon the charge of fraud. It was within the discretionary power of the superior court to remove the nonsuit. Both in civil and criminal cases an order of court may be revised at the same term or sitting of the court. *Com. v. Weymouth*, 2 Allen, 144; *Lowe v. Brigham*, 3 Allen, 429, 430; *Keith v. McCaffrey*, 145 Mass. 18, 12 N. E. Rep. 419. The charge of fraud was in the nature of a suit at law; the defendant's recognisance bound him to abide the final judgment; and there is no statute which entitled him to an absolute discharge on the mere entry of a nonsuit. Pub. St. c. 162, §§ 49-52; *Everett v. Henderson*, 150 Mass. 411, 418, 23 N. E. Rep. 318. No judgment had been entered upon the nonsuit. Exceptions overruled.

(159 Mass. 448)

**STANDARD BUTTON-FASTENING CO. v. ELLIS et al.**

(Supreme Judicial Court of Massachusetts.  
Suffolk. Sept. 6, 1893.)

**PATENTS FOR INVENTIONS—LICENSES.**

1. Leases of patented machines granting no exclusive rights are mere licenses, and do not imply a covenant for quiet enjoyment, such as would be broken when the patent is held an infringement, and the use of the invention is enjoined; and if, thereafter, the lessee continue to use the machine, he must pay the rent.

2. Though a contract of hire of patented machines is called a "lease," and the parties "lessor" and "lessee," and said contract stipulates that it only gives the right to use certain machines numbered and described, but not to make or sell any, and to use them only in a certain place unless after the lessor's consent to removal, this does not import any warranty that the patent is valid, nor that lessee shall have quiet enjoyment in its use.

Report from superior court, Suffolk county.

Action by the Standard Button-Fastening Company against Charles Ellis and others for rent of certain machines of plaintiff's manufacture. Judgment for plaintiff. Defendants except. Case reported. Affirmed.

George E. Smith, for plaintiff. Jones & Pingree, for defendants.

ALLEN, J. The defendants concede that a license to use a patented article

does not import a warranty of the validity of the patent, and they also concede the right of the plaintiff to recover rent or royalties according to the terms of the leases; but they contend that the plaintiff has broken certain express and implied covenants contained in the leases, and seek to defeat the plaintiff's claim by recouping the damages sustained by the breaches of covenant. The case therefore presents the question whether there has been a breach of any express or implied covenant on the part of the plaintiff. Unless distinguishable on this ground, the case falls within the decision in *Button-Fastening Co. v. Harney*, 155 Mass. 507, 29 N. E. Rep. 1148, and the defendants' argument rests entirely upon this supposed distinction. The defendants contend that there was an implied covenant on the part of the plaintiff for quiet enjoyment, and also that the leases contained express covenants to the same effect. There has been no interference with the defendants' physical possession of the machines. No question arises as to an implied warranty of title, so far as the mere physical character or possession of the machines is concerned; but letters patent had been granted for a certain invention embodied therein, and this invention had been determined to be an infringement upon certain other letters patent, and the use of it had been enjoined. The injury complained of by the defendants is the being deprived of the use of this invention.

So far as the invention described in the letters patent is concerned, the so-called "lease" was merely a license. No exclusive rights were granted thereby, and anything short of a grant of exclusive rights is a license. *Taylor v. Wilder*, 10 How. 477; *Howe v. Woodredge*, 12 Allen, 18; *Rob. Pat. §§ 763, 806-808, 1224, note*. A license imports no warranty that the patent is valid, and no case has been found which holds that a covenant for quiet enjoyment of the right to use the invention is implied. The analogy to a lease of land is not very close. A license to use a patented invention gives permission to make such use so far as the licensor can give such permission; that is, to use it so far as that can be done without infringing other patents. Where a grant of an exclusive right is made, if the exclusive right fails, the consideration of the grant fails. *Harlow v. Putnam*, 124 Mass. 558. But, where a mere license is given, it is held that there is no failure of consideration till the licensee is actually prevented from using the invention. *Marston v. Swett*, 82 N. Y. 526; *Angier v. Eaton*, 98 Pa. St. 594; *Jones v. Burnham*, 67 Me. 93; *Iron Works v. Newhall*, 34 Conn. 67; *White v. Lee*, 14 Fed. Rep. 789; *Covell v. Bostwick*, 39 Fed. Rep. 421; *Rob. Pat. § 1251*. The fact that the license is contained in a lease of a machine does not alter its character. No question arises under that portion of the contract between the parties which is properly regarded as a lease. The only questions are in relation to the right granted to use the patented invention. This right is a license, and is quite different in its legal effect from rights under a lease. No covenant for quiet enjoyment is implied in a

license to use a patented invention. When the defendants were prevented from using the invention, they might have refused to pay the rent or royalties, and given up the use of the machine. They did not, however, do this. They continued to use the machine, and now admit that this makes it their duty to pay the rent. There being no implied covenant for quiet enjoyment, this ground of defense fails.

The defendants further contend that such covenant is to be found in the language of the contract or lease. The portions relied on are as follows: In the first place, the instrument is called a "lease," and the parties are called "lessors" and "lessees," and the general phraseology is such as is usual in leases. There is also a provision "that this lease gives only the right to use said machine, and not the right to make or sell any machine, nor the right to use any other machines than the ones numbered and described as above;" also "the lessee is by this lease authorized to use the said machines only in lessee's factory in Haverhill, aforesaid: but, on proper notification of lessee's wish to remove machine to some other factory of lessee, lessor will authorize the use in such factory." These words were not designed to increase the obligation of the lessor in respect to warranting the validity of the patent, or covenanting that the lessee should not be disturbed in the use thereof. They were inserted for another purpose, and, when taken together, had the effect to limit the defendant's rights, rather than to increase them. They are to be construed with reference to the general rights which the instrument was intended to confer. The lessees became licensees, and the words quoted defined and limited their rights as licensees. To hold that they amount to a covenant that the licensees should not be disturbed in their use of the invention would be to add something which is in excess of the ordinary rights of licensees, and which was probably never contemplated by the lessor. Judgment on the finding.

(159 Mass. 451)

## HAYES v. JACKSON.

(Supreme Judicial Court of Massachusetts. Suffolk. Sept. 6, 1893.)

## FRAUDS, STATUTE OF—LAND CONTRACTS.

Under Pub. St. c. 78, § 2, providing that the consideration of the contract need not be expressed in the writing signed by the party to be charged therewith, but may be proved by any legal evidence, a receipt for a sum on account of the purchase of land described, at a certain price, "subject to a mortgage" of a certain amount, is a sufficient memorandum, though it be shown that the amount of the mortgage was to be deducted from the price expressed. *Field, O. J., and Knowlton, J., dissenting*.

Exceptions from superior court, Suffolk county.

Action by A. H. Hayes against Charles E. Jackson for damages for breach of contract to convey real estate. Judgment for plaintiff. Defendant brings exceptions. Overruled.

Gaston & Snow and F. S. Nickerson, for plaintiff. J. J. Myers and G. D. Goff, for defendant.

HOLMES, J. This is an action upon a contract for the sale of land. The judge has found for the plaintiff, and the only question is whether the memorandum was sufficient to satisfy the statute of frauds. Pub. St. c. 78, § 1, cl. 4. The memorandum was as follows:

"C. E. Jackson, Conveyancer and Dealer in Real Estate. Back Bay Lands and Sea Shore Lots a Specialty. Howard Bank Building, 19 Congress St., Boston, April 6, 1889. Received of Albert H. Hayes, one hundred dollars on account of sale of estate of number 379 Columbus avenue, for the sum \$14,140, subject to a mortgage of 8,000 dollars on 4½ per cent. interest, and I agree to pay the 140 dollars as commission to James C. Tucker; rents and insurance and interest to be adjusted to date; title to be passed within ten days from date. C. E. Jackson."

On the face of it, this discloses no defect; but, as the defendant and the plaintiff agreed in their testimony that the assumption of the mortgage of \$8,000 was part of the consideration, and went to make up the sum of \$14,140 mentioned, we assume that the judge found accordingly, and that it is open to the defendant to argue that the memorandum does not agree with the fact, but sets forth an agreement which was never made,—to pay \$14,140 for the equity of redemption. Whether this argument is sound or not we do not consider, because it seems to be disposed of by section 2 of our statute that the consideration of such promise, contract, or agreement need not be set forth or expressed in the writing signed by the party to be charged therewith. This section was inserted in the Revised Statutes, (chapter 74, § 2,) for the purpose of adopting and confirming the judgment of this court in *Packard v. Richardson*, 17 Mass. 122, declining to follow *Wain v. Warlters*, 5 East, 10. That case concerned a promise to pay a debt of another, a subject on which there has been much controversy in this country, (*Browne, St. Frauds*, § 390 et seq.) and went on the broad ground that it was not necessary to state the consideration, (*Marcy v. Marcy*, 9 Allen, 8, 10; *Wetherbee v. Potter*, 99 Mass. 354, 362.) The rule laid down in *Wain v. Warlters* was altered by statute in England, (St. 19 & 20 Vict. c. 97, § 3,) "because it was found, in practice, that it led to many unjust and merely technical defenses to actions upon guaranties;" (2 Smith, Lead. Cas. [8th Ed.] \*262, \*263, note to *Wain v. Warlters*.) The second section of our statute goes further, and applies to all the contracts mentioned in section 1, no doubt for similar reasons, among others. The defendant is sufficiently protected if all that he is to do is required to be in writing.

Of course, it may be said that, in a bilateral contract like the present, the contemporaneous payment of the price is a condition of the promise, and, therefore, that the promise cannot be set forth truly unless the consideration is stated. But the language of the section is general,

and should be read as, no doubt, it was meant. The only effect is that a promise set forth as absolute may be subject to an implied condition of performance on the other side. When such an implied condition exists, it will be construed into the writing, and knowledge of the law gives notice of its possible existence. In some cases it has been held unnecessary to state the consideration, even when there is no provision like our section 2, although the consideration was executory. *Thornburg v. Masten*, 84 N. C. 203; *Miller v. Irwin*, 1 Dev. & B. 103; *Ellis v. Bray*, 79 Mo. 227; *Violett v. Patton*, 5 Cranch, 142; *Camp v. Moreman*, 84 Ky. 635, 2 S. W. Rep. 179. In *Howe v. Walker*, 4 Gray, 318, Thomas, J., plainly indicated the opinion that section 2 of the statute applies in all cases, pointing out that this does not mean that, when the parties are reversed, the oral agreement will be sufficient to sustain an action.

The only case at all opposed to our conclusion, so far as we know, is *Grace v. Denison*, 114 Mass. 16. That was a bill for specific performance, not of the original agreement, but of the written document set forth, which document showed that a mortgage was to be given by the purchaser, but did not state what part of the purchase money was to remain secured in that way. Specific performance was refused, and in the judgment a brief reference was made to the statute of frauds, citing *Browne, St. Frauds*, § 376, 381; *Fry, Spec. Perf.* (1st Ed.) §§ 221, 222, and note 7. These sections state in general terms that the memorandum must contain the price, and do not apply in this state, so that the inference is that section 2 of our statute was overlooked by the court. It was not mentioned in the briefs of counsel or in the judgment. The decision cannot overrule the statute, and is no authority for a distinction under it. So far as it went on the doctrines of specific performance only, as would seem from the reference to *Fry*, (section 222, note 7,) stating *Baker v. Glass*, 6 Munt. 212, and to *Railroad Co. v. Babcock*, 3 Cush. 228, 232, and from the fact that Mr. Justice Wells, who delivered the opinion of the court, also wrote the decision in *Wetherbee v. Potter*, 99 Mass. 354, 362, it has no bearing on the case.

Exceptions overruled.

FIELD, C. J., (dissenting.) I do not assent to the opinion of the court. The agreement or receipt signed by the defendant purports to set out the price, and apparently contains all the terms of the contract. It is argued that one term of the contract was that "the tenant should be allowed to remain," but the exceptions recite that there was "conflicting evidence upon the point as to whether or not it was a part of the oral agreement that the tenant should be allowed to remain." The court, trying the case without a jury, has found for the plaintiff, and has refused to rule according to three requests made by the defendant. For aught that appears, the court may have found that it was not a part of the contract that the tenant should be allowed to remain: but, if there

was such an agreement, it was an agreement to be performed by the plaintiff after he received the conveyance, and seems to be collateral to the contract of purchase and sale, rather than a part of it. The real difficulty in the case is that the writing is ambiguous in regard to the price, and one question in the case might have been whether oral evidence was competent to remove the ambiguity, but no such question appears to have been raised. The evidence of the usage of real-estate brokers with respect to the amount of their commissions, if competent, had some tendency to show that the writing should be construed as both the plaintiff and the defendant testified the contract really was. The opinion of the court proceeds solely on the ground that, under our statute of frauds, the contract of sale, or a memorandum of the sale of land, signed by the vendor, need not contain the price or any of the other terms of the sale; that it is enough if the writing shows that the defendant has agreed to sell, on some terms unexpressed, certain designated land to the plaintiff, or contains an acknowledgment that such an agreement had been made. The reasons given for this opinion are that by our statute (Pub. St. c. 73, § 2) "the consideration of such promise, contract, or agreement need not be set forth or expressed in the writing signed by the party to be charged therewith, but may be proved by any legal evidence." This provision was introduced into our statutes in consequence of the decision in *Packard v. Richardson*, 17 Mass. 122. Rev. St. c. 74, § 2. In the report of the commissioners appointed to make the revision they say that "this section is new in terms, and is proposed for the purpose of adopting and confirming the judgment of the supreme judicial court upon the construction of the statute now in force. 17 Mass. 122." The decision in *Packard v. Richardson* was upon a written promise on the back of a promissory note, as follows: "We acknowledge ourselves holden as surety for the payment of the within note," signed by the defendants. In the opinion it is said: "The consideration existing was that these defendants were members of the company which made the note, and that a suit which had been commenced was stopped by the plaintiff, at their request. But this consideration was proved by parol, and the writing acknowledges no consideration whatever." The court declined to follow the decision in *Wain v. Warters*, 5 East, 10. See *Sanders v. Wakefield*, 4 Barn. & Ald. 595. All these cases arose upon contracts of guaranty or contracts to pay the debt of another, and the consideration of the promise was executed. When these cases were decided, it was not questioned that the memorandum of a contract of sale must contain the terms of the contract, and one term of every contract of sale is the price. Many of the states of the United States have passed statutes on this subject similar to ours, viz. Illinois, Indiana, Kentucky, Maine, Michigan, Nebraska, New Jersey, Virginia, West Virginia. See *Wood, St. Frauds*, 176, 892, 922. As it may be sug-

gested that decisions in England and in states where no similar statutes exist are not applicable, I shall confine my citations chiefly, if not wholly, to our own decisions, and to the decisions of the courts of those states whose statute on this subject is similar to ours.

It is substantially conceded that *Grace v. Denison*, 114 Mass. 16, is directly opposed to the opinion of the court in the present case, but it said that the second section of our statute of frauds was overlooked by the court. It was a bill in equity against a vendor for the specific performance of an agreement to convey land. The case arose on a demurrer for the cause "that such contract as the plaintiff alleges to be in writing, and signed by the defendant, is not sufficient to enable a court of equity to decree specific performance thereof." The only ground on which the demurrer was sustained was that the memorandum of the agreement was not sufficient to satisfy the statute of frauds. The memorandum indicated "that a part of the purchase money was agreed to be secured by mortgage of the premises to be conveyed, but it does not disclose nor furnish any means for the court to ascertain what part or amount is to remain upon mortgage, and what paid in cash upon delivery of the deed." "The writing being incomplete in one of its essential terms, and the court having no means to which it can lawfully resort to supply the defect, specific performance must fail." *Atwood v. Cobb*, 16 Pick. 227, was assumpsit by the vendee against the vendor on an agreement to convey land signed by both parties. The agreement was "in consideration of the same sum which I paid him (the vendee) for the same, with interest from the time I purchased the same till I paid for it, [supposed about six months,] with the expense of the deed; also the taxes for one year." One defense was the statute of frauds. On this the court say: "The principal uncertainty is as to the price to be paid. \* \* \* As the amount paid for an estate is usually determined by the consideration expressed in the deed of conveyance, or by some receipt or memorandum, it is possible to pronounce the contract void under the statute because it does not express with sufficient certainty the price to be paid for the estate." *Morton v. Dean*, 13 Metc. (Mass.) 385, was an action of assumpsit by the vendor of land against the vendee. The memorandum was signed by an auctioneer, who was the agent of both parties; and, in the opinion in that case, it was said: "But the memorandum of sale must refer to the conditions of sale, or the case will be within the statute. When the connection between the memorandum and the conditions is to be proved entirely by parol evidence, it is within the mischief intended to be prevented by the statute. The terms of the agreement which are material must be stated in writing." In *Waterman v. Meigs*, 4 Cush. 497, the court say: "The statute [of frauds] requires 'some note or memorandum in writing of the bargain.' This letter alludes to plank bought and

to be delivered, but it does not state any one of the elements of a contract, price, quantity, quality, time, place, or anything to inform us what the nature of the contract was, and is clearly not a sufficient memorandum." *Coddington v. Goddard*, 16 Gray, 436, was an action of contract to recover damages for not delivering 200,000 pounds of copper alleged to have been sold by the defendant to the plaintiff. The same doctrine was announced, although the question arose under the section of the statute of frauds relating to a contract for the sale of goods, wares, and merchandise. *Riley v. Farnsworth*, 116 Mass. 223, was an action of contract by the vendee of land against the vendor. The memorandum was signed by auctioneers, who were agents of both parties. It described the land and the price, and it acknowledged the receipt of a deposit, and contained an agreement that the vendor should fulfill the conditions of sale. These conditions were not in writing. The court say: "The memorandum in writing required by the statute of frauds must contain all the essential terms of the contract, so that the court can ascertain the rights of the parties from the writing itself without resorting to oral testimony." *Ashcroft v. Butterworth*, 136 Mass. 511, was an action of contract for breach of a written agreement to sell goods. The court say: "In this case it does not appear that the price is made certain by any writing signed by the defendants. The present price is, indeed, 8½d. per pound; but the prices generally are to be the same as those paid by the Ashcroft Manufacturing Company, and it does not appear that those prices are contained in any writing signed by the defendants to which this offer of the defendants refers. The statute of frauds has been pleaded. We think the ruling cannot be supported." See, also, *Elliot v. Barrett*, 144 Mass. 256, 10 N. E. Rep. 820; *Fogg v. Price*, 145 Mass. 513, 14 N. E. Rep. 741. In *Freeland v. Ritz*, 154 Mass. 257, 28 N. E. Rep. 228, the court say: "It is a well-settled rule of law that, while the memorandum must express the essential elements of the contract with reasonable certainty, these may be gathered either from the terms of the memorandum itself, or from some other paper or papers therein referred to." In *White v. Bigelow*, 154 Mass. 593, 28 N. E. Rep. 904, the court say: "To satisfy the statute [of frauds] the agreement or memorandum must, either by its own terms or by reference to some other writing, express with reasonable certainty all the conditions and essential elements of the bargain." See *Callanan v. Chapin*, 158 Mass. 113, 32 N. E. Rep. 941. While some of these cases are suits against the vendee, and some suits against the vendor, it is abundantly evident that this court has always held in both classes of cases that in a contract to convey land or other property, executory on both sides, the contract or memorandum, although it need be signed only by the party to be charged, must contain all the essential terms of the contract or bargain, and that the price agreed to be paid is an essential term. To say that the

court, in the decision of *Grace v. Denison*, overlooked the well-known provision of our statute of frauds concerning consideration, seems to me unwarranted.

The following are some of the decisions in other states whose statutes on this subject are similar to ours: *O'Donnell v. Leeman*, 43 Me. 158; *Williams v. Robinson*, 73 Me. 195. In the last case the court say: "But while, as before seen, the memorandum need not necessarily mention the consideration, that being proved by parol testimony, nevertheless, in order that the court may ascertain the rights of the parties from the writing itself, without resort to oral testimony, (*Riley v. Farnsworth*, 116 Mass. 223-225, 236,) to satisfy the statute the memorandum must contain within itself, or by some reference to other written evidence, the names of the vendor and vendee, and all the essential terms and conditions of the contract, expressed with such reasonable certainty as may be understood from the memorandum and other written evidence referred to, (if any,) without any aid from parol testimony." *Gault v. Stormont*, 51 Mich. 636, 17 N. W. Rep. 214; *Norton v. Gale*, 95 Ill. 533; *Farwell v. Lowther*, 18 Ill. 252; *Nibert v. Baghurst*, 47 N. J. Eq. 201, 20 Atl. Rep. 252; *Schenck v. Improvement Co.*, (N. J. Ch.) 19 Atl. Rep. 881. See *Williams v. Morris*, 95 U. S. 444; *Reed, St. Frauds*, § 393 et seq.; *Browne, St. Frauds*, §§ 376-385. In *Camp v. Moreman*, 84 Ky. 635, 2 S. W. Rep. 179, an opinion is expressed which accords with the opinion of a majority of the court in the present case, although, perhaps, it was not necessary to the decision. See *Freeland v. Ritz*, *supra*. *Thornburg v. Masten*, 88 N. C. 293, and *Miller v. Irwin*, 1 Dev. & B. 103, were decided under a statute of frauds copied from the English statute of Charles II., which contained no provision concerning consideration similar to ours. *Ellis v. Bray*, 79 Mo. 227, appears to have been decided on the ground that, "when a written memorandum of contract does not purport to be a complete expression of the entire contract, or a part of it only is reduced to writing, the matter thus omitted may be supplied by parol evidence,"—a doctrine to which I think this court is not committed.

When the whole contract or promise of the defendant is to do a certain thing, and this is an absolute promise, resting upon a consideration which has been executed, there is some reason in saying that the memorandum signed by the defendant need not contain the consideration or inducement of the contract or promise. But in a contract, executory on both sides, where the promises are mutual, and each is the consideration of the other, the promises are conditional, and one party agrees to perform his part of the contract only on condition that the other will perform his part, and it cannot be known what the promise of the one is without knowing the express or implied promise of the other. A promise to convey land because the promisee has actually received \$1,000 is not the same as a promise to convey land if the promisor will pay \$1,000 on receiving the conveyance, and a promise to

convey land for \$1,000, to be paid on the delivery of the deed, is not the same as a promise to convey land for \$10,000 to be paid on the delivery of the deed. The conditions on which the vendor agrees to convey are often many and complicated, and involve the assumption of mortgages and the performance of other acts. If a mere acknowledgment, in writing, of the vendor, that he has agreed to convey specific land to the vendee on terms which are not expressed, is sufficient to satisfy the statute of frauds, then it is open to the vendee to prove by oral testimony the price to be paid, and all the other terms of the contract to be performed by him, and the statute would no longer prevent frauds and perjuries. If it is a condition of the promise of the vendor that it is not to be performed unless at the time of the performance the vendee pays money, and gives or assumes mortgages, the condition qualifies the promise, and is a part of it, and the writing should contain all that is essential to show what the promise or contract on the part of the vendor in fact was. The decision of the court seems to me in great part to nullify the statute. I have not considered whether the judgment of the court might not be sustained on some other ground than that stated in the opinion.

Mr. Justice KNOWLTON concurs in this opinion.

(7 Ind. App. 309)

**BOARD OF COM'RS OF SHELBY COUNTY v. CASTETTER.**

(Appellate Court of Indiana. June 22, 1893.)

**DEFECTIVE BRIDGES — ACTION FOR INJURIES — INSTRUCTIONS — CONTRIBUTORY NEGLIGENCE — MEDICAL TREATMENT — RECOVERY FOR BY MARRIED WOMAN.**

1. Where, in an action for personal injuries, the evidence showed that as plaintiff was traveling on an approach to defendant county's bridge her horse becoming frightened, she was thrown over the embankment because there was no railing, the jury was properly instructed that if the approach was not maintained in a reasonably safe condition for public travel, and plaintiff knew its condition, she was not bound to forego travel, but was required to use care and prudence in proportion to such dangers, if any, as she may have known to exist.

2. A married woman may recover, in an action for personal injuries, the expense incurred on her separate account for medical treatment and nursing.

On petition for rehearing. Petition overruled.

For former report, see 33 N. E. Rep. 986.

LOTZ, J. In the former opinion, affirming the judgment of the lower court, it was said that "the instructions are none of them properly in the record. Under such circumstances, we are not required to consider them." Having reached the conclusion that the judgment should be affirmed, we refrained from stating the reasons why the instructions were not properly in the record. Counsel for appellant have filed an earnest petition for a rehearing, in which they show that they had no opportunity to examine appellee's

brief, or the record in the cause after said brief was filed and before the decision was rendered; that they had no knowledge of, and were not responsible for, certain alleged changes in the record; that the strictures contained in appellee's brief are very unjust and unfair, and place them in an unfavorable attitude before this court. They ask that a rehearing be granted, and they be permitted to explain their relation to such alleged changes, and to show that the instructions are properly in the record. We have examined the affidavits upon file, and are convinced that appellant's counsel are free from fault in relation to such alleged changes. We have concluded, under the facts shown by the affidavits on file, to treat the instructions as being properly in the record, and to give the appellant the full benefit thereof.

Only two of the instructions are assailed in the argument; and under the familiar rule, if any objection exist as to the others, such objections are waived. The first instruction of which complaint is made is in these words: "If you find that the approach to and of the bridge, and of which complaint is made, was not at the time of the alleged occurrence maintained by the defendant in a reasonably safe condition for public travel, and if you further find that the plaintiff at the time of going upon the same, if she did go upon the same at the time complained of, knew that the same was not so maintained, if it was not so maintained, she was not bound to forego travel upon such approach, but in traveling upon the same she was required by the law to use care and prudence in proportion to such dangers, if any, as she may have known to exist from the failure of any person to so maintain such approach." Appellant's counsel contend that under the rule embodied in this instruction no one is bound to forego traveling upon a public highway at any time, no matter how imminent the dangers of which he has knowledge; that, even though the danger be certain death, or destruction of property, the traveler need not refrain from traveling over the point of danger. This assumption is an extreme one, and has no similarity to the facts of this case. An instruction should be construed with reference to the evidence in hand. Here the evidence showed that the appellee was traveling upon an approach to a bridge; that the horse became frightened, and she was thrown over the embankment and injured; that there was no railing or guard at the side to prevent falling from the approach. It seems to be the settled law of this state that one is not required to refrain from traveling on a public highway merely because he knows it to be dangerous. The law only requires of him that he be careful in proportion to the danger of which he has knowledge, and may proceed, if it be consistent with reasonable prudence, to travel thereon; and whether he used reasonable care with his knowledge of the danger is generally a question for the jury. *Turnpike Co. v. Baldwin*, 57 Ind. 86; *Turnpike Co. v. Jackson*, 86 Ind. 113. As applicable to the evidence in this case, we think this instruction was not erroneous.



The court, in instructing the jury with reference to the elements of damage which might be taken into consideration, used this language: "You may also estimate any sum which you may find she has paid from her own separate means for medical treatment, and what liability she may have incurred for any such treatment upon her sole and separate account, not, however, exceeding the sum of fifty dollars." The complaint is silent as to whether the appellee was married or sole. It was an admitted fact on the trial that she was a married woman at the time the injury was received, and continued to be up to the time of the trial. The averment of the complaint as to the special damages for medical attendance is in the following words: "That she has expended and incurred a liability on account of medical attendance, nursing, and care in the sum of fifty dollars." It is the duty of the husband to support and maintain his wife, and to furnish medical treatment and care in the case of injury or ailment, and presumptively all such damages accrue to him; but this is but a naked presumption, and when it is averred and proved that the wife has expended money or incurred a liability on her own account, she is entitled to recover therefor as if she were sole. Under the present statutes of this state the only limitation upon the powers of a married woman to make contracts is that she cannot become surety, or alienate or encumber her real estate without her husband joining with her. In all other respects she stands upon an equal footing with her husband. If she expended money or incurred liability, as alleged in the complaint, she may recover therefor. The special circumstances showing her right of recovery is sufficiently averred. We think there was no error in giving this instruction.

Having considered the other questions discussed in the former opinion, we find no substantial reason for granting a rehearing.

The petition is therefore overruled.

(7 Ind. App. 179)

LOUISVILLE, N. A. & C. RY. CO. v.  
STANGER.

(Appellate Court of Indiana. June 24, 1893.)

RAILROAD COMPANIES — ACCIDENTS AT CROSSINGS  
— NEGLIGENCE — SOUNDING WHISTLE.

If, in approaching a crossing, the engineer should see that a traveler on the highway is in imminent peril, it is his duty to slacken the speed of the train, and come to a stop, before reaching the crossing, if possible; but if the train has reached the point where the law requires the signal to be given, and it is uncertain whether the train can be stopped before reaching the crossing, the signal must be given, though it may frighten a team on the highway, causing damages.

On petition for rehearing. Petition overruled.

For former report, see 32 N. E. Rep. 209.

LOTZ, J. The appellant has presented a petition for a rehearing, in which the former decision of this court is assailed

with great vigor. There are some acts charged in the complaint which do not, in our judgment, constitute negligence, and there are some facts found by the special verdict that are not alleged in the complaint, and which do not constitute negligence. Eliminating from the special verdict all such facts, and all conclusions of both law and fact, as we may do, (*Railway Co. v. Adams*, 105 Ind. 151, 5 N. E. Rep. 187,) the question arises whether or not there are facts alleged and found remaining sufficient to support the judgment rendered by the lower court. In their brief, appellant's counsel admit that there are two acts of alleged negligence which are averred in the complaint and found by the jury: "(1) That appellant, knowing that appellee's team was running away, and appellee was in a place of danger, blew the engine whistle three times; and (2) made no effort to stop or check the speed of said train, but willfully and carelessly increased the speed thereof." It is earnestly insisted that the evidence does not sustain either of these findings. We have examined the evidence, and find it conflicting on both of these points. It is the settled rule that this court will not disturb the judgment under such circumstances.

It is further contended that, as the law made it the duty of the engineer to give signals by sounding the whistle for the highway crossing, negligence cannot be predicated upon an act which the law requires to be done. The former opinion of this court is severely criticised. Counsel for appellant, with remarkable force and clearness, says: "Can it be said to be the law that when an engineer sounds the whistle of his engine in strict obedience to the statute he may be guilty of negligence? Must he, while holding in his hands the lives and property intrusted to his care, dashing along at the rate of fifty or sixty miles an hour, with all his cares, in the twinkling of an eye, transform himself into a witness, jury, and court, survey the surroundings, and determine with absolute accuracy above the possibilities of criticism whether he shall obey the law, and be guilty of gross negligence thereby, or disobey the law, and see before him a threatened fine for himself and damage suit for his company, and, maybe, death to his passengers? The statute requires that the whistle shall be sounded not more than one hundred nor less than eighty rods from the road crossing. The signal must be given within this space. This distance of twenty rods is often traveled in four seconds of time, and yet the engineer must look at the team, determine how fast it is running, how badly scared it is, how strong and capable the driver, what probable effect the sounding of the whistle will have on the scared team, and determine with accuracy whether the 'exception applies,' and he is justified in running on quietly, and probably creeping up on some driver about to cross, and who has with all due diligence listened for the warning guaranteed to him by law for his protection, and dash him and his carriage load of passengers into eternity. Would any jury and

court, with days of deliberation, and the facts laid before them by witnesses from every standpoint of observation, be able to determine just how fast the team may be running, just what conditions must exist to justify the engineer in disobeying the statute? In this case the horses were almost under control, the speed checked, and, if it had not been for this crossing whistle, they would not have become unmanageable. This was a much-traveled road; and can it even now be said that the sounding of the whistle on this very occasion did not give the required warning, and save the lives of a dozen people who otherwise would have come upon the track at the crossing with no knowledge of the approach of this [ir]regular train? In the opinion it is laid down as the law that 'upon many occasions an engineer may sound the whistle lawfully. When approaching a public highway crossing he is by law, in this state, required so to do. Circumstances may exist, however, that would render such an act the grossest negligence. If the engineer sounds the whistle upon a proper occasion, and in so doing he frightens a team of horses so that they become unmanageable and do injury, negligence will not be imputed to him by reason of the act, unless there are circumstances within his knowledge admonishing him that injury will probably result if the act was done. The mere sounding of the whistle cannot be deemed negligence, although blown in close proximity to a highway, and even though there are horses in the immediate vicinity.' The finding in this case is that 'said horses took fright and started in a trot along said highway, whereupon the appellee, holding the reins in his left hand, set the brakes on the wagon with his right, and thus checked said team,' when the engineer sounded the whistle. Can it be said as a proposition of law that an engineer is excused from sounding the warning whistle for a crossing when he sees a team scared and then checked up? Would he even be justified in neglecting to give the statutory signals under such circumstances? Surely the danger would have to be a great deal more apparent to make it negligence to sound the whistle in obedience to the statute."

After considering the cogent reasoning of counsel, we have reached the conclusion that there are expressions in the former opinion that do not accurately state the law as applied to the facts of this case. A moving train of cars is always attended with danger to those who may be on board and to those who may be near a highway crossing. The danger is enhanced in the ratio of the increased speed of the train. The law imposes upon a railway engineer the positive duty of giving the statutory signals in approaching a highway crossing, and inflicts a penalty for the violation of this duty. If, in approaching the crossing, he should see and know that a traveler upon the highway is in imminent peril on account of the approaching train, it is his duty to slacken the speed of the train, and come

to a stop, if possible, before reaching the crossing. If, however, the train has reached the point where the law requires the signals to be given, and it is uncertain whether or not the train can be stopped before reaching the crossing, he must give the signals; and negligence cannot be imputed to such acts. We think there are at least two acts of negligence,—the failure to check the speed, and increasing the speed of the train,—that were both alleged and found by the jury sufficient to support the judgment.

Petition overruled.

GAVIN, C. J., and DAVIS, J., concur in the result.

ROSS, J. I think the petition should be granted.

REINHARD, J. I agree with the conclusion reached in the original opinion. Whether I could indorse all the reasoning of the learned judge who rendered it, it will not now be necessary to decide.

(159 Mass. 477)

#### CODMAN v. BROOKS et al.

(Supreme Judicial Court of Massachusetts.  
Suffolk. Sept. 12, 1893.)

#### FRENCH SPOILATION CLAIMS—PAYMENT OF AWARD —DISTRIBUTION—ASSIGNMENT.

1. Act Cong. 1895, c. 25, (23 Stat. 283,) authorizing the court of claims to examine claims against the French government prior to the treaty of 1800, treated them as property belonging to the representatives of the original sufferers. They were so treated also by the report of the court. Act March 3, 1891, c. 540, (26 Stat. 862, 903,) appropriating money to pay such claims, provided that, where the original sufferers were bankrupts, the awards should be made on behalf of the next of kin, instead of the assignees in bankruptcy, and that the awards should not be paid until the court of claims certified that the personal representatives on whose behalf the award was made represented the next of kin, and till the courts which granted the administration certified that the legal representatives had given adequate security for the legal disbursement of the awards. *Held*, that the proviso did not take an award out of the estate of an original sufferer, and divide it equally among the next of kin, though a will disposed of it differently, but left it to be administered as his estate. Field, C. J., and Allen, J., dissenting.

2. An assignment by one of the sons of a deceased sufferer by French spoliation of all his interest in claims, demands, and other property mentioned in the executors' schedules of the assets of the estates, which had an item of claims against France prior to 1800, and another for claims after 1800, would carry his interest in an award for such claims.

Report from supreme judicial court, Suffolk county; James M. Morton, Judge.

Suit by Robert Codman, as administrator with the will annexed of William Gray, deceased, against William Gray

Brooks, as administrator of Henry Gray, deceased, and others, for instructions as to the distribution of an award for French spoillations. The case was heard by a single justice, and, at the request of all parties, was reported for the decision of the full court.

R. H. Dana and R. Codman, for plaintiff. J. B. Warner, for Edward Gray and others. W. G. Russell and J. Fox, for Lucia G. Alexander and others. H. D. Hadlock, for Brooks and others.

KNOWLTON, J. The plaintiff in this case, as administrator *de bonis non* with the will of William Gray, has received a large sum of money appropriated by congress under the statute of March 3, 1891, c. 540, (26 Stat. 862, 908,) to the payment of claims for vessels and other property belonging to the testator, illegally seized and condemned by the French government prior to the treaty of 1800 between France and the United States. William Gray left six children, of whom five were residuary legatees under his will, and the other was otherwise provided for.

The first question which we have to consider is whether this money is to be divided among the representatives of all his children, or only among those who represent the residuary legatees. The act of March 3, 1891, after making appropriations of specific sums to a large number of persons by name, ends with a proviso as follows: "Provided, that in all cases where the original sufferers were adjudicated bankrupts, the awards shall be made on behalf of the next of kin, instead of to the assignees in bankruptcy; and the awards in cases of individual claimants shall not be paid until the court of claims shall certify to the secretary of the treasury that the personal representatives on whose behalf the award is made represent the next of kin, and the courts which granted the administration, respectively, shall have certified that the legal representatives have given adequate security for the legal disbursement of the awards." This proviso is of doubtful meaning. Some of its clauses seem to point to one intention on the part of congress, and some to another; but, in determining what disposition is to be made of the moneys to which it refers, the whole statute is to be considered in connection with the previous legislation which it supplements. It is very clear that Statutes Jan. 1885, c. 25, (23 Stat. 283,) under which the court of claims acted in making to congress the reports on which this part of the appropriation bill is founded, treats the French spoliation claims as property belonging to the representatives of the original sufferers. The legislation proceeds upon the theory that the original sufferers had valid claims against the French government which the United States might properly demand and recover for their benefit, and that when the United States, by the treaty of 1800, relinquished these claims for a valuable consideration, there was an equitable right of property which congress ought to recognize in favor of citizens wrongfully despoiled. It is equally clear that the court

of claims, whose reports to congress were the foundation of the legislation under which the payments were made, treated these claims as property. The statute of 1891 follows closely these reports of the court of claims. It departs from them only in failing to appropriate anything for the few claimants who represent assignees in bankruptcy and in adding the proviso. The substance and effect of the legislation is a following of the original act of 1885, and the reports of the court of claims under it in treating these claims as property belonging to the representatives of the original holders, except in those cases where the claims had passed to assignees in bankruptcy, during the lifetime of those holders. For good reasons, doubtless, it was thought best not to attempt to revive proceedings in cases in bankruptcy, most of which were ended nearly a century ago, nor to make awards of large sums to those who long ago bought their claims, generally for nominal sums, in the settlement of estates in bankruptcy. By express provision, the payments in such cases are to be made for the benefit of the next of kin. This is the only express modification of the theory of the court of claims. There would seem to have been little necessity for this provision after the claims in favor of assignees in bankruptcy and their representatives had been stricken from the appropriation bill. But, perhaps, as has been decided by the court of claims, (*Henry's Case*, 27 Ct. Cl. 142,) congress intended this provision as a direction to that court in subsequent cases, and very likely a more important object of the provision was to cover any cases among the large number included in the appropriation bill in which it might subsequently appear that there had been an assignment in bankruptcy, and in which a claim might be made against the administrator under the assignment. Conformably to the views above expressed, it was held in *Balch v. Blagge*, 157 Mass. 144, 31 N. E. Rep. 764, that under this statute the next of kin must be determined as of the date of the death of the original sufferer. The precise question now before us which was not decided in that case is whether the proviso takes the money in each case entirely out of the estate of the deceased person to whose administrator it is appropriated, and divides it equally among the next of kin, notwithstanding the existence of a will which would dispose of it differently, or whether the whole statute, taken together, indicates a purpose on the part of congress to have the property administered as the estate of the deceased sufferer according to law. We think the principles established and the reasons given in *Balch v. Blagge*, *ubi supra*, require us to hold in the present case that the money goes to the residuary legatees under the will of William Gray, subject to the assignment made by one of them.

Among the persons to whom appropriations are made in this statute, several are described as administrators with the will annexed, which is an indication that the appropriation is of money belonging to the estate, and is at least a suggestion that it is to be administered under the

will. Except in case of bankruptcy, there is no express provision that the money is to go to the next of kin, but the court of claims is required to certify to the secretary of the treasury before payment that the personal representatives represent the next of kin. This would seem to have been inserted by way of caution to make it certain that the one receiving the award stands as successor to the original sufferer in the settlement of his estate after his death, and represents the next of kin. Such a one is the person through whom the next of kin must obtain whatever of personal property they receive from the estate of their deceased relative. Even if there is a will in which they are not mentioned as legatees, he represents them in a sense, for he stands in the place of their relative in reference to his estate; and if, notwithstanding the will, they make a claim by reason of their relationship, they can obtain nothing except through him. The last part of the proviso requires a certificate from the court which granted the administration that the legal representatives have given adequate security for the legal disbursement of the award. We are of opinion that this can mean nothing else than that kind of security which courts that grant administration of the estates of deceased persons are accustomed to take. Such courts could not lawfully require security except in reference to the property of the deceased person, and then only to dispose of it according to the law of the state where the administration is granted. Congress could not, if it would, impose upon such courts the duty of requiring any other kind of security, and there is nothing in this statute to indicate that any other kind of security than an ordinary probate bond was referred to. The object of the provision seems to be to guard against the payment of large sums of money to administrators whose official bonds are for small amounts. Doubtless congress did not contemplate the existence of debts which can be enforced at this late day against the estates of the personal sufferers. It is unnecessary now to decide whether, if such a debt against any person has been kept alive, it can be collected out of money received under this statute; but the different parts of the proviso, as well as the whole legislation on the subject, point to the conclusion that this money is to be disposed of under the will of the original sufferer if he left one, and, if not, it is to pass under the statute of distributions, and, in either case, is assets protected by the original probate bond of an administrator or an executor. The same conclusion has been reached by the courts of Pennsylvania and Connecticut. In *re Clement's Estate*, 150 Pa. St. 85, 24 Atl. Rep. 681; In *re Lefingwell's Estate*, (Conn.) 25 Atl. Rep. 455. The supreme court of the District of Columbia holds otherwise. *Gardner v. Clark*, 20 Wash. Law Rep. 2.

It is necessary to consider the effect of the assignment of Henry Gray to his four brothers. That assignment was for a valuable consideration, and included all his right, title, and interest "in and to all

notes, balances, claims and demands, and all other property, real and personal, mentioned in the said schedules, and all not therein mentioned, if any such there be, to which I am or may become in any way entitled, as one of the residuary legatees or one of the executors of said William Gray, or in any manner by or through him." In the schedules referred to, among "the claims on European governments for spoliation of property owned and insured by William Gray from 1796 to 1811," are the following: "Amount of claims on France prior to 1800 p. list, \$260,500; after 1800 p. list, \$162,000." The claims mentioned in the first item are claims of the kind provided for by the United States statute of January, 1885, (23 Stat. 283, c. 25, § 1;) and this item undeniably was intended to include the claims for payment of which the appropriations, considered in the present case, were made. We see no reason why Henry Gray could not assign all his interest in these claims. *Kingsbury v. Burrill*, 151 Mass. 199, 24 N. E. Rep. 36; *Jernegan v. Osborn*, 155 Mass. 207, 29 N. E. Rep. 520.

We have discovered no error in the rulings or findings of the justice before whom the case was tried. It was not contended that there was any fraud connected with this assignment. Whether the executors made some mistake in their estimate of the value of these claims is immaterial, and on any theory the consideration of the assignment was adequate. Henry Gray's share, namely, one-fifth, is to be equally divided among his four brothers. The administrator of the estate of Horace Gray, the elder, claims only for the benefit of the assignees of his intestate. The money in the hands of the plaintiff will be paid over to the legal representatives of William R. Gray, Francis C. Gray, and John C. Gray, deceased, and the assignees of Horace Gray, deceased. Decree accordingly.

FIELD, C. J., (dissenting.) After a good deal of hesitation, I have come to the conclusion that the most reasonable construction of the proviso under consideration is that, while the first clause is confined to cases where the original sufferers were adjudicated bankrupts during their lives, the second clause must be applied to all cases where the original sufferers were natural persons, as distinguished from corporations; that the creditors of such sufferers are in all cases to be excluded from receiving the money; that the personal representatives of such sufferers receive the money, not as assets generally of the estates of the original sufferers, but as representing their next of kin, and in trust for the next of kin; that the words "next of kin" must have the same meaning in both clauses of the proviso; and that these words, in either the legal or the popular sense, cannot properly be held to include legatees. Whether the words "next of kin" are held to mean nearest kindred or distributees, under our statutes in force when William Gray died, is, I understand, immaterial, as he left no widow surviving him, and no issue of deceased children. The representatives of his es-

tate, I think, hold the money as intestate property, for the benefit in equal shares of the estates of all his children, the assignees of any child taking that child's share.

ALLEN, J., concurs in this view.

(159 Mass. 474)

**SKINNER v. TIRRELL**

(Supreme Judicial Court of Massachusetts.  
Suffolk. Sept. 7, 1893.)

**SEPARATION OF HUSBAND AND WIFE—LOANS TO WIFE—EXPENDITURE FOR NECESSARIES—RIGHTS AGAINST HUSBAND—SUBROGATION—EQUITY.**

1. One who furnishes money to a wife, living apart from her husband for justifiable cause, which she expends for necessities, cannot recover therefor from the husband, on the principle of subrogation, as there never was any liability on the part of the husband to those furnishing the necessities, they having been sold to the wife and paid for by her.

2. There is no ground on which recovery can be had in equity against the husband for moneys so advanced to the wife.

Appeal from superior court, Suffolk county.

Suit by Mary E. Skinner against Leonard V. Tirrell. From a decree dismissing the bill, plaintiff appeals. Affirmed.

J. D. Long and E. C. Bumpus, for appellant. H. Kingman, for appellee.

MORTON, J. This is a bill in equity in which the plaintiff, who has advanced money to the defendant's wife while living apart from her husband, which she expended, it is alleged, in the purchase of necessities, seeks to be subrogated to the rights of the persons furnishing the necessities, and prays that the defendant may be ordered to pay to her the amount so advanced. The defendant demurred to the bill. The demurrer was sustained, and the bill was dismissed, and the plaintiff appealed. The demurrer was a general one, and it was claimed at the argument, as one ground of it, that the bill did not set out sufficient facts to show that the wife was living apart from her husband for justifiable cause. Without considering whether this objection was well taken, we assume that, if valid, it could be removed by amendment. The question then is whether the bill, if amended so as to remove this objection, can be maintained either on the ground of subrogation or of a general equity. We think it cannot stand on either ground. There can be no subrogation unless there is something to be subrogated to. A debt or liability cannot be created where none existed for the purpose of effecting a substitution. There never was any liability on the part of the defendant to the parties who furnished the wife with the necessities. The goods were sold to her, and were paid for by her. They were not furnished on the defendant's credit, but on the wife's. The money that was advanced by the plaintiff was not advanced to the parties who furnished the necessities, but to the wife, to be expended by her as she saw fit. There is no ground, therefore, for the application of the doctrine of subrogation. Although the right of sub-

rogation does not depend on contract, but rests on natural justice and equity, there must be an agreement, either express or implied, to subrogate, or some obligation, interest, or right, legal or equitable, on the part of the party making the payment or advance, in respect of the matter concerning which payment is made or money advanced, in order to entitle him to subrogation. *Hart v. Railroad Co.*, 13 Metc. (Mass.) 99; *Amory v. Lowell*, 1 Allen, 504; *Wall v. Mason*, 102 Mass. 313; *Insurance Co. v. Middleport*, 124 U. S. 534, 8 Sup. Ct. Rep. 625; *Arnold v. Green*, 116 N. Y. 566, 23 N. E. Rep. 1; *Gans v. Thiemé*, 93 N. Y. 225, 232; *Johnson v. Barrett*, 117 Ind. 551, 19 N. E. Rep. 199; *McNeil v. Miller*, 29 W. Va. 480, 2 S. E. Rep. 335; *Miller's Appeal*, 119 Pa. St. 620, 13 Atl. Rep. 504; *Suppiger v. Garrels*, 20 Ill. App. 625; *Gadsden v. Brown, Speer*, Eq. 37, 41; *De Concellio v. Brownrigg*, (N. J. Ch.) 25 Atl. Rep. 383; *Brewer v. Nash*, 16 R. I. 458, 462, 17 Atl. Rep. 857; *Building Soc. v. Cuncliffe*, 22 Ch. Div. 61; *Stevens v. King*, 84 Me. 291, 24 Atl. Rep. 850; *Sheld. Subr.* §§ 2, 3, 240. A mere volunteer is not entitled to subrogation. *Insurance Co. v. Middleport*, supra; *Arnold v. Green*, supra; *Gadsden v. Brown*, supra; *Sheld. Subr.* §§ 241, 242, and cases cited. Nor is one who lends money to another to pay a debt entitled, as matter of right, to stand in the creditor's shoes. *Sheld. Subr.* §§ 241, 242, and cases cited. So far as subrogation is concerned, the plaintiff's contention resolves itself into the proposition that the defendant's wife could have bought on her husband's credit the necessities which she purchased and paid for with the money advanced to her by the plaintiff; that, if the plaintiff had paid the parties supplying the necessities their several demands, she would have been entitled to be subrogated to their claims against the defendant; and that, therefore, a decree should be entered in her favor against the defendant in this suit. If the premises are correct, manifestly the conclusion does not follow from them. There are ancient and modern cases in England which hold that a person advancing money to a married woman under circumstances like those in this case can recover the same of the husband in equity. *Harris v. Lee*, 1 P. Wms. 482; *Marlow v. Pittfield*, Id. 559; *Deare v. Soutten*, L. R. 9 Eq. 151; *Jenner v. Morris*, 3 De Gex, F. & J. 45. See, also, *In re Wood*, 1 De Gex, J. & S. 465. These cases have been followed in this country in Connecticut, (*Kenyon v. Farris*, 47 Conn. 510,) and there is a dictum in a case in Pennsylvania (*Walker v. Simpson*, 7 Watts & S. 83) to the same effect. Certain text writers, following the English cases, have stated the law to be as there held. *Bish. Mar. & Div.* §§ 621, 622; 1 *Blsp. Eq.* § 193; 3 *Pom. Eq. Jur.* §§ 1299, 1300; 2 *Kent, Comm.* 146, note by *Holmes, J.*; *Schouler, Husb. & Wife*, § 61, note. But those cases do not appear to us to rest on any satisfactory principle. It was apparently conceded by the Lord Chancellor in *Jenner v. Morris*, supra, that they did not. He seems to have yielded to them simply as precedents which he was bound to follow. The earliest one, (*Harris v. Lee*, supra,) on which the sub-

equent ones rely, referred the jurisdiction, without much discussion or consideration of it, to the principle of subrogation. For reasons already given, we think that principle inapplicable. It is said that equity has jurisdiction because there is no remedy at law. It is admitted that there is none. Neither is there any right or claim at law on the part of the plaintiff against this defendant. To sustain the bill on that ground would require us to hold that equity may create a legal right where none exists, and then enforce it by equitable remedies. We do not understand that it can do so. The only remaining ground of jurisdiction is that the defendant was bound to furnish his wife with necessaries; that the money which the plaintiff advanced to her was actually expended in good faith by her for necessaries; that it will be no hardship upon the defendant to be obliged to pay for necessaries which the law would have compelled him to furnish; and that, in the interests of justice, equity should compel him to pay the plaintiff the sums which she has advanced. In effect, this is the same as saying that in equity money advanced to a wife living separate from her husband or justifiable cause, and expended by her in good faith in the purchase of necessaries, should itself be regarded as necessaries, and recoverable accordingly. At law, it is entirely clear that a married woman has no right under such circumstances to borrow money on her husband's credit, even for the purchase of necessaries. We can see no reason why the power should be withheld at law and given in equity. There may be strong reasons why married women, compelled, by their husbands' misconduct, to live apart from them, should be allowed to borrow money on their husbands' credit for the purchase of necessaries. Such reason would apply equally at law and in equity. It is for the legislature, if it deems it advisable, to give them such power. In this state they are not without a remedy in such cases, in addition to the right which they have at common law to pledge their husbands' credit for necessaries. The probate court may, upon their petition, order the husbands to pay to them, from time to time, such sums of money as it deems expedient for their support. Pub. St. c. 147, § 33 et seq. It is probable that this statute should be taken as a declaration of the legislative sense that a married woman, living apart from her husband, should obtain money for necessaries through the aid of the probate court, and not by pledging his credit. However that may be, a majority of the court can discover no satisfactory ground on which jurisdiction in equity of the present suit can rest. Decree affirmed.

court when the shares of the parties are in dispute, or appear to the court uncertain by reason of depending on the effects of a devise, or on other questions that the court deems proper for the consideration of a court of common law, the probate court properly included in the real estate of decedent, to be partitioned, land which had been devised to him on condition that he pay testator's debts, the only question being whether this was a legal condition, so that he did not take title, the debts not having been paid, though they became outlawed, or whether it was a charge on the land; it being clearly settled that such a devise merely charges the land.

2. Executors and administrators being required by Pub. St. c. 132, § 5, to file an inventory in the probate court, within three months of their appointment, of the property of deceased, it is unnecessary that a petition to the probate court for partition of deceased's real estate, in the course of settlement of the estate, describe the premises to be divided.

Appeal from probate court, Norfolk county.

Petition of Marsh and others for partition of the real estate of Charles French, deceased. From a decree of the probate judge ordering sale of the real estate, one French and others appeal. Affirmed.

J. V. Beal, for appellants. G. L. Wentworth, for appellees. A. E. Avery, for Elizabeth Gardner, one of the heirs at law of Charles French.

LATHEROP, J. This is an appeal from a decree of the judge of the probate court on a petition for partition, under Pub. St. c. 178, § 48 et seq., of all the real estate of the late Charles French, deceased, ordering commissioners to make sale of all the said real estate, consisting of several parcels, except one specified parcel. This decree was modified by a single justice of this court by excluding from the operation thereof a parcel of land known as the "homestead lot," situated on the corner of Plymouth street and Franklin street, in Holbrook. It appeared that this lot was formerly owned by one Zenas French, who died seized of the same on November 10, 1876, leaving a will, which, after mentioning various legacies to certain persons, proceeded as follows: "Third. I give, bequeath, and devise all the remainder of my estate, both real and personal, wherever or however the same may be situated, to my brother Charles French, and to my son, Zenas Aaron French, (upon condition that they pay all my debts and the above-named legacies as above required;) to have and to hold, to them, their heirs and assigns, forever." The homestead lot passed under this clause of the will. Charles French and Zenas Aaron French were nominated as executors of the will. Charles declined to serve, and Zenas Aaron was appointed sole executor on December 13, 1876, and gave a bond and due notice of his appointment. By deed dated October 27, 1877, Zenas Aaron conveyed his interest in the homestead estate to Charles French. At the hearing before the single justice, it was admitted that the legacies mentioned in the will of Zenas had been paid, but it was in dispute whether or not all the debts had been paid. It also appeared that such debts, if not paid, were barred

by the statute of limitations. The respondents, as heirs of Zenas, contended that the devise was on condition; that the condition had not been complied with; and that they had a right to assert their title. The justice was of opinion that the questions arising under the devise and offer of proof so affected the title to the real estate in controversy that no partition or sale ought to be made until the title should be settled.

Pub. St. c. 178, § 59, provides that "no partition shall be made by the probate court when the shares or proportions of the respective parties are in dispute between them, or appear to the court to be uncertain by reason of depending upon the construction or effect of a devise or conveyance, or upon other questions that the court deems proper for the consideration of a court of common law and of a jury." In *Dearborn v. Preston*, 7 Allen, 192, it was held, under the corresponding provision of Gen. St. c. 138, § 60, "that, to deprive the probate court of its jurisdiction in a matter of this kind in any particular case, it must be made to appear that there is a real doubt and uncertainty in regard to the legal rights of the parties;" and it was said: "The mere fact that they do not agree what those rights are, or that they are in controversy in respect to them with each other, is not of itself sufficient and conclusive. It must first be by some means affirmatively and satisfactorily shown that there is an actual dispute and uncertainty concerning their shares or proportions, which can be definitely determined only by submitting some controverted question of fact to a jury, or some doubtful and contested question of law to a legal tribunal, competent to decide it. If the facts in reference to which the alleged dispute or uncertainty arises are all known to, and expressly admitted by, the parties, and the law applicable thereto is clearly settled and established, and if these show that the court has jurisdiction, it is the duty of the judge to proceed and cause the partition to be made, although one of the parties should insist that there is a dispute and controversy concerning their relative shares and proportions of the estate." In the case at bar it is admitted that the legacies are paid, and we are only concerned with the debts. There can be no doubt that the devisees under the will of Zenas French took an estate in fee simple, charged with the payment of the debts of the testator. Although the charge was in the form of a condition, it was, as said by Chief Justice Shaw, in *Goodrich v. Proctor*, 1 Gray, 567, "in legal effect, rather a charge than a legal condition." The same case also decides that, if a grantee sells land charged with the payment of debts, the purchaser is not bound to see to the application of the purchase money. In *Andrews v. Sparhawk*, 13 Pick. 393, a testator devised his homestead, fish fence, pasture land, and farm to his grandson in fee; "the said homestead lands and farm to be subject and liable as follows, that is to say, to the payment of all my debts, funeral expenses, and all other charges and expenses which shall arise in

the settlement of my estate and affairs: also to the annuities and legacies herein-after bequeathed to my other grandchildren." Legacies were then given to the other grandchildren, and the devisee of the homestead was appointed executor. On a bill in equity brought by a legatee against a purchaser of the land to enforce a trust for the legacy, it was held that the purchaser was not bound to see to the application of the purchase money. The distinction was made between a trust created for specific or schedule debts and for debts generally; and it was held that in case of a trust for debts generally and legacies, as the legacies could not be paid until the debts were paid, they stood on no better footing than debts not scheduled. The cases of *Thayer v. Finnegan*, 134 Mass. 62, and *Amherst College v. Smith*, Id. 543, need not be considered, as they relate to specific legacies, and in this case no question is before us as to legacies, but only as to debts; and it seems to us clear that the rule which was applied in *Goodrich v. Proctor*, as to a conveyance on condition of paying debts, applies to a devise on the same condition. The contention of the respondents was not that the debts were not barred by the statute of limitations, but merely that the devise was on a condition, which condition had not been fulfilled; and, therefore, that they, as heirs at law of Zenas French, had a right to assert their title. We are of opinion that there is no "real doubt and uncertainty as to the legal rights of the parties," and that the homestead lot was properly included by the probate court in the real estate of Charles French.

It is further contended that the petition for partition was insufficient, because it contained no description of the premises to be divided. The petition in this case is under Pub. St. c. 178, § 48 et seq. It is a petition for partition of the estate of a deceased person, in course of settlement in the probate court. The authority of that court in such a case is merely incidental to its general jurisdiction over estates. *Sigourney v. Sibley*, 21 Pick. 101. Every executor, unless he is a residuary legatee, and every administrator, is required, within three months after his appointment, to make under oath, and to return to the probate court, a true inventory of the real and personal estate of the deceased. Pub. St. c. 132, § 5. When, therefore, a petition is filed for partition of all the real estate of the deceased, what the estate is, is ascertainable from the inventory. The practice in such a case is not to describe the lands specifically, except in the case where a part of the real estate lies in common, and undivided with that of another person, when such description is required by statute. Id. c. 178, §§ 60, 61. The form adopted for a petition for partition in 1862, under the provisions of Gen. St. c. 117, § 19, (Pub. St. c. 156, § 22,) and now in use, is not adapted to a description of the various parcels of real estate belonging to the estate of a deceased person, and does not contemplate such a description, whereas the form for proceedings under sections 45-47 does not contemplate a description of lands sought



to be divided under those sections. These forms are standard forms, and are binding by rule of this court. See *Baker v. Blood*, 128 Mass. 543, 544. We are of opinion, therefore, that the petition was sufficient in form. Decree of probate court affirmed.

(159 Mass. 461)

**INHABITANTS OF TOWN OF MELROSE  
v. CUTTER et al.**

(Supreme Judicial Court of Massachusetts.  
Middlesex. Sept. 7, 1893.)

**DRAINS—RIGHTS OF TOWNS—OBSTRUCTIONS.**

1. St. Mass. 1869, authorized the county commissioners of Middlesex to lay out such land and water courses on or adjoining the brooks running from certain ponds, one in the town of Melrose, to the tide water in the town of Malden, as were necessary for proper drainage. They were to award damages and assess benefits to adjacent property, the powers to be exercised only in case the towns approved the act, which they did. *Held* that, the commissioners having proceeded as directed, the parts of a drain within the respective limits of the towns belonged to them, and they were the proper parties to a suit to enjoin an obstruction thereof.

2. In the absence of anything in the statute indicating an intention to limit the enjoyment of the easement granted the towns to a closed drain, it being necessary to clean out the drain, the towns have the right to restrain the erection of buildings over it.

Report from superior court, Middlesex county; John W. Hammond, Judge.

Suit by the inhabitants of the town of Melrose against Joseph H. Cutter and others to enjoin the erection of a building over a brook, taken for a drain under St. Mass. 1869, c. 378. There was a decree dismissing the bill. At the request of plaintiff, the facts and findings of the court were reported. Reversed.

St. Mass. 1869, c. 378, an act relating to drainage in the towns of Malden and Melrose, authorized and directed the county commissioners of Middlesex county to take and lay out such land, water courses, and water rights on or adjoining the streams or brooks running from Ell pond, in Melrose, and Spot pond, in Stoneham, to the tide waters in Malden, as they should deem necessary for the purpose of proper drainage and public health. The commissioners were further authorized to change, widen, straighten, and deepen the channels of the brooks or streams, and use and appropriate them, in such manner as they should deem necessary for the purposes of drainage and health. The commissioners were authorized to award damages and assess benefits for their acts, and to determine what proportion of the whole expenses incurred should be assessed on the towns of Malden and Melrose, and to enforce such amounts against them. It was further provided that the powers conferred on the commissioners should not be exercised unless the town of Malden or the town of Melrose should approve the act. Both towns accepted the statute. The county commissioners proceeded according to the provisions of the statute, and had the brooks which were adapted as drains located, and their courses and widths described. The town of Melrose

thereafter annually expended money in clearing out the brook over which defendant was attempting to build, so far as the brook lay within the limits of the town.

F. S. Hesselstine, for plaintiff. Triffin & Fernald, for defendants.

MORTON, J. The plaintiff concedes, what we think is the fact, that only an easement was granted in the location. We also think that the town is bound to maintain the drain and keep it in repair, and that it is the proper party to bring this bill. *Clark v. Worcester*, 125 Mass. 226; *Needham v. Railroad Co.*, 152 Mass. 61, 25 N. E. Rep. 20. The drain is for the benefit of Melrose and Malden, and within their respective limits belongs to them. They naturally would be expected to maintain it and keep it in repair. Unless they are to do so, there is no provision for its maintenance and repair. The county commissioners have nothing further to do with it after locating, constructing, and paying for it. It is therefore reasonable to say that the drain should be kept in repair and maintained by Melrose and Malden. The court found that, if the brook were generally covered, it would be very difficult to clear it out, and cause extra expense and damage to the town. If, therefore, the drain belongs to the town, and the town has the right to maintain it as an open drain, the proposed action of the defendants will directly interfere with the rights of the town as a town, and renders it the proper party to bring this bill. *Needham v. Railroad Co.*, supra.

The principal contention of the plaintiff rests on the ground that there was a two-foot passageway or place for deposit on each side of the drain which would be obstructed. But, although it is said in the lay out that the stakes were driven 8 feet from the center line, it is also said that the drain is laid out 12 feet wide, and that the location is 6 feet from the center line. It is found, it is true, that the drain was widened by the defendant, without, so far as appears, any right to do so, or any authority from the town, to the full width of 12 feet, which implies that it was constructed originally of less width than the location; but that does not show the existence of a passageway under and as part of the location.

There is, however, another ground on which we think the plaintiff is entitled to the relief which it seeks. If the defendants have a right to build and maintain their shop over the drain in the manner in which they have done or propose to do it, other abutters on the drain have a like right. If an abutter can cover the drain with a building, he can cover it with earth. The result would be that the easement granted by the legislature would be limited to the right to build and maintain a covered drain. We find nothing in the act indicating any intention on the part of the legislature to limit in such a manner the enjoyment of the easement granted. It is a general rule that, in taking land for public purposes, all uses of the land necessary or incident to the enjoyment of

the public right are included. *Brainard v. Clapp*, 10 Cush. 6. The uses thus included are not to be extended beyond those reasonably necessary and incident to the purpose for which the land is taken, but are to be confined to them. *Clark v. Worcester*, *supra*. If a fee is not taken, the landowner may make any use of his premises which will not interfere with the enjoyment of the public right in the manner above described. Usually, however, damages are assessed on the theory that the public use will be exclusive. There is nothing to show that such was not the fact in the case. Further, the act in question was a measure in the interest of the public health. In the absence of anything in it limiting its scope to the maintenance of a covered drain, there is abundant reason for construing it so as to give the public authorities the right to maintain the drain as an open or covered one, as they may deem best. If the drain had been constructed and maintained as a covered drain, as was the case in *Clark v. Worcester*, *supra*, then it is possible that the defendants could rightfully build over the location. That, however, is not the case. We think the conduct of the defendants constitutes an invasion of the rights of the plaintiff, and that it is entitled to the injunction which it seeks. It is not necessary that it should appear that the plaintiff has sustained actual damage in order to entitle it to an injunction. *Stowell v. Lincoln*, 11 Gray, 434; *Harrop v. Hirst*, L. R. 4 Exch. 48. Decree dismissing bill reversed, and decree to be entered for plaintiff.

(49 Ohio St. 421)

#### FISHER v. CASSIDY.

(Supreme Court of Ohio. May 17, 1892.)

##### EQUITABLE SET-OFF.

In an action against the surviving surety on an administrator's bond brought by a distributee, defendant has an equitable right to set off money received by plaintiff as a distributee of the deceased cosurety's estate; since, if defendant should pay the claim, he could recover one-half from his cosurety's estate, or from plaintiff, as a distributee of the estate.

Error to circuit court, Muskingum county.

Action by one Cassidy against Joseph Fisher, as surety on an administration bond. From a judgment for plaintiff, defendant brings error. Reversed.

W. H. Ball and F. A. Seaborn, for plaintiff in error. H. F. Auchbauer, for defendant in error.

**PER CURIAM.** Action by a distributee on an administration bond. The bond had been executed by Addison Palmer, as administrator of the estate of Asa R. Cassidy, deceased, with Joseph Fisher and Nancy Cassidy, his sureties. Fisher, by way of counterclaim, set up the decease of Nancy Cassidy, his cosurety, the settlement and distribution of her estate, and the receipt of the plaintiff of \$23.75, as one of the distributees of her estate, which he asks to have set off against the claim of

the plaintiff on the bond. It is clear that, if Fisher should pay the full amount of the claim of the plaintiff, he would have the right to recover one-half the amount so paid from the estate of his cosurety Nancy Cassidy, deceased; and it is also clear that under our administration law and the decision in *Camp v. Bostwick*, 20 Ohio St. 337, he would have the right to recover on the same claim against the plaintiff as a distributee, to the extent of the assets received by him from the estate of the cosurety; and it therefore follows that he has, in this action, the equitable right to have the amount he might recover of the plaintiff set off against the claim of the latter upon the bond. Judgment reversed, and cause remanded to the court of common pleas for further proceedings upon the equitable set-off set up by Fisher in the "second defense" of his answer.

(49 Ohio St. 29.)

#### HEDDLESON v. HENDRICKS.

(Supreme Court of Ohio. April 2, 1892.)

##### BILL OF EXCEPTIONS—EFFECT OF SIGNING AND FILING.

Where the record of the trial court shows the allowance of 40 days after the term at which judgment was rendered for the presentation and filing of a bill of exceptions, and the due allowance, signing, and filing of the same within the 40 days is also shown by the record and by the bill itself, evidence will not be heard in this court to show that the bill was not presented to the opposite counsel 10 days before the expiration of the 40 days, or to the judges 5 days prior thereto.

(Syllabus by the Court.)

Action by one Heddleson against Hendricks. From a judgment for plaintiff, defendant appeals. Motion to strike bill of exceptions from file. Denied.

W. B. Loomis, for the motion. Nye & Follet, opposed.

**PER CURIAM.** The ground of the motion is that the bill of exceptions was not presented to opposite counsel for examination 10 days before the expiration of the 40 days after term, nor to the judges for their signature 5 days prior thereto, as required by section 5302, Rev. St., which facts are sought to be shown by affidavit. It appears by the record that the cause was tried at the September term, 1891, of the circuit court, and judgment entered September 24, 1891. It was then ordered that the journal remain open for the period of 40 days from the close of the term for the presentation, signing, and filing of defendant's bill of exceptions, and, when so allowed, signed, and filed, shall be a part of the record; also, "that on November 2, 1891, came the defendant and presented his bill of exceptions, which, being examined and found to be true and correct, is allowed, signed, filed, and ordered to be made part of the record herein, all of which is done and this entry made as of the September term, 1891." The bill of exceptions appears on its face to have been allowed and signed by the judges within the statutory time. Held, the record imports verity, and cannot be

impeached by evidence allwnde tending to show that the requirements of the statute were not complied with. Motion overruled.

(135 Ind. 600)

### HOOVER v. KILANDER.<sup>1</sup>

(Supreme Court of Indiana. Sept. 23, 1893.)

#### RES JUDICATA—ACTION ON NOTE.

Where defendant in a suit on one of a series of notes given for the purchase price of land defeats recovery under a plea of failure of consideration, he is precluded from making the same defense in a subsequent action on other notes of the series.

Appeal from circuit court, Huntington county; E. C. Vaughn, Special Judge.

Action by David B. Hoover against William J. Kilander on a promissory note. From a judgment for defendant, plaintiff appeals. Reversed.

B. M. Cobb, for appellant. Spencer & Branan and J. C. Branan, for appellee.

**HACKNEY, J.** The special finding of the lower court presents the only question for decision in this case. From the finding it appears that the appellee purchased a tract of land from one Thomas L. Lucas, and received a deed of general warranty therefor, the consideration being \$1,000, and that he executed his three promissory notes, with a mortgage of said lands, to secure the unpaid purchase price. All of said notes and the mortgage were transferred to the appellant by said Lucas, who is insolvent. When the first two notes became due, the appellant instituted proceedings to foreclose said mortgage, and for a personal judgment against the appellee. In that proceeding the appellee answered that the consideration for said three notes had failed, in that he had lost, and was evicted from, the west half of said tract, by the sale thereof upon a valid lien existing prior to said conveyance to the appellee, and that upon the remaining tract he was required to and did pay, to discharge a prior vendor's lien, and in taxes, \$352.06, and that he paid in cash to the said Lucas \$20. Upon the issue tendered by said answer in that cause, the appellee succeeded, and the judgment in his behalf remains in full force. Upon the maturity of the third of said notes the appellant instituted the present suit for judgment and foreclosure, and to the complaint the appellee answered a failure of consideration, in the same respects as formerly pleaded. This answer the court finds true, and further finds that the value of the 36 acres remaining to appellee at the time of his purchase was but \$325, while the said west half, from which he was evicted, was at the same time worth but \$640.

The only question raised by counsel is that upon the appellant's reply of former adjudication, and the findings of the court. It should have been held, as a conclusion of law, that the appellee was precluded by such former adjudication, and that he could not again plead the facts which defeated the first two notes for the purpose of showing the failure of the consid-

eration of the note in suit, notwithstanding such failure of consideration was to the extent of the full value of the land, and the full amount of the principal of the three notes. The briefs of counsel but suggest, on the one side, and deny on the other, the force of the proposition involved, and are destitute of citations supporting either view. If the series of three notes had been so tainted with fraud or other vice that, when established as to two of them, it would have affected all of the series, the former adjudication would have been effective in appellee's behalf. But the notes were not attacked in the former proceeding for fraud or other reason necessarily affecting all of the series. Under the plea of failure of consideration, a partial failure might have been sustained, so as to affect but one of them or two of them, and as not reaching the third. This is fully illustrated by the case of *Kilander v. Hoover*, 111 Ind. 10, 11 N. E. Rep. 796. In considering the effect of the former adjudication as exhausting the appellee's defense, so far as the particular elements of failure of consideration pleaded in both cases are concerned, it is not necessary that we should decide whether the appellee could have so divided the elements of failure of consideration as to have pleaded them in part to the two notes first sued upon, and withheld them in part for the remaining note. Neither is it essential to our conclusion that we should hold that, having pleaded his entire defense to the two notes, he should have reserved the excess of his defense by special verdict and judgment from which such excess could be pleaded to the third note. But it is very clear that he had a remedy by seeking the cancellation of the three notes in the first suit. Such is the effect of the holding in *Kilander v. Hoover*, supra. In *Foster v. Konkrigh*, 70 Ind. 123, several notes were given for a threshing machine, with a warranty. In a suit on one of such notes the payor pleaded a breach of warranty, and succeeded. In a suit on another of said notes the same defense was interposed, to which the former adjudication was replied, and the reply was held sufficient. This court there held that the breach could be asserted but once as a defense. We are unable to discover any difference in principle between that case and the present. It is true that in *Clark v. Sammons*, 12 Iowa, 370, a distinction was claimed, but was not satisfactorily stated; and where that case has been cited, notably in the *American & English Encyclopedia of Law*, and in *Wells on Res Adjudicata*, it has been criticised for maintaining such a distinction. In *French v. Howard*, 14 Ind. 455, the suit was upon the second of a series of notes for the purchase price of real estate, and it was answered that the consideration had failed. A reply that the same defense had been pleaded to the first note of the series, and that upon it the defendant had failed, was held sufficient. It is true that the adjudication in the first suit in that case was different from the adjudication here, in that the defense failed in that, and succeeded in this; but estoppels are reciprocal, and no one can take the benefit of

<sup>1</sup>Rehearing denied.

an adjudication who had not been prejudiced by it if it had gone contrary. *Herm. Estop.* p. 37. If, in the French Case, the answer had succeeded, it would have been no less an adjudication binding alike upon both parties; so, in this case, if the answer, when first pleaded, had failed, it would have been no less an adjudication affecting the parties mutually. The first reason of the rule that one adjudication undisturbed shall be final is that the welfare of society is disturbed by much litigation. It is said that the rule is "founded in wisdom, and sanctified by age." If the adjudication in the suit upon the two notes did not put at rest the questions as to whether one-half of the land had been lost by eviction, whether \$50 had been paid in taxes, whether \$240.15 had been paid to protect the title against a vendor's lien, etc., then each item of the alleged failure of consideration would be the subject of retrial. The evidence would be heard as to each item, and the conflict would be as thick and as furious as before. If such course were permitted a second time, why not as many times as there might be notes in a series? We do not believe the law subject to any such reproach. The subject of litigation has been once adjudged, and must not be again. The appellee, in whose favor that judgment was rendered, has not pleaded his judgment, and if he had it would be found insufficient for his defense, in that it does not reach the note in suit. That the judgment does not apply to the note in suit, and that its effect is wasted upon the two notes when it could have comprehended the three, is not from a defect in or delay of the law, but from the appellee's failure to avail himself of that remedy which was open to him. We have no information that upon the former trial the jury did not find that the failure of consideration proven was only sufficient to cover the two notes then in suit. That we have no such information is from the fault of the appellee, and not the weakness of the law. That the jury may have so found is an illustration of the error of supposing that the same controversy may again be heard. We regret the apparent hardship to the appellee from an enforcement of the rule, but it is our duty to enforce, and not to violate, or create special exceptions to, the well-known rules of the law. The judgment of the lower court is reversed, with instructions to restate its conclusions of law, and render judgment for appellant for \$703.99, with interest from April 28, 1891, with foreclosure of mortgage.

DAILEY, J., did not participate in this case.

(135 Ind. 77)

#### KLINGER v. LEMLER et al.

(Supreme Court of Indiana. Sept. 19, 1893.)

BONA FIDE PURCHASER—NOTICE OF EQUITIES.

One who, with notice of prior equities, purchases land from one without such notice, is protected therefrom.

Appeal from circuit court, Marshall county; George Burson, Special Judge.

Action by Jeremiah M. Klinger against George F. Lemler and others. From a judgment for defendant Lemler, plaintiff appeals. Affirmed.

Charles Kellison, for appellant. Samuel Parker, for appellee.

HACKNEY, J. The question for review is the sufficiency of the appellant's complaint, to which a demurrer was sustained in the circuit court. It is alleged that one George Riseley owned a 40-acre tract of land in Marshall county, and that said tract was benefited by certain drainage sought and secured in proceedings under the act of April 8, 1881, as amended March 8, 1883. In all of said proceedings said tract was erroneously described as in the northeast, instead of the northwest, quarter of the section, and said tract was assessed benefits in the sum of \$148, no part of which was ever paid by said Riseley. In December, 1885, the appellant, as drainage commissioner, sued said Riseley for the enforcement, by foreclosure, of the lien of said assessment; and in May, 1886, the appellant purchased said tract upon decree in said action for \$215.79, which sum he, as such commissioner, applied upon the construction of said drain, and the costs of said suit. In said foreclosure proceeding and the certificate of purchase issued to appellant, the lands were so erroneously described. After said foreclosure proceeding, and before the proceeding in this case, Riseley conveyed by proper description to McKelvy. McKelvy conveyed to Cullen, and Cullen conveyed by warranty deed to the appellee, George F. Lemler. The complaint seeks to charge Lemler with notice of the appellant's equity, and to enforce such equity as a lien senior to Lemler's rights. There are no allegations of notice to or fraud by McKelvy or Cullen, nor is it claimed in the argument that they were not bona fide purchasers, except as they may have been affected by a constructive knowledge of the assessment through the erroneous description. So far as they may be held to such knowledge, that far may the appellant also be held to such knowledge.

The appellant's counsel states his contention in the following three propositions: "(1) Did the ditch proceedings mentioned in the complaint create a lien against the 'land,' such as could have been enforced by a proper proceeding against said land in the hands of said George Riseley? (2) If a lien was created by such ditch proceedings against said land, so that the same could have been enforced against it in the hands of George Riseley, does not the complaint allege sufficient knowledge on the part of the appellee, George F. Lemler, to make the land liable to pay the amount of said ditch assessment in his hands? (3) The appellant having purchased at said sale in good faith, and without knowledge of the error in the description of said land, and the proceeds of said sale having been employed in constructing said ditch to the benefit of the land, is not appellant entitled to be subrogated to all the rights of the original lienholder?"

The first and third of these inquiries we may answer in the affirmative, giving emphasis to the contingency that such rights are enforced against Riseley. But the second inquiry must be answered in the negative, when we consider the further fact that McKelvy and Cullen are not charged with a knowledge of the equity sought to be enforced in behalf of the appellant, and are not purchasers in fraud of the holder of such equity. They are good-faith purchasers, as the appellant may be a good-faith purchaser, so far as we learn from the allegations of the complaint. Conceding, but not deciding, that the complaint sufficiently shows that Lemler had knowledge of appellant's equity, and considering either McKelvy or Cullen a good-faith purchaser, and the appellant must fail. In *Brown v. Cody*, 115 Ind. 484, 18 N. E. Rep. 9, it was said by this court, as to a purchaser with knowledge of prior equities: "If Mrs. Cody became the assignee of Drew, the purchaser at the sheriff's sale, she acquired a good title. Drew had a right to sell, and she to buy; and, if the former purchased in good faith at the sheriff's sale, he had a title which he might sell, even though Mrs. Cody might, had she been the original purchaser, not have been able to acquire a title, because of notice of prior equities. The general rule is that one who has notice of a prior equity will acquire the same title as that of his vendor, where the vendor is a purchaser in good faith. This is a familiar rule of equity, and has often been enforced by this court." In *Evans v. Nealis*, 69 Ind. 148, it is held that "Mrs. Evans, if she purchased or took a conveyance from one who was a purchaser in good faith for a valuable consideration, would take a title freed from the demands of her husband's creditors, though she may have had notice of the fraud imputed to her husband, because she would step into the shoes, and acquire the rights, of her grantor." In *Hampson v. Fall*, 64 Ind. 384, the following is quoted with approval from 2 *Perry, Trusts*, § 830, and we repeat it as giving a cogent reason for the rule: "So a purchaser with notice from a purchaser without notice is protected, not on his own merit, but on the merit of the innocent purchaser, for if such purchaser could not sell the estate he would be deprived of one of the valuable attributes of his property." See, also, *Arnold v. Smith*, 80 Ind. 422; *Trentman v. Eldridge*, 98 Ind. 525; 2 *Pom. Eq. Jur.* § 754. The ruling of the court below was right, and the judgment is affirmed.

(135 Ind. 105)

ALLEN et al. v. WINSTANDLY.

(Supreme Court of Indiana. Sept. 22, 1893.)

EXECUTION—INJUNCTION TO RESTRAIN.

Equity will not interfere to restrain a sale under execution of property belonging to a person other than the judgment debtor, unless such property has a special value, rendering compensation in damages impossible, or such sale would result in consequential damages, or the claim of one party involves or depends on some equitable interest or feature;

Rev. St. 1881, § 1286, providing an adequate remedy in other cases for recovering possession of such property.

Appeal from circuit court, Pike county; D. J. Heffron, Judge.

Action by William C. Winstandly against David Allen and others to quiet title to certain personal property, and to restrain a sale thereof under execution. From a judgment for plaintiff, defendants appeal. Reversed.

Duncan & Batman, Richardson & Taylor, and John R. East, for appellants. Ely & Davenport, for appellee.

HACKNEY, J. The appellee sought and secured, in the trial court, an injunction against the appellant Allen, as an execution creditor, and against Stillwell, as the sheriff holding such execution. The complaint alleged a judgment of the Morgan circuit court in favor of Allen for \$2,750, against one Jesse A. Mitchell; that upon execution issued on that judgment the appellants had levied, and would sell, unless restrained, certain mules, cattle, and corn, the property of the appellee, as the property of said Mitchell; that appellee was not a party to said judgment, nor to the suit in which it was obtained, and did not owe any part of said execution, nor was said execution a lien on any of said property. It is further averred that the levy casts a cloud upon, and disparages, his title to said property, and he prays judgment quieting his title to said property, and an injunction against a sale of it on said execution. Upon the trial the court found the facts specially, and stated conclusions of law therefrom in favor of the appellee. Facts clearly showing the appellee's ownership are found in detail, and the judgment, levy, and purpose to sell are also found as alleged in the complaint. It is not found, as a substantive fact, nor as an ultimate fact, that the proposed sale cast a cloud upon, or in any manner disparaged, the appellee's title, nor are any facts found indicating, beyond those we have stated, a peculiar reason for the interposition of an equitable remedy. The sufficiency of the complaint, and the correctness of the conclusions of law upon the facts specially found, are presented here as reserved questions for review. It is claimed that equity will not interfere to prevent the sale of personal property belonging to one person upon an execution against another, in the absence of facts showing that no remedy at law exists. It is urged that no such facts are averred in the complaint; that no such facts are found by the court; and that in the presence of a remedy by proceedings in replevin, or, after sale, a suit on the sheriff's bond for damages, no such facts could exist. The principal support given to this contention is the generally recognized rule that equitable relief is denied where the law furnishes a remedy as adequate or as "practical and efficient" to the ends of justice and its prompt administration as the remedy in equity, as it is stated in *Watson v. Southerland*, 5 Wall. 74.

The rule here insisted upon was applied

in *Henderson v. Bates*, 8 Blackf. 460, a case wherein Henderson sought to enjoin the sale of his personal property for the payment of executions against others. The court said: "It is also as well settled that chancery will not entertain a bill when personal property is the subject-matter, unless in some peculiar cases, nor will it interpose and enjoin the sale of personal property taken in execution, either on the ground that it is not the property of the defendant in the execution, but belongs to a third person, or that it belongs to the complainant, unless it be shown that if the property were sold the complainant would be without remedy at law." The peculiar cases in which it is there said that equity will interfere are those in which, from the peculiar character of the property, damages may not adequately compensate its loss to the owner. In *Sidner v. White*, 46 Ind. 588; *Trueblood v. Hollingsworth*, 48 Ind. 537; *Hollingsworth v. Trueblood*, 59 Ind. 542; and *Anderson v. Crist*, 113 Ind. 65, 15 N. E. Rep. 9,—the property of one was sought to be sold to pay the debt of another, and it was held that injunction would lie to restrain such sale. In the first of these cases the relief was proper, as an incident to the enforcement of an equitable right in the plaintiff to require the remaining property of the debtor to be sold before applying that purchased and held by the plaintiff from the debtor. In the other three cases the property of a cestui que trust was offered for sale to pay the debt of the trustee individually. The remedy in equity was proper, because of the peculiar guardianship of trust interests by courts of chancery. The cases of *Elson v. O'Dowd*, 40 Ind. 300; *Stout v. La Follette*, 64 Ind. 365; *Bank v. Cockrum*, 80 Ind. 355; *Bank v. Hargrove*, Id. 364; *Nicholson v. Stephens*, 47 Ind. 185; *Eversole v. Cook*, 92 Ind. 222; *Burch v. Dooley*, 123 Ind. 288, 24 N. E. Rep. 110; and *Greenwaldt v. May*, 127 Ind. 511, 27 N. E. Rep. 158,—were all cases where sales of personal property were enjoined. In no one of these was the property taken that of a third person, but in every instance was that of the debtor. In every case the relief by injunction was incident to an equitable remedy, and involved the validity of tax levies, judgments, or other liens, or was necessary to maintain the custody of such property in the court. In neither of these lines of cases was the question made or considered that is presented by the present case, nor did the court at all times state the rule under which equitable relief was extended. These omissions are not reasons for the contention that in this state we have departed from the doctrine of *Henderson v. Bates*, supra. Of the cases in this state where injunctions against the sale of personal property have been sustained, there is but one other than those above cited that we have found, and that is *Denny v. Denny*, 113 Ind. 22, 14 N. E. Rep. 593, where a widow sued to stay the sale of corn by the administrators of her husband's estate, she having chosen such corn as part of her statutory allowance. It was alleged, in addition to the facts we have stated, "that if it should be sold she would be left without

necessary feed for her animals, and that other corn could not then be readily procured." The court said, "This presented a state of facts which made it apparent that the plaintiff had no other complete and adequate remedy." Whatever else may be said of this conclusion, it cannot be maintained that the theory of *Henderson v. Bates*, supra, has been wholly abandoned in this state, for the distinguished judge who wrote that opinion manifestly had in mind the rule that, where an adequate remedy at law existed, equity would give no relief. Whether relief would lie, and furnish adequate relief, seems not to have been presented or considered, and the remedy in damages appears not to have been looked upon with favor. It is said, further: "If it be conceded that the plaintiff might have maintained a suit on the bond, it does not necessarily follow that she must have permitted the corn, to which she had a clear legal right, to be sold. She was not bound to take the chance of obtaining other corn, or of leaving her animals to suffer for want of feed." Her appeal to equity rested upon the threatened loss of necessary feed for her animals, and was deemed sufficient. We do not look with favor upon the contention that the appellee should have stood by, and, after a sale of his property, sought redress in damages. Such remedy was once thought adequate, and is yet so held by some courts, but the modern and most approved rule is that, if no other remedy exists, that will not be deemed adequate. Mr. Pomeroy says in section 1354, vol. 3, of his excellent treatise on Equity Jurisprudence: "Judges have been brought to see and acknowledge, contrary to the opinion held by Chancellor Kent, that the common-law theory of not interfering with persons until they have actually committed a wrong is fundamentally erroneous, and that a remedy which prevents a threatened wrong is, in its essential nature, better than a remedy which permits the wrong to be done, and then attempts to pay for it by the pecuniary damages which a jury may assess. The ideal remedy, in any perfect system of administering justice, would be that which absolutely precludes the commission of a wrong, not that which awards punishment or satisfaction for a wrong after it is committed." Judge Mitchell evidently so viewed the question in *Denny v. Denny*, supra.

Appellee's counsel urge upon us the contention that since the Code, with its blending of the rules of practice and pleading in suits in equity and actions at law, a choice of remedies may be had by the party seeking relief. We do not understand that the principles of equity and the rules of the common law have lost their distinguishing characteristics in the adoption of the Code. One court, under a simplified system of pleading, applies to the cause such principles as belong to the relief demanded. The court has no power to apply equitable principles to a cause for which the law has defined and prescribed relief, nor to apply statutory remedies where equity only provides the remedy.

Nothing more was intended by noting in *Champ v. Kendrick*, 180 Ind. 553, 30 N. E. Rep. 788, that "the distinction in pleading and practice in actions at law and suits in equity has been abolished, and all courts are courts of law and equity." The complaint before us does not allege that the property is of a peculiar value to the owner, nor does it appear that the threatened sale would result in consequential or collateral damages, and no fact is averred, indicating that the plaintiff may not freely pursue the statutory remedy in replevin. The statute specially designed for the relief of persons whose personal property is taken in execution for the debt of another provides that "when any personal goods are wrongfully taken or unlawfully detained from the owner or person claiming the possession thereof, or, when taken on execution or attachment, are claimed by any person other than the defendant, the owner or claimant may bring an action for the possession thereof." Rev. St. 1881, § 1266. If he will have immediate delivery of the property, his affidavit must state "that the same has not been taken for a tax assessment or fine, pursuant to a statute, or seized under an execution or attachment against the property of the plaintiff, or, if so seized, that it is, by statute, exempt from such seizure." Wherein the statutory remedy is less adequate, or is not as plain, practical, and efficient, as that by injunction, we have not been advised by appellee's able counsel, and our investigation has not disclosed. By the statutory remedy, possession could have been restored or special bond given for the return of the property, while the remedy sought left the property in the hands of the sheriff to perish, or to cost more in support than its worth, with but the right of action on the sheriff's official bond, and the uncertain means of establishing the extent of the owner's losses. If it were not the rule that the existence of a legal remedy is a denial of equitable relief, it is perfectly clear that replevin is the better remedy; but, when we are confronted with that rule, authority should not be necessary to establish the adequacy of the remedy under the statute. However, we are not without direct authority upon this point. In 1 Pom. Eq. Jur. § 177, after discussing the rule as to real property, the author says: "In like manner, the concurrent jurisdiction does not embrace suits by the legal owner to recover possession of a chattel, except in the few cases where the chattel has a certain special, extraordinary, and unique value, impossible to be compensated for by damages, nor suits merely to determine the legal title to chattels between adverse claimants, where the claim of neither party involves or depends upon any equitable interest or feature. In all ordinary controversies concerning the legal ownership or possession of chattels, the common-law actions of replevin or trover furnish a complete and adequate remedy." In support of this proposition are cited the following cases: *Bowes v. Hoeg*, 15 Fla. 403-408, (recovery of possession of a chattel;) *Long v. Barker*, 85 Ill. 481, (to determine legal title to chattels;)

*McCullough v. Walker*, 20 Ala. 389-391, (to enforce a gift of a chattel;) *Young v. Young*, 9 B. Mon. 66, (to try legal title to chattels;) *Comby v. McMichael*, 19 Ala. 747, (to compel delivery of chattel;) *Hail v. Joiner*, 1 S. C. 186. See, also, 2 Story, Eq. Jur. § 709. In 10 Amer. & Eng. Enc. Law, p. 871, it is said: "An injunction will not lie to prevent the sale of personal property of a third person, levied on by an officer for unpaid taxes, when the property is not of peculiar value to the owner, and it does not manifestly appear that great injury would result to the owner from consequential or collateral damages occasioned by such sale. In such case the owner has a complete and adequate remedy at law, to which he may resort for redress." Many authorities are cited in support of the text, and include decisions in the states of West Virginia, Alabama, California, Michigan, Florida, Minnesota, Nevada, New York, North Carolina, Wisconsin, and Missouri. Our conclusion is that the complaint alleged no facts excusing a resort to an equitable remedy, or showing that replevin was not a remedy plain and efficient. The finding of the court is more devoid of such facts than the complaint. The decree of the circuit court is reversed, with directions to sustain appellants' demurrer to the complaint.

(135 Ind. 72)

## HARDESTY et al. v. HINE.

(Supreme Court of Indiana. Sept. 20, 1893.)

## APPLICATION FOR LIQUOR LICENSE — AMENDING REMONSTRANCE — FITNESS OF APPLICANT — QUESTION FOR JURY.

1. On appeal to the circuit court from the county commissioners, in proceedings to obtain a liquor license, refusing to allow the remonstrance, as filed before the commissioners, to be so amended as to make the allegations more specific, is an abuse of the court's discretion.

2. On an application for a liquor license, it is proper to show that at various times minors were allowed to be about the pool table in the saloon of which the applicant was manager, and that the applicant threw dice with a minor in said saloon, when things of value were won and lost.

3. On an application for a liquor license, it was error to instruct the jury that the facts that the applicant threw dice with certain minors to ascertain who should buy lemonade and beer, and played pool with a minor, "would not be sufficient to defeat his application," as the applicant's fitness to be intrusted with such license was a question for the jury.

Appeal from circuit court, Boone county; Stephen Neal, Judge.

To the application of Edward Hine for a license to sell intoxicating liquors, Alexander Hardesty and others filed a remonstrance, and, from a judgment granting the application, remonstrants appeal. Reversed.

P. H. Dutch, for appellants. Ralston & Keefe, for appellee.

HOWARD, J. On appeal from the board of county commissioners, the appellee, over the remonstrance of the appellants, was granted a license to sell intoxicating liquors. It is contended that



the court erred in refusing to allow the appellants to make their remonstrance, as filed before the commissioners, more specific, and to file additional specifications thereto. The motion to so amend the remonstrance, and make it more specific, was filed before any witnesses were sworn, and before the impaneling of the jury. In *Stockwell v. Brant*, 97 Ind. 474, it was said: "The general rule is that appeals from the county board are tried in the circuit court on the issues made before the county board. \* \* \* But the issues made below are subject to proper amendments in the appellate court under the general rules of law. \* \* \* In *Goodwin v. Smith*, 72 Ind. 118, which was an application for a liquor license, this court said: 'In highway cases the practice has uniformly been to permit such amendments, and we can see no reason why the same rule should not apply to the class of cases to which the one under discussion belongs.'" *State v. Vierling*, 88 Ind. 99; *Blair v. Kilpatrick*, 40 Ind. 312. Had the appellee seen fit to move the court to require the appellants to make their remonstrance more specific, we think the motion would necessarily have been sustained. For a still better reason, we are of opinion that appellants themselves should have been permitted to amend their own remonstrance by making the same more definite and particular. The object in view was certainly one in the interest of a fair trial of the case upon its merits, namely, to bring all the facts before the jury. It was no part of the functions of the court to do aught that might aid in the concealment of these facts. While it was, of course, within the sound discretion of the court to grant or refuse the request of the appellants, as made, nevertheless we are constrained to conclude that under the circumstances there was an abuse of the discretion of the court in refusing to allow the amendment.

The appellants offered to prove that at various times minors were allowed and permitted to be about the pool table in the saloon, when it was under the care, management, and control of the appellee, and that the appellee threw dice with a minor in said saloon, when things of value were won and lost. The evidence was objected to, and the objection sustained by the court. We think such evidence competent to show the character of the applicant, and his fitness to conduct a saloon. The appellants had alleged in their remonstrance that the appellee, while the owner of the premises described in his application, and while employed in said saloon during the past year, "has unlawfully suffered and permitted minors to play pool therein, and has unlawfully suffered minors to congregate in and about a pool table kept therein, and has himself, within the last year, in said saloon, played pool with minors upon the pool table kept therein, at divers times." In *Stockwell v. Brant*, cited above, it was held that it was for the jury to determine whether a liquor seller, about whose premises drunken men were in the habit of congregating, was a fit person to receive the license which he was seeking. It

was a still greater wrong in this case for the appellee to allow minors to congregate about the pool table, and to play upon it, and even to play with them himself. The offered evidence should have been admitted. *Grosop v. Rainier*, 111 Ind. 361, 12 N. E. Rep. 694; *Bronson v. Dunn*, 124 Ind. 252, 24 N. E. Rep. 749.

Complaint is made that many of the instructions of the court were incorrect; among them, the following: "If you find from the evidence given in the cause that the applicant, Edward Hine, Sr., did throw dice with one Daniel Kinney to ascertain who should buy the lemonade, and also threw dice with one Christy, a minor, to see which of the two should buy the beer, and also played pool with one Lawrence Wysong, a minor, these facts alone would not be sufficient to defeat his application, but the jury should consider these facts, in connection with all the other evidence given in the cause, in determining the question of the fitness of the applicant to be intrusted with a license to sell intoxicating liquors." If the facts stated in the charge would not be sufficient to defeat the application, it is difficult to see what degree of moral obtuseness the court might consider sufficient to show the applicant's unfitness to be intrusted with a license. Few greater crimes against society can be conceived than that of the moral pollution of our youth. *Rev. St. 1881, §§ 2080, 2081, 2088*. But these were questions of fact, for the exclusive consideration of the jury, and not for the trial court nor for this court to decide as questions of law. It was not for the court to take from the jury the facts necessary to determine the fitness of the applicant for the trust which he asked them to confide to him. "The immorality of the act mentioned in the instruction, and the fitness or unfitness of the applicant to obtain a license, were questions of fact for the jury to decide from the evidence before them, and with which the court had no right to interfere." *Kelser v. Lines*, 57 Ind. 431. The evidence admitted on the trial shows that the saloon when managed and controlled by the appellee, and with his knowledge and consent, was frequented by minors, and was used for gaming, with very little pretense of secrecy. We think the motion for a new trial should have been sustained. *Hamilton v. State*, 75 Ind. 586; *Com. v. Taylor*, 14 Gray, 26; *People v. Sergeant*, 8 Cow. 139; *State v. Leighton*, 23 N. H. 167; *Bachelor v. State*, 10 Tex. 258. The judgment is reversed, with instructions to sustain the motion for a new trial, and for further proceedings in accordance with this opinion.

(135 Ind. 49)

**LEWISVILLE NATURAL GAS CO. v.  
STATE ex rel. REYNOLDS.**

(Supreme Court of Indiana. Sept. 19, 1893.)  
CITY ORDINANCES—REGULATING PRICE OF NATURAL GAS.

1. Municipal corporations of Indiana have no power, at common law, to fix by ordinance the price at which natural gas shall be supplied to consumers.

2. Act March 7, 1887, (Elliott's Supp. § 800,) providing "that the boards of trustees of towns, and the common councils of cities, shall have power to provide, by ordinance, reasonable regulations for the safe supply, distribution and consumption of natural gas within the respective limits of such towns and cities," does not confer the power to regulate the price at which natural gas shall be furnished. *City of Rushville v. Rushville Natural Gas Co.*, 28 N. E. Rep. 853, 132 Ind. 575, overruled.

Appeal from circuit court, Henry county; Eugene H. Bundy, Judge.

Action in the name of the state, at the relation of William Reynolds, against the Lewisville Natural Gas Company, for mandamus. Relator had judgment, and defendant appeals. Reversed.

John Morris and M. E. Forkner, for appellant. Brown & Brown, for appellee.

COFFEY, J. The appellant is a corporation duly organized under the laws of this state, and was at the time of the commencement of this suit, and had been for a long time prior thereto, engaged in the business of supplying natural gas to the citizens of Lewisville, Ind., for use as fuel and lights. On the 15th day of August, 1892, the town of Lewisville, which is an incorporated town, by its trustees, passed an ordinance, by the terms of which the appellant was prohibited from charging a greater sum than one dollar per month for furnishing natural gas for a cooking stove during the months of May, June, July, August, and September. Prior to that time the appellant had been supplying the relator with gas to be used in his cook stove, but upon the refusal of the relator to pay the charges fixed by the appellant, it refused to supply him. He tendered it the sum fixed by the ordinance, and demanded that the appellant should furnish him with gas at the price fixed, but the company refused to do so; and thereupon this suit was instituted to compel the appellant, by mandamus, to furnish gas at the price fixed by the ordinance of the town. The relator having succeeded in the court below, this appeal is prosecuted for the purpose of reversing the judgment of the circuit court on account of alleged errors in the proceedings in that court. The controlling question in the case relates to the power of the town to fix, by ordinance, the price at which the appellant shall supply the citizens with natural gas. It is contended by the relator—First, that the town possesses such power at common law; and, second, that such power is conferred by the statutes of the state; while the appellant contends that no such power exists, either under the rules of the common law or the statutes of the state of Indiana.

It is safe to assert, we think, that in this state municipal corporations possess no power except such as is conferred upon them by statute, either in express terms or by necessary implication. Judge Dillon, in his work on Municipal Corporations, (4th Ed., § 89,) says: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no

others: First, those granted in express words; second, those necessarily or fairly implied in, or incident to, the powers expressly granted; third, those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied." In the case of *City of Anderson v. O'Conner*, 98 Ind. 168, it was said by this court: "Doubtless, it is true, as appellant's counsel claim, that a municipal corporation can only exercise such powers as are conferred upon it by the laws under which it is incorporated. But where the power to do an act is conferred upon the city, and the law is silent as to the manner of doing such act, the city authorities are necessarily clothed with a reasonable discretion in determining how such act shall be done." See, also, *Indiana Municipal Law*, (Thornton, 112, note 3,) for a collection of the authorities upon the subject now under discussion.

It is not contended that the general statute upon the subject of incorporating towns confers upon towns, when incorporated, the power to regulate the price at which natural gas shall be sold. It is contended, however, that such power is conferred by an act of the general assembly approved March 7, 1887, (Elliott's Supp. § 800.) That act is as follows: "Section 1. Be it enacted by the general assembly of the state of Indiana: That the boards of trustees of towns and the common councils of cities in this state, shall have power to provide, by ordinance, reasonable regulations for the safe supply, distribution and consumption of natural gas within the respective limits of such towns and cities, and require persons or companies to whom the privilege of using the streets and alleys in such towns and cities is granted for the supply and distribution of such gas to pay a reasonable license for such franchise and privilege." The contention of the appellee is sustained by the case of *City of Rushville v. Rushville Natural Gas Co.*, 132 Ind. 575, 28 N. E. Rep. 853. From the conclusion reached in that case, however, the writer of this opinion was compelled to dissent. Judge Miller took no part in the decision of that case, by reason of having decided the cause, as special judge, in the circuit court. In construing a statute, we will look to the letter, and to the statute as a whole, to the circumstances under which it was enacted, to the mischief to be remedied, and to the condition of affairs when it was enacted. *Board of Com'rs of Fountain Co. v. Board of Com'rs of Warren Co.*, 128 Ind. 295, 27 N. E. Rep. 133. The courts take judicial notice of the fact that natural gas is, in a high degree, inflammable and explosive, and so dangerous that its use may be made the subject of police regulation. *Jameson v. Oil Co.*, 128 Ind. 555, 28 N. E. Rep. 76. As the public safety is always the highest consideration in all legislation, it is fair to presume that when the act under discussion was passed the general assembly had in view the safety of the people of the state. Some police

regulation in the localities in which natural gas was to be used, in order to secure the safety of the people and their property, was an absolute necessity. There is not a word or syllable to be found in the act indicating that the general assembly had in view any other purpose than that of securing the safe supply and use of natural gas. To secure the safe supply and use of natural gas is one thing, and to fix the price at which gas shall be supplied is another and quite a different thing. In our opinion, it was not the intention of the general assembly to confer, by the act above set out, the power to regulate the price at which natural gas should be furnished. It follows that the conclusion reached in the case of *City of Rushville v. Rushville Natural Gas Co.*, supra, was erroneous, and should be overruled. The trustees of the town of Lewisville having no power to regulate the price at which natural gas should be furnished, the ordinance in question, purporting to do so, is void upon its face, and the circuit court, for that reason, erred in overruling the demurrer to the complaint. Judgment reversed, with directions to the circuit court to sustain the demurrer to the complaint in this case.

(125 Ind. 59)

LOUISVILLE, N. A. & C. RY. CO. v.  
STATE ex rel. WARD, Commissioner.<sup>1</sup>

(Supreme Court of Indiana. Sept. 20, 1893.)

SUPREME AND APPELLATE COURTS—JURISDICTION.

Under Act March 4, 1893, giving the appellate court "jurisdiction in all cases for the foreclosure or enforcement of liens of purely statutory origin where the amount in controversy does not exceed \$3,500," such court has jurisdiction of an appeal from an order refusing to modify a personal judgment for \$700, rendered in a proceeding to collect a drainage assessment, so as to make it enforceable only against the land.

Appeal from circuit court, Lake county.

Action on the relation of Henry Ward, commissioner, against the Louisville, New Albany & Chicago Railway Company to collect a drainage assessment. From an order refusing to modify a judgment rendered for plaintiff, defendant appeals. Transferred to the appellate court.

E. C. Field and C. C. Matson, for appellant. J. W. Youche, for appellee.

DAILEY, J. The acts disclosed by the record, and material to an explanation of the ruling of the court, are that in January, 1887, John Brown and others filed in the Lake circuit court their petition for drainage, under the circuit court drainage act, approved April 6, 1885. In said petition it was alleged, among other things, that the right of way of the appellant, extending through sections 17, 18, and 20, in township 32, range 8, in said county, would be affected, and such proceedings were had thereunder that the right of way of appellant company was assessed for benefits in the sum of \$700, which assessment was approved by the court, and from the judgment affirming the assessments no appeal was ever prosecuted, but the same remains in full force; that after-

wards said ditch was ordered constructed, and was completed according to plans and specifications, but appellant failed to pay the amount so assessed. Appellee commenced this suit for the purpose of its collection, and recovered a personal judgment against appellant in the sum of \$700, also the further sum of \$35, attorneys' fees, together with all the costs of the action, without relief, and a decree declaring said sums and costs to be a valid lien on the defendant's right of way specified therein. Appellant then filed its written motion to change and modify the judgment so as to eliminate therefrom the judgment in personam, and prosecutes this appeal.

The appellate court, under the acts of 1893, has exclusive jurisdiction of this question. The act approved March 4, 1893, granting additional jurisdiction to that court, is as follows: "Section 1. Be it enacted by the general assembly of the state of Indiana, that in addition to the jurisdiction which the appellate court now possesses, that court shall have jurisdiction in all cases for the foreclosure or enforcement of liens of purely statutory origin where the amount in controversy does not exceed thirty-five hundred dollars." Acts 1893, p. 356. This cause is therefore ordered to be transferred to the appellate court.

(125 Ind. 91)

CHICAGO & I. COAL RY. CO. v. HALL.

(Supreme Court of Indiana. Sept. 22, 1893.)

RAILROAD RIGHT OF WAY—LICENSE BY LANDOWNER—REMEDY OF OWNER—ACTION FOR DAMAGES—CONDEMNATION PROCEEDINGS.

1. A complaint against a railroad company alleged that defendant's predecessor, which constructed the road, offered to purchase the right of way over plaintiff's land, but the latter, because he could not estimate his damages until the road was built, permitted it to build across his land under an agreement that it would afterwards pay the damages, when ascertained; that it never paid such damages, and the road was sold on foreclosure, and finally became the property of defendant, which also refused to pay such damages; and that plaintiff then demanded possession, and revoked the license under which defendant was using the right of way. The prayer was for damages, for recovery of possession, and all other proper relief. Held, that the complaint did not seek to recover for a tortious appropriation by defendant of plaintiff's land, but was a statement of facts showing the creation of an equity to damages for the taking and use of land without compensation to the owner.

2. In such case the averments as to a revocation of defendant's license, and the demand for possession, are mere surplusage.

3. Where a landowner and a railroad company stipulate that the latter may build its road across his land, and, when completed, that it will pay him the damages occasioned, the parties thereby dispense with the writ of ad quod damnum, and agree that the damages shall be ascertained by mutual stipulation; and the landowner need not resort to the statutory proceeding, in case of failure of such company or its successor to pay the damages, but may enforce payment by the latter by an equitable action for that purpose.

Appeal from circuit court, Tippecanoe county; B. W. Langdon, Judge.

<sup>1</sup> Transferred to Appellate Court, 35 N. E. 916.

Action by Joseph R. Hall against the Chicago & Indiana Coal Railway Company to recover damages for a right of way over plaintiff's land. From a judgment for plaintiff, defendant appeals. Affirmed.

S. H. Spooner and W. H. Lyford, for appellant. John R. Coffroth, for appellee.

DAILEY, J. This suit was instituted in the Benton circuit court, but on change of venue was tried in the Tippecanoe circuit court. The first paragraph of complaint is a common action for ejectment. This was dismissed before trial. The second paragraph is substantially as follows: "And said plaintiff above named, further complaining of defendant above named, says that he is now, and for ten years last past has been, the owner in fee of the following real estate in Benton county, Indiana, to wit, the southeast quarter of section 7, township 24 north, range 7 west, containing 160 acres, and at the time of the happening of the grievances hereinafter complained of he was, and for a long time prior thereto had been, using all of said land as one farm; that on the — day of August, 1881, the Chicago & Great Southern Railway Company, a corporation organized under and by virtue of the laws of the state of Indiana in that behalf enacted, desired to construct its road through a part of said land, to wit, the southwest quarter thereof, and applied to plaintiff to pay him for a right of way through the same; that plaintiff then informed said company that it would be impossible for him to state what damage the construction of the road through his premises would be to him or his land until the same was constructed; that thereupon it was agreed between plaintiff and said company that the latter should construct its road across plaintiff's said land, and that as soon as said road was completed said company would pay him the damages occasioned; that pursuant to said agreement said company, in 1882, constructed its road over the southwest quarter of said real estate, occupying a strip fifty feet wide, beginning sixty-six and one-half rods north of the southwest corner of said 40-acre tract; thence in a southeasterly direction through said premises, leaving the same at a point 78½ rods east of the southwest corner thereof, which is now occupied and covered by the roadbed of this defendant; that defendant afterwards operated its trains over the same, thereby greatly injuring and damaging plaintiff, in this: that the strip of land is, and was at the time it was taken, of the value of \$300; that plaintiff's said farm of 160 acres is cut into two pieces, thereby decreasing the value thereof, and the fields are carved into odd and inconvenient shapes, requiring a large amount of additional fencing, greatly interfering with the use of said farm in raising and handling stock, and rendering the property liable to be burned, to plaintiff's damage in the sum of \$2,500; that said Chicago & Great Southern Railway Company refused to pay said damages, though he demanded the same, and

said license theretofore given said company became and was revoked by plaintiff; that on November 1, 1890, and April 9, 1883, said company executed to John C. New, trustee, two certain deeds of trust upon all the franchises, rights, and privileges, and all the real and personal property of said company, of every kind and character, the first one to secure the payment of 2,000 bonds, each for the sum of \$1,000, which said mortgages were duly recorded in the Record of Mortgages, in the recorder's office of said Benton county, the first one on November 23, 1881, in Record 11, page 455; that afterwards Henry H. Porter, holder of a majority of said bonds so issued, bought an action against said maker and others, in the United States circuit court for the district of Indiana, to foreclose said mortgage, but this plaintiff was not a party thereto; that such proceedings were had in said court; that on February 16, 1886, a decree of foreclosure was entered, and on March 27, 1886, said Chicago & Great Southern Railway Company, its property, franchises, etc., was sold by William P. Fishback, master commissioner, under order of said court, at public auction, and that said Porter purchased the same, and received a deed therefor by order of said court, and said New, trustee as aforesaid, also conveyed the property covered by said deeds to said Porter on April 20, 1886; that afterwards Porter, together with others, organized a company for the purpose of operating the said railway, said company being organized under and by virtue of the laws of the state of Indiana in that behalf enacted, under the name of the Indiana Railway Company, and said Porter conveyed and transferred to the last-named company the property, rights, and privileges so purchased by him; that the Chicago & Indiana Railway Company was a railway company duly organized under the laws of Indiana in that behalf enacted; that afterwards said Indiana Railway Company and said Chicago & Indiana Coal Railway Company were consolidated, said consolidated company taking the name of the last-named company, and said company is now occupying the last above described real estate of plaintiff under and by virtue of said proceedings, and none other; that after said Chicago & Great Southern Railway Company had constructed its track across plaintiff's aforesaid land, it used, occupied, and enjoyed said premises, and operated its trains over the same, for more than two years, and that defendant company is now, and for more than one year last past has been, using, occupying, and enjoying the same, and operating its trains over it, without right, and during all of said time has unlawfully kept the plaintiff out of possession thereof; that said Chicago & Great Southern Railway Company is, and was at the time of the foreclosure and sale, and ever since has been, insolvent; that prior to the commencement of this suit he demanded of defendant the payment of said damages to his land, but it failed and refused to pay the same, and he then demanded possession of said real estate, and revoked the license under which it was using, occupy-

ing, and enjoying said land. Wherefore, plaintiff demands judgment for \$5,000, for the recovery of said land, and all other proper relief." To the second paragraph of complaint, appellant answered—Firstly, the statute of limitations of six years; and, secondly, a special plea. A demurrer to each of these answers was filed, overruled to the first, and sustained to the second. The record recites that the appellant did file answers and interrogatories; that appellee did file demurrers to these answers; but neither of them is in the record, and the record also recites the ruling of the court thereon. But subsequently the ruling upon the demurrer to these answers was vacated, and appellant thereupon filed its two paragraphs of answer,—the only ones in the record. To these paragraphs a demurrer was filed, which was overruled as to the first, and sustained as to the second, but to this ruling there was no exception saved by appellant. The record reads as follows: "And the court, being sufficiently advised, now sustains the said demurrer to the fourth paragraph of answer to the second paragraph of complaint, to which ruling of the court the plaintiff then and there excepted. The court now overrules the demurrer to the second paragraph of answer to the first paragraph of complaint, and also now overrules the demurrer to the third paragraph of answer to the second paragraph of complaint, to which rulings of the court, and each of them, upon each of said demurrers, the plaintiff then and there excepted; and the plaintiff now files his reply to the second paragraph of answer to the first paragraph of complaint." The errors assigned are as follows: Firstly, the complaint does not state facts sufficient to constitute a cause of action; secondly, the court erred in overruling defendant's demurrer to the second paragraph of complaint; thirdly, in sustaining demurrer to fourth paragraph of answer to the second paragraph of complaint; fourthly, in overruling defendant's motion to set aside default taken against appellant, and to vacate judgment; fifthly, in overruling defendant's motion for a new trial. This cause was tried by the court, and judgment rendered on the second paragraph of complaint, the first paragraph having been eliminated from the cause before trial.

Counsel for appellant discuss the sufficiency of the complaint under its first assignment of error, and upon the overruling of the demurrer to the second paragraph of the complaint, on the theory that the complaint seeks to recover for a tortious appropriation of plaintiff's lands by defendant company, and as the facts disclosed by it clearly put defendant's predecessor in lawful possession of appellee's land, under an express license, appellee postponing damages until after the road was constructed, appellant was not a wrongdoer, and for the occupancy up to this time could not have been sued in an action founded upon tort, and that having entered upon a parol license, upon the faith of which appellant expended large sums of money in constructing and equip-

ping the road, the licensor will be held estopped from revoking the license until the licensee can be placed in statu quo, and hence that at no time could appellant have become a trespasser. Counsel quote from *Railway Co. v. Allen*, 113 Ind. 308, 15 N. E. Rep. 451, in which the court says: "What we affirm is that acquiescence after public rights have intervened will prevent a landowner from destroying the line of road by wresting possession of a part of it from the company. \* \* \* A citizen who has stood by until after the completion of a line of road has involved public interests shall not be allowed to sever the line, and destroy its efficiency, by wresting possession of a part of it from the company." It is stare decisis that a license, coupled with an interest, is irrevocable. *Campbell v. Railroad Co.*, 110 Ind. 490, 11 N. E. Rep. 482; *Railroad Co. v. Nye*, 118 Ind. 223, 15 N. E. Rep. 261; *Railroad Co. v. Jones*, 103 Ind. 386, 6 N. E. Rep. 8; *Railway Co. v. Soltwedde*, 116 Ind. 257, 19 N. E. Rep. 111; *Suchman v. Railroad Co.*, 71 Ind. 285; *Railway Co. v. Michener*, 117 Ind. 465, 20 N. E. Rep. 254; 2 Rorer, R. R. §§ 741-751. "The doing of what the law gave her a right to do cannot be imputed as a tort." *Dill v. Bowen*, 54 Ind. 208. The authorities above cited and relied upon by appellant would be entirely pertinent to the first paragraph of complaint in ejectment, had it remained in the record, or to an action for trespass, but we think counsel are mistaken in their claim that appellant is charged as a trespasser, and by inadvertence misconstrue the pleading. The correct theory of the complaint is the one adopted by the trial court, viz. it is a statement of facts to show the creation of an equity to damages for the taking and use of land, to show that the old company entered, constructed, and operated its road over the land in dispute by consent of plaintiff, without payment of damages occasioned thereby, which were to be ascertained and paid when the road was built. The pleading negatives every fact inconsistent with the integrity of this equity, and shows circumstantially the relation of all the parties to this strip of land, and that plaintiff is without compensation. It does not seek to recover for a breach of agreement made by the old company and the plaintiff, but for a breach of equitable duty laid on the defendant by force of the facts that it has taken his land, and is using and holding it, in the same plight as its predecessor held it, and that plaintiff is entitled to, and is without, compensation. The new company is enjoying the easement under the conditions of the old company, and the benefits and burdens incident to its use are inseparable, in the absence of any relevant act or omission of the defendant. The equitable principle applicable here, as in many other cases, is that he who derives an advantage ought to sustain the burden. Mr. Brown says: "A man will be bound by that which would have bound those under whom he claims, quoad the subject-matter of the claim, and no man can, except in certain cases, which are regulated by the

statute law and the law merchant, transfer to another a better right than he himself possesses. The grantees shall be in no better condition than he who made the grant." This doctrine was fully recognized in *Railway Co. v. Griffin*, 107 Ind. 461, 8 N. E. Rep. 451, in this statement: "On the former appeal of this cause we held that if this averment were true it showed the appellant's election to adopt the original appropriation of appellee's premises by its entry upon, use and occupation of, such premises, for the purposes of its railroad." We then said: "In such case the appellant's liability does not rest upon the judgment against the old corporation, but, upon the principle of having adopted and ratified the original appropriation, it is bound, in equity and good conscience, to make compensation, for the right of the appellees for compensation for their property is protected by the constitution, and it will not do to say that their unsatisfied judgment against the old, insolvent corporation affords them any compensation. The maxim applies 'Qui sentit commodum, sentit debit et onus.'" In *Railway Co. v. Boney*, 117 Ind. 501, 20 N. E. Rep. 432, the court say: "Where a consolidation of railroad companies takes place, in pursuance of the statute, the corporation into which the original companies are merged becomes liable for all the valid debts and obligations of the consolidated company, and a judgment in personam may be rendered against it therefor." The same doctrine is declared in *Railway Co. v. Prewitt*, (Ind. Sup.) 33 N. E. Rep. 367, and cases there cited. This is now settled law. The averments of the second paragraph of complaint, concerning what is styled a revocation of appellant's license and the demand for possession, are mere surplusage, in view of the chief line of averments to which we have referred.

But the learned counsel for appellant urge with much vigor another reason why this demurrer should have been sustained, viz. assuming that appellee has a cause of action, he should have proceeded by the writ of *ad quod damnum*, as provided by statute, and that, having misconceived his action, he must fail here; that it is a common-law remedy, and the statute provides an ample remedy, of which appellee could avail himself, to the exclusion of the common-law remedy. Counsel insist that he is probably restricted to the one specified in the statutes, and that it is exclusive. The statutory remedy is provided for in section 3953, Rev. St. 1881, and is in this language: "If, from any cause, there shall be any failure of the right of way, or when the title thereto has not been acquired, upon which any railroad of this state is now constructed, it shall be lawful for the company owning the road, or for the party owning such lands upon which any part of the road is constructed, to apply to the proper court for the writ for the assessment of damages, and have the damages which the owner of said property has sustained, or may sustain by reason of the taking, use and occupancy thereof by the company for the construction and maintenance

of said road; and upon the assessment and payment by the company of the damages which may be assessed or awarded, the title to such property shall vest absolutely in the company for the purposes of the said railroads," etc. In this case the appellant insists upon the broad proposition that, when any work of a public character is authorized by an act of the legislature, and a mode of obtaining compensation for private property to be taken for its construction is specifically pointed out, such compensation must be sought in the way prescribed by the act, and not otherwise. On the other hand, appellee contends that the method thus pointed out by the statute is cumulative, and does not defeat or take away the common-law remedy. It will be observed that the language of the statute is: "It shall be lawful for the company owning the road, or for the party owning such lands, upon which any part of the road is constructed, to apply to the proper court for the writ for assessment of damages," etc. It does not specify that it shall be so done, but it designates no plan other than the writ for such assessment. In no analogous cases under this statute has the point ever been decided adverse to appellee, but the court has on several occasions expressed dicta in relation to the matter in ejectment suits and actions for trespass. In *Railway Co. v. Beck*, 119 Ind. 124, 21 N. E. Rep. 471, which was a possessory action, the court say "that a landowner who stands by, without demanding compensation, until a railroad company has so far completed and put in operation its road as to involve the public interest, can neither enjoin the company, nor maintain ejectment to recover his land. The only remedy left to the landowner, in such a case, is to proceed, within the proper time, to have his damages assessed and enforced against the railroad company. This rule is founded upon the general principles of public policy, as well as upon the provisions of section 3953, Rev. St. 1881." In *Railway Co. v. Swinney*, 97 Ind. 599, the court say: "The accepted doctrine now is that where a railroad company, or other corporation possessing similar powers, takes possession and enters into the use of real estate without the consent of the owner, and without taking the necessary means to acquire the title it assumes to assert, the owner may resort to any or all of the usual remedies known to the law for the protection of his estate in the property." The doctrine thus expressed, appellant claims, leaves, by implication, the converse of the rule, namely, that where the owner does consent, and the company takes possession under his license, he cannot avail himself of all these remedies, but must be limited in his remedies to one or more of them. In *Railway Co. v. Clifford*, 118 Ind. 467, 15 N. E. Rep. 524, also a possessory suit, the court say: "The counsel for appellant are in error in assuming that the only remedy to the landowner is that given by statute. He is not confined to that remedy, but, in the proper case, may prosecute an action for damages or for possession." In *Harshbarger v. Railway Co.*, (Ind. Sup.) 30 N

E. Rep. 1083, which was an action to recover for lands appropriated by defendant company, and acquiesced in by the owner, the court say: "It is a right of action existing in the owner at the time of the appropriation and the creation of the right of action separate and distinct from the land. The right of action occurred at the time when the ancestor might have maintained an action for damages, or instituted proceedings to have his damages assessed." In *Lane v. Miller*, 22 Ind. 104, the court say: "The objection made to the complaint is that, as the law on the assessment of damages has given a person whose lands are injured by the erection of a milldam a remedy by writ of assessment of damages, he is confined to that remedy, and cannot resort to his action at common law." In *Snowden v. Wilas*, 19 Ind. 10, a query is raised whether he should not be confined to the statutory remedy, but the point has never been decided by this court. In *Sumney v. Mulford*, 5 Blackf. 202, the point, after full examination, was ruled the other way. In *Toney v. Johnson*, 28 Ind. 382, a milldam case, the court say: "It is insisted that the demurrer to the complaint should have been sustained, on the ground that the remedy provided by statute excludes any other proceeding. Such has not been the view taken by this court. From the organization of this court, actions like the present have been sustained. The distinction between statutes which are exclusive, and those which simply provide a cumulative remedy, is stated in *Lang v. Scott*, 1 Blackf. 405. If a statute is introductory of new rights, which did not before exist in the country, and prescribes a penalty for their violation, the persons claiming under the act must depend for the security of the right thus claimed upon the provisions therein specified. When there is a pre-existing right at common law, and an affirmative statute intervenes, inflicting a new penalty, the law is otherwise." In *Railway Co. v. Allen*, 118 Ind. 583, 15 N. E. Rep. 446, the court use this language: "Our conclusion is, that acquiescence does defeat the action of ejectment, unless there are countervailing facts, or some element which nullifies the force of the acquiescence. We do not assert that it will defeat any action where only compensation is sought. \* \* \* Compensation he may recover, possession he cannot. To the recovery of just compensation his rights are confined." These various opinions expressed by judges on points that did not necessarily arise in most of those cases, and were not directly involved in them, seem somewhat conflicting; but, taking the language employed in section 3953, "it shall be lawful for the company owning the road, or the party owning the lands, \* \* \* to apply to the proper court for the writ of assessment," etc., excludes the idea that the common-law right of action for damages is abrogated, and supports the theory that the statute furnishes him this remedy in addition to the one with which he was vested under the common law. But, for the purposes of this case, we do not regard it necessary to decide this question. If appellant had preferred

the writ of assessment, it also had a right to invoke the aid of the statute, from its very terms, and thereby avoid the direct suit for damages, of which it complains. The license, according to its theory, not having estopped appellee from asserting a claim under the writ, appellant would not be deprived of the benefits of the statutory remedy. To be denied by statute a remedy possessed before its enactment, its terms should be express, or so clearly repugnant to the exercise of it as to imply a negative. Parties are not compelled to avail themselves of statutory privileges, where they agree among themselves to adjust their own controversies in a different manner. The law fosters and encourages compromises and settlements of questions in dispute, in lieu of litigation, where consonable terms can be agreed upon. The machinery of statutory law is at times cumbersome and unwieldy, and the administration of justice under it quite expensive. If, to avoid costs of litigation, they waive its provisions, and agree on a cheaper and more direct plan, looking to equitable relief, courts should uphold and enforce its provisions. In this case, as stated, appellant's predecessor applied to appellee, before the road was constructed, to pay him for this right of way. Appellee then informed the company that he could not tell the extent of his damage until the road was constructed. Thereupon, it was agreed that the company might construct its road across appellee's land, and when completed it would pay the damage occasioned. It occurs to us that by force of this license and agreement the parties dispensed with the writ of *ad quod damnum*, and agreed that the damages should be ascertained by mutual stipulation. If the original company had remained in possession, it could have been compelled to pay. Appellant got no better title under the foreclosure proceedings than its predecessor had. Why should it not be compelled to do justice to the wronged landowner? The original company had acquired the right to build its road upon the land in question without being guilty of trespass, or remitted to the writ of *ad quod damnum*, and the measure of damages, as suggested, was afterwards to be ascertained by agreement. When appellant took possession of appellee's land, it affirmed the agreement, and, in equity, made itself liable to pay the damages. "Acquiescence on the part of the landowner, though acting as a waiver of his right to maintain ejectment, is by no means a waiver of his right to damages such as would have been recovered in a regular condemnation proceeding." 19 Amer. & Eng. Enc. Law, 860. Appellant is possessed of a license which, being irrevocable, renders it as secure in its possession as an easement, and "an easement once acquired becomes a privilege in favor of the dominant estate, and a burden imposed upon the servient estate, and subsequent grantees take it subject to the privilege or burden." Ballard, Real Estate St. § 366. The appellant does not discuss the sufficiency of the evidence to sustain the finding, and the question is therefore waived. Judgment affirmed.



(135 Ind. 113)

## LOUISVILLE, N. A. &amp; C. RY. CO. v. MALOTT et al.

(Supreme Court of Indiana. Sept. 19, 1893.)

## EASEMENTS—PRIVATE RAILROAD SWITCH—USE BY RAILROAD COMPANY—MEASURE OF DAMAGES.

1. Where a landowner conveys to a stone company a tract of land, together with a right of way over another tract on which to construct a railway switch to connect the land granted with a certain railroad, the easement is appendant to the land granted, and the railroad company has no right to use the switch constructed thereon for its own general purposes.

2. In an action by such grantor against the railroad company for damages for using such switch for its own purposes, the difference between the rental value of plaintiff's land with the right of way used only in connection with the land granted to the stone company, and the rental value with the right of way used by defendant for its own purposes also, is the proper measure of damages.

Appeal from circuit court, Monroe county; R. W. Miers, Judge.

Action by Josephine F. Malott and others against the Louisville, New Albany & Chicago Railway Company to enjoin the use by defendant, for its own purposes, of a certain private railroad switch across plaintiffs' land, and for damages for such use during six years preceding the commencement of the action. From a judgment for plaintiffs, defendant appeals. Affirmed.

E. C. Field and W. S. Kinnan, for appellant. N. Crooke and J. E. Boruff, for appellees.

HOWARD, J. In 1883 the appellees, Josephine F. Malott and others, as stated in appellant's brief, conveyed to the Hoosier Stone Company a tract of land in Lawrence county, removed from the main line of appellant's railroad about three-fourths of a mile. Appellees also owned at this time the lands situated between the main line of railroad and the land conveyed to the Hoosier Stone Company, and in the deed of conveyance to the stone company conveyed a right of way over the intermediate lands. The words of conveyance are as follows: "This indenture witnesseth, that William P. Malott and Florence O. Malott, his wife, and John E. Malott and Josie F. Malott, his wife, of Lawrence county, in the state of Indiana, convey and warrant to the Hoosier Stone Company, of Lawrence county, in the state of Indiana, for the sum of three thousand dollars, the following real estate in Lawrence county, in the state of Indiana, to wit: The southeast quarter of the northeast quarter of section thirty-three, town six north, range one west, containing forty acres, more or less,—together with a right of way for railway switch track from line of the Louisville, New Albany and Chicago Railway to said lands over lands of grantors, in section 34, same township and range." The railway switch track was put in right after the deed was executed. The stone company opened up a quarry, and have ever since been shipping stone over said

track, on appellant's cars, to the different markets of the country. On the 1st day of November, 1890, appellees filed their complaint against appellant, stating the foregoing facts, and averring that said right of way was "appurtenant to said forty-acre tract," and "for the purpose of enabling said Hoosier Stone Company to transport its stone quarried upon said forty-acre tract of land to market, and for no other purpose, and for the use of the Hoosier Stone Company only." The complaint further avers that appellant the Louisville, New Albany & Chicago Railway Company, without right or any authority whatever from appellees, has been for the past six years, and now is, using said switch and right of way for its own purposes, and for railroad purposes generally, and especially for general switching purposes; that said railway company has been during said period, and now is, switching off trains, often long freight trains, onto said switch and right of way, and allowing them to remain there for a long period of time, while waiting for other trains to pass on the track; and said railway company is now, and has been, in the habit of switching onto said switch and right of way great numbers of freight cars coupled together, for days at a time; thus blocking up the passways of appellees from one part of their farm to another, which is situate upon each side of said switch. The complaint further states that said use, so made by said railway company of said switch, is not so done in carrying and transporting the stone of said Hoosier Stone Company from its quarry to market, but for its own separate use and benefit; claiming damages in the sum of \$3,000, and praying that said railway company be enjoined from further making such unauthorized use of said switch and right of way, or any other use than transporting the products of said Hoosier Stone Company on said forty-acre tract to market, or to appellant's said track. A demurrer to the complaint was overruled, which ruling is assigned as error. An answer in general denial having then been filed, the cause was submitted to the court, and the court, on request of appellant, found the facts specially, and its conclusions of law thereon. The court found the facts substantially as stated in the complaint, and found that the rental value of appellees' farm was depreciated \$160 per year by reason of the unauthorized uses of the switch-track right of way by appellant. From the facts found, the conclusions of law were as follows: "As a conclusion of law, I find for the plaintiff, and assess plaintiff's damages at the sum of \$690, and that defendant be enjoined from the use of said switch except for the purpose of transporting the stone from said quarries, and all the necessary incidents thereto." Appellant excepted to the conclusions of law, and also to the overruling of its motion for a new trial, both of which rulings of the court are assigned as errors. Afterwards, judgment was rendered and a decree entered perpetually enjoining appellant from the use of said right of way, except in the business of removing stone

quarried on the Hoosier Stone Company's said 40-acre tract.

While appellant assigns several errors, the argument of counsel is confined to a discussion of the theory and sufficiency of the complaint, and to the correctness of the mode by which the court arrived at the measure of damages. Counsel, in their brief, admit that during the period of time after the construction of the railway switch track, and before the bringing of this suit,—that is, about six years,—“it is without dispute that the appellant was continuously carrying stone products from said stone quarry, and, for a year or two before the bringing of the suit, also carried the stone product of one or two other quarries, opened up beyond the quarry of the Hoosier Stone Company; that it had used the track to switch passing trains, both freight and passenger, meeting at this point, and has often stood cars and trains of cars not in immediate use on said track for storage.” Many of the questions discussed in this case have, in effect, been already decided by this court in the case of *Stone Co. v. Malott*, 130 Ind. 21, 29 N. E. Rep. 412. The appellees in that case were substantially the same persons as the appellees in this case, and in their complaint against the Hoosier Stone Company they alleged substantially the same facts as stated in the complaint in the case at bar. They further alleged in their complaint in that case that the Hoosier Stone Company had, without their knowledge or consent, sublet to other parties the right to carry the stone product of other quarries over said railway switch track in the cars of the Louisville, New Albany & Chicago Railway Company, and asked that the lessees of said stone company be perpetually enjoined from the further use of the said switch and right of way, and for damages. This court held the complaint good. The court further held, in that case, that the deed, which is the same deed named in this case, “constituted a grant of the forty acres, and a way across the other land from such tract to the railroad. It was a grant of way appendant, and is incident, to the estate of the company in the forty acres. It inheres in the land, and concerns the premises, and pertains to the enjoyment of the same. \* \* \* The way is granted for the benefit of the particular land, and its use is limited to use in connection with the enjoyment of such land. \* \* \* The grantors have the right to rely on its use being limited to the purpose for which it is granted, \* \* \* and can prevent the use of the way for purposes not authorized.” This reasoning applies with all its force to the case before us, and disposes of all alleged errors as to the sufficiency of the complaint, as to the ruling on the demurrer, and as to the conclusions of law on the facts found by the court. The way is appurtenant to the 40-acre tract; the stone company can use it only as appurtenant to that tract, and the appellant railway company has no rights in the way not granted to the stone company. In truth, so far as disclosed in the record, the railway company has no right whatever to the use of

the right of way, and, without the consent of appellees, could make no use of it except as agent of the stone company, and in connection with the stone company's use of its said 40-acre tract.

The court arrived at its finding of the damage done appellees' farm by evidence given as to the rental value of the farm with the right of way used only in connection with the 40-acre tract, and the rental value with the right of way used by the appellant for its own purposes in addition to its use in connection with that tract. Taking the right of way used only in connection with the 40-acre tract, the evidence showed the annual rental to be worth \$300, and, when used as the appellant company had used it for its own purposes, the evidence showed the annual rental to be worth \$200. The difference is \$100, and for six years \$600, which the court concluded to be the damage suffered by appellees. We think this was a reasonable and proper manner of arriving at the amount of the damages. We find no error in the record. The judgment is affirmed.

(135 Ind. 60)

#### LOUISVILLE & J. FERRY CO. v. NOLAN.

(Supreme Court of Indiana. Sept 21, 1893.)

APPEAL—ASSIGNMENTS OF ERROR—SUFFICIENCY—WAIVER—FERRYBOAT—INJURY TO PASSENGER.

1. An assignment of error is waived by failure to refer thereto in appellant's brief.

2. An assignment of error based on the contention that the special verdict did not justify the judgment will be treated as waived where there is a failure to specify what fact is wanting in such verdict or wherein it is defective.

3. Plaintiff, while a passenger on defendant's ferryboat, was hurt by the falling of a stanchion, which was knocked down by the stage plank which had been run out to land the passengers, and which, by the falling away of the boat, was brought in contact with the stanchion. There was evidence that the stanchion had been shoved in to temporarily support the upper deck, which was heavily loaded, and that it was not perpendicular, nor fastened to the floor, and there was also evidence that the crew placed the stage plank so that it came in contact with the stanchion. There was, on the other hand, evidence that the stanchion was secure enough to resist any ordinary blow or strain, and that other passengers placed the stage plank so that it struck the stanchion. *Held* that, the burden of proof being on defendant, a verdict for plaintiff was justified by the evidence.

Appeal from circuit court, Floyd county; C. P. Ferguson, Judge.

Action by Florence M. Nolan against the Louisville & Jeffersonville Ferry Company. From a judgment for plaintiff, defendant appeals. Affirmed.

J. K. Marsh and A. Dowling, for appellant. C. L. & H. E. Jewett, for appellee.

DAILEY, J. The amended complaint in this action is in two paragraphs, for damages for personal injuries alleged to have been sustained by the appellee while aboard the defendant's ferryboat *Shall Cross*, in the Ohio river, at Jeffersonville. The specific acts of negligence charged in the first paragraph, among others, are

that the appellant failed to make the temporary stanchion, erected on the boat, secure, and that its servants caused the stage plank to come in violent contact with it, knocking it down, and thereby striking and injuring the appellee. The negligence attributed to the appellant in the second paragraph consisted in its omission to fasten the stanchion securely at either end, and in permitting the stage plank to come in sudden and violent contact with the stanchion, thereby causing the injury of which complaint is made. A demurrer was filed to each paragraph of amended complaint, overruled, and exceptions were taken by the appellant. The appellant answered, denying the matters stated in each paragraph of the complaint. The cause was removed to Floyd county, where it was tried by a jury, and a special verdict returned, assessing appellee's damages at \$5,000. There was a motion for a new trial, which was overruled, and the appellee excepted thereto. The appellant moved the court for judgment in its favor on the special verdict. The court overruled the motion, and the appellant excepted. Judgment was rendered on the special verdict in favor of the plaintiff below. Appellant excepted, and presents his appeal to this court. The evidence is set out in the bill of exceptions. In this court the appellant has assigned four errors: First, the ruling of the court on the demurrer to the first paragraph of amended complaint; second, the ruling of the court on the demurrer to the second paragraph of amended complaint; third, overruling the motion for new trial; fourth, the refusal to render judgment in its favor on the special verdict.

The first and second of the alleged errors are not referred to in appellant's brief. Therefore, under the rules of practice of this court, they are waived. *Telegraph Co. v. Ferris*, 103 Ind. 91, 2 N. E. Rep. 240. And the question of the sufficiency of the complaint is not raised in this court.

In the discussion of the fourth assignment of error, the appellant says: "Notwithstanding the effort of the appellee to make the verdict cover every fact necessary to entitle her to judgment, the facts found by the jury fall short of that result, and upon that verdict the motion of the appellant for judgment ought to have been sustained." This is the only discussion by it as to the insufficiency of the facts found, or of the evidence to sustain the verdict. Appellant has not specified what fact is wanting in the special verdict, nor wherein the verdict is defective, and the court discovers none after having examined the record with some degree of care. Under so limited a discussion of so important an assignment, the court feels authorized in assuming that there is a waiver on the part of the appellant to enter into a discussion of the fourth assignment of error, and will not explore the record further for errors not specifically pointed out. *Burk v. Hill*, 55 Ind. 420.

For the reasons stated, appellant will be deemed to seek a reversal solely upon the matters discussed in the third assignment of errors, viz.: The alleged error of the court in overruling the motion for a

new trial. Under this assignment, the learned counsel for appellant have, at some length, urged that appellee sustained her injuries on account of the acts and conduct of her fellow passengers, and not on account of the acts or conduct of the appellant, or of any of its servants, agents, or employees. The admitted facts in the case disclose that at about 8 o'clock on the evening of July 18, 1888, a church society, known as the "Debt Paying Society of St. Augustine's Catholic Church," having chartered appellant's excursion boat *Shall Cross*, went on an excursion from Jeffersonville, about 12 miles up the Ohio river. The crew of the boat, employees of the appellant, consisting of five persons, had charge of the vessel, which had been chartered and paid for by the society. The church society sold tickets which entitled the persons holding them to become members of the excursion party, and the appellee, having purchased a ticket, was received upon said boat, and went upon said trip. Upon its return to Jeffersonville, about midnight, the steamer landed at the wharf, and the excursion party were put ashore about 100 yards up stream from the regular ferry dock maintained for that purpose. Had they landed the vessel at the regular dock, the passengers, in leaving the boat, could have stepped from the deck with entire safety, thereby avoiding the necessity of using a stage plank for the purpose of exit therefrom. After the steamer had landed at the place indicated, and some parties had put out the stage plank, on which about 600 people had disembarked in safety, leaving on board probably 75 persons, appellee came from the upper deck, preparatory to leaving the vessel, and stepped to within four or five feet of the stage plank. Just at this time the steamer *Sunshine*, another of appellant's excursion boats, having delivered its guests, drew up alongside the steamer *Shall Cross*, thereby disturbing the water, and causing the last-named vessel to start in motion, and drop down stream, tightening her lines. The parties, in adjusting the stage plank, had omitted to run it out far enough to cause the end resting on the deck to clear one of the temporary stanchions standing near the gateway, and, as the boat dropped down stream, the end of the stage plank came in contact with the stanchion, knocking it down, and injuring the appellee in the manner stated in her complaint. From the foregoing summary of uncontested facts, the following propositions are established: First, the appellant, on the occasion referred to, was a common carrier of passengers; second, the appellee was a passenger on the steamer *Shall Cross*; third, the injury occurred by reason of the accident complained of.

It is the settled law of this state that a carrier of passengers is not an insurer of the safety of its passengers, but it is required to exercise the highest degree of care to secure their safety, and it is liable to a passenger who is himself without fault or any omission or failure to exercise this power, and for the slightest neglect of duty in this respect. *Railroad Co.*

*v. Hendricks' Adm'r*, 26 Ind. 223; *Railroad Co. v. Boyd*, 65 Ind. 526; *Railroad Co. v. Williams*, 74 Ind. 462; *Railroad Co. v. Buck*, 96 Ind. 846; *Railroad Co. v. Rainbolt*, 99 Ind. 551. The question of negligence is largely dependent upon the relationship which the parties sustain to each other, and duty. Thus, in case of common carriers, it has been a rule of the law from the earliest times that, in consideration of the great danger to human life consequent upon the neglect of duty, they must exercise the greatest practicable care for the safety of their passengers. 16 Amer. & Eng. Enc. Law, 427. "The passenger is entitled, not only to be properly carried, but he must be carried to the end of the journey for which he has contracted to be carried, and must be put down at the usual place of stopping." "It is the duty of the company to provide for the safe receiving and discharge of passengers. It is bound to exercise the strictest of diligence, not only in carrying them to their destination, but also in setting them down safely, if human care and foresight can do so." *Railroad Co. v. Buck*, 96 Ind. 357. It is a maxim that the law looks to the proximate, and not at the remote, causes of an injury. Out of the application of this maxim grows the liability or nonliability of a defendant charged with the infliction of an injury by his negligence. Unless the alleged negligence of the defendant was the proximate cause of the injury of which plaintiff complains, there can be no recovery. For consequences of which his act or omission was only a mere condition or remote cause the defendant is not liable. To constitute actionable negligence, there must be not only a casual connection between the negligence complained of and the injury suffered, but the connection must be a natural and continuous sequence, unbroken by any other cause. "Proximate cause" is defined to be any cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produced the result complained of, and without which the result would not have occurred. In the construction of this rule, in many cases what seems a remote cause is held proximate, because, in examining the chain of causation, no other proximate cause appears, supposed intervening causes being found merely conditions or occasions, and not efficient causes. In this class of cases, conditions and occasions are often, but erroneously, insisted on as proximate causes. *Sherman v. Stage Co.*, 24 Iowa, 563; *Story*, Bailm. §§ 241, 242. "Consequences which follow in unbroken sequence, without any intervening efficient cause, from the original wrong, are natural, and for such consequences the original wrongdoer must be held responsible, even though he could not have foreseen the particular results, provided that, by the exercise of ordinary care, he might have foreseen that some injury would result from his negligence. No other proximate cause being found, the original wrong is held proximate, and no wrongdoer ought to be allowed to apportion or qualify his own wrong; and, as a loss has actually happened while his own wrong-

ful act was in force and operation, he ought not to be permitted to set up as a defense that there was a more immediate cause for the loss if the cause was put in operation by its own wrongful act. But, of course, if the original act of the defendant, although it was the proximate cause of the injury, was not negligent, the fact that it was the proximate cause of such injury will not warrant a recovery." 16 Amer. & Eng. Enc. Law, 438, 439. This court, in discussing the question in *Railroad Co. v. Buck*, supra, adopt the language of a Maryland court, and say: "The law is a practical science, and courts do not indulge refinements and subtleties, as to causation, that would defeat the claims of natural justice. They rather adopt the practical rule that the efficient and predominating cause, in producing a given event or effect, though there may be subordinate and dependent causes in operation, must be looked to in determining the rights and liabilities of the parties concerned." "To entitle such party to exemption, he must show, not only that the same loss might have happened, but that it must have happened, if the act complained of had not been done." "It is no defense, in an action for a negligent act, that the negligence of a third person or an inevitable accident or an inanimate thing contributed to cause the injury of the plaintiff, if the negligence of the defendant was an efficient cause of the injury. In such cases the fact that some other cause operates with the negligence of the defendant in producing the injury does not relieve the defendant from liability. His original wrong, concurring with some other cause, and both operating proximately, at the same time, in the production of the injury, he is liable to respond in damages, whether the cause was a guilty or an innocent one. In cases of this character, the negligence of two independent persons may concurrently result in an injury to a third, in which event the injured party may maintain his action against either or both of the negligent parties." 16 Amer. & Eng. Enc. Law, 440-443. It is elementary that natural causes are always proximate. Again, it is no answer to an action by a passenger against a carrier that the negligence or trespass of a third party contributed to the injury. *Eaton v. Railway Co.*, 11 Allen, 500; *Railway Co. v. Caldwell*, 74 Pa. St. 421; *Spooner v. Railway Co.*, 54 N. Y. 230.

Counsel for appellant, recognizing the rules above stated as being applicable for the guidance of courts in proper cases, urge that this cause does not come within the rules laid down; that "the evidence shows that the proximate cause of the accident to the appellee was the collision of the stage plank with the stanchion;" that "on no other ground can the fall of the stanchion be explained;" that "there was no proof that the stanchion was not properly and sufficiently fastened to resist any of the ordinary and probable shocks or strains to which it was likely to be exposed;" that "it did stand firm and secure during the entire voyage;" that "it required a powerful blow from an unusual and unexpected source to drive it from its

position;" that "there was no proof of any negligence on the part of the appellant which occasioned the collision between the stage plank and the stanchion;" and that the appellee sustained her injuries on account of the acts and conduct of her fellow passengers, and not on account of the acts or conduct of appellant, or any of its servants, agents, or employees; that the crowd of passengers, during the necessary absence of the crew, and while they were engaged in the performance of their duties, seized the stage plank, and ran it partly out upon the bank while the boat was still in motion, and so placed it that it came in contact with the stanchion, knocking it down upon the person of the appellee. There is considerable testimony tending to support this theory, but there is just as positive testimony that the stanchion which fell upon and injured the appellee was placed in the position it occupied while the upper deck was heavily loaded, so that, owing to the pressure from above, it could not be and was not made perpendicular; that it leaned in the direction of Kentucky, at an angle of 85 degrees, and that the end next to the floor was never fastened or adjusted thereto; also that the stage plank was thrown out by the crew, and the occupants of the boat were permitted to cross thereon. Harry Strauss, a witness for appellee, says: "I reside at Jeffersonville, Indiana, and have lived there all my life. I know the plaintiff. She lived at Jeffersonville, and has lived there for several years. Don't know how long. She lived there on the 18th of July, 1888. I remember the excursion on the Shall Cross on that day. I was down at the river in the evening before the excursion started. The Shall Cross was at the landing at Jeffersonville. It was some time in the afternoon. I was on the boat. Saw a temporary stanchion which had been put in to support the upper deck. It was not perpendicular. It leaned, and was not fastened at the bottom. It leaned towards the lower deck. I saw it again when the crowd was in the boat in the same position. It was leaning all the time, and was not straight up and down. The excursion was given by St. Augustine Society, and they went up the river on the Shall Cross. The boat left Jeffersonville at 8 o'clock in the evening. There was a crowd on board,—some 700 or 800 people. I did not see the stanchion fall. I was on the forward part of the boat. I saw the plaintiff, Florence Nolan, on the boat while it was going up the river. No change was made in the position of the stanchion from the time it was first put up." George Klespies, for appellee, testified as follows: "I saw the stanchion before the accident. I saw it put up. Ad. Northum put it up. He and John Noon and a colored man put it up. It was put up fifteen or twenty minutes before the boat started. Some 800 people went on the excursion. About three hundred of them were on the boiler deck. The shoulder of the stanchion was put in an opening at the top in a stringer, and it was struck about three licks with a maul. It was not driven up straight. I noticed it

when I was with my girl. I said, 'Come away; you'll get killed.'" James Maher also testified that he saw the stanchion put up by one of the ferry company's men at a time when there were 200 or 300 people on the upper deck; that it was set at an angle of 85 degrees; that they took a sledge hammer, and hit it as hard as they could, but never got it straight, and went off and left it; that there was no fastening on the bottom to hold it in position, and no evidence that it had been handled or nailed to so hold it. Witness further says: "I would not have paid such attention to it, only a friend of mine said, 'You had better get away from there. That thing will fall and kill somebody.'" "Saw the stanchion on the floor after the accident." The testimony of Howard and Irwin, witnesses for appellant, was that the temporary stanchion should have been placed in position before the weight was placed on the upper deck. Hon. Frank B. Burke testified that the crew on the boat ran out the plank, which seems to have been a necessary means of escape at that dock. James Maher swore that the boat had been landed 10 minutes before the accident happened. Maud Craig testified that, of the 700 or 800 people originally on the boat, but about 75 remained when the accident happened, which would indicate that appellee was proceeding to leave with due care and caution when the injury occurred, and that she did not rush or crowd herself into danger. Bud Miller, the pilot and master of the boat, testified that, after landing the boat, he left the pilot house, and went down stairs, and the stage was out, some 200 people having left the boat, that he gave no order to pull in the plank, but asked them to go off slowly, and not crowd the plank.

We refer to this much of the testimony to show that plaintiff's theory was supported by a line of witnesses. The credibility and weight to be given their statements were to be determined by the jury. The general rule is that questions of fact are to be submitted to a jury, and this includes not only cases where the facts are in dispute, but also the questions as to the inference to be drawn from such facts after they have been determined. The element of ordinary care must, from its very character, require the decision of a jury, when asked for, except where there is a violation of statutory duty, or where the facts are undisputed, and but one inference can reasonably be drawn from them, and courts are reluctant to disturb verdicts under such circumstances. In addition to what is above stated, while the burden rested on the appellee in the first instance to prove all the material allegations of her complaint, yet the authorities are uniform on "is subject. The fact that a passenger suffers an injury while upon a railroad train will ordinarily raise a presumption that the company is negligent. *Railroad Co. v. Hendricks'* Adm'r, supra. The contract between the carrier and passenger, among other just and reasonable rules, requires that the carrier should take the burden of showing that it used all proper precautions for the

passenger's safety. *Railroad Co. v. Rainbolt*, 99 Ind. 551. "Public policy requires of the carrier, in cases like this, that it shall affirmatively show that it has taken all usual and practical precautions to maintain its carriages and appliances for carrying in safe condition." *Railroad Co. v. Newell*, 104 Ind. 264, 3 N. E. Rep. 836; *Railway Co. v. Hendricks*, 128 Ind. 462, 23 N. E. Rep. 58; *Bridge Co. v. Quinkert*, 2 Ind. App. 244, 28 N. E. Rep. 338. Where a passenger, rightfully on a train, is injured by the breaking down of a bridge, the presumption is that the carrier was guilty of negligence, and the onus is on it to prove the contrary. *Railway Co. v. Thompson*, 107 Ind. 442, 8 N. E. Rep. 18, and 9 N. E. Rep. 357; *Railway Co. v. Jones*, 108 Ind. 551, 9 N. E. Rep. 476. The appellant having assumed the duty to carry the appellee safely, as a matter of law, it will not be heard to say that, having assumed this obligation, it stood by and permitted others to take charge of its affairs, and thereby injure the person to whom it owed the duty. *Eaton v. Railway Co.*, 11 Allen, 500; *Spooner v. Railway Co.*, 54 N. Y. 230; *Railway Co. v. Caldwell*, 74 Pa. St. 421. From the facts established in this cause by the appellee, and the authorities cited, it was clearly the duty of the appellant to prove a complete negative of the averments in these respects in order to defeat the appellee's right to recover, and, having failed to do so, there is no error in overruling the motion for a new trial. The judgment ought to be affirmed. It is therefore ordered, upon the foregoing opinion, that the judgment be and it is in all things affirmed, with costs.

(136 Ind. 39)

**CINCINNATI, L. ST. L. & O. RY. CO. v. GRAMES.<sup>1</sup>**

(Supreme Court of Indiana. Sept 21, 1903.)

**ACCIDENT AT RAILROAD CROSSING — EVIDENCE — QUESTION FOR JURY — SPECIAL VERDICT.**

1. In an action against a railroad company for injuries received at a crossing, it appeared that plaintiff stopped his wagon 60 feet west of the crossing, and looked and listened, and, not perceiving any train, drove on, and after crossing a side track was struck by an engine on the main track, approaching from the south. The buildings west of the track were such as to obstruct a view of approaching trains from any point within 90 feet west of the tracks till within 12 feet thereof. A box car stood on the side track, four feet south of the center of the street, which prevented plaintiff's seeing or hearing the train, and it was found that in so placing the car, and in not giving proper signals, defendant was negligent. *Held*, that the question whether plaintiff exercised ordinary care in failing to stop just before reaching the track was for the jury.

2. In an action for personal injuries, where the jury return a special verdict setting forth the facts of the case, but fail to find whether plaintiff exercised ordinary care, and there is room for difference of opinion, on the facts found, as to whether he did so, such inferential fact is for the jury, and not for the court. *Railroad Co. v. Spencer*, 98 Ind. 186; *Railroad Co. v. Bush*, 101 Ind. 582, distinguished. *Conner v. Railroad Co.*, 4 N. E. Rep. 441, 105 Ind. 62, disapproved.

Appeal from circuit court, Clinton county; A. E. Paige, Judge.

<sup>1</sup> Rehearing denied.

Action by Richard Grames against the Cincinnati, Indianapolis, St. Louis & Chicago Railway Company for personal injuries. From a judgment for plaintiff, defendant appeals. Reversed.

John T. Dye and Baker & Daniels, (Byron K. Elliott and William F. Elliott, of counsel,) for appellant. A. C. Harris and Linton Cox, (P. H. Dutch and J. G. Adams, of counsel,) for appellee.

COFFEY, J. This was an action by the appellee, in the court below, to recover damages on account of a personal injury. The complaint alleges, among other things, that on the 31st day of August, 1887, the appellant, as an organized corporation, was the owner and was in the possession of a railway which it was operating through Boone county, in this state; that on that date it, by its servants, was running a freight train on its railway through the town of Thorntown, in that county; that the appellee, in company with his brother, was traveling over and upon a public highway in said town known as "Main Street;" that the appellant's railway track intersects and crosses said highway in the town at a point about 76 feet east of the intersection of Main street with Pearl street; that appellee approached the railway crossing in a two-horse wagon from the west; that on either side of Main street, west of the crossing, for the distance of one-half mile or more, there were high buildings, which, after appellee passed out of Pearl street, in going east towards said crossing, greatly obstructed the view of appellant's railway track; that the view of appellant's railway track and passing trains was also obstructed by a box car which appellant had unlawfully and negligently left standing upon its side track which crossed Main street parallel with the main track; that while appellant, on the day named, was in the act of passing over said crossing in his wagon, an engine and some cars attached thereto, conducted by the appellant's servants, approached said crossing from the southeast, running at a negligent, rapid, and reckless rate of speed, said servants negligently omitting to give any signal or notice whatever of the approach of said engine and cars; that while engaged in said negligent conduct the engine so conducted by them collided with the wagon upon which appellee was riding, casting and throwing him against the iron rails and the ties upon the track of appellant's railway; that by reason of the injuries thus received he is permanently disabled, and will, in the future, be unable to perform any kind of manual labor, or pursue any kind of business; that such injuries were wholly caused by the negligent conduct of the appellant, as above set forth; and that the appellee did not contribute in any way whatever to produce the same, and that he was without fault on his part. Issue being joined on this complaint, the cause was tried by a jury, resulting in a special verdict, upon which the court, over a motion for a new trial, rendered judgment for the appellee. In this court the appellant assigns as error

—First, that the circuit court erred in rendering judgment for the appellee on the special verdict of the jury; second, that the circuit court erred in overruling the appellant's motion for new trial.

The special verdict fully establishes the negligence of the appellant in the matters alleged in the complaint. Indeed, it is not contended by the learned counsel for the appellant that the negligence of its employees on the occasion of the injury of which complaint is made was not of such a character as to render it liable, provided the appellee was not guilty of negligence which contributed to his injury. It is contended, however, that it does not appear from the special verdict that the appellee was not guilty of contributory negligence. Before entering upon an examination of the verdict under immediate consideration, it may not be improper to state some of the legal rules by which we are to be governed in determining its sufficiency to authorize a judgment for the appellee. While in some jurisdictions it is otherwise, it is firmly settled in this state that contributory negligence is not a matter of defense, and that the plaintiff, by pleading and proof, must affirmatively show that he did not, by his own negligence, contribute to the injury for which he sues, before he can recover. *Railway Co. v. Butler*, 103 Ind. 32, 2 N. E. Rep. 138; *Lyons v. Railroad Co.*, 101 Ind. 419; *Railway Co. v. Hiltzhauser*, 99 Ind. 486. It seems to be settled, also, in this state, that, where one approaches a point upon the highway where a railroad track is crossed upon the same level, it is his plain duty to proceed with caution, and if he attempts to cross the track, either on foot or in a vehicle of any description, he must exercise, in so doing, what the law regards as ordinary care under the circumstances. He must assume that there is danger, and act with ordinary prudence and circumspection upon that presumption. It has also been repeatedly held by this court that the law proceeds "beyond the featureless generality that one must do his duty in this respect, or must exercise ordinary care under the circumstances. The law defines precisely what the term 'ordinary care under the circumstances' shall mean in these cases. In the progress of the law the question of care at railway crossings, as affecting the traveler, is no longer, as a general rule, a question for the jury. The quantum of care, in a large class of cases, is exactly prescribed as matter of law. In attempting to cross, the traveler must listen for signals, notice signs put up as warnings, and look attentively up and down the track. \* \* \*

If a traveler, by looking, could have seen an approaching train in time to escape it, it will be presumed, in case he is injured by a collision, either that he did not look, or, if he did, that he did not heed what he saw." The presence of a railroad track, upon which a train may at any time pass, is notice of danger, and it is the duty of a person about to cross such road, on a public highway, to exercise caution in doing so, and to look both ways for approaching trains, if the surroundings are such as to admit of such a precaution. It

is also held that cases may arise in which the question as to whether a person injured at a railroad crossing did or did not exercise ordinary care under the circumstances becomes one of fact to be determined by the jury under proper instruction by the court. *Beach, Contrib. Neg.* p. 191, § 63; *Railway Co. v. Hill*, 117 Ind. 56, 18 N. E. Rep. 461; *Railway Co. v. Mathias*, 50 Ind. 65; *Railway Co. v. Martin*, 82 Ind. 476; *Railroad Co. v. Clark*, 73 Ind. 168; *Railroad Co. v. Righter*, 42 N. J. Law, 180; *Conner v. Railway Co.*, 105 Ind. 62, 4 N. E. Rep. 441; *Railway Co. v. Hunter*, 33 Ind. 335; *Railway Co. v. Greene*, 106 Ind. 279, 6 N. E. Rep. 603; *Manu v. Stockyard Co.*, 128 Ind. 138, 26 N. E. Rep. 819; *Hathaway v. Railway Co.*, 46 Ind. 25; *Railway Co. v. Butler*, 103 Ind. 39, 2 N. E. Rep. 138. With these established principles before us, we proceed to an examination of so much of the special verdict in this case as tends to throw light upon the question as to whether the injury for which the appellee sues is, in any degree, to be attributed to his negligence, and as to whether it appears therefrom that he was not guilty of contributory negligence.

It appears from the special verdict of the jury that, on the 31st day of August, 1887, the appellee, who at that time resided on a farm eight miles southeast of Thorntown, in Boone county, brought a load of wheat into town on a two-horse wagon, arriving about 10 o'clock in the morning. He went into town from the east, on Main street, and in doing so crossed the appellant's railroad track, which at this point runs north and south, and saw the situation and surroundings at the crossing, and the position of a box car which stood on the side track at the crossing. After unloading his wheat, he hitched his team on Pearl street, where it remained for a short time, after which he unhitched it, returned to the wagon with his brother, and started in a northeasterly direction to Main street, and to a point on Main street 60 feet west of the point where Main street crosses the main track of the appellant's road, and in full view of the crossing. At this point, appellant stopped his team for the period of one minute, and he and his brother listened and looked for approaching trains. He started towards the crossing, directing his brother to look and listen for approaching trains from the north, while he listened for trains approaching from the south. At the crossing there is a space of 5½ feet between the main track and the side track, the side track being on the west of the main track. Main street is 100 feet in width. On the south side of this street, and abutting thereon, is a two-story brick building, extending from Pearl street east 76 feet, to a point within 3 feet and 4 inches of the west rail of the side track above mentioned. On the north side of the street, and abutting thereon, is a three-story frame building extending east from Pearl street to the appellant's right of way, on which its railroad tracks above mentioned are located. East of the railroad tracks, and abutting on the north side of Main street, is a two-story frame



house, known as "Adair's Hotel," the west end of which building is within 20 feet of the east rail of appellant's railroad track. There is also on the east side of the railroad track, and abutting on the south side of Main street, a two-story brick building, the west side of which extends south along the track, the northwest corner of which building is 15 feet from the east rail. Between this building and the building on the west side of the railroad, on the same side of the street, is a distance of 46 feet. There is constructed on the west side of the railroad tracks, for a distance of two blocks either way, north and south from the Main street crossing, buildings and sheds, except at street and alley crossings, which obstruct a view of the tracks and approaching engines and cars from any point on Main street, within a distance of 90 feet west, until a point is reached within 12 feet of the west rail of the side track. These buildings and sheds obstructed the view of the appellee as he approached the crossing. At the time of the accident under immediate consideration, a box car 34 feet in length stood on the side track, the north end of which car was at a point within 4 feet of the center of Main street, and was located south of the center of the street. When the appellant stopped his team in Main street within 60 feet of the crossing, and before starting to the crossing, he and his brother listened for the approach of trains, and did not hear any such train, or the sound of any whistle, bell, or other signal. He immediately started for the crossing, driving his team in a walk, looking and listening for the approach of trains until his horses passed upon the main track of the railroad, but did not see or hear any such train. While so driving from the point where he stopped to the main track, the appellee could not have heard or seen the approach of an engine or train of cars by the exercise of his sense of seeing or hearing. When appellee's horses reached the main track of appellant's road, they were struck by an engine approaching from the south at a speed of 30 miles an hour, by means of which appellee was thrown from his wagon, suffering permanent injuries. It is further found by the jury that the box car above mentioned obstructed the view and hearing of the appellee to such an extent as that he was not able to see or hear the approaching engine, which collided with his team, and that had it not been for such car he would have seen the same in time to avoid such collision, and that if the appellant's employees had sounded the whistle or rung the bell in approaching the crossing, the appellee would have heard the same in time to have avoided the injuries for which he sues. The appellee had never been in the town prior to the day of this accident, except on one occasion, and that was two years prior to his injury, when he passed through the town of Thorntown; but on the day of his injury he passed over this crossing, in coming into town, and saw its condition and surroundings. This is a statement, in brief, of all the facts found by the jury, tending in any degree to throw light up-

on the question as to whether the appellee was or was not guilty of contributory negligence. From these facts it is earnestly contended by the appellant, with much plausibility, that, inasmuch as the appellee's view of the railroad track was completely cut off by the surrounding buildings and sheds until he reached a point within 12 feet of such track, he should have stopped at that point to look for approaching trains, and as he did not do this, but drove upon the track without such precaution, he did not exercise ordinary care, under the circumstances, and for this reason he was guilty of contributory negligence. On the other hand, it is contended by the appellee that the facts above stated show that he exercised all the care that the law requires, in approaching the crossing where he was injured, and for this reason it should be held that he was not guilty of contributory negligence. To state the contention of the parties more accurately, it is contended by the appellant that, from the facts above stated, we should adjudge, as a matter of law, that the appellee was guilty of contributory negligence, while the appellee contends that we should adjudge, as a matter of law, from such facts, that he was not guilty of contributory negligence.

The first question, therefore, for consideration, is this: Can we adjudge, as a matter of law, from the facts disclosed by the special verdict of the jury in this case, that the appellee, on the occasion of his injury, was guilty of negligence which contributed to such injury? It is asserted by many text writers, as well as by many courts of last resort, that the cases in which the court can adjudge, as matter of law, that negligence does or does not exist, seldom arise. To this declaration, thus broadly asserted, we cannot give our unqualified assent. The fact is more correctly stated, we think, by Judge Cooley, in his work on Torts, (3d Ed., p. 805,) where he says: "But in the great majority of cases the question of negligence, on any given state of facts, must be one of fact." While we believe it to be true that, in the majority of cases involving the question of negligence, such question is one of fact, for the jury, we do not believe it to be true that cases do not frequently come before the courts in which the court may adjudge, as matter of law, upon the undisputed facts in the case, that negligence does or does not exist. Thus, in the case under immediate consideration, we have the facts found by the jury that the engine which collided with the appellee's team approached the crossing at which the collision occurred without ringing the bell or sounding the whistle, and that it was running at a very rapid rate of speed, through a populous town, at a time in the day when it was likely to come into collision with persons or teams on the public crossing. We have no trouble in adjudging, as a matter of law, that the appellant's servants were guilty of negligence in approaching the crossing without sounding the whistle or ringing the bell, because they were neglecting to perform a duty enjoined by

statute, designed to protect from injury persons approaching the crossing. The assertion so often repeated in our reported cases, to the effect that the law precisely defines what the term "ordinary care under the circumstances" shall mean, when applied to a person approaching a railroad crossing, is the enunciation of a general rule; but, like most other general rules, it has exceptions. Thus, in approaching a crossing, the law requires that the traveler shall listen for signals; must take notice of the signs put up as warnings; must look attentively up and down the track, if the surroundings are such as to admit of this precaution; and he must not attempt to cross in front of a moving train. If he neglects these precautions, and by reason of such negligence is injured, the court will adjudge, as a matter of law, that he has been guilty of contributory negligence. In such cases the law not only prescribes the kind of care to be used, but it fixes also the exact quantity of care. It is plain, however, we think, that in very many cases the question as to whether a person injured at a crossing exercised ordinary care under the particular circumstances is one for the jury. The court cannot adjudge that negligence exists, as a matter of law, in any case, unless the facts are undisputed, and the conclusions to be drawn therefrom are indisputable. "The question of negligence must be submitted to the jury as one of fact, not only where there is room for difference of opinion between reasonable men as to the existence of the facts from which it is proposed to infer negligence, but also where there is room for such difference as to the inferences which might fairly be drawn from conceded facts." 1 Shear. & R. Neg. (4th Ed.) § 54. In support of this text are cited *Hart v. Bridge Co.*, 80 N. Y. 622; *Bernhard v. Railroad Co.*, 1 Abb. Dec. 131, 32 Barb. 165; *Johnson v. Bruner*, 61 Pa. St. 58; *Dahl v. Railroad Co.*, 62 Wis. 652, 22 N. W. Rep. 755; *Railroad Co. v. Hotham*, 22 Kan. 41; *Gaynor v. Railroad Co.*, 100 Mass. 208; *Mangam v. Railroad Co.*, 38 N. Y. 455; *Haycroft v. Railroad Co.*, 2 Hun, 489; *Railroad Co. v. McElwee*, 67 Pa. St. 311; *Paterson v. Wallace*, 1 Macq. H. L. Cas. 748,—which fully sustain it. As sustaining this rule, see, also, *Cooley, Torts*, (2d Ed.) pp. 800-805; *Whit. Smith, Neg.* p. 40, note. "Whenever there is any doubt as to the facts, it is the province of the jury to determine the question, or, whenever there may reasonably be a difference of opinion as to the inferences and conclusions from the facts, it is likewise a question for the jury." *Beach, Contrib. Neg.* (2d Ed.) pp. 569, 570. This rule was adopted by this court in the case of *Railway Co. v. Collart*, 78 Ind. 261, and has been steadily followed in all subsequent cases requiring its application. *Railroad Co. v. Walborn*, 127 Ind. 142, 26 N. E. Rep. 207; *Mann v. Stockyard Co.*, 128 Ind. 138, 26 N. E. Rep. 819; *Shoner v. Pennsylvania Co.*, 130 Ind. 170, 2 N. E. Rep. 616, and 29 N. E. Rep. 775. In this case, as we have seen, the appellee stopped in Main street, 60 feet from the crossing at which he was injured, and looked and listened for approaching trains. When

the jury say he looked, we must take it that he looked at or toward the crossing, for it is shown that his view of the railroad track was completely cut off except at that point. Without any other stop, he drove upon the crossing, and collided with an engine and cars. It is probable that he was unable to obtain a view of the track to the south, the direction from which the engine came, by reason of the building on the south side of Main street, and by reason of the obstruction created by the box car negligently left by the appellant in the street, on its side track. Knowing of the existence of these obstructions, whether he should have stopped immediately before entering upon the track is a question about which we think there is room for a difference of opinion. Not having done so, one impartial, sensible man might, with much reason, say that he was guilty of negligence, while another man, equally as impartial and sensible, might say that he exercised all the caution that a man of ordinary prudence would have exercised under the circumstances, and that he was not negligent. For this reason we cannot adjudge, as a matter of law, that he was guilty of negligence. The question as to whether he exercised ordinary care under the circumstances was, under the authorities above cited, we think, a question for the jury.

Can we adjudge, as a matter of law, from these facts, that the appellee was not guilty of contributory negligence? If the jury had returned a general verdict either for the appellant or the appellee, and the facts disclosed by the special verdict in this case had been made to appear by answers to special interrogatories, we do not think we could disturb such general verdict as being in conflict with the answers to interrogatories. A general verdict for the appellant would necessarily have embraced a finding that the appellee had been guilty of contributory negligence, while a general verdict for the appellee would have included a finding that he was guilty of no such negligence. But here we have no general verdict. The verdict is special, and does not find whether the appellee did or did not exercise ordinary care under the particular circumstances. If the verdict embraced this finding, the case would be free from difficulty; but without such finding, to entitle the appellee to judgment, we must draw the inference of fact, from the facts found by the jury, that he did exercise care under the particular circumstances in this case. This we are not permitted to do. We must take the verdict as it comes to us, and can add nothing to it. The ultimate fact, without which the law cannot pass judgment, namely, the fact that the appellee did or did not exercise ordinary care under the circumstances surrounding him at the time of his injury, remains undetermined. It may be that the facts found by the jury would authorize the inference of fact that the appellee exercised ordinary care, but, if so, that inference should be found by the jury, to entitle him to judgment. We do not mean to hold that, if the jury should draw inferences

from given facts which were wholly unauthorized, the finding would be permitted to stand; but where two inferences may be reasonably drawn from any given state of facts, and the jury finds one of such inferences, this court would have no more power to interfere with such finding than it would with any other finding of fact made by the jury. For this reason it is necessary for the jury to state the facts, in their verdict, upon which they base the inference found by them. In our opinion the verdict of the jury in this case is not sufficient to warrant a judgment in favor of the appellee, by reason of the failure of the jury to find the inferential fact, from the facts found, that he exercised ordinary care under the particular circumstances in this case. In reaching this conclusion, we have not overlooked the cases of Railroad Co. v. Spencer, 98 Ind. 186; Railroad Co. v. Bush, 101 Ind. 582, and Conner v. Railroad Co., 105 Ind. 62, 4 N. E. Rep. 441. The two first cases hold—and we think correctly—that a general statement of the jury, in a special verdict, to the effect that a particular act was or was not negligent, is the statement of a mere conclusion, and will be ignored by this court. But there is a very broad distinction between that kind of statement and the finding of an inferential fact from the existence of other stated facts. These cases in no wise conflict with the conclusion at which we have arrived in this case. What was said in the case of Conner v. Railroad Co., supra, upon the subject of the right of the jury to find inferential facts, is, we believe, unsupported by authority, and was wholly unnecessary to a decision of the case, inasmuch as the special verdict was sufficient to authorize a judgment for the appellee without the finding of inferential facts. Where the finding of an inferential fact, however, is necessary to maintain the action, such fact must be found by the tribunal trying the cause. Such is the effect of all the authorities cited above upon that subject, and we know of no authority to the contrary. Judgment reversed, with directions to the circuit court to grant a new trial.

(159 Mass. 484)

**WEMYSS v. WHITE et al.**

(Supreme Judicial Court of Massachusetts.  
Suffolk. Sept. 16, 1893.)

**TRUSTS — DISCRETION OF TRUSTEES — CHANGE IN TRUSTEES — EFFECT ON BENEFICIARY'S POWER OF ALIENATION.**

1. Where a testator devises property in trust, and directs the payment of the income to the beneficiary, and also that the trustees may, at any time, in their discretion, discontinue the payment of the income, and apply the same as they deem best for the beneficiary's support, the beneficiary does not have an absolute right to the income which he can alienate in advance of its payment to him.

2. St. 1884, c. 285, which provides for a bill in equity to reach property of the debtor, notwithstanding the fact that it cannot be applied until a future time, does not change the rule that a person having the right to dispose of property may settle it in trust in favor of another, with the provision that the income shall not be alienated by the beneficiary by antici-

pation, or be subject to be taken by his creditors in advance of its payment to him, although there is no cesser or limitation of the estate in such an event.

3. The fact that one of the trustees of a fund, the income of which is payable, in their discretion, to the beneficiary, resigned, and another was appointed in his place, does not give such beneficiary an absolute right to such income, since Pub. St. c. 141, § 6, provides that a new trustee has the same powers, rights, and duties as if he had been originally appointed.

Report from supreme judicial court, Suffolk county.

Bill in equity by James Wemyss, Jr., against Charles G. White and others, trustees under the will of B. F. White, deceased, to compel defendants to apply the income of the estate to the payment of a certain order and mortgage executed to plaintiff by H. G. White, the beneficiary under the will. Case reserved and reported to the full bench. Bill dismissed.

A. F. Means, for plaintiff. F. Ranney, for defendant.

**LATHROP, J.** It was held, after much consideration by this court, in Bank v. Adams, 133 Mass. 170, that a person having the right to dispose of property may settle it in trust in favor of another, with the provision that the income shall not be alienated by the beneficiary by anticipation, or be subject to be taken by his creditors in advance of its payment to him, although there is no cesser or limitation of the estate in such an event. This case distinctly repudiated the doctrine of the English courts of equity, which is "that, when the income of a trust estate is given to any person (other than a married woman) for life, the equitable estate for life is alienable by, and liable in equity to the debts of, the cestui que trust; and that this quality is so inseparable from the estate that no provision, however express, which does not operate as a cesser or limitation of the estate itself, can protect it from his debts." Id. 172, per Morton, C. J. As the English doctrine does not obtain in this commonwealth, we have no occasion to consider the numerous cases cited from the English reports in support of the plaintiff's contention. The effect of the decision in Bank v. Adams is to put an equitable cestui que trust upon the same footing as a married woman under the English decisions. The question in every case is whether an equitable cestui que trust takes an absolute, unqualified interest, which he can assign, and which can be reached by his creditors, or whether he takes merely a qualified interest, over which he has no power until the property, principal, or income comes into his possession. This question is determined by ascertaining the intention of the creator of the trust, it being held in Bank v. Adams that the intentions of the creator of the trust "ought to be carried out, unless they are against public policy," and that the power of alienating in advance is not a necessary attribute or incident of a qualified estate or interest, so that the restraint of such alienation would introduce repugnant or inconsistent elements. Id. 173. In Bank v. Adams the intention

was expressed in clear and unequivocal words. The gift was of a certain sum of money to executors, in trust, to invest and pay the net income thereof to a brother of the testator, "free from the interference or control of his creditors;" the testator declaring his intention to be "that the use of said income shall not be anticipated by assignment." See, also, *Clafin v. Clafin*, 149 Mass. 19, 20 N. E. Rep. 454; *Billings v. Marsh*, 153 Mass. 311, 26 N. E. Rep. 1000. "Such provision need not be in express terms, but it is sufficient if the intention is fairly to be gathered from the instrument when construed in the light of the circumstances." *Baker v. Brown*, 146 Mass. 368, 371, 15 N. E. Rep. 783; *Slattery v. Wason*, 151 Mass. 266, 23 N. E. Rep. 843. The case at bar resembles very closely that of *Hall v. Williams*, 120 Mass. 344. There the residue of the property was devised to trustees to pay the balance of the income, after paying certain annuities, in equal parts to the seven children of the testator. Then followed a provision that, if either of the recipients should be "wanting in thrift or care, or a sound discretion in the use of money," the trustees were "charged with paying and disbursing the same in such way or ways as shall be most likely to make the same inure and be beneficial" to such recipient. It was held that this vested in the trustee a large discretion as to the time and manner of payment, and that a child could not assign or otherwise dispose of his share of the income in advance of its payment to him. In the case at bar, the trustees may, "at any time, in the exercise of their discretion, discontinue the payment of the income, and apply the same in such way as they deem best for the beneficiary's support and maintenance." It follows that the beneficiary did not have an absolute right to the income, which he could alienate in advance, but, as was said in *Bank v. Adams*, "only the right to receive semiannually the income of the fund, which, upon its payment to him, and not before, was to become his absolute property." St. 1884, c. 285,<sup>1</sup> does not change the rule laid down in *Bank v. Adams*, and *Billings v. Marsh*, *ubi supra*; and we find nothing in the cases of *Ricketson v. Merrill*, 148 Mass. 76, 19 N. E. Rep. 11, and *Wilson v. Fire-Alarm Co.*, 151 Mass. 515, 24 N. E. Rep. 784, cited by the plaintiff, which intimates the contrary.

The plaintiff further contends that, as one of the trustees resigned, and another was appointed in his place, the present trustees cannot exercise any discretion, and that the interest of the beneficiary is therefore absolute. By the express terms of the statute, the new trustee has "the same powers, rights, and duties \* \* \* as if he had been originally appointed." Pub. St. c. 141, § 8. The discretion given to the trustees is a part of the trust, to

be exercised by them as long as the trust shall continue. It cannot be considered as merely a personal confidence in the persons named as trustees. *Nugent v. Cloon*, 117 Mass. 219, 221; *Bradford v. Monks*, 132 Mass. 405, 407; *Schouler*, Petitioner, 134 Mass. 426, 428. Bill dismissed.

(49 Ohio St. 372)

#### McGUIRE et al. v. RANNEY.

(Supreme Court of Ohio. April 26, 1892.)

ERROR—WAIVER OF PROCESS AND ENTRY OF APPEARANCE PRIOR TO FILING—EFFECT—DEATH OF DEFENDANT IN ERROR.

The waiver of process and entry of appearance upon a petition in error, prior to the filing of the same, by attorneys of record of the defendant in error, takes effect as of the filing of the petition; and where, after such indorsement of appearance is made, and before the petition is filed, the defendant in error dies, the waiver and entry of appearance is of no legal effect. If no other service is had or attempted within six months after the rendition of the judgment of the court below, the petition in error will be dismissed for want of jurisdiction of this court to hear and determine the cause.

(Syllabus by the Court.)

Action by Rufus P. Ranney against McGuire and others. From a judgment for plaintiff, defendants bring error. Motion by executors of Ranney, who died pending error to dismiss. Granted.

Oviatt, Allen & Cobbs, for the motion. Tibbals & Frank, opposed.

PER CURIAM. The ground of the motion is that this court is without jurisdiction to hear and determine the proceeding in error, because more than six months have elapsed since the rendition of the judgment of the circuit court, and no service of process in error has been had. Judgment of the circuit court was rendered September 22, 1891. Petition in error was filed December 22, 1891. Upon the petition is written a waiver of process and entry of appearance, without date, duly signed by the attorneys of record for the defendant in error in the action below. This paper was, in fact, signed some time prior to December 6, 1891. On this last-named date the defendant in error deceased. No summons in error has issued, nor is there service of any kind, unless the waiver and acknowledgment of service by the attorneys of record in the original cause upon the petition, prior to the decease of the defendant in error, can have that effect. We think it cannot. It would not be possible in any manner to bring a party into court prior to the filing of the petition. The waiver and appearance by counsel speaks, therefore, as of the date of the filing of the petition in error, December 22, 1891. The decease of the defendant in error December 6th terminated the authority of the attorneys of record in the original case, and hence the entry of appearance on the petition in error is without legal effect. No service having been made, therefore, within six months from the date of the judgment of the circuit court, this court is without jurisdiction, and the petition in error must be dismissed. *Cisna's Adm'r v. Beach*, 15 Ohio, 300. Motion sustained.

<sup>1</sup>St. 1884, c. 285, provides as follows: "A bill in equity may be maintained to reach and apply in payment of a debt any property of a debtor, as provided by clause 11, section 2, of chapter 151, of the Public Statutes, notwithstanding the fact that \* \* \* it cannot be reached and applied until a future time."

(49 Ohio St. 236)

**WILMOT v. LYON et al.**

(Supreme Court of Ohio. Jan. Term, 1892.)

**SALE—FRAUDULENT INTENT OF PURCHASER—INSTRUCTION.**

In replevin by the sellers of goods against the agent of the mortgagees of the purchaser, on the ground that the goods were obtained by fraud, there was evidence that the purchaser, at the time of the sale, was insolvent, and that it did not intend or expect to pay for such goods. *Held*, that the court properly charged that a purchase of goods on credit, with intent not to pay for them, is fraudulent, and, if the purchaser has no reasonable expectations of being able to pay, it is equivalent to an intention not to pay.

Error to circuit court, Cuyahoga county.

Action of replevin by John H. Lyon & Co. against E. P. Wilmot to recover certain goods sold and delivered by plaintiffs to the Chagrin Falls Paper Company, and which had been mortgaged by such company to various parties, and delivered to defendant as the agent of the mortgagees. There was a judgment for plaintiffs, and defendant brings error. Affirmed.

Estep, Dickey, Carr & Goff, for plaintiff in error. Everett, Dellenbaugh & Weed, for defendants in error.

**PER CURIAM.** The Chagrin Falls Paper Company purchased, on credit, of John H. Lyon & Co., a quantity of merchandise, which, after its delivery, was mortgaged by the company to various parties, and possession thereof delivered to the mortgagees; and while the same was in the possession of E. P. Wilmot, as agent of the mortgagees, Lyon & Co. replevied the property, claiming it had been obtained from them by fraud. On the trial the evidence tended to prove that the Chagrin Falls Paper Company, at the time of the purchase, was indebted to an amount largely in excess of the value of its property and assets, and that it did not intend or expect to pay for the property so purchased, and had no reasonable expectation of paying for the same. The court, among other things, charged the jury that "a contract for the purchase of goods on credit, made with intent on the part of the purchaser not to pay for them, is fraudulent, and, if the purchaser has no reasonable expectations of being able to pay, it is equivalent to an intention not to pay." *Held*, the charge given was a correct statement of the law applicable to the case, and is approved. *Talcott v. Henderson*, 31 Ohio St. 162. Judgment affirmed.

(49 Ohio St. 228)

**STATE v. INSKEEP.**

(Supreme Court of Ohio. March 8, 1892.)

**ASSAULT AND BATTERY—INDICTMENT—DUPLICITY.**

An indictment for assault and battery, which charges that defendant "did make an assault in and upon one M., and him, the said M., did then and there strike and wound," is not open to the objection that it charges two distinct offenses in a single count.

Exceptions from court of common pleas, Brown county.

John Inskeep was indicted for assault and battery, and a motion to quash the indictment being sustained on the ground that it contained but one count, and charged two distinct offenses, the state excepted. Exceptions sustained.

The indictment charged "that John Inskeep, \* \* \* on the eighth day of November, 1890, at the county aforesaid, unlawfully did make an assault in and upon one John W. Moler, and him, the said John W. Moler, did then and there strike and wound," etc.

David Tarbell, Pros. Atty., for the State. Young & McBeth, for defendant.

**PER CURIAM.** The common pleas erred in sustaining the motion. The indictment is not bad for duplicity, is in proper form, and the motion should have been overruled. Exceptions sustained.

(49 Ohio St. 60)

**HYDE v. BANK.**

(Supreme Court of Ohio. Jan. 19, 1892.)

**APPEAL—JUDGMENT OF CIRCUIT COURT—STAY OF EXECUTION—WHEN TERMS FIXED BY SUPREME COURT.**

Rev. St. § 6725, which provides that the execution of a judgment or final order, "other than those enumerated in this chapter," of any judicial tribunal, may be stayed on terms prescribed by the court in which the petition of error is filed, does not authorize the supreme court to fix the terms of the stay of a judgment of the circuit court, affirming the judgment of the court of common pleas for money only, since in such case the judgment defendant is entitled to a stay on filing a petition in error to the supreme court, and giving an undertaking in double the amount of the judgment, to the acceptance of the clerk of the circuit court, in accordance with Rev. St. § 6718.

Action by Bank against Hyde, in which defendant moved for a stay of execution of the judgment of the circuit court. Motion overruled.

E. Sowers, for the motion. Brewer & Palmer, opposed.

**PER CURIAM.** Where a judgment is rendered in the court of common pleas against a defendant for money only, and it is affirmed by the circuit court, the defendant, upon filing a petition in error in this court to reverse the judgment below, is entitled to a stay of execution, upon giving an undertaking in double the amount of the judgment, to the acceptance of the clerk of the circuit court, in accordance with section 6718, Rev. St. In such case this court is not required, nor authorized, by the provisions of section 6725,<sup>1</sup> *Id.*, to fix the terms for the stay of the judgment of the circuit court. Motion overruled.

<sup>1</sup> Rev. St. § 6725, provides as follows: "Execution of a judgment or final order, other than those enumerated in this chapter, of any judicial tribunal, or the levy or collection of any tax or assessment therein litigated, may be stayed, on such terms as may be prescribed by the court in which the petition in error is filed, or by a judge thereof."

(159 Mass. 487)

## MINER v. OLIN et al., (two cases.)

(Supreme Judicial Court of Massachusetts.  
Suffolk. Sept. 30, 1893.)

## AUSTRALIAN BALLOT LAW — NOMINATIONS — RESTRICTIONS—OFFICIAL BALLOT.

St. 1893, c. 417, known as the "Australian Ballot Law," provides that in order to nominate, by a caucus, or by a convention of delegates chosen by caucuses, a candidate whose name shall be put on the official ballot, there must be present not less than 25 voters participating and voting therein, unless the party holding such caucuses polled not less than 3 per centum of the entire vote cast for governor at the preceding annual election. Held that, if the provisions of the law requiring an official ballot are constitutional, the restrictions made by such statute as to the names of candidates that shall be printed thereon are reasonable and valid.

Case reserved from supreme judicial court, Suffolk county; James M. Barker, Judge.

Two petitions, heard together,—one by Alonzo A. Miner, for a writ of certiorari to compel William M. Olin and others, as ballot law commissioners, to send to the court a certain certificate of nomination of relator for the office of state senator, the objections filed against the same, and their proceedings thereon, with all other papers and things touching the same; and the other, by the same relator, for a writ of mandamus to compel William M. Olin, as secretary of the commonwealth, to place or print the name of relator on the official ballot as candidate for the office of senator for the seventh Suffolk senatorial district for the Prohibition party. Heard by a single judge, and, by agreement of parties, reserved for the consideration and determination of the full court. Petitions dismissed.

W. Hamlin, for petitioner. Albert E. Pillsbury, Atty. Gen., for respondents.

FIELD, C. J. These petitions—one against the ballot law commissioners, and the other against the secretary of the commonwealth—are brought for the purpose of compelling the secretary of the commonwealth to put on the official ballot to be used at the next annual state election the name of the petitioner as a candidate of the Prohibition party for the office of senator from the seventh Suffolk senatorial district. The Prohibition party did not cast 3 per centum of the entire vote cast for governor at the last annual election, and there were not 25 legal voters participating and voting in the caucuses which elected the delegates who composed the convention that nominated the petitioner for said office. Under St. 1893, c. 417, in order to nominate by a caucus, or by a convention of delegates chosen by caucuses, a candidate whose name shall be put on the official ballot, the presence of 25 qualified voters, participating and voting, is required only in the caucuses of a party which polled less than 3 per centum of the entire vote cast for governor at the preceding annual election. The other provisions in the statute concerning caucuses require that each caucus shall have a

chairman and secretary, but it is said that the presence of no more voters is required, and that two or more voters of any political party polling 3 per centum, or more, of the entire vote cast for governor, can hold caucuses which can make nominations, or select delegates to a convention which can make nominations, which must be put on the official ballot. The contention is that, by section 71 of the statute, a distinction is made between the qualified voters of a political party which at the preceding annual election "polled for governor at least three per centum of the entire vote cast in the state for that office," and the qualified voters of a political party which polled less than 3 per centum of such vote, and that the effect of this is to impair the rights of the voters of small political parties, and of the candidates of such parties. If nominations entitled to be put on the official ballot are not made at a caucus or convention, they may be made by nomination papers, under section 77 of the statute; but the nomination paper, in the case of a state senator, must be signed by qualified voters of the district or division "not less in number than one for every one hundred persons who voted for governor, at the preceding annual state election, in such district or division, but in no case less than fifty." It is argued that under these provisions it is practically impossible for a political party which at the last annual election polled less than 3 per centum of the vote cast for governor to nominate, in many representative and senatorial districts, any candidate for senator or representative, whose name can be put on the official ballot. Section 130 of the statute provides that "there shall be left at the end of the list of candidates for each different office, as many blank spaces as there are persons to be elected to such office, in which the voter may insert the name of any person not printed on the ballot, for whom he desires to vote for such office." If a voter spoil a ballot, he may successively obtain two others, but there is no provision for obtaining more. Section 166, *Id.* The voter is permitted to remain in the inclosed space where the marking compartments are not more than ten minutes; and, in a compartment, not more than five minutes, if all the compartments are in use, and other voters are waiting to occupy them. Section 167, *Id.* It is argued that the effect of all these provisions is that voters generally will not take pains to write or insert names in the blank spaces, to any great extent; that they are not allowed time to do it properly, when many blanks are to be filled; that as it is not required, in the qualifications of voters, that they should be able to write the names of other persons than themselves, the provisions of section 164 for aiding such voters as declare "that by blindness or other physical disability" they are unable to mark their ballot, are not adequate; and that under the statute the rights of all qualified persons to elect officers, and to be elected to office, are not equal, and the privileges of some are abridged, in violation of article 6 and article 9 of the declaration of rights. It is ar-

gued on the other hand that the intent of the statute was, and that in practice the effect of it is, to render elections more free than they were before, and that under the statute a reasonable opportunity is afforded to every voter to vote for whom he pleases, with the least chance for any improper interference with the expression of his will.

We have not found it necessary to express any opinion upon many of the questions argued. The statute of 1893, c. 417, is an attempt to regulate, in the most minute way, the whole conduct of elections. It provides for an official ballot to be prepared by public officers at public expense, which the voter is required to use, and he is no longer permitted to prepare his own ballot, except by inserting names in the blank spaces of the official ballot. Section 145, indeed, provides that if the ballots to be furnished to any polling place in a city or town shall fail to be delivered, or if, after delivery, they shall be destroyed or stolen, "it shall be the duty of the clerk of such city or town to cause other ballots to be prepared substantially in the form of the ballots so to be furnished and wanting," and these may be used; but there is no provision in the statute that in any event the voter may use a ballot prepared by himself. The whole scheme involves the use of an official ballot, which is to be the same for all voters in a voting precinct, and on which the choice of the voters is generally to be indicated by a mark. It is plain that such a ballot cannot contain the printed names of everybody who may desire to be a candidate, or whom a few persons may desire to be a candidate, for office. If such a ballot is to be used, there must be restrictions with reference to the number of the names of candidates to be printed on it. The petitioner in these cases does not contend that the provisions of the act requiring an official ballot are unconstitutional. He does not bring these petitions in his capacity as a voter, and complain that his rights as a voter are impaired by the statute. His whole purpose is to compel the secretary of the commonwealth to print his name on the official ballot as a candidate of his party for senator. He desires to avail himself generally of the provisions of the statute. He wishes only that the particular provisions shall be declared void which require the caucuses of a party which did not poll at least 3 per cent. of the vote cast for governor at the preceding election to be composed of at least 25 voters. It is plainly impracticable to permit on an official ballot the names of every candidate for office which caucuses composed of two or more voters may nominate; and the limitations upon the right of nomination by caucus contained in the statute cannot be considered unreasonable, if the provisions of the statute generally are such as the legislature can constitutionally enact. If the provisions of the statute requiring an official ballot to be prepared and used are unconstitutional, the secretary of the commonwealth cannot be compelled to prepare any official ballot, and therefore cannot be compelled to print the petitioner's name on

the official ballot. If these provisions are constitutional, the clauses under which the petitioner's name has been excluded are incidental to the main provisions of the statute, and are not unreasonable, and some such restrictions are necessary to carry into effect the main purpose of the statute. Petitions dismissed.

(139 N. Y. 55)

**PEOPLE ex rel. EDISON ELECTRIC ILLUMINATING CO. v. BARKER et al., Commissioners of Taxes.**

(Court of Appeals of New York. Oct. 3, 1893.)

**TAXATION—ASSESSMENT—CERTIORARI.**

1. Relator's treasurer returned to the tax commissioners a sworn statement showing a capital of \$4,500,000, debts funded and unfunded nearly \$2,700,000, with assets, exclusive of their patent rights, about \$1,100,000. The patent rights had been bought for \$2,250,000 of stock, but were in litigation, and the real estate was worth nearly \$700,000. *Held*, that an assessment on personalty of \$1,000,000 was erroneous.

2. When a writ of certiorari to tax commissioners directs them to return, besides relator's sworn statement, any other evidence considered by them, or, if there be none such, that they shall so state, a return not including any other evidence, but not denying its existence, and stating that, having examined the statement, and made "due inquiry" as to the value of relator's capital, they, the commissioners, had fixed its assessable value at a certain sum, is no justification of an assessment not borne out by relator's statement, since, if the statement, which was made in answer to questions on respondents' printed blanks, was too general, respondents could ask for more definite information.

Appeal from supreme court, general term, first department.

Certiorari on relation of the Edison Electric Illuminating Company of New York to Edward P. Barker, Thomas S. Feitner, and Edward L. Parris, commissioners of taxes for the city and county of New York, to review an assessment. From an order of the general term (22 N. Y. Supp. 1043) affirming the special term's judgment dismissing the writ, relator appeals. Reversed.

Miller & Wells, (Charles E. Miller, of counsel,) for appellant. George S. Coleman, for respondents.

**PECKHAM, J.** The relator is a corporation organized under the laws of the state of New York, and doing business in the city of New York. The defendants are the commissioners of taxes in that city, and as such they assessed the relator on the value of its personal property for the year 1892 at the sum of \$4,500,000. This was the amount of its capital actually paid in and secured to be paid in. No deduction was made of the assessed value of any real estate paid for by the company, nor of the amount of its stock, if any, belonging to the state, or to any literary or charitable institution, as provided for by the statute. I think it may be assumed the assessment was thus made because of the failure of the relator to send to the commissioners the written statement provided for in the law, and



from which an assessment in conformity with the facts would be more likely to result. After such assessment was made, and while the books were open for examination and correction, the relator, considering itself aggrieved by such assessment, applied to have the same corrected, pursuant to the provisions of section 820 of the New York consolidation act. At the time of such application the relator submitted to the defendants a statement in writing and under oath. This statement is in the record, and shows the following matters:

The total gross assets, exclusive of patent rights, value undetermined .....	\$1,108,865 00
Capital stock actually paid in or secured to be paid in .....	4,500,000 00
Amount of surplus earnings .....	.....
Rate of dividend for last year, or last annual dividend, 4 per cent. ....	.....
Indebtedness in detail as follows:	
Bills and accounts payable .....	440,503 00
Bonds .....	2,250,000 00
	<hr/>
	\$2,690,503 00

Then followed a statement of the assessed value of each portion of real estate owned by the company, by ward and ward map numbers, and aggregating \$698,500. The statement further showed that the stock had hardly an established market value, although there had been a few sales during the year, averaging about 75, the par being 100. It was also stated the value of the stock depended greatly upon the value of the patent rights, the validity of which was in litigation, and that an adverse decision would very seriously affect the value of the stock; that \$2,250,000 of the capital stock had been issued for patent rights to Mr. Edison, and those patents were owned by the company. In estimating the value of the assets it was stated that, so far as applicable, the valuation of the tax commissioners had been adopted. This statement was sworn to by the treasurer of the corporation. After its presentation to and examination by the tax commissioners, the assessment against the relator was reduced to the sum, for taxable purposes, of \$1,000,000. The relator, still feeling aggrieved, sued out a certiorari for the purpose of obtaining a review of the assessment, and claimed that from the facts appearing, and which it is alleged were uncontradicted, it was not liable to be assessed for any amount whatever. The writ commanded the defendants to return, among other things, and besides the written statement above alluded to, "any other evidence or information, if any, before you or considered by you in arriving at your decision, and, if there were no other evidence or information, that you so state." The defendants returned no other evidence or information than the statement mentioned, but the return did not otherwise and in terms negative the existence of some other information considered by them. After reciting the fact that the relator filed the written and sworn statement with them, the

defendants in their return stated that "thereupon we examined into the complaint so made by the relator, and considered such statement in writing, and, having made due inquiry as to the value of the capital owned by the relator, we fixed the amount of such value subject to assessment for the purpose of taxation at the sum of \$1,698,500, which we believed to be just;" and, after deducting the assessed value of the real estate, a balance of \$1,000,000 for taxable purposes was left, which the defendants "decided to be the sum for which the said capital stock, to wit, the capital stock owned by the relator, was lawfully assessable for taxation for the year 1892," and the assessment was therefore reduced from the original sum of \$4,500,000 to that amount.

The application of the relator which it made to the defendants was under section 820 of the consolidation act, and was in relation to the assessed valuation of its personal estate. The section provides that the applicant shall be examined under oath by the commissioners, and they are to fix the amount of the assessment as they may believe to be just. The record contains no other examination under the oath of the applicant than the sworn statement already described, and it may properly be assumed from the heading, form, and contents of that statement that it was made when the relator made its application, and at the instance of the commissioners, and in answer to their questions printed on blanks for that purpose. The section of the statute requires the commissioners to declare their decision within a certain time. This decision, it need scarcely be said, is not to be capricious, arbitrary, or fanciful. It must be based upon some evidence or facts, and should be the result of the exercise of judgment and discrimination. This would naturally be so, and the statute in the succeeding section (821) provides for a certiorari to review or correct on the merits any decision or action of the commissioners in such matter. This does not mean that the court is to place itself in the position of an assessor, and review the decisions of those officers upon questions of value or appraisement where the officers proceeded upon information or evidence tending to support their decision. The court generally will not look into questions of fact as to the amount or value of the personal estate of a corporation or individual. These are questions for the judgment of the assessors, and their decisions will ordinarily be sustained. This doctrine has been advanced and decided in several cases, among the latest of which is *People v. Hicks*, 105 N. Y. 198, 11 N. E. Rep. 663. In the case of a corporation liable to be taxed upon its capital and surplus, as the relator is, the inquiry is as to the actual value of such capital and surplus. *People v. Coleman*, 126 N. Y. 433, 27 N. E. Rep. 818. When the evidence upon the subject is entirely uncontradicted, and is full and complete, so that all the necessary facts are established beyond any fair dispute, and if there can be but one inference resulting therefrom, and there is no reason appear-

ing for doubting the truth of such evidence, a refusal on the part of the assessors to decide in accordance with it would be merely capricious and arbitrary, amounting to a legal error, and it should not be sustained.

The statement verified by the treasurer of the relator is unfavorably criticised on the ground of its generality. It is said to be a wholesale assertion, no details being given, and from which it is impossible for any one to determine the exact situation of the property of the relator, or its real value, and hence the relator has failed to show any error in the decision of the commissioners. Under the statute the relator made application to correct the assessment actually made in regard to its personal estate. It therefore became the duty of the commissioners to examine the applicant on oath. This was done by examining the treasurer, and such examination was made by obtaining written answers to printed questions submitted to the applicant. The answers were full responses to the questions that were put, and if the commissioners desired anything further, or more in detail, or some explanation of data actually furnished, in order to come to a decision, some request should have been made or some question put to the applicant calculated to elicit the desired information. In the absence of any such demand, and while the answers to the questions actually put are reasonably plain and full, the commissioners should not be permitted thereafter to question the data actually given, on the ground that they were not as full as they might have been. If they were as much in detail as was requested, and if no fault were then found with the answers on any ground of insufficiency of information upon a subject embraced in an inquiry, it seems to me that justice and fair dealing require the acceptance of the information given as containing the truth, unless there be some reason founded upon other facts established by competent evidence to cause the commissioners to disbelieve the information given by the applicant, or in its behalf, and under oath. 126 N. Y. 433, 27 N. E. Rep. 818. The commissioners cannot, under such circumstances, avoid the legal effect of the information thus given by stating in a return to a writ of certiorari that they had made "due inquiry as to the value of the capital owned by the relator," and had come to a certain decision in regard to it. If they made inquiries other than the questions contained in the written statement, and upon which they acted, they should, when required by the terms of the writ of certiorari, give the court some information as to the nature, extent, and direction of such inquiries, and they should state what the information was which they obtained, and upon which they based their decision; otherwise the commissioners might always return that they had made "due inquiry," and had come to a certain decision, and the court would be powerless to give relief, notwithstanding the decision might be clearly against the evidence which was sworn to and uncontradicted on the part of the applicant, and, if be-

lieved, entirely sufficient to warrant the correction claimed by such applicant.

In this case all the questions which the commissioners placed in their printed blanks were answered by the treasurer, and, so far as the record shows, to the satisfaction of the commissioners,—at least, no demand for further or more detailed information appears to have been made; and we think that the commissioners, in the absence of any reason for disbelieving it, were bound, under these circumstances, to assume the truth of the information thus obtained. We think, for these reasons, it must be taken as true that when the statement was made the total gross assets of the relator, exclusive of patent rights, (whose value was undetermined,) was \$1,108,865; that its capital actually paid in or secured to be paid in was \$1,500,000; that it owed in the shape of bills and accounts payable, \$440,503, and in the shape of bonds, \$2,250,000; that the assessed value of its real estate paid for by it was \$698,500; and that it had issued \$2,250,000 of its capital stock to Thomas A. Edison in payment for patent rights owned by him and transferred to the company for that consideration. The question is, what do these facts prove as to the actual value of the capital of the relator? It had no surplus, as the statement showed. The subject of assessment was the capital of the corporation. The assessment must by law be at the actual value of the subject assessed, and, when that is known and ascertained, no other value can be substituted for it. 126 N. Y. 433, at page 448, 27 N. E. Rep. 818, 822. If facts sufficient were disclosed in this statement from which this value could be accurately discovered, these facts must be conclusive on the question, assuming them to have been sufficiently proved by uncontradicted evidence, as already set forth, and that there was no reason which appeared in evidence for disbelieving them. Under such circumstances, and for the purpose of an assessment, the market price of the shares of the stock into which the capital is divided is not material, nor the amount of the dividends which may have been paid by the company. These are not the subjects of taxation under the law relating to the assessment of corporations, and such facts are immaterial when the exact data are given from which the value of the capital can be accurately ascertained. In the absence of these exact data, the facts just stated, as well as others, may be looked at for the purpose of obtaining from them, as well as the nature of the facts will permit, what is the value of the capital and surplus, if any there be. Outside of its patents, the total gross assets of the relator, as above stated, included all its capital. These gross assets, it is thus seen, did not equal the amount of its indebtedness, (\$2,690,503,) saying nothing of the deduction to be made on account of the assessed value of its real estate, (\$698,500.) This indebtedness must, in the nature of things, be taken into consideration in arriving at the value of the capital of the relator. And when it is seen that the indebtedness of a corporation is double the amount of all its assets, it follows, upon

the system adopted by the state for the assessment of corporations, that the actual value of the capital of such a corporation is zero; in other words, capital has no value for assessment and taxation. If it be assumed that the portion of the capital of the relator invested in patents is not taxable, because of the relator's clearly made out, and the commissioners should not have made any assessment whatever against it.

The relator asserts that the portion of its capital invested in patents is not taxable. It bases such claim upon two grounds,—one that the state statute does not provide for such assessment, and the other that patents cannot be assessed or taxed by or under state authority. We think the state statute reaches the case of patents where held by corporations, if such patents are not otherwise exempt from taxation. In defining the terms "personal estate" and "personal property," as used in the chapter on taxation, (chapter 13 of the first part of the Revised Statutes,) it is said that such terms shall include, among other things, "such portion of the capital of incorporated companies, liable to taxation on their capital, as shall not be invested in real estate." 1 Rev. St. p. 358, § 8. This would cover the case of any portion of the capital of a corporation which was invested in patents. The claim for exemption must be founded upon the second ground above stated, viz. that patents cannot be taxed by or under state authority. A tax upon the actual value of the capital of a corporation is a tax upon the property in which such capital may be invested, and if any of such property is exempt from taxation the value thereof must be excepted from any assessment of the capital. *People v. Commissioners of Taxes*, 23 N. Y. 192, per Denio, J., at page 195; *People v. Commissioners of Taxes*, 2 Black, 620, 629; *Bank Tax Case*, 2 Wall. 200; *Van Allen v. Assessors*, 3 Wall. 573. The assessment of the shares in national banks against the individual owners, where the capital of such banks had been invested in bonds of the United States, was sustained under the act of congress, for the reason that the shareholders were not the owners of the bonds, but the corporation was, and the corporation was not taxed by reason of an assessment upon its shareholders. *Van Allen v. Assessors*, 3 Wall. 573. This question as to the validity of the taxation by or under state authority of patents issued by the United States for new and useful inventions is a most important one. We do not think it necessary to decide it in this case, for the reason that we regard the assessment as clearly erroneous, even upon the assumption that the patents are taxable. The statement of the treasurer shows that the patents, assuming them to be of the par value of the stock which was issued in payment for them, viz. \$2,250,000, would make the total assets of the relator over \$3,358,865. The indebtedness amounted to \$2,690,503, and the assessed value of the real estate to the further sum of \$698,500, or a total amount of \$3,389,003, which is over \$30,000 more than the total assets of the re-

lator, including the patents. This clearly shows that an assessment of \$1,000,000 upon the capital of the relator must be the result of an erroneous process for arriving at the value of its assessable property.

It is said, however, that as the treasurer stated in his verified statement that in estimating the assets he had adopted, so far as applicable, the valuation established by the tax commissioners, the rest of the valuation must be that of the treasurer, and that the "due inquiry" made by the defendants simply resulted in a difference of opinion as to the values between the treasurer of the relator and the assessing officers, and the latter are the persons to make the assessment. I have already alluded to the position of the defendants as to their having made "due inquiry," and we must, for the purpose here in controversy, assume that the value of the assets, exclusive of the patents, was as stated by the treasurer. As to the value of the patents, it is not stated in so many words what such value was. It is, however, stated that stock to the amount of \$2,250,000 was issued in payment for the patents. It is also stated that their validity was in litigation, and not yet decided, and the value of the stock of the relator depended largely upon the value of the patents, which constituted to a great extent its assets, outside of the real estate and conductors. Upon these facts, I think, while it may be said the value of the patents was to a certain extent undetermined and contingent, there was nothing whatever upon which to base a finding that their value was over a million dollars beyond the par value of the stock given in payment for them. This would have to be decided in order to uphold the assessment, if we are to take the value of the other assets as stated by the treasurer. The sworn statement tends strongly to the view that the patents, under the existing circumstances, were not of a greater value than the par of the stock issued for them, and they should not be assessed at more than that. We might almost take judicial notice that the par value of stock issued by a corporation in payment for patents to be transferred to and used by it is never less than the real value of such patents under highly favorable views thereof. The fact that stock of the par value of \$2,250,000 had been issued for the patents in question is quite strong evidence that they were not in reality worth more than the par value of the stock so issued. The fact that their validity was in dispute adds force to the correctness of the conclusion. At any rate, the commissioners had the opportunity of examining the officer on oath, and they availed themselves of the same, and asked all the questions they desired to, and they were all answered; and if they failed to ask as to the exact value of the patents they ought not to be heard to complain, so long as the facts actually proved by the relator in regard to them were sufficient to justify no other inference than that the value was certainly not in excess of the par value of the stock issued in payment for them.

The assessment actually made has, in

our opinion, no evidence to support it. Upon no view of the facts actually proved, and which are wholly uncontradicted, and which there is no reason to disbelieve, so far as there is any evidence, can the assessment be sustained; and it is plain that either some radically erroneous theory for an assessment has been adopted by the commissioners, or that their decision is wholly without evidence to support it, and that their action has resulted in an assessment which is illegal, and cannot be sustained in our view of the law. In this case we are not differing with the assessors upon a mere question of values. The evidence is such as to show that there is no basis for the assessment if the sworn statement of the treasurer be accepted, and, under the circumstances, we think it appears that it should have been. Our decision in no way offers any improper facilities for the escape of corporations from proper assessment and taxation. If the defendants herein had information which warranted an assessment such as they made, notwithstanding the sworn statement, they should have returned that information, and thus have shown to the court what it was upon which they acted in making the assessment they did. If the statements given under oath by the applicants are not sufficient in detail or otherwise, then more questions may be asked, and the examination continued to the satisfaction of the commissioners. If they have any fair reason or ground for disbelieving the sworn statements, they are not bound by them. But they cannot capriciously reject or disregard them, and assess in total defiance of the facts thus sworn to. Without passing upon the question whether patents issued by the United States, as above described, are taxable or not, but in this case assuming they are taxable, we think the assessment in question is illegal, and must be set aside, and to that end the orders of the general and special terms must be reversed. We think we ought not to allow costs in such cases, because the defendants are public officers acting in the bona fide discharge of their duties, and they should be protected in such discharge from any fear of costs consequent upon an honest mistake. All concur. Order reversed.

(139 N. Y. 14)

PEOPLE ex rel. DURANT LAND IMP.  
CO. v. JEROLOMAN, Justice.

(Court of Appeals of New York. Oct. 3, 1893.)

MANDAMUS TO COURTS—DISCRETION.

Plaintiff in summary proceedings, having given a stipulation in order to a speedy hearing of its appeal, obtained a reversal. When the case was again set down before the justice, plaintiff moved to set aside the stipulation, on the ground that the amendment of 1893 to Code Civil Proc. § 1310, staying such proceedings pending appeal, applied to the case, which motion was granted. *Held*, that the supreme court could properly refuse plaintiff a mandamus to the justice to proceed with the case, asked on the ground that the statute was not retroactive, and so did not apply.

Appeal from supreme court, general term, first department.

Application by the people on the relation of the Durant Land Improvement Company for mandamus to John Jeroloman, as justice of the district court in the city of New York for the eighth judicial district, to proceed with a cause pending before said court. From an order of the general term (23 N. Y. Supp. 512) reversing an order of the special term granting a peremptory writ of mandamus, relator appeals. Affirmed.

Charles J. Hardy and Esek Cowen, for appellant. Henry B. Twombly and William B. Putney, for respondent.

PECKHAM, J. A mandamus is only granted in the sound discretion of the court. This discretion is not, of course, a capricious or arbitrary exercise of the power of the court to refuse relief even in a proper case. Where, however, it appears that with reference to the very question at issue the conduct of the party applying for the writ has been such as to render it inequitable to grant him relief by mandamus, the court may, in the exercise of this discretion, refuse the writ. *People ex rel. Wood v. Board of Assessors*, 137 N. Y. 201, 33 N. E. Rep. 145, and cases cited. We think there are facts sufficient in this case to justify the court in refusing a mandamus as matter of discretion. The relator gave a stipulation in order to have its appeal in the summary proceeding heard at an early moment. That stipulation gave rights to and imposed obligations upon the landlord which did not before exist. By reason of its execution the landlord obtained what it sought in the shape of an early determination of its appeal. Having obtained a reversal of the order appealed from, the proceeding to remove the tenant was again set down before the defendant as justice, and when it came up the amendment of 1893 to section 1310 of the Code of Civil Procedure was referred to by counsel for the tenant, and the defendant refused to proceed. The landlord then sought the aid of the court to relieve it from its stipulation, and in its moving papers assigned as a ground therefor that the amendment in question had stayed the proceedings to remove, and its counsel urged the same reason on the argument of the motion. The court took the same view as the counsel, and therefore vacated the stipulation. Having thus accomplished the vacatur of the stipulation upon the ground that the amendment applied to the case in hand, the landlord then and on the same day asked the supreme court for a mandamus to compel the defendant to proceed with the trial of the summary proceedings, on the ground that the amendment was not retroactive in its effect, and that it did not, therefore, apply to the present proceeding. We think the court below might well have refused the writ upon the ground that the landlord was not in a position to ask for a mandamus, even though the court were of opinion the statute did not apply to proceedings pending when it was passed. Upon the assumption that it did apply, the landlord had got rid of what it re-

garded as a vexatious stipulation, and there is nothing inequitable in the court saying that the landlord shall not be thereafter heard when asking relief on the ground that the act did not apply. The order of the general term of the supreme court does not state upon what ground the decision is based, and the writ may have been refused as a matter of discretion. We do not look into the opinion for the grounds upon which the court proceeds in such cases. We could not review the exercise of discretion by the court below unless there were a clear abuse of it, which cannot be claimed here. Without deciding whether the amendment in question did or did not apply to the proceedings then pending, we are of the opinion that the order must be affirmed, with costs, for the reasons above stated. All concur. Order affirmed.

(139 N. Y. 6)

### SPEIR v. CITY OF BROOKLYN.

(Court of Appeals of New York. Oct. 3, 1893.)

MUNICIPAL CORPORATIONS — FIREWORKS DISPLAY — NUISANCE.

1. A large display of fireworks, including heavily-charged explosives, held at the junction of two narrow and completely built streets of a large city, and managed by private persons under no official responsibility, is an unreasonable and dangerous use of the streets, and a public nuisance. 19 N. Y. Supp. 665, affirmed.

2. While a display of fireworks in a city street may be in fact a nuisance, the city cannot relieve itself of liability for damages caused by such a display, licensed by the mayor under the authority of an ordinance, on the ground that the ordinance is ultra vires, since the council, admittedly, has regulating powers in the premises.

Appeal from city court of Brooklyn, general term.

Action by S. Fleet Speir against the city of Brooklyn for damages for the setting fire to plaintiff's house by fireworks. From a judgment of the general term (19 N. Y. Supp. 665) affirming a judgment of the special term (18 N. Y. Supp. 170) in favor of plaintiff, defendant appeals. Affirmed.

The facts appear in the following statement by ANDREWS, C. J.:

One Amantrano obtained a permit from the mayor's office, Brooklyn, for the discharge of fireworks at the corner of Montague and Clinton streets, adjacent to the Academy of Music in that city, which permit recited that it was granted under chapter 3, art. 3, § 2, of the city ordinances. Under this permit, on the night of November 1, 1887, there was a display of fireworks, consisting of rockets, shells, bombs, balloons, and colored fire, conducted by one Bidwell, (who had been employed by Amantrano,) in the streets at the place mentioned, on the occasion of a political meeting. A copy of the permit was sent from the mayor's office to the chief of police, (as was the custom when such permits were granted,) and in consequence of the permit the police did not interfere with the display. The display was extensive, and the rockets used were large and powerful. During the display one of the

rockets entered the window of plaintiff's house, within 60 or 80 feet from the point where it was discharged, setting fire to the house, and occasioning the damage for which the action was brought. It had been customary for the mayor to grant similar permits for the discharge of fireworks in the streets on occasions of political meetings, under the assumed authority of the ordinance referred to. The city ordinances relative to fireworks are as follows, (chapter 3, art. 4, § 2:) "No person shall fire or discharge any cannon, gun, pistol, fowling piece or firearm of any description, or store or sell or offer to sell, explode or set off any firecracker, rocket, squib or combustible fireworks of any description, within the city limits: provided, that nothing in this section contained shall be construed to extend to any fireworks exhibited by order of the common council, or by any exhibitor who shall be authorized by a permit from the mayor to exhibit the same for public amusement, under a penalty of twenty-five dollars for each and every offense." Chapter 3, art. 5, § 14: "The use of fireworks of all descriptions is prohibited within the city limits, except on the whole of the fourth day of July in each and every year: provided, however, that this section shall not apply to such public displays as may be authorized by the city authorities, or such private displays as may be allowed under permit from the mayor granted for such purpose; and any person violating any of the provisions of this section shall forfeit and pay a sum not exceeding five dollars for each and every such offense." Further facts are stated in the opinion.

Almet F. Jenks, for appellant. Wm. C. De Witt, for respondent.

ANDREWS, C. J. The finding of the trial judge that the use of the street for the discharge of fireworks constituted a public nuisance is amply justified, in view of the circumstances. It has been decided in some cases that the discharge of fireworks in the streets of a city or village is a nuisance per se, and subjects persons engaged in the transaction to responsibility for any injury to person or property resulting therefrom. *Jenne v. Sutton*, 43 N. J. Law, 257; *Conklin v. Thompson*, 29 Barb. 218. It may be doubted whether the doctrine, in its full breadth, can be maintained. The practice of making the display of fireworks a part of the entertainment furnished by municipalities on occasions of the celebration of holidays or the commemoration of important public events is almost universal in cities and villages; and we are not prepared to say that this may not be done, and that streets and public places may not be used for this purpose, under the supervision of municipal authorities,—due care being used both as to the place selected, and in the management of the display,—without subjecting the municipality to the charge of sanctioning a nuisance, and the responsibility of wrongdoers. But the circumstances in the present case do not take the transaction in question out of the category of nuisances, or relieve the parties

who conducted or promoted the affair from liability for the injury occasioned. The discharge of fireworks in a city under any circumstances is attended with danger. In the present case the danger was greatly enhanced by the location. It was at the junction of two narrow streets of a large city, completely built upon, and where any misadventure in managing the discharge would be likely to result in injury to persons or property. The display was of considerable magnitude, and the explosives, especially the rockets, were heavily charged, and, when exploded, were carried with immense velocity. It was managed by private persons under no official responsibility, and no municipal or public interest was concerned. Under the circumstances, in view of the place, the danger involved, and the occasion, the transaction was an unreasonable, unwarranted, and unlawful use of the streets, exposing persons and property to injury, and was properly found to constitute a public nuisance.

The judgment below adjudges that the city of Brooklyn is liable for the injury sustained by the plaintiff, and this is the only question in the case. That a municipal corporation may commit an actionable wrong, and become liable for a tort, is now beyond dispute. If the city directed or authorized the discharge of the fireworks which resulted in the injury complained of, it is, we think, liable. The inquiry is whether the city of Brooklyn did anything which, as to this plaintiff, placed it in the attitude of a principal, in carrying on the display. The mayor of the city, its chief executive officer, expressly authorized it, assuming to act, in so doing, under an ordinance of the common council. In so doing, and in construing the ordinance as authorizing him to grant a permit to private persons to use the public streets for the discharge of fireworks, he was following the practice which had long prevailed; and, so far as appears, no question had been raised that such permits were within the ordinance. The permit, when given and communicated to the police, was understood as preventing any police interference with the act permitted, and it had that effect in the case in question. The city had power to prohibit or regulate the use of fireworks within the city, and to enact ordinances upon the subject. The ordinances passed were not *ultra vires*, in the sense that it was not within the power or authority of the corporation to act in reference to the subject under any circumstances. See *Dill. Mun. Corp.* § 963 et seq. It is the settled doctrine of the courts that a municipality is not bound merely by the assent of its executive officers to wrongful acts of third persons, nor could the mayor bind the city by a permit, for the granting of which he had no color of authority from the common council, and which was not within the general scope of his authority. *Thayer v. City of Boston*, 19 Pick. 511. If the permit was in fact authorized by the ordinance, the city would, as we conceive, be liable, although the particular act authorized was wrongful. For a mistake in the exercise of its powers,

or by acting in excess of its powers, upon a subject within its jurisdiction, whereby third persons sustain an injury, there seems to be no reason, in justice, which should deny the injured party reparation. The common council is the governing body. It represents the corporation, and its acts are the acts of the corporation, when they relate to subjects over which the corporation has jurisdiction. It is true that the power to pass ordinances and to regulate the use of fireworks did not embrace a power to authorize or legalize nuisances. But, if the ordinance transcended the power of the common council in this respect, the misconstruction of the common council of the extent of its powers in dealing with the subject, which was concededly within its power of regulation, does not, we think, within any just view of municipal exemption from the consequences of unauthorized and wrongful acts of the governing body, exempt the city from liability. See *Cohen v. Mayor*, 113 N. Y. 532, 21 N. E. Rep. 700. But it is claimed that the ordinance did not, by its true construction, authorize the mayor to grant permits to use the streets for the discharge of fireworks. The contention is that there is an implied limitation that the permit should extend only to proper and suitable places other than the public streets. But there is no such limitation, in terms, in the ordinances, and the streets are not excepted from the power granted; and the case shows that the ordinance has been acted upon for many years, and has never been construed as now claimed. We are not prepared to say that the legal construction of the ordinance is not that which is now claimed by the counsel for the city, or that there is not to be read into it the limitation claimed. But the ordinance is at least indefinite and ambiguous. It might well be construed by laymen as it has been construed by the executive officers of the city. The ordinance was in fact the reason for the granting of the permit in this case. We think that, as to the plaintiff, who has suffered the injury, the city is bound by the construction of the ordinance placed upon it by the mayor, which was not only possible, but plausible, and upon which, for years, the mayor had acted. We think the judgment is sustainable, and it should therefore be affirmed. All concur.

(139 N. Y. 320)

SAXTON v. NEW YORK EL. R. CO. et al.  
(Court of Appeals of New York. Oct. 3, 1893.)

ELEVATED RAILROADS—DAMAGES TO ABUTTING  
LOTS—BENEFITS.

1. In an action for damages to abutting property by the construction and maintenance of an elevated railway, it is error to refuse to find that the easements interfered with, aside from consequential damages to the premises, have in themselves only a nominal value, as benefits can only go to reduce consequential damages. *Bookman v. Railroad Co.*, 33 N. E. Rep. 333, 137 N. Y. 302, followed.

2. In estimating benefits resulting from the construction and maintenance of an elevated railway, not only those peculiar to the premises, but also those shared with neighbor-

ing property, should be considered. *Sutro v. Railroad Co.*, 33 N. E. Rep. 334, 137 N. Y. 592, followed.

Appeal from supreme court, general term, first department.

Action by James Saxton against the New York Elevated Railroad Company and the Manhattan Railway Company for an injunction, and for damages to real property. From a judgment of the general term (19 N. Y. Supp. 746) affirming a judgment for plaintiff entered on the report of Grover Cleveland, Esq., referee, defendants appeal. Reversed.

Davies & Rapallo, (Julien T. Davies and Brainard Tolles, of counsel,) for appellants. Peckham & Tyler, (E. W. Tyler, of counsel,) for respondent.

**PER CURIAM.** It is impossible to distinguish in many material matters the errors appearing in this case and in the case of *Bookman* against the same defendants, decided by this court, and reported in 137 N. Y. 802, and 33 N. E. Rep. 333. We have looked at the original record on file in the clerk's office in that case. The court there found the fact of injuries resulting to plaintiff's property by reason of the building and maintenance of the road, and over and above any benefit resulting from it and peculiar to the premises. The court had been requested by the defendants' counsel in that case to find that the benefits resulting from the road and peculiar to the premises should be set off, and the court granted the request and so found; and it also found there were no benefits peculiar to such premises. It refused to find that the easements taken or affected, aside from any consequential damages to the premises from the taking of such easements, had in themselves only a nominal value. The same request was made in this case, and the same refusal followed. In this case another request was granted, and the fact found that the only property rights taken were easements of light, air, and access in and over the street, while in the *Bookman* Case the request was refused. We cannot, however, see that this one difference in the two records is enough to call for a different result when a perusal shows so many material points in which they are precisely similar. There are many identical and material errors in the two records, and the judgments in both should be the same. In *Sixth Ave. R. Co. v. Metropolitan El. Ry. Co.*, (lately decided,) 34 N. E. Rep. 40, we held that, where it was apparent the court had adopted the true rule of damages, an error of an abstract nature in the description of the injury sustained would not be ground for a reversal. The referee in this case, like the court in the *Bookman* Case, has confined his consideration of benefits to those which were peculiar to the premises in question. This we have held is error. *Sutro* Case, 137 N. Y. 592, 33 N. E. Rep. 334. And the request made to the referee in this case regarding benefits peculiar to the premises should not prevent our consideration of the exception taken to the rule as adopted, any more than did the

same kind of a request made by defendants in the *Bookman* Case. It was in neither a request to the referee to adopt that theory as the true one in regard to damages, but it was placed among a number of other requests, and so worded as to show that the defendants' claim was that at least and at all events special benefits should be deducted. There was a plain exception to the finding which confined the rule to peculiar benefits. At any rate, there is no distinction which can fairly be taken between the two cases, and the same judgment should prevail in each so far as this court is concerned. The judgment must therefore be reversed, and a new trial granted, costs to abide the event. All concur.

(139 N. Y. 1)

### TRIPLER v. MAYOR, ETC., OF CITY OF NEW YORK.

(Court of Appeals of New York. Oct. 3, 1893.)

MUNICIPAL ASSESSMENTS—RECOVERY OF PAYMENT.

Where a lot owner seeks to recover the payment of an assessment in fact void, but apparently a lien on his lot, the burden being on him to prove that when he paid he did not know that the assessment was void, the sufficiency of his proof is a question for the jury. *Earl and Gray, JJ.*, dissenting.

Appeal from supreme court, general term, first department.

Action by Isabel S. Tripler against the mayor, etc., of the city of New York to recover moneys paid on a void assessment. From a judgment of the general term affirming without opinion a judgment in favor of defendant, plaintiff appeals. Reversed.

James A. Deering, (George G. Munger, of counsel,) for appellant. William H. Clark, Corp. Counsel, (George L. Sterling, of counsel,) for respondent.

**ANDREWS, C. J.** This case was before this court on a former appeal by the defendant from an affirmance by the general term of the judgment of the special term rendered on the first trial in favor of the plaintiff, on which appeal the judgment was reversed, and a new trial ordered, upon the grounds stated in the opinion. 125 N. Y. 617, 26 N. E. Rep. 721.

In determining the present appeal we must be guided by the former decision upon any question there decided, applicable to the case as now presented. We held on the former appeal that the assessment, though valid on its face, was void, for the reason that the work of constructing the sewer, for which the assessment was laid, was done by days' work, and not by contract, without the requisite authorization of the common council, following the *Cases of Blodgett* (91 N. Y. 118) and *French*, (93 N. Y. 634,) which involved the validity of similar assessments. But the court further held that the imposition of the assessment, and the published notice requiring payment, given by the city in 1881, did not constitute coercion in fact, so as to make the payment of the assessment in 1887 involuntary, no steps having been taken by the city, subsequent to the pub



lication of the notice in 1881, to collect or enforce the assessment. The court further held that the mere fact that the assessment was an apparent lien on the plaintiff's land, which might be followed by proceedings for its sale, where the city had remained passive for six years, did not constitute coercion in law, so as to make a payment, made in 1887, for the purpose of clearing the title, involuntary, unless the payment was made in ignorance of the facts which made the assessment illegal. The court held that the burden was upon the plaintiff to prove that when the payment was made she did not know that the assessment was void, and that this element of the case was wholly absent; and the learned judge who wrote the opinion referred to many circumstances appearing in the record which justified an inference that she knew when she paid the assessment that it was invalid. The court therefore reversed the judgment, and directed a new trial, for the reason, as stated in the concluding sentence of the opinion, that the "law required the plaintiff to prove that she authorized the payment in ignorance of the facts, and there is no such finding and no evidence in the case on which to base it." The case went back to a new trial pursuant to the order of the court, and on the new trial the plaintiff sought to meet the point on which the reversal in this court proceeded, and gave evidence tending to prove that neither she, herself, nor the purchaser who paid the assessment under her authority out of the purchase money reserved, knew or had any notice when the payment was made of the facts invalidating it. The learned trial judge on that occasion, following the principle of our former decision, submitted the question of notice to the jury, who found for the plaintiff, and a verdict was rendered in her favor for the amount of the assessment paid, with interest. The general term, on appeal, reversed the judgment entered on the verdict, on the assumption that the evidence was the same as on the first trial. The case was tried a third time, on which trial the court directed a verdict for the defendant, and denied the plaintiff's motion for leave to go to the jury on the question of knowledge, and the plaintiff appealed from the judgment entered on this direction to the general term, where the judgment was affirmed without an opinion.

We think the general term was in error in supposing that the case was the same on the question of knowledge as on the first trial. It was radically different, the defect then existing being supplied by evidence on the part of the plaintiff that neither she nor the purchaser had any knowledge of the infirmity which affected the assessment when payment was made. There are strong circumstances tending to an opposite conclusion, and a jury might well hesitate to accept the view sought to be established by the testimony of the plaintiff and her witnesses. But the question belonged to the jury, and not to the court, who were the judges of the credibility of the witnesses, and the tribunal to make the inferences of fact deduc-

cible from all the circumstances and the whole evidence. The general principle that the owner of land incumbered by an assessment for a local improvement, apparently valid, enforceable in due course, and at the will of the municipality, by a sale of the premises, may in good faith pay the assessment, and relieve the land from the incumbrance, and thereafter, on discovering that the assessment was unauthorized and illegal, may recover back the money paid, is consonant with the sentiment of justice. The rule doubtless is attended with some public inconvenience, and in many cases technical defects are relied upon to escape a just share of public burdens. But, on the other hand, it is very important that taxation should find its warrant in the strict letter of the law, and that municipal burdens on property shall only be imposed upon a compliance with all the substantial safeguards enacted for its protection. The ordinary citizen is not advised of the steps which precede the imposition of an assessment. He finds his property assessed, and liable to be sold for nonpayment of the assessment; and, having innocently and in ignorance paid the charge, there is no injustice in requiring a return to him of the money. If he had notice or was put on inquiry before the payment was made, and failed to pursue it, and there was no coercion in fact, he occupies a different position. The question of the knowledge of the plaintiff should have been submitted to the jury, and for the error in refusing such submission the judgment should be reversed, and a new trial granted.

All concur, except EARL and GRAY, JJ., dissenting.

(139 N. Y. 73)

#### PEOPLE v. WEBSTER.

(Court of Appeals of New York. Oct. 3, 1893.)

##### HOMICIDE—TRIAL—EVIDENCE.

1. On the plea of self-defense made necessary by a personal quarrel, defendant offered the evidence of his wife that deceased had been to her rooms, and made her indecent proposals. The court admitted her testimony of what she had told defendant about deceased's conduct just before the homicide, but excluded her statements as to how deceased actually behaved, and in so doing remarked that no conduct of deceased justified a murder; that a man could not justify the killing of another because he disapproved of the latter's previous conduct; that, if deceased so misbehaved, it was no justification for murder; that the law did not justify a killing for real or imagined insult; that whether the wife's statements were true was immaterial, their only bearing being on defendant's state of mind. *Held* not prejudicial to defendant, as indicating that the court thought him guilty of murder.

2. On a plea of justification, evidence of the peaceful character of deceased was excluded. The court remarked that his general character was not in issue, and that, so far as defendant's guilt was concerned, the jury must assume deceased's character irreproachable. *Held*, that said remarks were not exceptionable, as prejudging the credit of deceased's dying declaration, the court having carefully distinguished this question.

3. A photograph of deceased may be introduced to show his physical characteristics,

in rebuttal of defendant's plea of fear of bodily harm.

4. Defendant pleaded self-defense made necessary by a quarrel with deceased, whom defendant's alleged wife had accused of making indecent proposals to her. Defendant testified on his own behalf. *Held*, that he could be cross-examined as to the circumstances under which he had met the woman, and the life she was then leading. 22 N. Y. Supp. 634, affirmed.

5. Evidence that a witness for the defense was in intimate and affectionate relations with defendant's household is competent for the prosecution. 22 N. Y. Supp. 634, affirmed.

6. Evidence that a witness who testified that she had been an eyewitness of the crime was addicted to the opium habit, and of the extent of said habit's influence over her, is competent in impeachment. 22 N. Y. Supp. 634, affirmed.

Appeal from supreme court, general term, first department.

Burton C. Webster was convicted of manslaughter in the first degree, and, from a judgment of the general term (22 N. Y. Supp. 634) affirming the conviction, defendant appeals. Affirmed.

William F. Howe, (Howe & Hummel, of counsel,) for appellant. De Lancey Nicoll, Dist. Atty., (Henry B. B. Stapler, Asst. Dist. Atty., of counsel,) for the People.

MAYNARD, J. The defendant was tried at the New York oyer and terminer upon an indictment charging him with the crime of murder in the first degree, in killing Charles E. Goodwin on August 2, 1891. The jury convicted him of manslaughter in the first degree, and he was sentenced to imprisonment for the term of 19 years. He admitted the act of homicide, but pleaded that it was justifiable on the ground of self-defense. The defendant and deceased occupied rooms upon the same floor of the Pervial flat, in Forty-Second street, New York city. The latter was unmarried, and the former was cohabiting with a woman with whom a marriage ceremony had not been solemnized, but he claimed that a civil contract of marriage had been entered into between them in the month of January of the same year. It appears from his admissions on the trial that he had previously married another woman, and it was not shown that the former marriage had been, in any lawful manner, dissolved. The defendant's version of the homicide was that upon the evening of its occurrence he came to his rooms, and found his wife, who was then pregnant, attended by one Fannie Romaine, a servant in the employ of the janitor of the flat; that she seemed to be ill, and during their conversation she complained to him about the conduct of the deceased, stating that he had made improper advances to her, and indecently exposed his person in her presence, and in other ways behaved in an unbecoming manner, and that while the defendant was away she dare not go into the hall, through fear of encountering him, and that her present sickness, which was likely to result in a premature birth, was caused by his annoyances. While they were talking, the deceased knocked at the door, which was opened by the defendant, and the former, apparently surprised

at finding him in, addressed him with an oath, and struck at him with his hand, just grazing the face, and causing a slight scratch, and then retreated to his own room, 49 feet distant, where he was followed by the defendant, who entered the room, and remonstrated with him about his conduct; that the deceased greeted the defendant with oaths and curses, and seized a cuspidor, and was in the act of throwing it at him, when, believing that he was in imminent peril of his life, he drew a pistol, and shot him in a vital part, from which death ensued in a few hours. The defendant's wife and the woman Romaine were witnesses in his behalf. They claim to have immediately followed him to the deceased's room, and to have witnessed the homicide, and they gave substantially the same account as the defendant of the occurrence. The people challenged the truth of the testimony of these three witnesses for the defense, and insisted that it was fabricated in every material respect, and that it was the product of a conspiracy to shield the defendant from the consequences of his crime by falsehood and perjury. The theory of the prosecution was that the defendant deliberately went to the deceased's room for the purpose of killing him, and found him engaged in writing a letter, and, without any lawful provocation, instantly shot him. This view was supported by the dying declaration of Goodwin, and by many circumstances of a most convincing character. It is not the province of this court to decide between these conflicting theories. It is sufficient that there was some evidence to support both, and it was the office of the jury to say which had been established by satisfactory proof, or whether each might not be partly true. Nor can we determine the grounds upon which they rested their verdict. We are bound to assume it was the result of conclusions or inferences legitimately drawn from some competent evidence in the case, but it is beyond our ken to discern the particular process by which they arrived at their verdict. It cannot, therefore, be said that because the defendant was not convicted of the crime of murder in the first degree, but of a lesser offense, the jury disregarded the evidence of the prosecution, and gave credence only to that of the defendant's witnesses. The facts upon which the people relied may have given rise to different inferences in their minds than those which the district attorney sought to draw from them, and they may have accepted in part the account of the homicide given by the defendant, and rejected other portions, which they deemed unworthy of belief. The only thing which can properly be affirmed of their verdict is that they found that the defendant killed the deceased in the heat of passion by means of a dangerous weapon, and not with premeditation or deliberation, or with an intent to effect his death, and that they rejected the claim of the defendant that he did it in lawful self-defense. It follows that if errors were committed in the reception of evidence, materially affecting the credibility of the defendant's witnesses, or in the comments of the court upon the trial, they must be

reviewed and considered, for we are unable to say that if they existed they did not prejudice the defendant, or affect the verdict of the jury.

The first exception to be noticed relates to the reasons given by the court for the admission and rejection of certain evidence in regard to the conduct of the deceased towards the defendant's wife, and the communications made to the defendant by her with respect to such conduct. The defendant was permitted to show what she had told him upon this subject upon the evening of the homicide, and previously, but he was not allowed to prove, by his wife or others, that the deceased had actually been guilty of the offenses complained of. There was a prolonged struggle between the prosecution and the defense as to where the line should be drawn, in determining the question of the admissibility of this evidence. In disposing of this question the remarks were made, to which the exceptions have been taken. The trial judge correctly defined, in plain and vigorous language, the rule of law which should control in the reception and application of such evidence. He stated, in substance, that no conduct of the deceased justified the defendant in murdering him,—clearly referring to the alleged improper and lascivious behavior of the deceased towards the defendant's wife,—and that a man could not justify the killing of another because he disapproved of his previous conduct. When the wife was under examination, a discussion arose whether she should be permitted to state what the deceased did when the defendant was not present, and the court, in excluding it, said that she might state what she told the defendant that the deceased had done, but could not state whether the deceased had in fact done the things referred to; that it was entirely immaterial whether he had or not; that, if he had so misbehaved himself, it was no justification for murder, and the defendant could not escape the consequences of his own act because of any act of the deceased done prior to the killing; that the law of this state did not authorize or justify any man in taking the law into his own hands, and slaying another, because he has, or imagines he has, received an insult; that the witness might state any communication she made to the defendant at or about the time of, or shortly prior to, the occurrence, as to anything that the deceased did; that the only material thing was the communication, and it was entirely immaterial whether the things disclosed actually happened. Substantially the same remarks were repeated when the defendant was examined, and permitted to state what his wife had told him about the deceased, and the court then also stated that the jury must not consider the question whether the communications made by the wife were true; that they were admitted only to show the condition of the defendant's mind when he fired the shot. It is not now claimed that any error was committed in the reception or rejection of evidence upon this point, but it is insisted that these remarks were in the nature of

a judicial criticism upon the defendant's case; that they were unfair and prejudicial to the defense, and must have conveyed to the jury the impression that the trial court believed that the defendant was guilty of the crime of murder, and in this way affected a substantial right of the accused. We do not think the language of the learned trial judge is fairly susceptible of such an interpretation. It was no more than a clear-cut statement of a most pertinent legal principle. The charge was murder; the defense, a justification; and the court merely said, in terms not liable to misconstruction, that no wrong done by the deceased to the wife was available as a justification, but, if the defendant believed that the wrong had been committed, the state of mind induced by the belief might be considered in determining the motive and intent of his actions. Where evidence is admitted, not bearing directly upon the main issue, but having only an incidental relation to a material fact, which is the subject of inquiry, it is both the province and the duty of the trial court to clearly state the limitations of its scope and application to be observed by counsel and jury. This duty is especially enjoined in cases like the present, where jurors, however conscientious and intelligent, might be misled by the character of the testimony, and, yielding to an impulse of indignation, permit it to exercise an undue influence in controlling their verdict.

Evidence offered by the prosecution to show the general reputation of the deceased for peace and inoffensiveness was excluded, the court remarking that his general character was not in issue; that he was as much entitled to the protection of the law as the best and most exalted man in the community, and that it was no justification to the defendant for taking his life whether he was of good or bad character; that his character could not, under any circumstances, be an issue in the case; that, so far as the guilt or innocence of the defendant was concerned, the jury must assume that Goodwin was a man of irreproachable character. The defendant's counsel excepted to these remarks, and reminded the court that they attacked his dying declaration, and that in that respect his character was in issue. In construing these comments it must be kept in mind that we are dealing with a case where the killing was admitted, and the general character of the deceased had not been questioned by the defense. While the truthfulness of the dying declaration was disputed, it did not involve the general character of the deceased, and the defendant had offered no proof to impeach his character from the speech of people. What the court said had reference exclusively to the defense of justification, and did not involve the credibility of the deceased's dying statements. On the contrary, the learned judge was careful to say that whether or not he should be believed was another thing; and by these remarks, as well as by the charge subsequently given, the jury were left free to determine whether his account of the homicide, or that of the defendant, was the true one.

In disposing of this branch of the case, we recognize the full import of the expression of this court in *Sindram v. People*, 88 N. Y. 196, that "it is desirable that the court should refrain, as far as possible, from saying anything to the jury which may influence them either way in passing upon controverted questions of fact, and perhaps comments upon the evidence might be carried so far as to afford ground for assigning error;" but there is a wide difference between the possible case there suggested, and one, like the case at bar, where no intimation was given by the trial judge of his own views as to the credibility of witnesses, and his remarks were confined to a demonstration of the true quality and value of evidence of an exceptional kind, and to a timely and needful caution to the jury to limit its force and application within appropriate bounds.

A photograph of the deceased was admitted in evidence, under a general objection that it was incompetent, immaterial, and irrelevant, and after it had been exhibited to the defendant, upon cross-examination, and he had stated, in response to the question whether it was a "just picture" of the deceased, that it somewhat resembled him. Subsequently, a juror inquired of the court the object of showing the picture to the jury, and was told that it was admitted for the consideration of the jury in determining the question whether they believed the defendant was in danger at the time he fired the shot,—to give them some idea of the kind of a man the defendant claimed his assailant was. Exceptions were taken to the reception of the photograph for this purpose, which, we think, are not tenable. *Cowley v. People*, 88 N. Y. 465; *Walsh v. People*, 88 N. Y. 458; *Archer v. Railroad Co.*, 106 N. Y. 589, 13 N. E. Rep. 818; *Alberti v. Railroad Co.*, 118 N. Y. 77, 23 N. E. Rep. 35. There was no objection on the ground that it had not been shown to be a correct likeness. The exception went only to the competency of the evidence. Where self-defense is the plea, the physical characteristics of the slain are, obviously, a proper matter of proof. Whether he was a man of a large and powerful physique, or an athlete, or puny and feeble, and inferior in size and strength, it was a material fact to strengthen or rebut, according to the nature of the evidence, the claim of the defendant that he believed he was in great danger of bodily harm when he was assailed. Witnesses who had known the deceased might have been permitted to describe him as accurately as the imperfections of human speech would allow, and the evidence is no more objectionable when his form and features are delineated by means of the photographer's art.

We do not think any error was committed in permitting the district attorney, upon cross-examination of the defendant, to show the circumstances under which he met the woman with whom he was living, and the kind of life she was then leading. The questions were all within the range of a proper cross-examination. Their manifest purpose was to prove that his relations to this woman were unhal- lowed and adulterous in their origin; that

their subsequent life together was that of libertine and mistress, and not of husband and wife; and that his word was therefore not entitled to the same weight as if his conduct had always been upright and blameless. It is now an elementary rule that a witness may be specially interrogated, upon cross-examination, in regard to any vicious or criminal act of his life, and may be compelled to answer, unless he claims his privilege. A party who offers himself as a witness in a criminal cause is not exempt from the operation of the rule. He is not compelled to testify, and, if not examined, the law provides that it shall not give rise to any presumption against him. When he elects to become a witness, it is for all the purposes for which a witness may be lawfully examined in the case; and he is not, in the constitutional sense, "compelled to be a witness against himself," although, when subjected to the test of a legitimate cross-examination, he may be required to make disclosures which tend to discredit or to incriminate him. *People v. Tice*, 181 N. Y. 657, 30 N. E. Rep. 494. The extent to which disparaging questions, not relevant to the issue, may be put, upon cross-examination, is discretionary with the trial court, and its rulings not subject to review here, unless it appears that the discretion was abused. *Turnpike Co. v. Loomis*, 32 N. Y. 127; *Gretton v. Smith*, 83 N. Y. 245. It is urged that this evidence should have been excluded because it tended to implicate the defendant's wife, who was a witness for him, and thus to impeach her, in an unauthorized way, before the jury. But any apprehended misuse of this species of evidence may always be avoided by asking and obtaining an instruction to the jury that it is only to be considered in determining the credibility of the witness who makes the confession.

The exceptions which remain to be considered relate to the evidence of the witness Fannie Romaine. She was, ostensibly, in the employ of the proprietor of the flat, as a chambermaid, and in that capacity had no other duties to perform, with reference to the occupants of the defendant's rooms, than pertained to the other rooms of the house. The prosecution sought to show that she had in fact become devotedly attached to the defendant and his wife, and was at the time of the homicide practically one of his household, and that their relations were intimate and confidential. We think the people were entitled to a submission of this proof, not as of a collateral, but as an independent, fact, and that the trial court properly allowed it to be so given. That such is the rule where the witness is hostile to the party against whom he is called cannot be questioned. As was said by Chief Justice Earl in *People v. Brooks*, 181 N. Y. 325, 30 N. E. Rep. 189: "The hostility of a witness towards a party against whom he is called may be proven by any competent evidence. It may be shown by cross-examination of the witness, or witnesses may be called who can swear to facts showing it." *Garnsey v. Rhodes*, 188 N. Y. 461, 34 N. E. Rep. 199. The same rule must prevail

where the relations of the witness to the party who produces him are more intimate and friendly than those which ordinarily exist in social or business intercourse. This kind of evidence is especially valuable in criminal prosecutions, for "there are no cases," says Wharton, "in which party sympathy, personal friendship, family affection operate, as a rule, so effectively, as where life and liberty are at stake. In such cases, while (unless in the relationship of marriage, to be hereafter discussed) there is no exclusion on account of bias, however strong, bias is always of importance in determining credibility. Nor is this exclusively on the ground that bias prompts perjury. So it may sometimes do, but cases of this class are rare, while cases in which bias leads to unconscious perversion of facts are frequent. \* \* \* For these reasons, interest and party or social sympathy may be always shown in order to discredit a witness, and the same observation may be made as to near relationship." Whart. Crim. Ev. § 376. In the pursuit of this line of proof, the people were permitted to show by the housekeeper of the flat that this witness spent a great deal of the time in the company of defendant's wife; that she was her companion, and went out to dinner with her in that capacity; and that she stayed with her evenings, and as late as 3 o'clock in the morning. The housekeeper was then allowed, under objection, to state that on one occasion the witness Romaine had told her that she used to go with the defendant's wife to hunt up the defendant, and remain outside of a well-known place of amusement two hours at a time, while defendant's wife was looking for him. The witness Romaine had denied upon her cross-examination that she had ever done so, or that she had ever so stated to the housekeeper. The evidence was properly allowed. It tended to contradict the Romaine woman as to a fact which was material in the case, and related directly to the intimacy of her associations with the defendant's family, and the extent to which she was willing to serve them. The housekeeper was also allowed to state, under objection, that Miss Romaine, while employed in the Percival flats, was an habitual opium eater, and that she was many times under the influence of the drug, and that Miss Romaine had told her that she could not leave it off, or she would go mad. The witness Romaine had admitted upon her cross-examination that she was in the habit of taking opium, and in reply to the question, "Were you under the influence of it on this particular night when this occurred?" she replied, "Not any more than any other time." She was asked if she had not told the housekeeper that, if she gave up the use of opium, it would kill her. She denied having so stated, or that she had any conversation with her upon the subject. Upon redirect examination, apparently for the purpose of excusing some discrepancies between her testimony on this trial and that given upon the examination before the police magistrate, the defendant's counsel asked her if she was not, at the time of the former exam-

ination, taking opium frequently, and she replied in the affirmative, and also stated that she was cured of the habit while in the hospital subsequently. Under these circumstances, we think the people were entitled to give independent proof of the extent to which this habit had control of her, and to contradict her testimony when she denied that she had stated that she was so addicted to the use of the drug at the time the homicide occurred that she could not live without it. She was one of the principal witnesses for the defense. She claimed to have been present when the defendant killed the deceased, and to have witnessed the entire occurrence, and to be able to give a minute description of the fatal encounter, and the value of her testimony depended largely upon the accuracy of her perceptions. If she was then under the influence of a powerful narcotic, whose well-known properties are to distort the vision and induce mental confusion, it was material to show it; and her denial of the admission she made to the housekeeper was the denial of a material fact, with respect to which she might be contradicted, if the denial was untrue. It was not within the rule which concludes the cross-examining party by the answers of the witness.

We are satisfied that no errors were committed on the trial, to the prejudice of the defendant, and the judgment of conviction must be affirmed. All concur.

(49 Ohio St. 374)

McROBERTS v. LOCKWOOD et al.

(Supreme Court of Ohio. May 3, 1892.)

PARTITION—APPEALABLE JUDGMENT.

1. A proceeding for partition of real estate, brought under chapter 9, div. 7, tit. 1, of the Code of Civil Procedure, is a civil action, although the petition states no equitable grounds for relief; and, being within the original jurisdiction of the court of common pleas, and the parties not being entitled to a trial by jury, the cause may be appealed to the circuit court, under the provisions of section 5226, Rev. St.

2. In such case the final judgment from which an appeal may be taken is not an order of the court made in confirming or setting aside the proceedings of the commissioners, or of the sheriff in apportioning or selling the premises, but is that which finds the parties to be entitled to partition, ascertains and declares the portion of each, and orders the share of each to be apportioned to their several owners.

(Syllabus by the Court.)

Error to circuit court, Erie county.

Statement by the court:

On November 4, 1887, the defendants in error filed in the court of common pleas of Erie county a petition for partition of certain lands and tenements in the petition described, making the plaintiff in error a defendant to the proceedings. The plaintiff in error (defendant in the court of common pleas) interposed no answer, and at the ensuing term of the court a judgment was rendered, finding that the defendants in error and the plaintiff in error owned the premises described in the petition in fee simple, as tenants in common, finding the share owned by each party, and ordering the

share of each to be set off to each of them in severalty. At the February term, 1888, the judgment was modified by including certain lands that had been omitted in filing the petition. Upon a writ of partition being issued, the lands were apportioned by the commissioners named therein, who reported their proceedings to the May term, 1888, of said court of common pleas, at which term they were approved and confirmed. The plaintiff in error, being dissatisfied with the division made by the commissioners, appealed the case to the circuit court. The latter court, upon the motion of defendants in error, dismissed the appeal, whereupon the plaintiff in error instituted proceedings in this court to reverse the judgment of the circuit court in dismissing the appeal. Affirmed.

U. T. Curran, for plaintiff in error.  
Goodwin, Goodwin & Hull, for defendants in error.

**PER CURIAM.** A proceeding to obtain the partition of real estate, instituted and conducted under title 1, div. 7, c. 9, of the Code of Civil Procedure, is a civil action. Whether the petition states facts of a character to invoke the equitable jurisdiction of the court or not, the action is one in which the parties are not entitled to a jury trial, and of which the court of common pleas had original jurisdiction, and therefore may be appealed to the circuit court under the general right of appeal provided for by section 5226, Rev. St. The judgment or decree from which an appeal may be taken is that which finally determines the rights of the parties. In an action to obtain the partition of real estate, the judgment that finds the parties to be tenants in common, ascertains and declares the share of each, and orders the shares so found to be apportioned to their several owners, is the one that determines the rights of the parties, and it is from this decree that an appeal in this class of actions may be taken. Whatever the law may be elsewhere, it has not been the policy of this state to allow appeals from orders of the court of common pleas in proceedings after judgment, such as confirmations of or setting aside sales of real estate and the like. The action of the court of common pleas in such cases is reviewable only by proceedings in error. *Reeves v. Skennett*, 13 Ohio St. 574. An order of partition partakes of the nature of an execution or order of sale. Proceedings under it may result in apportioning the premises, or, if they cannot be divided without injury, in their sale. Whether the commissioners apart the premises, or report that they are not susceptible to division without injury, and a sale of them is made by the sheriff, the orders of the court of common pleas in approving and confirming or setting aside the proceedings at their several stages of progress are not appealable. Section 5227, Rev. St., provides that a party desiring to appeal his cause to the circuit court, shall, at the term the order or judgment is made, give notice of such intention, and, within 30 days after the rising of the court, give an undertaking as

prescribed by that section. Notice of his intention to appeal the cause was not given by the plaintiff in error at the term of court at which the final judgment was rendered, nor was his undertaking filed within 30 days thereafter, for which reasons the appeal was properly dismissed. Judgment affirmed.

(49 Ohio St. 372)

**COMMISSIONERS OF ROSS COUNTY v. STATE** ex rel.

(Supreme Court of Ohio. May 3, 1892.)

**SHERIFF — COMPENSATION IN CRIMINAL CASES — CHANGE OF VENUE — FAILURE TO CONVICT.**

1. Where, in a criminal case, the venue is changed, and the state fails to convict, or defendant proves insolvent, the county in which the indictment was found is not liable for the fees of the sheriff of the county in which the trial was had.

2. Where, in a criminal case, the state fails to convict, or defendant proves insolvent, the only compensation to which the sheriff is entitled is the allowance, not exceeding \$300, provided for by Rev. St. § 1231.

3. Rev. St. § 1264, which prescribes the course of procedure where the venue is changed in criminal cases, does not affect the right of the sheriff of the county in which the trial is had to compensation.

Error to court of common pleas, Ross county.

Petition by the state ex rel. against the commissioners of Ross county, to compel defendants to allow relator's claim for certain fees as sheriff. There was a judgment for plaintiff, and defendants bring error. Reversed, and petition dismissed.

Marcus G. Evans, Pros. Atty., for plaintiff. Carpenter & Logan, for defendant.

**PER CURIAM.** Where, in a criminal case, the venue is changed, and the state fails to convict, or the defendant proves insolvent, the county in which the indictment is found is not liable for the fees of the sheriff of the county in which the trial was had. Section 1264, Rev. St., prescribing a course of procedure in such cases, does not affect the right of that officer to compensation. The only compensations which sheriffs are entitled to receive in cases where the state fails to convict, or the defendant proves insolvent, is the allowance, not exceeding \$300, provided for by section 1231 of the Revised Statutes. Judgment reversed, and petition dismissed, at the costs of the defendant in error.

(49 Ohio St. 370)

**NILES v. PARKS.**

(Supreme Court of Ohio. April 26, 1892.)

**JUDICIAL SALES — CONFIRMATION — SETTING ASIDE — MOTION — APPEAL.**

1. The court of common pleas has complete control over its own orders during the term at which they are entered, and may, in its discretion, on motion of the purchaser, set aside a sheriff's sale in an action to foreclose a mortgage, and an order confirming the same.

2. This discretionary power is not lost by continuing the motion to the next term, and when then decided it is the same, in legal con-

templation, as if the decision was made at the term at which the motion was filed.

3. On appeal from a judgment setting aside the sale and order of confirmation, the supreme court will not consider the evidence introduced on the hearing of the motion, to determine its sufficiency.

Error to circuit court, Lucas county.

Action against one Niles to foreclose a mortgage. The land was sold, under an order of sale, to Lysander Parks, who afterwards moved to set aside the sale and the order of confirmation. From a judgment for movant, Niles brings error. Affirmed.

Statement by the court:

The defendant in error, Lysander Parks, bid off certain land offered for sale by the sheriff under an order issued for that purpose in an action to foreclose a mortgage on the land. At the sale, and before Parks made his bid, it was announced, as he claims, by the sheriff, "that there were 301 acres in the tract of land that he was then offering for sale, and the sheriff further said that the land had been several times before offered for sale, and that if any person bidding on the land, who had not examined the land, or the title to the same, found either the title, or the quantity and character of the land, to be unsatisfactory, he would not be compelled to take the property. Whereupon Parks said, 'I have not seen the land, and do not know its value, but, judging from the number of acres, I should think the land cheap; and I will bid on it, on the conditions you offer it, and on no other;' and his bid was made and accepted expressly on the conditions above named, and said conditions were a part of his bid on said property." The land, which was sold as a tract containing 301 acres, was struck off to Parks, and return made of the sale by the sheriff, which was confirmed by the court before Parks saw the land, or had ascertained the quantity contained in the tract. It was represented to the court, at the time the sale was confirmed, that Parks had given consent to the confirmation, which he says was not true. Soon afterwards he examined the land, and caused it to be surveyed, whereby he discovered that the tract contained but 241 acres, and on that account was not as valuable as it would have been if it had contained the quantity represented. At the same term of the court at which the sale was confirmed, Parks filed his motion to set aside the order of confirmation and the sale, which motion was continued to the next term, when the court heard the evidence, and sustained the motion, setting aside both the order of confirmation and the sale. The defendant in the foreclosure suit, plaintiff in error here, excepted, and the evidence submitted on the hearing of the motion was embodied in a bill of exceptions, upon which error was prosecuted to the circuit court, and thence to this court.

Clayton W. Everett, for plaintiff in error. Parks & Barber, for defendant in error.

PER CURIAM. 1. This court will not consider the evidence introduced on the hearing of the motion for the purpose of determining whether it is sufficient to sustain the judgment of the court on the motion.

2. The court of common pleas had complete control over its own orders during the term at which they were entered, and might set aside the sale and entry of confirmation, at its discretion. *Huntington v. Finch*, 3 Ohio St. 445.

3. The discretionary power of the court in this respect was not lost by the continuance of the motion to the next term, and when decided at that term it was the same, in legal contemplation, as if the decision had been made at the term at which the motion was filed. *Bank v. Doty*, 9 Ohio St. 508. The case of *Ralston v. Wells*, (decided at this term,) 49 Ohio St. 298, 30 N. E. Rep. 784, is distinguished from this case in the essential feature that there the motion was filed at a term subsequent to that at which the judgment was rendered. Judgment affirmed.

(49 Ohio St. 229)

#### STATE ex rel. v. SCHWAB.

(Supreme Court of Ohio. March 8, 1892.)

CONSTITUTIONAL LAW—SPECIAL ACT CONFERRING CORPORATE POWERS—VALIDITY.

Act March 25, 1891, (88 Ohio Laws, p. 197,) entitled "An act to supplement sections 1672, 1675, and 1676 of the Revised Statutes," and which provides, *inter alia*, that in cities of the third grade of the second class, having a population, at the eleventh federal census, of 17,565, one member of the council at large shall be elected annually, who shall be president of the council, and appoint all standing committees, applies only to the city of Hamilton, and is in conflict with Const. art. 13, § 1, which provides that the general assembly shall pass no special act conferring corporate powers.

Quo warranto proceedings by the state ex rel. against Schwab. Judgment for plaintiff.

W. C. Shepherd, for plaintiff. Thomas Millikin and M. O. Burns, for defendant.

PER CURIAM. The act of March 25, 1891, entitled "An act to supplement sections sixteen hundred and seventy-two, sixteen hundred and seventy-five, and sixteen hundred and seventy-six, of the Revised Statutes," (88 Ohio Laws, p. 197,) which provides, among other things, that in cities of the third grade of the second class, having a population, at the eleventh federal census, of 17,565, one member of the council at large shall be elected annually, who shall be president of the council, and appoint all standing committees, applies only to the city of Hamilton, and is in conflict with section 1 of article 13 of the constitution<sup>1</sup> of this state, and void. Judgment of ouster.

<sup>1</sup> Const. art. 13, § 1, provides as follows: "The general assembly shall pass no special act conferring corporate powers."



(135 Ind. 80)

**RICHWINE v. PRESBYTERIAN CHURCH  
OF NOBLESVILLE.**

(Supreme Court of Indiana. Sept. 22, 1893.)

**COMPLAINT FOR INJUNCTION—SUPPLEMENTAL COMPLAINT—ANSWER TO CROSS COMPLAINT—NEW TRIAL AS OF RIGHT—BOUNDARIES—EVIDENCE.**

1. Under Rev. St. 1881, § 399, which authorizes the court to allow supplemental pleadings where a complaint alleges that defendant is threatening to enter on plaintiff's property, and asks that he be enjoined, it is not error to permit a supplemental complaint to be filed, averring that since the filing of the first complaint defendant has entered on the premises, and asking for possession and damages.

2. Where defendant, in such case, files a cross complaint claiming title, an answer thereto is not bad which disclaims title in plaintiff to all land claimed by defendant, and lying south of "the line formerly and until recently occupied by the fence that stood three feet south of, and parallel with, the south wall of" plaintiff's church building, and denies title in defendant to all land north of such line.

3. Where a party enters on land after a suit is commenced against him to enjoin him from entering, he cannot be heard to say, after the court decides against him, and awards plaintiff nominal damages, that he entered on the premises in good faith.

4. Where, by supplemental complaint, a cause of action for damages and possession of real estate is joined with an action to enjoin defendant from entering on the land, and for damages, and the two causes, as thus joined, whether properly or improperly, proceed to judgment, by which all questions at issue under both causes of action are adjusted, the defeated party is not entitled to a new trial as of right.

5. Where a cause of action, in which a new trial as of right should be granted, is improperly joined with a cause of action wherein a new trial will not be awarded as of right, and the causes, as thus joined, proceed to judgment, the fact that the defeated party unsuccessfully objected to the misjoinder by demurrer will not entitle him to a new trial as of right, since he could have prevented the misjoinder by standing on his demurrer.

6. In an action by a church for possession of real estate, it is not error to refuse to permit defendant to prove by a former owner that the witness held the land in dispute, up to a certain line, under a claim of right, unless it is first shown that such claim was made to the church, or some person entitled to act for it.

7. Where, in a controversy as to the division line of real estate, it appears that there is no record of the original monuments or surveys, so that recent surveys are only approximately correct, the testimony of those who remember where the corners and line were, as shown by a fence erected nearly 40 years before the trial, and subsequently removed on becoming dilapidated, will control, in favor of the party claiming to such line and occupying the premises for many more than 20 years prior to the bringing of the action, as against the paper title of the parties, and the evidence of many witnesses that they do not remember such fence, and that they had never seen it.

Appeal from circuit court, Marion county; E. A. Brown, Judge.

Action by the Presbyterian Church of Noblesville against George C. Richwine for an injunction, the possession of real estate, and for damages. From a judgment for plaintiff, defendant appeals. Affirmed.

Shirts & Kibbourne and Stephenson & Fertig, for appellant. F. B. Pfaff and Kane & Davis, for appellee.

HOWARD, J. The appellee alleges in its complaint that said church is the owner and entitled to the possession of a part of lot 5 in square 14 in the town (now city) of Noblesville, "beginning at a point on the west line of said lot, and three feet south of the foundation and south wall of said church building, and run thence east, 132 feet, to the east line of said lot; thence north to the north line of said lot; thence west, 132 feet, to the west line of said lot; and thence south to the place of beginning." It is further alleged "that said church has held the exclusive and adverse possession of said premises, claiming to be the owner thereof, continuously, for forty years;" and it is averred that the defendant, the appellant in this appeal, "is entering and threatening to enter on said premises, and is erecting and threatening to erect thereon buildings for his own use and occupancy, and that, unless restrained by this court, he will make excavations and erect such buildings on said premises, and will so construct and erect the same as to shut off the light and air on the south side of said building, and interfere with the use and enjoyment thereof by said members of said church, who hold and have held devotional and religious exercises therein for forty years last past;" asking for damages and an injunction. In a supplemental complaint it is alleged, "that said defendant, since the commencement of this suit, and with full knowledge of the plaintiff's rights, as above stated, has entered upon and taken possession of said real estate, although forbidden by the plaintiff so to do, and has made excavations thereon, torn down and removed fences therefrom, erected buildings, walls, and other structures thereon for his own use and benefit, and for his own exclusive occupancy;" asking for damages and possession. A demurrer to the complaint for improper joinder of causes of action was overruled, as was also a motion to strike out the supplemental complaint, and also a motion to separate the complaint into paragraphs; also a demurrer to the complaint for want of facts. The answer is in four paragraphs: (1) Admitting the acts complained of, but denying that they took place on any part of said lot "other than 26 2-5 feet off of the south side thereof;" (2 and 3) the statute of limitations; and (4) the general denial. There is also a cross complaint to quiet title to said "twenty-six and two-fifths feet off the south side of lot five." A reply in general denial was made to the first three paragraphs of the answer, and an answer in three paragraphs to the cross complaint, (1) denying appellant's title to any part of said lot five, "situate and lying north of the line formerly and until recently occupied by the fence that stood three feet south of, and parallel with, the south wall of the church building;" (2 and 3) the statute of limitations. A demurrer to these paragraphs of answer to the cross complaint was overruled, and the appellant replied in general denial. On a trial

by the court, there was a finding for the appellee. A decree was entered, awarding damages in the sum of one cent, quieting the title of appellee, awarding a writ of ejectment against appellant, and enjoining the appellant from any further interference with appellee's possession and enjoyment of said real estate.

Numerous rulings on the pleadings are assigned as errors and discussed by counsel. Whether it was error to overrule the demurrer to the complaint for improper joinder of causes is a question which it would avail nothing to decide, for the reason that the statute has expressly provided that such error, if it exist, shall not be sufficient to reverse a judgment. Rev. St. 1881, § 341; *Rennick v. Chandler*, 59 Ind. 354; *Coan v. Grimes*, 68 Ind. 21; *Haala v. Stewart*, 109 Ind. 371, 9 N. E. Rep. 403.

We do not think the court erred in refusing to strike out the supplemental complaint. The statute (Rev. St. 1881, § 399) authorizes the court to allow supplemental pleadings showing facts which occurred after the former pleadings were filed. The original complaint stated that appellant was threatening to enter upon appellee's property, and asked that he be enjoined from so doing. The supplemental complaint averred that since the filing of the first complaint the appellant had actually entered upon the premises, and asked that possession be restored to appellee. We think the pleading was in conformity with the statute, and that it was in harmony with the cause of action made by the original complaint. "The office of the supplemental complaint . . . is to bring upon the record such new facts that the court may grant the proper relief upon the facts existing at the time of the final decree." *Patton v. Stewart*, 4 Ind. 448. In the case at bar the additional averments in the supplemental complaint enabled the court to give to the appellee a complete remedy in the final decree; the order of ejectment being based upon the facts stated in the supplemental complaint, and proved upon the trial. The policy of the law is, so far as it can be done, to give a complete remedy in one suit for all wrongs complained of, growing out of the same transaction, and so put an end to the litigation. The supplemental pleading in this case, taken with the original, formed but a single complaint. This complaint was, in effect, a claim for the recovery of real property, with damages for injury to the land, and a prayer to quiet title, all of which may be united, as appears by clause 5 of section 278, Rev. St. 1881. But our courts are courts of law and equity, and while the court in this case had undoubted power to render a decree for possession, quieting title, and damages, it also had power, in the same decree, to enjoin the commission or continuance of the injury complained of. The prayer for injunction was therefore properly united with the prayer for damages, for recovery of possession of the real estate, and to quiet title to the same. *Dannell v. Allen*, 53 Ind. 180; *Field v. Holzman*, 93 Ind. 205; *Bishop v. Moorman*, 98 Ind. 1. We think that the pleading, as a

whole, was good, and that the motion to strike out the supplemental complaint was properly overruled.

Whether the motion to separate the complaint into paragraphs should have been allowed, need not be inquired into. The error, if any, was harmless, and, in any case, could not avail on appeal. Section 341, Rev. St. 1881; *Railway Co. v. Rooker*, 90 Ind. 581.

The answer to the cross complaint was not bad for the reason that it disclaimed title in the appellee to all land claimed by appellant, and lying south of "the line formerly and until recently occupied by the fence that stood three feet south of and parallel with, the south wall of the church building," and denied title in the appellant to all land north of that line. This answer, indeed, states the principal issue between the parties, and nearly the whole body of the evidence given in the case was directed to the question of the existence or nonexistence of the line of division thus referred to.

The appellant made three motions to modify the decree in accordance with the views maintained by him in his pleadings, and supported by the evidence adduced by him. The motions were severally overruled. The court found for the appellee on its pleadings, and on the evidence given in the case. This finding resulted in giving to appellee the land in dispute. To sustain the motions of appellant to modify the decree so as to give him a part of the property already found to belong to the appellee would have been quite inconsistent. Nor can it be said, as counsel for appellant contend, that appellant acted in good faith in entering upon the disputed territory, and erecting his buildings thereon. This entry was made and the buildings erected by him after the filing of appellee's original complaint, and against the express prohibition of appellee. Appellant acted with his eyes open, and at his own peril. He was not taken advantage of, nor unawares; but, after suit was brought to enjoin his entering upon the premises, he deliberately proceeded to do what the court was about to decide whether he had a right to do or not. The court having decided against him, he cannot now be heard to claim that he was an occupant in good faith. He took the hazard, and must abide by the result. The court undoubtedly took all equities of this nature into consideration, in awarding appellee's damages at one cent, for the case discloses more than nominal damages to appellee.

We think the court correctly ruled that appellant was not entitled to a new trial as of right. Where the title to real estate, only, is involved, as in ejectment or suit to quiet title, a new trial as of right should be awarded on motion. But where two causes of action are joined, in one of which the title to real estate is, and in the other is not, involved, the rule is different. This action was originally, and remained to the end, one for injunction and damages, in which a new trial as of right was not allowable. In the supplemental complaint the cause of action was one for damages, and the possession of real es-

tate. Whether these causes of action were improperly joined, as appellant contends, or whether they were properly joined, the causes proceeded to judgment, and the decree adjusted all questions at issue under both causes, and in such case the policy of the law is not to allow a new trial as of right.

Counsel for appellant, in their very able and elaborate argument, quote the following from the case of *Wilson v. Brookshire*, 126 Ind. 497, 25 N. E. Rep. 181: "The rule is that where a cause proceeds to judgment, which embraces a substantive cause of action, in which a new trial as a matter of right is not allowable, then, even though it embraces other causes, in which a new trial as of right is allowable, the policy of the law is to regard that cause of action as controlling in which a second trial as of right is not permitted." *Bradford v. School Town of Marion*, 107 Ind. 280, 7 N. E. Rep. 256; *Butler University v. Conard*, 94 Ind. 353." Of this statement of the rule, as given by Judge Mitchell, counsel for appellants say in their brief: "So far as appears from the statement of facts in that case, the statement therein made by the court was correct, as applying thereto. It is correct as applied to a case where two causes of action are properly joined, in which no new trial as of right is allowable as to one of them, and where the party otherwise entitled to a new trial acquiesces in such joinder; and it is also correct as applied to a case where two causes of action have been improperly joined, and the case proceeds to judgment without objection." We agree with the statements of the learned counsel, but counsel say that the rule does not apply where causes have been improperly joined over the objection of the party otherwise entitled to a new trial as of right; that "what the learned judge meant by the statement, 'where the case proceeds to judgment,' was simply that where such case proceeded to judgment without objection no new trial as of right could be had." This contention is fully answered by the quotation in appellant's brief from *Butler University v. Conard*: "The defendant has it in his power, by demurrer, to prevent the misjoined causes of action from being tried together. If the plaintiff, by his fault, incorrectly joins two or more claims in one action, and the defendant permits the misjoined causes to go to trial together, the unsuccessful party in the trial should not be heard to complain because a new trial as of right is refused. Either party had it in his power to have the cause of action in which such new trial is proper tried by itself, and thus to secure, in case of an adverse judgment, the benefit of a new trial without cause." It is not enough for appellant to say, in answer to this, that the court overruled his demurrer. He could have stood upon his demurrer, refused to plead further, and thus prevented the improperly joined causes from proceeding to judgment. But we do not think there was an improper joinder of causes. The action was substantially one for injunction and damages, the question of title being incidental. Neither a jury trial, nor a new trial as of

right, could be demanded. *Miller v. City of Indianapolis*, 123 Ind. 196, 24 N. E. Rep. 228.

In the motion for a new trial for cause, four reasons are given; the first and second being that the finding and judgment are not supported by sufficient evidence, and that they are contrary to law. The third reason given, that the court refused to permit the appellant to prove the acts and declarations of one Wallace, a member of the church congregation, in connection with a certain survey of the disputed territory, presents no question, for the reason that no exception to the ruling of the court is shown in the record. Neither was it shown what acts or declarations it was proposed to prove. Nor does it appear that Wallace had any authority to speak for appellee, or to bind the church by his words or actions.

The fourth reason assigned for a new trial is that the court refused to allow a witness, Eli Shumack, a former owner of the land now owned by appellant, to prove that he held the real estate in controversy, up to a certain line, under a claim of right. The court refused to allow the evidence unless it was shown that the claim was made to the church, or some officer or other person entitled to act for the church. We think this was right. The mere intent which a person has in mind when he does an act cannot bind an adverse party, to whose knowledge that claim or interest is not brought. Besides, the ruling of the court was harmless to appellant. The witness had already, over appellee's objection, answered fully as to his claim of title to the land in question.

A mass of evidence was introduced by both parties, principally to determine the location of the line dividing the lands of appellant from those of appellee. We have gone carefully over the record, of nearly 750 pages, and are satisfied that, while there is much conflict in the testimony, yet there was ample evidence to support the finding of the court. Appellee's claim is that, at the time of building the church, being about 40 years before the bringing of the suit, and at a time when the adjacent lots were vacant, and the surrounding streets and alleys not well defined, the church authorities located their lot by measurements then believed to be correct; that they placed their church building within their own ground, and three feet away from appellant's land; that they built a fence around their lot, setting the fence on appellant's side only, two feet and six inches from the church, or six inches from appellant's land, so that the fence might be wholly upon the church ground; that this fence so remained until about 1876 or 1877, when, by agreement with, and at the request of, Eli Shumack, then owner of appellant's land, this fence, having become dilapidated, was removed; that Shumack at the same time agreed to protect and care for the church property; and that no claim to the disputed ground was ever made by appellant, or any of those through whom he derives title, until about the time of the bringing of this suit. The

only two survivors of those who made the original measurement of the church lot, and had the partition fence built, testified to the foregoing facts, and they were corroborated by numerous witnesses who had seen the fence during the whole period that it was up, and also by the man who assisted in its removal. Many witnesses, however, testified that no such fence ever existed; but we are of opinion that this conflict may be reconciled, in a large degree, by the circumstance that some witnesses testified as to what they had seen and remembered, while others, equally honest, testified as to what they had not seen or did not remember. Several surveyors and engineers testified that there is no record now left of any monument of the original town of Noblesville. They also testified as to late surveys or measurements made from certain stones placed about 20 years before the time of the suit, but admitted that the location of those stones was only approximately correct, or, rather, assumed to be correct. Of course, the location of lot lines and corners measured from such monuments could only be approximately correct. It is true that in case of a survey as provided by statute, (Rev. St. 1881, §§ 5950 to 5955,) to determine and perpetuate a line or a corner, the surveyor's record, if unappealed from, would suffice. But in this case no record was kept of any survey, and the testimony given by the surveyors was of very little value, except to show that all the original monuments of the town have been lost. The testimony of those who remembered where the lines and corners of the lots were originally established, and where they have since been maintained, must control. Because appellant's paper title gives him 26 2-5 feet, and appellee's calls for only 39 3-5 feet, this cannot avail to give appellant a part of the land claimed adversely, and occupied by appellee for many years preceding the 20 years prior to this action. Nor is it material that the church authorities may have been mistaken in the beginning, when measuring their lot, erecting their church, and building their fence around it. The testimony is that the measurements were made from an ancient stake, which was believed at the time to mark the corner of the church lot according to the original plat of the town. The lines so determined, and recognized for 40 years since, cannot now be called in question. *Flynn v. Glenn*, 51 Mich. 580, 17 N. W. Rep. 65, and cases there cited; *Brown v. Anderson*, 90 Ind. 93; *Wingler v. Simpson*, 93 Ind. 201; *Roots v. Beck*, 109 Ind. 472, 9 N. E. Rep. 693.

Whether appellee sued in the proper corporate name is a question not properly raised by the record. For all that appears, the suit was brought by the trustees in the corporate name chosen by the church society, and no question was made of this by either party during the trial. This is all that the statute requires. Rev. St. 1881, § 3824, and other sections. Even if it were otherwise, it would now be too late to raise the question. *Heaston v. Railroad Co.*, 16 Ind. 275; *Presbyterian*

*Church v. Horton*, 50 Ind. 222; *Wiles v. Trustees, etc.*, 68 Ind. 206. We find no available error in the record. The judgment is affirmed.

(3 Ind. App. 305)

#### **HALLETT v. HALLETT et al.**

(Appellate Court of Indiana. Sept. 20, 1893.)

**INSANITY OF HUSBAND—RIGHTS OF WIFE—ACTION FOR SUPPORT AGAINST GUARDIAN.**

1. An action by a wife against the guardian of her insane husband for support is, in effect, against her husband, and will not lie, as the common law gives no such right, and the statute gives it (Rev. St. § 5132) only where the husband has deserted his wife, or is in the state prison, or is an habitual drunkard, or has renounced the marital relation, and refused to live with his wife, by joining a sect requiring such renunciation.

2. In such case, however, she may procure necessities, and her husband's estate will be liable therefor, or, if the guardian refuses to furnish support, she may apply to the court under whose authority he is acting, to compel him to make suitable provision.

3. Though timber, while standing on land of an insane husband, is part of the realty, when severed by his guardian it at once becomes personalty, and the wife cannot recover from him one-third of the proceeds of a sale thereof.

4. Where, before appointment of a guardian for an insane husband, the wife and children are in possession of his land, and raise a crop thereon, they are entitled thereto for their support, and may recover from the guardian as an individual, if he takes possession and sells the same, since the common law, in case of the involuntary absence of the husband, gives the wife the right to use his property to provide a support for herself and children.

5. The wife, however, in such case, cannot recover from the guardian, as such.

Appeal from circuit court, Montgomery county; E. C. Snyder, Judge.

Action by Rebecca Hallett against Elijah P. Hallett and others. From a judgment for defendants, on sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Hurley & Clodfelter for appellant. W. T. Whittington, H. A. Wilkinson, and H. D. Van Cleave, for appellees.

ROSS, J. The appellant, in May, 1891, filed her complaint in three paragraphs, alleging that she and the appellee Elijah P. Hallett were husband and wife, having been married 15 years prior to the filing of her complaint; that they lived and cohabited together from the time of their marriage until in the year 1888, at which time her said husband became of unsound mind, and was sent to the hospital for the insane, at Indianapolis, where he is now confined; that as a result of such marriage there was born to them five children, all of whom are now living, and range in age from 4 to 14 years; that at the time her husband became insane he was the owner of an undivided one-third interest in 200 acres of land, said interest therein being of the value of \$2,200, also the owner of personal property of the value of \$300; that there was situated on said land a dwelling house and other nec-

<sup>1</sup>Rehearing denied.

essary outbuildings, which were occupied and used by appellant, her husband, and their children, and after her husband became an inmate of the hospital she and their children continued to reside on said land, and occupy said dwelling house as a home, and continued to use the real estate and personal property of her said husband in supporting herself and children; that by the use of all of her husband's property, and by the most persevering industry and strictest economy, she was hardly able to support herself and children from the use of said property; that about two years after said Elijah P. Hallett became insane the appellee Henry D. Van Cleave was appointed his guardian, who, as such guardian, immediately took possession of all the property and effects of his ward, together with 85 bushels of wheat, which she had raised on said land, of the value of \$70, and that he afterwards returned to appellant about \$300 worth of the personal property, consisting of live stock and household goods; that in October, 1890, in a suit brought by the owners of the other two-thirds of said land against said Van Cleave, as guardian, for partition, there was set off to said Elijah P. Hallett 68 acres and 72-100 of an acre, the greatest part of which was in timber, there being no dwelling house thereon; that said guardian, under an order of the court, sold timber from the land, receiving therefor the sum of \$410; that she has been deprived of her only means of support for herself and children by reason of the taking from her of her husband's said property, and that she and her infant children are dependent upon charity; that, in the care and support of their children during the year preceding the filing of her complaint, she incurred liabilities in the sum of \$250, which she requested said guardian to pay, and that he refused to pay the same, or in any manner provide for her or her children; that, soon after said guardian procured the order for the sale of said timber, she demanded that he turn over one-third of the proceeds of such sale to her, which he promised to do, but has failed and refused to do. To each paragraph of the complaint the defendants filed demurrers, which were sustained by the court, and, the plaintiff refusing to amend, judgment was rendered in favor of the defendants.

In support of the sufficiency of the facts alleged to constitute a cause of action, it is insisted—First, that appellant and her children are entitled to support out of the husband's estate, and for a failure to furnish the same a cause of action accrued in her favor against the guardian; second, that appellant having an inchoate interest in her husband's real estate, the timber being a part of the real estate, a sale thereof by the guardian gave her a vested right in one-third of the proceeds of such sale; and, third, that she was entitled to recover the value of the 85 bushels of wheat which she raised on her husband's lands, and which was taken from her by said guardian.

This action is virtually against the husband for support. Under the common law, no such right of action existed in favor of the wife. Hence, we must look

to the statute for a remedy, if any exists.

A husband is liable for necessities furnished his wife, although not furnished at his request, nor under an express promise to pay therefor. *Eiler v. Crull*, 99 Ind. 375. It is the duty of a husband to support his wife, and this legal obligation creates a liability in favor of one furnishing her the necessities for such support; and, while the common law afforded the wife no personal remedy, for which she could bring an action and enforce such remedy, yet, through the rules of agency, she was enabled to bind his credit, thus procuring the desired result. Numerous statutes have been enacted by the legislature of this state enlarging the rights and remedies of the wife. For instance, section 5132, Rev. St., provides that "a married woman may obtain provision for the support of herself and the infant children of herself and husband, in her custody, in any of the following cases: First. Where the husband shall have deserted his wife, or his wife and children without cause, not leaving her, or them sufficient provision for her or their support. Second. When the husband shall have been convicted of a felony and imprisoned in the state prison, not leaving his wife or his wife and children sufficient provision for her or their support. Third. When the husband is an habitual drunkard, and by reason thereof becomes incapable, or neglects to provide for his family. Fourth. When a married man renounces the marriage covenant, or refuses to live with his wife in the conjugal relation, by joining himself to a sect or denomination the rules and doctrines of which require a renunciation of the marriage covenant, or forbid a man and woman to dwell and cohabit together in the conjugal relation according to the true intent and meaning of the institution of marriage." Again, section 2968, Rev. St. 1881, provides that "in all cases where the guardian of any person of unsound mind, under the direction of any court of competent jurisdiction, has made or may hereafter make sale of any lands of such person of unsound mind, the wife of such person of unsound mind may, by her separate deed, release and convey all her interest in and title to such land; and her deed, so made, shall thereafter debar her from all claim to such land, and shall have the same effect on her rights as if her husband had been of sound mind, and she had joined with such husband in the execution of such conveyance." The law of descent (section 2492, Rev. St. 1881) reserves to the widow and children the use of the family dwelling house, and the messuages thereunto pertaining, and fields adjacent, not exceeding 40 acres, free of rent for one year from the death of the husband; and section 262, Id. 1881, reserves, in case of the husband's death, for the use of the widow and minor children, all the provisions on hand, provided for consumption by the family. Admitting, as we must, that for a husband to become hopelessly insane is a greater misfortune to his family than his removal by death, yet none of the above sections of the statute provide a remedy, in case of his insanity, whereby the wife may either sell or

incumber her husband's estate, or have any interest therein set off to her in her own right. Whether the husband is sane or insane, the wife is entitled to support; and while she can neither dispose of his estate, nor sue and recover means from his estate with which to support herself, except in the cases provided by section 5132, *supra*, she may procure the necessities for the support of herself and children, and the husband's estate will be answerable therefor. In the case of *Booth v. Cottingham*, 126 Ind. 431, 26 N. E. Rep. 84, which was an action brought by the appellant to recover for medical services rendered the wife of appellee's ward, the court says: "It would be a reproach to the law if the wife of an insane man, whose estate is in the hands of a guardian, were denied the necessities of life, (and surely medical attention in illness is necessary,) but no such reproach rests upon the law. For many years it has been settled that the wife of an insane man shall be provided with such things as are reasonably necessary to her comfort and welfare." As long as no guardian had been appointed to take charge of and manage her husband's estate, the appellant had a right to manage and use it for the support of the family, but, upon the appointment of the appellee Van Cleave as guardian, he became the proper custodian of all his ward's estate. If such guardian failed or refused to make suitable provision for appellant and her children, she might have applied to the court under whose authority the guardian was acting, and the court would direct the guardian to make proper provision. This seems to have been the course pursued in the case of *State v. Wheeler*, 127 Ind. 451, 26 N. E. Rep. 552, 1008, which meets our approval as to the proper course to pursue.

It is true that the timber, while standing upon the land, was a part of the realty itself, but when it was severed it at once became personal property.

Among other facts alleged in the first paragraph of the complaint, it is averred that appellant raised 85 bushels of wheat on her husband's land the year preceding the appointment of the appellee Van Cleave as guardian, which he, as such guardian, took possession of and sold. The appellant and her children had such an interest in the wheat raised by them previous to the appointment of appellee Van Cleave as entitled them to use the same for their maintenance and support, and to the possession of which he had no right as such guardian. While we find no direct provisions authorizing the wife, in case of the involuntary absence of the husband, to cultivate his lands, and thus provide for the support of herself and children, an unwritten law grants to the wife the right, by her own exertions, to provide sustenance and clothing for herself and those left helplessly in her charge, and to that end she may use the property of her husband. In *Loy v. Loy*, 128 Ind. 150, 27 N. E. Rep. 351, which was an action brought by the appellant to enjoin the use and removal of personal property claimed by appellant under a chattel mortgage given by the husband after he had deserted his

wife and children, the mortgagee being cognizant of the facts, the wife set up in defense the fact of such desertion and failure to provide by the husband, and that her children, after such desertion, had planted the crops mortgaged, which had been cultivated for the support of herself and children, the same constituting their sole dependence for subsistence. This answer was sustained by the lower court, and on appeal the supreme court says: "A husband who wrongfully abandons and refuses to support his wife and family not only subjects himself to the various civil and criminal penalties provided by legislative enactment, but he impliedly clothes her with authority to feed and clothe herself and children by the ordinary use and consumption of the property left in her possession, and, to a limited extent, to exercise such authority and control over his property and business as may be necessary for its preservation, and the support of herself and children." Such seizure and conversion by the appellee Van Cleave vests no right of action in appellant against him as such guardian, but, if any exists, it would be against him as an individual. *Rose v. Cash*, 58 Ind. 278.

Counsel for appellant, while pointing out with great clearness the justness of a wife's claim to support out of the estate of her insane husband, have failed to cite either statute or adjudicated case wherein the wife is given a right of action against her husband's estate for such support, and we are unable to find any such authority. There was no error in sustaining the demurrers to each paragraph of the complaint. Judgment affirmed.

(8 Ind. App. 297)

#### LAKE ERIE & W. R. CO. v. ARNOLD.<sup>1</sup>

(Appellate Court of Indiana. Sept. 20, 1893.)

#### CARRIERS—EJECTION OF PASSENGER—DAMAGES—INSTRUCTIONS—APPEAL.

1. The amount of damages for humiliation and shame laid upon a passenger by his wrongful ejection from a train is for the jury to determine, and a verdict for \$500 will not be disturbed as excessive.

2. The fact that the amount of additional fare wrongfully demanded of a passenger before ejecting him was trifling, and could have been paid by him, and that the conductor advised him to pay it, and fix the matter up with the ticket agent, cannot be considered in mitigation of damages for such ejection.

3. Nor can the fact that, at the time the additional fare was demanded, there was a doubt as to the terms of the ticket previously given the conductor, be considered in mitigation, as it was as much the carrier's duty to give way as the passenger's.

4. In an action against a carrier for wrongfully ejecting plaintiff from its train for refusal to pay additional fare after he had given the conductor a ticket, where the terms of the ticket were disputed, but not until after it had been taken up, and the ticket was not in evidence on the trial, a request by defendant to charge that the conductor is not required to accept a passenger's statement as to his right to be carried; that the ticket presented by him is conclusive evidence of his right, and, if it shows on its face that he is not entitled to passage, the conductor may eject him,—was properly refused, as inapplicable to the evidence.

<sup>1</sup>Rehearing denied.

5. Affidavits used on motion for a new trial will not be considered on appeal where they are merely marked exhibits, and copied into the record, but are not made a part of the record by bill of exceptions or order of the court.

Appeal from circuit court, Tipton county; L. J. Kirkpatrick, Judge.

Action by George S. Arnold against the Lake Erie & Western Railroad Company for wrongfully ejecting plaintiff from a train on which he was a passenger. From a judgment for plaintiff, defendant appeals. Affirmed.

W. E. Hackedorn and Beauchamp & Mount, for appellant. Blackledge, Shirley & Moon, for appellee.

LOTZ, J. The appellee was the plaintiff and the appellant the defendant in the court below. In his complaint, appellee charged, in brief, that he purchased a ticket of the defendant's agent in the city of Kokomo, which ticket entitled him to ride upon the defendant's passenger train, from the city of Kokomo to the city of Indianapolis; that he took passage upon defendant's train at said city of Kokomo, and presented his said ticket to defendant's agent, the conductor of said train, and that said ticket was received and accepted by said conductor; that he was carried upon said train to a point beyond the city of Noblesville, when said conductor came to him, and, in the presence of other passengers, demanded of the plaintiff that he pay his fare from Noblesville to Indianapolis, stating that the ticket taken by him from plaintiff only entitled plaintiff to ride upon said train to Noblesville; that plaintiff refused to pay said additional fare wrongfully demanded of him, and that said conductor then demanded of plaintiff, in the presence and hearing of other passengers, that he leave said train, which plaintiff refused to do; that said conductor used towards plaintiff opprobrious epithets, and accused him of attempting to defraud, by riding without paying his fare; that, when the train reached a station called "New Britain," the said conductor again demanded of plaintiff that he pay his fare, and plaintiff again refused, and said conductor then wrongfully and by force ejected plaintiff therefrom; that plaintiff was greatly angered, mortified, and disgraced thereby, and endured great mental suffering and physical pain. The defendant answered this complaint by the general denial. There was a trial by jury, and a verdict for the plaintiff in the sum of \$500.

The assignment of error discussed by appellant's counsel is that the court erred in overruling the motion for a new trial. It is strenuously insisted that the verdict is not sustained by sufficient evidence. We have examined the evidence with some care, and, while it is in some respects conflicting, yet we think it fairly supports the verdict. The elaborate and forcible argument made by the appellant's counsel on this point, we presume, was presented to the trial court. If it was unavailing there, under the fixed rules governing appellate courts, it must surely prove futile here.

Another cause assigned for a new trial is that the damages assessed by the jury are excessive. The action made by the complaint sounds in tort. It seeks to recover damages for the humiliation and shame laid upon appellant, and for an injury done to his person. In this class of cases, it is the peculiar province of the jury to assess the damages. In the case of *Coleman v. Southwick*, 9 Johns. 45, Kent, C. J. said: "The question of damages was within the proper and peculiar province of the jury. It rested in their sound discretion, under all the circumstances of the case; and unless the damages are so outrageous as to strike every one with the enormity and injustice of them, so as to induce the court to believe that the jury must have acted from prejudice, partiality, or corruption, we cannot, consistently with the precedents, interfere with the verdict. It is not enough to say that, in the opinion of the court, the damages are too high, and that we would have given much less. It is the judgment of the jury, and not the judgment of the court, which is to assess the damages in actions for personal torts and injuries." This language has been quoted with approval by the supreme court of this state. *Railway Co. v. Collarn*, 73 Ind. 261, 274. Under the allegations of the complaint, and under the instructions of the court, in order to entitle the appellee to a verdict, the jury must necessarily have found that the appellee purchased a ticket from Kokomo to Indianapolis, and that the conductor was in the wrong in expelling appellee from the train. It may be, and we think the evidence shows, that the conductor was acting in good faith, and that he honestly believed that the ticket taken up by him only entitled appellee to ride to Noblesville. But the jury must have found that the conductor either made a mistake, or purposely tried to extort an additional fare from appellee. In either event, the appellant would be liable for his tortious conduct.

Counsel for appellant insist that the conductor treated the appellee in the most courteous and gentlemanly manner possible under the circumstances; that he advised appellee to pay his fare, and then settle the matter with the agent at Kokomo, and that, even after the expulsion from the car, he advised him to purchase a ticket, or pay his fare, and continue his journey to Indianapolis; that appellee refused to do this, although he had the money with which to pay his fare; that his expulsion was largely due to his own conduct, and was invited by him for the purpose of laying the foundation for an action; that, under such circumstances, the damages are excessive, and show that the jury were improperly influenced by prejudice or partiality. It is true that the appellee was offered an opportunity to pay his fare, and continue his journey unmolested, and that he had the money with which to pay, and was advised to settle the matter with the agent at Kokomo, and that he refused to do so, and that he refused to leave the car until the conductor took hold of him, and that no great violence or injury was done to his



person. The attitude and manner of the conductor was firm, and attended with some asperity, and the attention of the other passengers was attracted by the controversy between them. The conductor testified that the appellee got off under protest and against his will, and that he was prepared to use force, if necessary, to put him off. We do not concur in the doctrine that it was the duty of the appellee to pay the extra fare demanded of him, and afterwards settle the question in dispute with the company or its agents; nor do we think his failure so to do can be considered in mitigation of damages. It is true that the amount demanded was trifling, but the principle involved is the same as if the sum demanded had been a large one. However much we may commend the conduct of that person who yields his rights to avoid a difficulty, it is nevertheless the privilege of every person to stand upon his strict legal rights, and the law does not require him to yield them, or make concessions to avoid trouble. The argument that the damages are excessive impliedly admits that some damages are recoverable. The jury found that the appellant's agent was in the wrong. Its attitude before the court, then, is this: "It is true that the appellee purchased a ticket from Kokomo to Indianapolis, and that the conductor inadvertently made a mistake, but gave appellee good advice, an opportunity to pay his fare and save himself from expulsion and mortification. Therefore only nominal or a small amount of damages ought to be assessed." Such circumstances might tend to rebut malice, but the damages were not assessed upon the theory of malice. There is no such charge in the complaint. Again, it might be urged that there was a doubt at the time as to whether appellee's ticket was from Kokomo to Indianapolis, or from Kokomo to Noblesville, and that such circumstances ought to go in mitigation of damages. If there was a doubt, it was as much a duty of appellant's agent to forego ejecting appellee as it was appellee's duty to pay the fare, and continue his journey, when the opportunity was offered. Appellant chose to stand upon what it conceived to be its strict legal rights. It cannot now be heard to complain if the appellee chose to do the same. It comes with an ill grace for the appellant, after it has pushed what it believed to be its rights to the last extremity, to say that, because it offered to carry appellee if he would pay his fare, the damages ought to be mitigated. Appellee was under no legal obligation to accept any offer, no matter how considerably made. In fact, the offer itself was only what the appellant would have been compelled to give to any person who would pay the fare demanded. The time to be magnanimous was before the expulsion occurred. Appellant cannot excuse or palliate the wrong, or mitigate the damages flowing therefrom, by its subsequent acts. Nor will it be permitted to palliate its own sordid conduct by the want of magnanimity in the person it has aggrieved. The appellee, by the acts of appellant's agent, was placed in a very

unpleasant position before the passengers on the train. By conduct, if not by words, he stood charged with an attempt to defraud the railroad company, and of endeavoring to ride from Noblesville to Indianapolis without paying the fare therefor. His attitude, as thus made to appear, was that of a dishonest man, and brought shame and discredit upon him. If he had paid the extra fare demanded after such accusation, a legitimate inference might be drawn therefrom that he was guilty of the dishonesty attributed to him. Whether he should pay and stay on the train, or refuse to pay and suffer expulsion, was a matter which the law left to the sole discretion of appellee. It was his rights that were being infringed, and he was the sole arbiter of the course he should pursue. Under the circumstances of this case, the verdict does not strike us as so excessive and enormous as to lead us to believe that the jury acted from prejudice or partiality. *Railroad Co. v. Fix*, 88 Ind. 381; *Railroad Co. v. Cloes*, (Ind. App.) 32 N. E. Rep. 588; *Railway Co. v. Hennigh*, 39 Ind. 509; *Railroad Co. v. Conley*, (Ind. App.) 32 N. E. Rep. 96; *Railway Co. v. Conrad*, 4 Ind. App. 83, 30 N. E. Rep. 406; *Railroad Co. v. Graham*, 3 Ind. App. 28, 29 N. E. Rep. 170; *Railroad Co. v. Wolfe*, 128 Ind. 347, 27 N. E. Rep. 606; *Railway Co. v. Howerton*, 127 Ind. 236, 28 N. E. Rep. 792; *Railroad Co. v. Acres*, 108 Ind. 548, 9 N. E. Rep. 453; *Railroad Co. v. McDonough*, 53 Ind. 289; *Railroad Co. v. Myrtle*, 51 Ind. 566; *Railroad Co. v. Milligan*, 50 Ind. 392.

It is also contended that the court erred in modifying instruction No. 9, requested by appellant, and in giving the same to the jury as modified. This instruction, as asked, read as follows: "The conductor of a railroad is not required to accept the statement of a passenger as to his right to be carried on said train. The ticket, as presented by the passenger, is conclusive as to whether or not he is entitled to passage on said train; and if such ticket shows on its face that the passenger is not entitled to passage on said train, the conductor may lawfully eject him therefrom, unless he pays his fare." This instruction was not relevant to the evidence. The controversy did not arise until after the ticket was taken up, and the disputed point was whether or not it was from Kokomo to Indianapolis, or from Kokomo to Noblesville. The ticket itself was not produced on the trial. It was a conceded fact that the appellee was entitled to passage on the train, but the point to which he was entitled to go was the controverted question. The modification did not harm the appellant. The instruction asked and refused, as an abstract proposition, correctly states the law, but it was not applicable to the issue tendered by the complaint. Appellee could only succeed on the theory stated in the complaint. Under the issues and facts disclosed, there was no error in refusing the instruction asked.

The sixth and last cause for a new trial discussed by counsel is that for newly-discovered evidence. The affidavits in support of this cause are attached to the mo-

tion, marked exhibits, and are copied into the record, but they are not made a part of the record by a bill of exceptions or by order of the court. Such affidavits must be brought into the record by a bill of exceptions, or made a part thereof by order of the court. *Elbert v. Hoby*, 78 Ind. 111; *Elliott's App. Proc.* § 817. In this condition of the record, we cannot consider them. We find no reversible error in the record. Judgment affirmed, at the costs of appellant.

(7 Ind. App. 526)

### HUGHES v. NOLTE.

(Appellate Court of Indiana. Sept. 22, 1903.)

BREACH OF MARRIAGE PROMISE — EVIDENCE — INSTRUCTIONS — PUNITIVE DAMAGES.

1. In an action for breach of marriage promise, where, in cross-examination of plaintiff, testimony is elicited tending to show that illicit relations existed between the parties, as a result of which plaintiff believed herself pregnant, it is proper to admit plaintiff, in rebuttal, to show that her general reputation for chastity and morality was good.

2. It is proper to permit plaintiff's mother to testify as to declarations and manifestations of grief on the part of plaintiff, made in the presence of her relatives, and others who were comparative strangers, on defendant's failure to appear at the time and place fixed for the wedding, when she learned of his intention not to marry her.

3. There was evidence of the making of the contract; that illicit relations had followed; that plaintiff, believing herself pregnant, so told defendant; that a day was fixed for the marriage, and the plaintiff expended money in making preparations; that defendant failed to appear at the appointed time and place, which fact occasioned unfavorable comment against her; that she did not see him for four months, when he promised to make everything all right by marrying her. *Held*, that an instruction that if defendant made or broke the contract from bad or fraudulent motives exemplary damages might be allowed was applicable to the evidence.

Appeal from circuit court, Jackson county; Sam. B. Voyles, Judge.

Action by Anna Nolte against Hal. P. Hughes for breach of marriage contract. From a judgment for plaintiff, defendant appeals. Affirmed.

Cooper & Cooper, for appellant. Cox & Cox, for appellee.

DAVIS, J. This was an action instituted by appellee against appellant to recover damages for breach of marriage contract. There was a trial by a jury, which resulted in a verdict and judgment against appellant for \$2,500. The only error discussed is that the court erred in overruling appellant's motion for a new trial.

The first question discussed brings in review the ruling of the trial court in allowing appellee, in rebuttal, to introduce evidence as to her general reputation for virtue and chastity, and also for morality. On cross-examination of appellee, counsel for appellant elicited testimony tending to show that illicit relations had existed between the parties, as the result of which she believed she was pregnant. This testimony, so far as we have been able to discover, was not in response to anything

to which she testified in chief; but, conceding that the cross-examination was proper, we are not prepared to say, under the circumstances of this case, in view of the fact that the appellant called out the testimony, as indicated, that there was error in the admission of the testimony in rebuttal in support of her general reputation for chastity, virtue, and morality. *Perkins v. Hayward*, 124 Ind. 445-449, 24 N. E. Rep. 1033; *Jones v. Layman*, 123 Ind. 569, 24 N. E. Rep. 363.

The next reason urged is that the court erred in admitting in evidence the testimony of her mother as to declarations and manifestations of grief and distress made by appellee to her mother and others who were present, in the absence of appellant, on the occasion of his failure to appear at the time and place fixed for the wedding, when she learned of his intention not to marry her. The fact that comparative strangers may have been present with her relatives and those interested in her would not necessarily exclude such declarations and expressions of grief. *Cates v. McKinney*, 48 Ind. 562.

The other reasons discussed relate to the instructions given. The court, in substance, stated that if appellant entered into the contract and broke it with bad motives, or if the element of fraud entered into the controversy as an ingredient in the act of appellant, either in making the contract or breaking it, exemplary damages might be allowed. It is conceded that the instructions correctly state the law, but it is urged that they are not applicable to the case made by the evidence. *Insurance Co. v. Nexsen*, 81 Ind. 347; *Dryden v. Knowles*, 38 Ind. 148; *Haymond v. Saucer*, 84 Ind. 8-11. There was evidence tending to sustain the alleged contract: that illicit relations had followed; that appellee believed she was pregnant and communicated this supposition to appellant; that a day was fixed for the marriage; that appellee expended \$100 in making preparations for the wedding; that appellant failed to appear at the appointed time and place; that such failure occasioned unfavorable comment against her, and that many people believed his failure and departure were on her account; that she did not see or hear from him for four months; and that when she did see him, he promised to return and straighten out the false reports against her, and that he would make everything all right by marrying her, as he had agreed to do. Without further comment, it will suffice to say that, under all the facts and circumstances of this case, the instructions, as a whole, correctly state the law.

It is next insisted that the verdict was excessive and outrageous. The damages, in our opinion, are not so large as to warrant a reversal for that reason. Conceding that the questions discussed are properly presented by the record, we have not been able to find any reason which would authorize this court in disturbing the judgment of the trial court; but the fact is, as we have discovered in looking through the record, although the question has not been suggested by counsel, that

the bill of exceptions containing the evidence is not technically a part of the record. On September 10, 1891, appellant was granted 90 days in which to file bill of exceptions. There is attached to the record what purports to be a bill of exceptions, but there is no record entry, statement, or memorandum in the transcript, independent of the bill, either preceding the bill or in the certificate, in substance and to the effect that the bill was filed. *Gish v. Gish*, 6 Ind. App. —, 84 N. E. Rep. 305, and authorities there cited. In this case, in view of the fact that the questions raised have been decided, the oversight has worked no injury, and we only call attention to the matter in this instance for the purpose of impressing upon the profession the duty incumbent on them of exercising great care in the examination and preparation of transcripts on appeal. Judgment affirmed, at costs of appellant.

LOTZ, J., absent.

(7 Ind. App. 411)

COOPER et al. v. PETERSON.

(Appellate Court of Indiana. Sept. 19, 1893.)

APPEAL—NOTICE—DISMISSAL.

An appeal by a part of the defendants, not taken in term, will be dismissed where a codefendant, who is affected by the judgment, is not a party, and no notice of the appeal was served on him, as required by Rev. St. 1881, § 635.

Appeal from superior court, Marion county; N. B. Taylor, Judge.

Action by Hannah Peterson against George Cooper and others. From a judgment for plaintiff, some of the defendants appeal. Dismissed.

J. F. Harney and D. C. Stover, for appellants. L. J. Coppage, for appellee.

ROSS, J. The appellee brought this action in the Marion superior court against the Masonic Mutual Benefit Society of Indiana, Homer Bowers, administrator of the estate of Joseph Cooper, deceased, and the appellants George Cooper, Elizabeth Wren, and Jessie Irene Wren, to recover the benefits accrued under a certificate of membership issued November 27, 1882, by said Masonic Mutual Benefit Society to one Joseph Cooper, in favor of his legal heirs, which certificate the appellee alleged in her complaint she became and was the owner of at the death of said Joseph Cooper, and that she was entitled to all the benefits thereunder. She further alleged that the appellants and said Bowers, as administrator, asserted title to the fund to be derived from said certificate, which claims she alleged were unfounded, and asked that the court decree that they have no interest in said fund, and that said society pay said fund over to her. The complaint was in three paragraphs. The appellants Elizabeth Wren and Jessie Irene Wren being minors, a guardian ad litem was appointed to defend their interests, and in their behalf such guardian filed an answer of general denial. The appellant George Cooper filed a demurrer to

each paragraph of the complaint, which was overruled, and he, jointly with his coappellants, thereupon filed an answer of general denial and a cross complaint in two paragraphs. The defendant Bowers, administrator, filed answer to the complaint, and also a cross complaint against his codefendants and the plaintiff. Issues were formed on the cross complaints, the defendant the Masonic Mutual Benefit Society filing an interpleader to the complaint and the several cross complaints, admitting the execution of the certificate sued on, and its liability thereunder, but alleging its inability to determine to whom the same should be paid, and thereupon brought the amount due on said certificate into court, and, under the order of the court, turned the same over to the clerk of the court, and was thereupon discharged from further defending in said action, or from further liability on said certificate. The cause was tried by the court, and a special finding of the facts made, with conclusions of law thereon; the court, on the facts found, concluding in favor of the plaintiff on her complaint against all of the defendants, and against the defendants upon their cross complaints, and entered judgment accordingly, directing the clerk, after the payment of the costs of said action, to pay the balance of said fund over to the plaintiff. From this judgment an appeal was taken by the defendants George Cooper, Elizabeth Wren, and Jessie Irene Wren to the general term, where the judgment rendered at special term was in all things affirmed, from which judgment of affirmance this appeal is prosecuted.

The defendant Homer Bowers, administrator of the estate of Joseph Cooper, did not join in the appeal to the general term, and was in no way a party thereto, and is not a party to this appeal.

The appellee now insists that no questions for review are presented, for the reason that the proper parties have not been joined in this appeal. Section 635, Rev. St. 1881, provides that a part of several coparties may appeal; but in such case they must serve notice of the appeal upon all the other coparties, and file the proof thereof with the clerk of this court. This statute is mandatory, and the numerous cases decided are explicit that an appeal by a part of several coparties, without giving notice thereof to the coparties not joining in the appeal, will be dismissed by this court. *Knarr v. Conway*, 37 Ind. 257; *Wickham v. Hess*, 38 Ind. 183; *Harlan v. Watson*, 39 Ind. 393; *Reeder v. Maranda*, 55 Ind. 239; *Herzog v. Chambers*, 61 Ind. 333; *Cranmore v. Bodine*, 65 Ind. 25; *Cough v. Thomas*, 71 Ind. 286; *Holloran v. Railway Co.*, 129 Ind. 274, 28 N. E. Rep. 549; *Brown v. Trexler*, 132 Ind. 106, 30 N. E. Rep. 418, and 31 N. E. Rep. 572. The necessity for all parties to the judgment being in the appellate court on appeal is apparent from the fact that but one appeal can be taken from a joint judgment, and no judgment can be rendered on such appeal binding upon others than those who are before the court. *Hunderlock v. Investment Co.*, 83 Ind. 139. The legislature may limit the time in which

an appeal may be perfected, and designate the notice to be given to coparties not joining in the appeal, and the right to appeal is thereby limited, and the right of such coparties to notice settled. Unless an appeal is perfected by the filing of the transcript, with the assignment of errors, within the time designated by the statute, there is no cause in this court for review. *Smythe v. Boswell*, 117 Ind. 365, 20 N. E. Rep. 263, and cases cited. Until all the necessary parties have in some manner been brought before the appellate court, the appeal is not perfected, and the court has no jurisdiction. *Hunderlock v. Investment Co.*, supra; *State v. East*, 88 Ind. 602; *Shulties v. Keiser*, 95 Ind. 159; *Elliott's App. Proc.* § 144. The statute relative to appeals, in referring to "coparties," means only parties to the judgment, and not merely parties to the action. *Hogan v. Robinson*, 94 Ind. 138. Judge Elliott, in his work on *Appellate Procedure*, (section 140,) says: "While it is safe to affirm that all persons included in a joint judgment must be parties to the appeal, it is not safe to say that only such persons must be parties to the appeal; for there may be cases where the decree or judgment is not strictly a joint one, in which all the parties are so affected by it as to be necessary parties to the case on appeal. Thus a decree in partition may affect all so materially as to require that they should be brought before the appellate tribunal. So, where a fund is in court for distribution, the claimants of the fund may, in some instances, be affected by a judgment awarding part of it to some one of their number, and, if so, all affected should be parties, for their rights cannot be justly adjudicated without their presence as parties. A further illustration is supplied by the case wherein it was held that, where a judgment affected one of several legatees, all must be made parties. The authorities referred to warrant the conclusion that those whose rights are involved are necessary parties, although their rights may be severed in their nature. Whether the persons who were parties below shall be made parties on appeal depends, it is safe to say, upon the effect that the judgment of the appellate tribunal may have upon their rights. If it will affect their rights materially, they should be made parties, and notified. But because they were in the court below as parties to the record is not always decisive of the question whether they should be made parties on appeal." By the adjudicated cases it is settled that parties to the record who are not parties to the judgment appealed from have no interest in the judgment, and are not proper parties to an appeal. *Logan v. Logan*, 77 Ind. 558; *Barghott v. McDonald*, 87 Ind. 549; *Koons v. Mellett*, 121 Ind. 585, 23 N. E. Rep. 95, and cases cited; *Alexander v. Gill*, 130 Ind. 485, 30 N. E. Rep. 525.

What we have said relative to notice to coparties is applicable in cases where the appeal is not taken and perfected in term; but when an appeal is taken in term by a part of the parties to the judgment, and such appeal is perfected, as provided by statute for appeals, in term time, copar-

ties not joining in the appeal need not be notified of such appeal, if made appellees in the assignment of errors. *Holloran v. Railway Co.*, 129 Ind. 274, 23 N. E. Rep. 549.

The record before us discloses that from the judgment of affirmance by the court in general term an appeal was prayed for and granted on the filing of an appeal bond within 30 days from June 1, 1891, and it also shows that no appeal bond was filed; the appellants, by their neglect to file such bond, waiving the right to a term-time appeal.

The finding and judgment of the court in special term was against Homer Bowers, administrator, George Cooper, Elizabeth Wren, and Jessie Irene Wren, and in favor of the appellee. The appeal to the general term was taken by the appellants now prosecuting this appeal; said Homer Bowers, administrator, not being a party thereto. He is not made a party to this appeal; neither has he received the notice which the statute directs shall be given coparties not joining in the appeal. Said Bowers, as administrator, claimed the right to the fund in controversy, and any judgment rendered by this court as to the ownership thereof would not be binding on him. For the failure to give the notice required by the statute to coparties not joining in the appeal, this appeal will have to be dismissed. The appeal is dismissed, at the costs of the appellants.

(7 Ind. App. 537)

LAKE ERIE & W. R. CO. v. LOWDER.  
(Appellate Court of Indiana. Sept. 22, 1893.)

On rehearing. Petition overruled.  
For prior report, see 34 N. E. Rep. 447.

DAVIS, J. Counsel for appellant earnestly urge that the petition for rehearing filed herein should be granted. It is insisted that the court has failed to state any reason why the authorities cited in the original opinion support the complaint, or wherein the authorities cited by appellant in support of the position that the alleged injury was the result of unavoidable accident are not applicable, and, further, that the court erred in holding that the complaint states facts sufficient to constitute a cause of action. At the risk of being prolix, but avoiding repetition so far as possible, we will again, and more in detail, review the question presented and the authorities cited.

In support of the proposition that the averments in the complaint show that the injuries in question were, under the authorities, the result purely of accident, counsel for appellant cited in one of their briefs on the original hearing the following cases: *Railway Co. v. Locke*, 112 Ind. 404, 14 N. E. Rep. 391; *Brown v. Collins*, 53 N. H. 442; *Lusee v. Buchanan*, 10 Amer. Rep. 623; *Hoag v. Railroad Co.*, 85 Pa. St. 293; *Bennett v. Ford*, 47 Ind. 264; *Railroad Co. v. Rowan*, 104 Ind. 88, 8 N. E. Rep. 627; *Pennsylvania Co. v. Whitlock*, 99 Ind. 16. The general rule enunciated in the foregoing cases is that a railroad company engaged in operating its road in the

usual course of business is not liable for damages done to the property of the adjoining landowner on account of accidents which occur without fault or negligence on the part of the company. In *Railway v. Locke*, supra, the principles of negligence are fully and ably discussed, and the doctrine is approved that when one person is in such position with regard to another that every one of ordinary prudence would recognize that, if he did not use ordinary care and skill in his own conduct, he might cause injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger. In *Hoag v. Railroad Co.*, supra, it is held that where an injury arose from negligence the question of proximate cause is to be decided by the jury upon all the facts of the case, but where the facts are undisputed, and the intervening agency is manifest, the question is one for the court, and that in determining what is proximate cause the true rule is that the injury must be the natural and probable consequence of the negligence,—such consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer as likely to flow from his act. Conceding that the law is correctly stated in these cases, they do not sustain appellant's contention in this case. The demurrer to the complaint admits the acts of negligence on the part of the company as charged in the complaint, and also the alleged consequences of such negligence. The facts stated in the complaint clearly show that the injuries to appellee's property were the proximate result of the appellant's negligence, and the consequences thereof, under the circumstances, were such as might have been foreseen by the company as likely to flow from the negligence alleged. The cases cited in the original opinion, as well as the authorities relied on by appellant, by reason and analogy, support the proposition that where a railroad company negligently and carelessly runs a heavy freight train, consisting in part of several cars of oil, over a defective and unsafe track, through a city, in the night, at a high and dangerous rate of speed, to wit, 35 miles an hour, in violation of an ordinance, it is guilty of a positive wrong, and not a mere passive negligence, and is liable for the loss sustained by the burning of the property of the adjoining landowner, occasioned through the wrecking of the train, and the consequent flowing and burning of the oil, as the proximate and natural result of such negligence, under the circumstances alleged in the complaint. It was not necessary to aver in the complaint that after the wreck occurred the company was then and there guilty of any other and additional act of negligence, which caused the burning oil to run down hill onto appellee's land. Nothing could have been done after the wreck occurred to prevent such a result. The immediate flowing of the burning oil onto and over appellee's premises, and the consequent burning of her property, was, under the circumstances attending the disaster, inevitable. In other words, in

conclusion, on this subject, it will suffice to say that the wreck of the train, the ignition, explosion, and burning of the oil, and the consequent destruction of appellee's property, are shown by the averments in the complaint to have been the natural and proximate result of the negligence of appellant.

It is next insisted that what we have said in criticism of the instructions, and our conclusion that the errors and inaccuracies referred to were unimportant and harmless, is a radical departure from a long line of adjudicated cases in this state. In this contention, counsel are mistaken. The rule referred to, and which we applied in this case, is correctly stated in section 648, Elliott's App. Proc., and is fully supported by the authorities therein cited.

It is contended that the words used in the third instruction, relative to the degree of care imposed on appellant under certain circumstances, were such as required absolute perfection on the part of appellant in the maintenance, operation, and management of its property, and, therefore, that the instruction was radically wrong, and directed the minds of the jury to an improper basis on which to place their verdict. In determining the construction and effect that should have been, or was likely to be, given the objectionable language, the connection in which it was used, the facts and circumstances to which it referred, and the other instructions as an entirety, should all be considered. In this connection, we call attention to the fact that there seems to have been no dispute on the trial upon the subject that the track of appellant's railroad was in a defective condition at the point where the wreck occurred. The theory of appellant was that such defect was caused by the act of vandals, for the purpose of wrecking another train on that night, and the theory of appellee was that such defect was the result of lack of care and attention on part of appellant. There was evidence tending to prove all the alleged acts of negligence mentioned in the complaint, although it was in some respects contradictory. It is not, necessarily, perhaps, unless in violation of a statute or ordinance, an act of negligence to run a freight train, similar to the one in question, at a high rate of speed, in the nighttime, through a populous city; but, however this might be, it would, we apprehend, ordinarily be actionable negligence to so run such a train over a defective track. Certainly, therefore, under the circumstances disclosed in this case, the appellant, in the transportation through towns and cities, in the nighttime, of heavy freight trains, consisting largely of tanks of oil,—which, in the event of accident, were likely to take fire, explode, run on and over adjoining property, destroying the same, and likely to endanger human life,—should have used such a degree of care and diligence as was commensurate with the hazards of the undertaking. The instruction was not "fatally erroneous" or "radically wrong," and therefore the authorities cited do not apply. *Lower v. Franks*, 115 Ind. 339, 17 N. E. Rep. 680; *Rapp v. Kester*, 125 Ind. 79,

25 N. E. Rep. 141. A re-examination of the questions involved confirms our opinion that the record discloses no prejudicial error against appellant. Petition for rehearing overruled.

# MERCHANTS' & MECHANICS' SAV.

BANK v. FRAZE et al.

(Appellate Court of Indiana. Sept. 20, 1893.)

## APPEAL—SECURITY FOR COSTS.

Under rule 34 of the appellate court, (27 N. E. Rep. vii.) providing that, when it appears before submission of a cause that the appellant is a nonresident of the state, security for costs will be required of him, such security may be required though appellant have already given an appeal bond to prosecute the appeal, and abide by and pay the judgment and costs.

Appeal from circuit court, Jay county.

Appeal by Merchants' & Mechanics' Savings Bank against Benjamin E. Frazee and others. Motion to require appellant to give security for costs. Granted.

Enos L. Watson and John M. Smith, for appellant. James S. Engel, for appellees.

PER CURIAM. On the 21st of June, 1893, appellees filed a motion to require appellant, a nonresident, to give security for costs, as provided in rule 34 of this court. Afterwards, on the 27th of June, 1893, appellant applied for and obtained supersedeas, conditioned on the due execution of a proper appeal bond. On June 29th the bond, with surety, was filed and approved. This bond contains a provision that appellant "shall well and truly prosecute said appeal, and abide by and pay the judgment and costs which may be rendered or affirmed against it." The appeal bond secures the payment of the costs in the event the judgment of the trial court is affirmed. If, however, the judgment should be reversed, the costs are not secured. True, in that event, judgment for costs would be rendered against appellees for costs, and appellees would not be in position to complain because payment of costs had not been secured by appellant. The security, however, is not required in such cases, by rule 34, for the benefit of the appellee, but is for the purpose of insuring the payment of the costs and fees occasioned by the appeal, and made by the appellant, to the officers of the court, without reference to the result of the litigation. Therefore, in conformity to the requirements of this rule, appellant will be required to give security for costs within 30 days, pursuant to rule 34. The clerk is instructed to give notice accordingly.

(7 Ind. App. 518)

# RAREY v. LEE.

(Appellate Court of Indiana. Sept. 21, 1893.)

RE JUDICATA—CONTINUING TRESPASS—SUCCESSIVE ACTIONS.

1. By obtaining a judgment for damages for flowing water on his land, and an injunction restraining such injury in the future, plaintiff is not concluded from bringing another

action for a subsequent injury arising from a continuance of such trespass.

2. A judgment for plaintiff in an action to restrain the flowage of surface water and for damages is conclusive as to the right of defendant to so flow water in another action for a similar trespass subsequently committed.

Appeal from circuit court, Howard county; L. J. Kirkpatrick, Judge.

Action by Stephen P. Lee against Daniel Rarey. From a judgment for plaintiff, defendant appeals. Affirmed.

O'Brien & Wolf and C. N. Pollard, for appellant. Blackledge, Shirley & Moon and Bell & Purdum, for appellees.

ROSS, J. The appellees sued the appellant to recover damages for injury to his land from surface water alleged to have been wrongfully thrown upon such land by appellant. The complaint is in two paragraphs, in substance the same, to each of which a demurrer was filed and overruled. The appellant then filed an answer of general denial, under which it was agreed appellant could prove all defenses the same as if specially pleaded.

The first and second errors assigned in this court call in question the sufficiency of the complaint, the first paragraph of which is as follows: "The plaintiff, Stephen P. Lee, complains of the defendant, Daniel Rarey, and says that the plaintiff has been since the 2d day of September, 1885, the owner in fee and in possession of the following described real estate in Howard county, Ind., to wit: 'The northeast quarter of the southeast quarter of section twenty-two, (22,) township twenty-four (24) north, range four (4) east, except five (5) acres in the southeast corner of the same, being 35 acres.' That the defendant is the owner in fee and in possession of the southwest quarter of section twenty-three, (23,) said township and range; also of the five (5) acres above excepted out of the southeast corner of said section 22,—in all 165 acres in said county and state. That running north and south, and in a southwesterly direction on the northwest quarter of said 160 acres, there is a natural elevation in the land extending almost entirely across the said northwest quarter. That said elevation is several inches in height, there being but about fifteen acres of the defendant's land in said northwest quarter on the west side of said elevation or ridge. That said elevation or ridge is of such a character that in its natural condition it causes all the surface water which falls and collects upon the land of the defendant lying east of said elevation to flow off of the defendant's land in an easterly and northeasterly direction, and away from the plaintiff's land and the lands of the defendant that are contiguous to plaintiff's. That the defendant, on or about the — day of October, 1885, and at various times since, wrongfully and unlawfully cut ditches from two to three feet deep through said natural ridge and elevation, and thereby caused the water to flow almost continuously from that time to the time of bringing this action over and upon the land of the plaintiff, and in large quantities, and in a manner

that it would not have done had it not been for the unlawful cutting of said ditches by the defendant. And that, on account of the cutting of said ditches and other tributaries cut into the same by the defendant, whereby the water from a great portion of the defendant's said land has been thrown on the plaintiff's land, and diverted from its natural course, the plaintiff's crops of corn, wheat, grass, hay, and vegetables, as well as his lands, have been destroyed and injured. Plaintiff further says that on the 30th day of September, 1887, this plaintiff commenced an action in the Howard circuit court against the said Daniel Rarey to enjoin him, the said Rarey, from thus flowing and delivering the waters from his said land, and out of its natural course, upon the lands of plaintiff, and to recover damages from the said defendant for injury to plaintiff's crops, and to his said land; that such proceedings were had in said cause, (which was cause No. 8,388, to which the said defendant appeared,) upon the issues joined therein, that it was adjudged, ordered, and decreed by the court that the said Rarey be perpetually enjoined from flowing the water from his said land upon that of the plaintiff, as hereinbefore set forth, and also a decree and judgment for damages was rendered by the court in said cause against the defendant, Rarey, for the flowing of the water upon the plaintiff's land by reason of the construction of the ditches aforesaid, and the injury to his crops and land, and a finding was also made in said cause to the effect that the said defendant did unlawfully and wrongfully flow the water from his said land to and upon that of plaintiff, to his injury and damage, which finding, judgment, and decree was rendered on the — day of —, 1888, and is still in force. Plaintiff further says that the said defendant wholly disregarded said judgment and decree, and from the time of its rendition to the present time has continued to wrongfully and unlawfully flow the water from his said land, as hereinbefore set forth, to and upon the plaintiff's land, and greatly injuring his crops and land, and, in addition to cutting and constructing said drain and ditches through said elevation and ridge, the said defendant has constructed new and other ditches upon his said land than those that were in existence at the time of the rendition of said judgment, and has thereby caused the water to collect more rapidly and in larger volumes in said drain so constructed through said elevation and ridge, and thereby caused the water to collect more rapidly and in greater quantities upon his said land than it did prior to the rendition of said judgment, and has so constructed his system of drainage upon his said land as to bring about and produce such result, to the plaintiff's great injury and damage; that, by reason of the facts hereinbefore set forth, plaintiff's crops of hay, corn, wheat, and vegetables, and lands were during the years 1889 and 1890 damaged in the sum of \$300, for which sum plaintiff prays judgment and all proper relief."

The appellant insists that neither para-

graph of the complaint states a cause of action, for the following reasons: First, that, having brought an action and recovered damages, all injuries accrued or which might afterwards result from the act complained of were merged in that judgment; and, second, that having recovered in the former action, in addition to his judgment for damages sustained, an order enjoining the appellant from flowing water upon appellee's land, appellee's remedy, if any he has, is to proceed against appellant for contempt; that, having invoked the aid of the court to protect him from further injury at the hands of appellant, he must pursue that remedy, and has no other. We think both contentions untenable. For all trespasses committed at the time the former judgment was rendered, damages were assessed, and all rights to recover therefor were merged in that judgment, and no subsequent action could be successfully maintained for the same trespasses. The injunctive relief granted at that time was to prevent future injury by forbidding appellant from further trespassing; yet if appellant disregarded the order of the court, and committed another trespass, which he surely did if he continued to flow water on appellee's land, a new cause of action accrued in favor of appellee. Any punishment which the court might inflict for the violation of its order would not remedy the injury done the appellee. Neither would a judgment in favor of the appellee compensating him for the injury sustained purge appellant of contempt. It is a settled rule of law that for one injury, the thing causing it being permanent, and not subject to being abated, but one cause of action arises, in which all damages must be recovered, for the reason that there is but one wrong, for which there is but one remedy, which cannot be divided. *City of La Fayette v. Nagle*, 113 Ind. 425, 15 N. E. Rep. 1. But it is equally well settled that when the thing causing the injury is not in itself permanent, being abatable, the injured party may seek and recover redress for injuries sustained to the time of the bringing of his action, and for a subsequent injury may maintain another action. In 3 *Suth. Dam.* p. 403, the author announces the rule to be that "when a wrongful act is done, which produces an injury which is not only immediate, but from its nature must necessarily continue to produce loss, independent of any subsequent wrongful act, then all the damages resulting, both before and after the commencement of the suit, may be estimated and recovered in one action." This rule, however, does not extend to trespasses or other tortious acts. While the commission of a certain wrong is a trespass, its continuance is a nuisance, which may be abated. 5 *Amer. & Eng. Enc. Law*, p. 16, and cases cited. If the appellant, without right, caused water to flow from his land upon the lands of appellee, he was guilty of trespass, and each and every time he so caused the water to flow was a separate and distinct trespass; and the appellee, in bringing an action for damages, in addition to recovering damages for the in-



jury sustained, might invoke the aid of the court by injunction to prevent further trespassing by the appellant, and, when such relief was granted, it is presumed that it was effective. The cause was, in legal contemplation, removed. That the appellant did not remove the cause after the order of the court so to do is, in effect, the creating of a new cause, for which, if injury resulted, damages might be recovered. In this case it was not the digging of the ditch on appellant's land which must be denominated as alone the cause, for, unless there was a flow of water in it, no injury could result to the appellee. Again, the appellant had a right to dig ditches upon his own land, and, as long as he confined the water flowing therein to such land, he was not liable, but, whenever he permitted it to escape and do injury to others, he became answerable therefor. None of the authorities cited by counsel for appellant have decided contrary to the principles here announced. In each of those cases the rule is settled that when a cause of action exists, and a party has two remedies to enforce his rights, the adoption of one forfeits his right to pursue the other. So far as any objection has been pointed out, we think both paragraphs of the complaint state a good cause of action.

The view we have taken of the complaint disposes of most of counsel's argument as to the sufficiency of the evidence to sustain the verdict; yet we have read the evidence with care, and find it not only sustains the allegations of the complaint, but in the main is uncontradicted. We have experienced considerable difficulty in arriving at an intelligent understanding of the evidence, from the fact that reference is made in the testimony of almost every witness to a plat, their evidence having special reference to such plat, and yet the record contains no plat, and there is nothing to indicate that it was ever offered or introduced in evidence. This court cannot examine the evidence unless it is all in the record, and it is not fair to ask us to pass upon the sufficiency of the evidence to sustain the verdict unless we have before us all the evidence which the jury had. The jury had exhibited to them a plat, upon which the witnesses pointed out the location of the ditches complained of, as well as the course of the water. With the plat thus before them, the evidence was probably clear and effective, while the utterances of the witnesses without the plat is wholly unintelligible to this court.

Objection is urged to several of the instructions given, but we think they were proper, under the case made by the pleadings and the evidence. The evidence upon which damages were assessed discloses no injury prior to the rendition of the judgment in 1888.

Again, we think there was no error in the court's instruction with reference to what was adjudicated in the former action, for the reason that that judgment was an adjudication of the questions in issue, among which was the right of appellant to flow water upon the land of appellee. That question was settled against

the appellant by that judgment, and is still in force, unless he has acquired rights subsequent to the rendition of that decree. The evidence shows no such rights to have been acquired. Part of the instructions tendered by appellant, and which the court refused to give, were, in substance, covered by other instructions given. Others refused had no application to the facts, and were rightfully refused. As heretofore stated in this opinion, the judgment recovered by the appellee against the appellant in 1888 was decisive of appellant's rights to flow water on appellee's land. If the appellant had a right, when that judgment was rendered, to flow the water complained of on the appellee's land, that was a matter of defense which he should have set up in that action; and, if he failed to do so, he lost all rights thereunder, or, if he did set it up in defense, it was determined against him, and, having abided that judgment, he has no remedy now.

We need not extend this opinion by giving reasons for deciding that the appellant was not entitled to a new trial on account of the alleged misconduct of counsel for the appellee, further than to state that the record shows no misconduct. The record discloses that the counsel for the appellee, in his closing argument to the jury, read to them several of the instructions which the court had previously indicated he would give to the jury. It affirmatively appears that counsel did not attempt to in any manner construe such instructions. Counsel, in their argument of a cause to the jury, have a right to read to the jury the instructions which the court has indicated (pursuant to section 534, Rev. St. 1881) will be given by the court, and may comment on the evidence to which the instructions are applicable. *Scott v. Scott*, 124 Ind. 66, 24 N. E. Rep. 686. We find no reversible error in the record. Judgment affirmed.

LOTZ, J., not present.

(3 Ind. App. 547)

# BENSCH et al. v. FARNSWORTH.<sup>1</sup>

(Appellate Court of Indiana. Sept. 21, 1893.)

ACTION BEFORE JUSTICE—AMENDMENT OF PLEADING—REVIEW—ERRORS NOT APPARENT.

1. Where plaintiff in replevin before a justice of the peace alleges that the property is worth \$200, and claims \$50 damages in addition, he may, before the case is appealed, amend his complaint by omitting the claim for damages, so as to bring the case within the justice's jurisdiction.

2. A document offered in evidence, and excluded, must appear in the record, in order that its competency may be determined on appeal.

Appeal from circuit court, Lake county; William Johnston, Judge.

Action by William Farnsworth against Augusta Bensch and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Peter Crumpacker, for appellants. E. A. Rosenthal and Worden & Morris, for appellee.

<sup>1</sup> Rehearing denied, 37 N. E. 204.

GAVIN, C. J. Appellee brought suit in replevin before a justice of the peace. In his complaint he alleged the value of the property to be \$200, and claimed \$50 damages in addition, making the entire amount involved, therefore, \$250, which was in excess of the amount over which a justice has jurisdiction. Before the trial in the justice's court, appellee, by leave of court, amended his complaint so as to omit the claim for damages, and bring the amount within the justice's jurisdiction. In this there was no error. It accords with the liberal spirit of our Code to permit such an amendment, rather than to dismiss the cause, and require the plaintiff to refile his complaint. By this amendment the character of the action was in no manner changed, but the amount in controversy simply reduced. The action of the court is in harmony with the decisions of our supreme court in *Brown v. Lewis*, 10 Ind. 232, and *Harvey v. Ferguson*, 1d. 393. We do not believe these cases were overruled by the case of *Kiphart v. Brennenman*, 25 Ind. 152, where the court held that after a complaint had been filed before the justice as a complaint in ejectment, the cause tried, and appealed to the circuit court, the plaintiff could not then claim the right to amend his complaint so as to make it for forcible entry and detainer, and thus bring it within the jurisdiction of the justice. Here the amendment was made in the justice's court, and not after the cause had passed from that court, as in the *Kiphart* Case.

The only reason presented for a new trial is: "Error of law occurring at the trial, and excepted to by said defendants, in this: That the court refused to permit the defendants, and each of them, to introduce in evidence the papers, proceedings, and judgment in the case of *Bensch v. Farnsworth*, and to prove in connection therewith, in response to proper questions, that the plaintiff herein had actually litigated with the defendant *Bensch* in said action as to the title and possession of the identical property in suit." The bill of exceptions does not purport to contain all the evidence, but simply a part thereof, it being the aim of the parties to present the question under section 630, Rev. St. 1881. For this purpose it is not necessary that all the evidence should be in the record, but it is necessary that "the evidence given or proposed, touching the point in question, should have been set out in the bill of exceptions." *Railway Co. v. Adams*, 112 Ind. 302, 14 N. E. Rep. 80. While this statute authorizes a party to bring a question before this court upon a part of the record only, it is nevertheless incumbent upon him to bring before this court, in proper manner, all that is necessary to make it affirmatively appear that there was error in the action of the court below. *Railway Co. v. Adams*, supra; *Starry v. Winning*, 7 Ind. 311. In *Shugart v. Miles*, 125 Ind. 445, 25 N. E. Rep. 551, where the question was presented in the same manner as here, it is said that the record must be so made up as to "make it affirmatively appear that the rulings were harmful to appellant."

Any question of error in the action of the court in excluding the evidence offered manifestly hinges upon the contents of the papers and records excluded. Without a knowledge of their contents, this court cannot determine their materiality and competency, nor the materiality and competency of the oral evidence offered in connection with them. These documents and records have not been brought before us by the bill of exceptions. The statements of counsel made to the court at the time of offering the evidence cannot supply the lack of the papers themselves. A statement of what it is expected to prove by a witness on the stand is, of course, a sufficient offer, but this rule does not hold good as to documentary evidence. The trial court inspects and determines the admissibility of documentary evidence from the contents of the papers, which speak for themselves. *Gould v. Weed*, 12 Wend, 12; *Scripps v. Reilly*, 38 Mich. 10. The rule that the documentary evidence offered must be brought before us, in order to render any question as to its exclusion available, is not a new one, and is directly supported by authority. "Where a document is offered and excluded, it must be brought into the record, in order that the court, on appeal, may determine its competency." *Elliott*, App. Proc. § 748; *Williams v. State*, 127 Ind. 471, 26 N. E. Rep. 1082; *Nudd v. Holloway*, 43 Ind. 366.

Some questions of practice have been presented, which it is unnecessary that we should consider or determine, in view of the conclusion reached above. The judgment is affirmed, with costs.

(7 Ind. App. 375)

#### ROSS et al. v. CONWELL.

(Appellate Court of Indiana. Sept. 19, 1893.)

##### COMPENSATION OF TRUSTEES.

Though a will provide that trustees appointed thereby shall receive out of the proceeds of the estate "a reasonable compensation, to be fixed by themselves," the court has power to reduce the compensation fixed by the trustees.

Appeal from circuit court, Fayette county; F. S. Swift, Judge.

Appeal by John W. Ross and others, trustees, from a judgment sustaining in part exceptions filed by William D. Conwell to their report as trustees. Affirmed.

Conner & Frost, for appellants. Little & McKee, for appellee.

REINHARD, J. The appellants are the trustees under the will of Abraham B. Conwell, deceased. The testator, who left a large estate to be disposed of, provided in his will, among other things, that the "trustees, or their successors, shall each receive out of the proceeds of said estate, for their services in the discharge of said trust, a reasonable compensation, to be fixed by themselves." Exceptions were filed by the appellee to the appellants' final report in said estate in the court below, and these were in part sustained. From this ruling an appeal was

taken to the supreme court, and from that court the cause was transferred to this, under the act enlarging the jurisdiction of the appellate court. Acts 1893, p. 29, § 1, subd. 7.

The only question presented relates to the compensation of the trustees for their services, the court having ordered a reduction of the amounts claimed and taken credit for by them in their report. At the trial a number of witnesses testified upon both sides of the question of the reasonableness of such charges, as well as to the character of the services rendered, and there was a sharp conflict in their testimony. If the question of what was a reasonable allowance was properly submitted to the court, it is difficult to perceive upon what basis a reversal could be asked upon the sufficiency of the evidence. There was ample evidence to support the finding, and, under the well-settled rule that the judgment will not be disturbed when the evidence is at all conflicting, we cannot interfere, in the absence of some other cause sufficient for a reversal. It is strongly contended, however, on the part of appellants, that the question of what was "a reasonable compensation" was not one within the power of the trial court to determine, but must be left to the decision of the trustees themselves, where the testator had placed it. To this proposition we cannot give our assent. Ordinarily, it is true, where the testator himself stipulates what the compensation shall be, and the trustee or executor accepts the trust, it amounts to a contract between the parties by which, if made in good faith, they are mutually bound. *Biscoe v. State*, 23 Ark. 592; *In re Hopkins*, 32 Hun, 618; *College of Charleston v. Willingham*, 13 Rich. Eq. 195. See, also, *Rev. St. 1881*, § 2397. The rule just announced rests upon the principle that, where the parties to an agreement have fixed the compensation among themselves, the courts will not interpose their judgment as a substitute for that of the parties, even though such consideration be of indeterminate value, but will give full effect to the agreement if it be free from fraud or undue influence. See *Shover v. Myrick*, 4 Ind. App. 7, 30 N. E. Rep. 207. But when the amount of such compensation is, by the stipulation of the contract, left to the arbitrary determination of one of the parties, or to the agents or officers of such party if the same be a corporation, it is in the nature of a contract not to resort to a judicial forum for a settlement of the controversy, and such contracts are not binding in law. See *Society v. Werner*, (at present term,) 34 N. E. Rep. 105; 12 Amer. & Eng. Enc. Law, 305. It is the general policy of the law that trustees shall not be permitted to profit by their trust estates, and so far has this doctrine been carried in the courts of England that no compensation is ordinarily allowed the trustee for his services, "lest it tempt him to profit in that way." 3 Redf. Wills, (3d Ed.) p. 533, § 59. While this rule as to compensation is not generally followed in the United States, it is still the policy of our law that the judicial proceedings in such matters shall be made as

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inexpensive as possible, and with a view to the benefit of the cestuis que trustent, the trustee being remunerated for faithful services under the direction of the court. *Schouler, Ex'r's*, § 545.

In the case before us it appears from the trusts conferred, and the language employed in the will, that the testator had great confidence in the integrity, competency, and responsibility of the trustees named by him. These facts, together with the further one that the testator expressed a willingness to leave the reasonableness of their charges to the determination of the trustees themselves, were doubtless proper for the consideration of the court in adjudging the value of the services. *Bowker v. Pierce*, 130 Mass. 262. It is proper to state, however, that the appellants were not all named by the testator as his trustees, but that death in one case, and failure to qualify in another, rendered it necessary to make substitutions. It would seem that as to the substituted trustees, at least, it cannot be claimed that their compensation was fixed by the will, and that as to these the will cannot control the remuneration, even where the same is fixed definitely. *Widener v. Fay*, 51 Md. 273. It is not, and certainly cannot be, claimed with any degree of justification that, by the terms of the will, the trustees take any portion of the estate as a legacy. The utmost that can be maintained successfully is that the intention of the testator was to repose a large discretionary power in the trustees, but that such discretionary functions were subject to review by the probate court cannot be denied. The intention of the testator should be looked to by that court in settling what is a reasonable fee for the services of the trustees, but it cannot be held that it was the intention of the testator to give such trustees an unlimited discretion as to how much they should retain for their services. Such a construction would place all estates similarly situated at the mercy of those administering them. Such is not the law, and for this additional reason the position assumed by the appellants is not tenable. The power of fixing the compensation rests in the court under the statute, and not in the trustees. *Collins v. Tilton*, 58 Ind. 375; *Watkins v. Romine*, 106 Ind. 378, 7 N. E. Rep. 193. Judgment affirmed.

(139 N. Y. 68)

PEOPLE ex rel. HARLAN & HOLLINGSWORTH CO. v. CAMPBELL, Comptroller.

(Court of Appeals of New York. Oct. 3, 1893.)

TAXATION—FOREIGN CORPORATION—CAPITAL EMPLOYED IN STATE—CERTIORARI—EVIDENCE—AFFIDAVITS.

1. Where the only property that a foreign corporation has within the state is a small amount of furniture in an office, and the only obligations it incurs in the state are for rent of such office, and the salary of its agent in charge of the same, it employs no capital in the state that can be made the basis of taxation.

2. On certiorari to review the action of the comptroller in imposing taxes on the capital

stock of a foreign corporation, the comptroller cannot object for the first time on appeal that the application for the writ was not made within 30 days, as required by Laws 1885, c. 301, § 17.

3. Where a corporation applies to the comptroller to review his action in imposing taxes on its capital stock, affidavits may be received and treated as competent evidence, though the comptroller may require the witnesses to be examined orally before him; and, where he receives and considers such affidavits as evidence without objection, he cannot claim, on certiorari to review his action, that no competent evidence was before him.

Appeal from supreme court, general term, third department.

Certiorari by the Harlan & Hollingsworth Company to review the action of Frank Campbell, comptroller of the state of New York, in imposing taxes on the capital stock of relator, a foreign corporation, on the ground that it was doing business and employing its capital within the state. From a judgment of the general term (22 N. Y. Supp. 1111) affirming the action of the comptroller, relator appeals. Reversed.

Henry B. B. Stapler and Henry W. Smith, for appellant. S. W. Rosendale, Atty. Gen., for respondent.

EARL, J. The relator is a foreign corporation, having its charter and local habitation in the state of Delaware. The comptroller, claiming that it was "doing business in this state," imposed taxes upon it, on account of such business, under the act, chapter 542 of the Laws of 1880, and the acts amendatory thereof, (chapter 861, Laws 1881; chapter 501, Laws 1885; chapter 463, Laws 1889,) for the years 1889, 1890, and 1891, computing the taxes upon the basis of \$25,000 capital stock "employed within this state." Subsequently, the relator, claiming that it did not do any business or employ any of its capital within this state, applied to the comptroller to review and readjust the taxes; and after hearing the relator, and reviewing and considering its evidence submitted to him, he refused to make any change in the taxes imposed. Subsequently, the relator obtained a writ of certiorari to review the action of the comptroller, to which he made return, and the general term affirmed his action.

The comptroller makes some preliminary objections to the maintenance of this proceeding, not involving the merits, which must first be considered. He claims that the application for the certiorari was not made within 30 days after service upon the relator of the notice of the settlement of the taxes, as required by section 17 of the act of 1885. It is quite true, from the dates given in this record, that the certiorari was not applied for in time. But it does not appear that such a point was taken in the court below. There the proceeding seems to have been entertained without any such objection, and the action of the comptroller was affirmed. If he desired to avail himself of such an objection, he should have moved then, on that ground, to quash the writ, and that would have given the relator an opportunity to meet the objection by showing

that by some agreement or estoppel he could not avail himself thereof. It is too late now, for the first time, to raise the objection.

The comptroller further claims that the relator did not submit to him any competent evidence upon its application for a review or resettlement of the taxes, as required by section 20 of the act of 1889. It appears that the relator did not furnish witnesses to be sworn and examined orally before the comptroller. The evidence was in the form of affidavits furnished to and received by him. His decision shows that he considered the affidavits as evidence, and it does not appear that any one objected to them as competent and sufficient evidence. The comptroller could doubtless have required the witnesses to be examined orally before him. But it was for him to determine how the evidence should be presented before him; and in this, as in many other legal proceedings, affidavits may be received and treated as competent evidence.

So the merits of this controversy are before us, and it must be determined upon the facts appearing in this record. There is no dispute about the facts. The business of the relator was to manufacture steamships and railway cars, and to equip and repair the same, and all that business was carried on in the state of Delaware. There all the parties interested in the relator, and all its officers, resided, and there all its real business transactions were conducted. All its contracts were made there, and all its products were sold and delivered there. It did no manufacturing in this state, kept no money here, and had no property here except a small amount of office furniture, and in fact it transacted none of its corporate business here. It kept a hired office in the city of New York, which was in charge of a resident salaried agent, and the office was maintained "solely for the convenience of itself and patrons; the only design of said office being a meeting place for the discussion of questions which are likely to arise preliminary to the signing of contracts for appointments and conferences with such of its patrons who, being in the city of New York from time to time, may desire the convenience of an office for communications with it, and for ascertaining through its agent in charge of the same what contracts are offering in that locality, and the character and responsibility of the parties offering the same; the contracts themselves being made and signed in every case at the home office, in Wilmington." And this is all the claimed business done by the relator in this state. And upon these facts can it be said that it was, within the meaning of the statute, "doing business in this state?" We leave this question unanswered, as we are satisfied that it did not employ any of its capital within this state, and that, therefore, there was no basis for the imposition of the taxes. As before stated, except the small amount of furniture in its office, it did not have or keep any property of any kind within this state, and it did not disburse any money in this state. The only obligations it incurred in this state were

for the rent of the office and the salary of its agent, and they were discharged by checks drawn in the state of Delaware on a Delaware bank, and paid in that state. Those checks were obligations of the relator, and not property, in any sense, belonging to it, and they were no portion of its capital. They operated as payments made in the state of Delaware, and there was no ground whatever for saying that it employed \$25,000 of its capital, or any other sum, within this state. We do not think that the office furniture could fairly be considered as capital employed within this state. But, even if it could be, the amount is too small for serious consideration under the acts mentioned. We are therefore of opinion that the order of the general term and the decision of the comptroller in the imposition of the taxes should be reversed, with costs of appeal to this court. All concur, except MAYNARD, J., taking no part.

(139 N. Y. 87)

### PEOPLE v. CAMP.

(Court of Appeals of New York. Oct. 3, 1893.)

#### KIDNAPPING.

Pen. Code, § 211, provides that one who willfully seizes, confines, inveigles, or kidnaps another, with intent to cause him, without authority of law, to be secretly confined or imprisoned within the state, is guilty of kidnapping. *Held*, that defendant was not guilty of such offense, where he procured an adjudication that the person alleged to have been kidnapped was insane, and, without using force, publicly conveyed her to a lunatic asylum, though she was not insane at the time. 21 N. Y. Supp. 741, affirmed.

Appeal from supreme court, general term, fifth department.

Austin J. Camp was convicted under Pen. Code, § 211, of the crime of kidnapping. From a judgment of the general term (21 N. Y. Supp. 741) reversing the judgment of conviction, and discharging defendant, the people appeal. Affirmed.

A. P. Rich, Dist. Atty., (Louis Marshall, of counsel,) for the People. James A. Wright, (Frank D. Wright, of counsel,) for respondent.

EARL, J. We think the court below could, under section 527 of the Code of Criminal Procedure, properly have reversed this conviction on the ground that the verdict was against the weight of evidence, or that justice required a new trial. But if it had reversed the conviction upon either of these grounds, or for any other errors which could be obviated or corrected upon a new trial, instead of discharging the defendant, it should have ordered a new trial. Code Crim. Proc. § 548; *People v. Phillips*, 42 N. Y. 200. Therefore, to uphold the decision of the general term, discharging the defendant, we must be able to see in this record some fundamental obstacle to his conviction for the crime charged in the indictment.

Kidnapping was an offense at common law, and consisted in the unlawful removal of a person from his own country or state against his will. 4 Bl. Comm. 219; 1 Russ. Crimes, (8th Ed.) 962; 1 Whart.

Crim. Law, (8th Ed.) § 590; 2 Bish. Crim. Law, (7th Ed.) § 750. In the case of adult persons, it is believed that at common law the crime of kidnapping was not complete until the person alleged to have been kidnapped was removed from his own country to another, and thus deprived of the benefit and assistance of the laws under whose protection he lived. But, at a very early day in England, statutes were passed extending the crime to other cases, and it is now defined by statutes, it is believed, in all the states of this country; and nowhere, so far as we can discover, would the acts of the defendant, as disclosed by the evidence in this case, constitute the common-law or statutory offense of kidnapping. Now, what are the material facts of this case? Mrs. Baird, aged 29 years, was a married daughter of the defendant, living with him, separate from her husband. In August, 1890, the defendant, alleging that she was insane, went to the county judge, and stated the case to him. He designated two competent and qualified physicians to examine her, and they went to the house of the defendant, and examined her, and investigated her condition, and certified under oath that she was insane, and subsequently their certificate was approved by the judge. She knew of these proceedings, and knew that the physicians had adjudged her to be a lunatic, and that she was to be taken to the asylum. The defendant, having the certificate, took her in the daytime to the lunatic asylum at Utica, and for that purpose he used no force or violence whatever. He believed that he had the right to take her, and she, believing that she was obliged to go, voluntarily went with him, without making any resistance, or any effort to escape. She was delivered at the asylum, and there remained for about three weeks, when she was discharged on the ground that she was not insane. The asylum physicians and attendants believed that she was not insane at any time while she was in the asylum. Upon the trial there was a controversy as to her insanity when the certificate of the physicians was made, and as to the motive of the defendant in taking her to the asylum, and as to his belief that she was really insane at the time. We will, for the purposes now in hand,—although far from believing it,—assume that she was not insane, and that the defendant knew it, and that he used the forms of law from improper and malicious motives, and yet we are of the opinion that he did not commit the crime of kidnapping. As we have stated, under the common law, these acts would not have constituted the crime of kidnapping, because Mrs. Baird was not removed from the state. The Revised Statutes defined the crime of kidnapping as follows: "Every person who shall without lawful authority forcibly seize and confine any other, or who shall inveigle or kidnap any other with intent either (1) to cause such other person to be secretly confined or imprisoned in this state against his will; or (2) to cause such other person to be sent out of this state against his will." 2 Rev. St. p. 664, § 28. And this section of the Revised Statutes,

consisting of these subdivisions, was carried into the Penal Code, and is there subdivision 1 of section 211, as follows: "A person who willfully seizes, confines, inveigles or kidnaps another with intent to cause him, without authority of law, to be secretly confined or imprisoned within this state, or to be sent out of the state, or to be sold as a slave, or in any way held to service, or kept or detained against his will," is guilty of kidnapping. The Code provision was a mere revision of the provisions contained in the Revised Statutes, and we have no reason to suppose that it was intended to embrace within the definition of the crime acts before innocent. When the person seized or inveigled is not removed from the state, the intent must be secret confinement within the state. When the person is seized and removed in broad daylight, over public highways and railroads, in the presence and view of many people, and taken to a public asylum, where there are public officials, numerous physicians, and other people, there certainly is no secrecy about the transaction, and it bears no resemblance to what has always been understood to be kidnapping. In such a case there may be an assault and false imprisonment, but not the crime here charged. Such a person has the protection of our laws, and ample remedies against the wrongdoer, and the writ of habeas corpus is always available for his release. Suppose a public officer, without authority of law, publicly seizes a person in the street, and takes him to the police station or jail. Is he guilty of kidnapping? Suppose the defendant, inflamed by undue religious zeal, had taken his daughter by force, and carried her to some church, and compelled her to sit in a pew by his side during religious services. Would he have been guilty of this crime? These questions must obviously be answered in the negative, and unless they can be answered in the affirmative the defendant's conviction upon the facts of this case cannot be maintained. The first part of section 211 provides for all cases of kidnapping by seizure and confinement within the state. The latter part, after the words "within this state," relates to cases of removal of the person seized or inveigled from the state; and, if a broader meaning be given to the latter part, then the fore part is useless and unnecessary. In construing the section, a purpose should be attributed to all the language used. It is clear, therefore, that a new trial could not result in the conviction of the defendant, and hence he was properly discharged. Many other questions are discussed in the learned and exhaustive briefs submitted to us, but we do not consider their determination at this time important. The judgment should be affirmed. All concur.

(139 N. Y. 51)

In re CALLAHAN'S ESTATE.

(Court of Appeals of New York. Oct. 3, 1893.)

APPEAL—FROM OPINION.

n executrix having failed to appear  
nt as required by an order of a sur-

rogate, an order requiring her to show cause why a warrant of attachment should not issue against her, and her letters be revoked, was granted; and on the return thereof she filed an affidavit reiterating her claims made in opposition to the order to account, and alleging that a copy of that order had not been served on her, and she was not, therefore, in default. The surrogate overruled the objection, and filed a written memorandum stating that the statute did not require service of the order, and that the account must be filed within five days, or a warrant of attachment would issue. *Held*, that the memorandum was simply a continuance of the proceeding, and not an appealable order. 20 N. Y. Supp. 824, affirmed.

2. An order of a surrogate requiring an executrix to account is not a final order, and therefore is not appealable.

Appeal from supreme court, general term, first department.

Louisa Leach applied to the surrogate for an order requiring Mary McGuire, executrix of John Callahan, deceased, to file an account as executrix. The order was granted, but McGuire failed to file the account, and an order was granted requiring her to show cause why a warrant of attachment should not issue against her. On the return of the order, the surrogate filed a memorandum holding contrary to the contention of McGuire. From a judgment of the general term (20 N. Y. Supp. 824) affirming the order for the accounting, and dismissing the appeal from the memorandum, which was specified in the notice of appeal as one of the orders appealed from, McGuire appeals. Affirmed as to the dismissal, and dismissed as to the appeal from the judgment affirming the order.

Thos. J. McKee, for appellant. Niles & Johnson, (W. W. Niles, Jr., of counsel,) for respondent.

MAYNARD, J. We can find no authority for this appeal. The order which the appellant seeks to review was made in a special proceeding before the surrogate of New York, and is not final. The respondent claimed to be a creditor of the appellant's testator, and filed a petition for the judicial settlement of the accounts of the appellant as executrix, and that she be cited to show cause why she should not render and settle her account, and setting forth all the facts essential to confer jurisdiction upon the surrogate to issue the citation. Upon the return day the appellant appeared, and filed a verified answer to the petition, alleging facts which, if true, very clearly established that the respondent was not a creditor of the estate, and not entitled to institute the proceeding, and that her demand had been duly rejected upon presentation, and that the six-months statute of limitations had intervened to bar an action upon the claim. The respondent then filed the affidavit of herself and her attorneys, by way of reply, showing that no notice of the rejection of the claim had been served upon her or them. The surrogate thereupon made an order requiring the appellant, at a future day, to appear in his court, and make and file an account of her proceedings as executrix, and attend before him from time to time as might be necessary

for that purpose. It is from that order that the present appeal has been taken. The record further shows that the appellant neglected to obey the order of the surrogate, and did not appear at the time named, and render an account, and the respondent applied, upon an affidavit setting forth the default, for an order requiring the appellant to show cause why a warrant of attachment should not issue against her, and her letters be revoked, which was granted. Upon the return of that order the appellant appeared, and filed an affidavit substantially reiterating the claim made in her answer to the first petition,—that the respondent had no valid debt against the estate, and also alleging that a copy of the order requiring her to account had not been served upon her, and she could not, therefore, be regarded as in default. The surrogate overruled this objection, and, in a written memorandum filed, held that the statute did not require service of the order, and that the account must be filed within five days thereafter, or a warrant of attachment would issue. This memorandum had none of the qualities of an order, but was, in effect, simply a continuance of the proceeding until the day named, as a favor to the executrix, and to enable her to comply, if she so elected, with the provisions of the original order. The appellant has treated this memorandum as in itself an order, and in her notice of appeal has appealed therefrom, as well as from the original order for an accounting.

The general term very properly dismissed that part of her appeal, and it remains to be considered whether the order of the general term affirming the order for an accounting is appealable here. It is very plain that this is not a final order, within the purview of subdivision 3, § 190, but simply the initial step in a special proceeding in the surrogate's court. The point of the appellant's contention, if we correctly apprehend it, is that the surrogate had no jurisdiction to make the order requiring her to account upon the petition of the respondent; that when it appeared by her sworn answer that the respondent had no valid claim, and was not a creditor of the estate, as that term is used in the statutes relating to proceedings in surrogate's court, the surrogate could not lawfully proceed further in the matter, but was bound to dismiss the proceedings, or at least to suspend action therein until the respondent had established her status as a creditor in another tribunal. It might be argued that, as the question is one of jurisdiction, it would be a more orderly procedure to have it first finally determined; otherwise, the appellant might be compelled to render an account which the surrogate had no authority to require, and, while the question might be raised upon an appeal from the decree, it would be too late to afford the appellant an adequate remedy. But, if she is right in her position that the surrogate is devoid of jurisdiction, she may decline to render the account, and permit an order to be entered directing a warrant of attachment to be issued, and her letters revoked, which would be such a

final adjudication in the proceeding as to be appealable here. This she seems to have started out to do, but for some reason did not wait until final action had been taken, but brought the present appeal, which we think is ineffectual for the purposes of review in this court. The appeal must therefore be dismissed, with costs. All concur, except FINCH and PECKHAM, JJ., not voting.

(129 N. Y. 140)

# IN RE MAYOR, ETC., OF CITY OF NEW YORK.

(Court of Appeals of New York. Oct. 3, 1893.)

JUDGES—SPECIAL DESIGNATION—CONTINUING JURISDICTION.

Under Const. art. 6, § 12, authorizing provision for designating judges of the superior and common pleas courts to hold circuits and special terms of the supreme court, and Code Civil Proc. § 236, clothing a judge so designated with all the powers of a supreme court justice to make orders in any action in said court, the judge designated is not a supreme court justice; and when application has been made to him sitting as such justice, and after hearing and submission he resigns from the superior court, and is appointed a supreme court justice, he does not retain jurisdiction of the application. 23 N. Y. Supp. 532, affirmed.

Appeal from supreme court, general term, first department.

Application by the mayor, etc., of the city of New York to acquire property for improvement of the water front. From an order of the general term (23 N. Y. Supp. 532) reversing an order appointing commissioners, the mayor, etc., appeal. Affirmed.

William H. Clark, (Charles J. Blandy, of counsel,) for appellants. John C. Shaw and Frank A. Irish, (Grats Nathan, of counsel,) for respondents.

O'BRIEN, J. The order appealed from reversed an order appointing commissioners to estimate the damages in an application by the city, through the proper department, to acquire land under water and certain wharf property for public use, in order to improve the water front in or adjacent to certain streets. The application was submitted to Judge Ingraham at a special term of the supreme court, at which he presided. At the time, he was a judge of the superior court of the city of New York, designated by the governor to hold circuits and special terms in the supreme court, under the provisions of section 12, art. 6, of the constitution, and section 236 of the Code. After the application was submitted to him, and before the decision, he resigned the office of judge of the superior court, and was appointed a justice of the supreme court by the governor, to fill a vacancy in that office then existing, and in his capacity of justice of the supreme court, presiding at the special term, he decided the application, and made the order which was appealed from March 18, 1892. The general term reversed upon the ground that the judge who made the order lost jurisdiction of the matter upon his resignation of the office of judge



of the superior court. The statute under which the proceedings were instituted conferred power upon the court to hear and determine the questions involved, and not upon a judge out of court. Laws 1882, c. 410, §§ 715, 964, 965. In general, it may be said that the powers of a judge of a court, with respect to actions or proceedings pending before the court over which he presides, terminate when he ceases to be a judge, or when his office expires by resignation, removal, expiration of his term, or otherwise. In order to prevent a failure of justice, or great expense and inconvenience to suitors or parties having business before the court, or before judicial officers, this rule has been, in exceptional and specified cases, modified by statute. There is no reason, however, for attempting, by any strained or doubtful construction of these statutes, to bring cases within them not embraced within the language used, or their plain scope and intention. This would be so in any case, but it would seem to be specially applicable to a case like this, where private property is sought to be obtained for public use without the consent of the owner. In such a case, where the power is challenged at every step, there ought not to be any question in regard to the jurisdiction of the court to divest the owner of the title and transfer it to another.

In this case, after the application was made and submitted, and before any decision was rendered, the judge of the court before which it was heard resigned, and thus both his designation by the governor to act and his office became vacant. All further power or jurisdiction over the case was lost, unless saved by some statute. The Code (section 25) empowers a judge out of office to settle a case or exceptions, or make return of any proceedings had before him while in office, but this does not enable him, after his general judicial functions have ceased, to decide an issue or motion. Section 26 is specially applicable to the city and county of New York and the county of Kings, and relates to special proceedings instituted, or a proceeding commenced, before a judge out of court in an action or special proceeding pending in court, and authorizes a continuance of them before another judge of the same court. The precise scope and meaning of this provision is left in some doubt by the decisions, but it is safe to affirm that it relates to a proceeding before the judge out of court, acting as an officer, and has no application to an issue or motion in an action or special proceeding heard by the court before the office of the judge holding the same was vacated. *Woodruff v. Insurance Co.*, 90 N. Y. 521; *Dresser v. Van Pelt*, 15 How. Pr. 19. Section 52 provides that in case of the death, sickness, resignation, removal from office, absence from the county, or other disability of an officer before whom a special proceeding has been instituted, where no express provision is made by law for the continuance thereof, it may be continued before his successor, etc. This section also applies, not to a proceeding in court, but to one before an officer; and manifestly

this case is not within it. The only statutory provision upon which the learned counsel for the corporation relies or can rely to uphold the jurisdiction to make the order in question is the last part of section 238, which is the statute wherein the legislature conferred power upon the governor, in pursuance of the constitution, to designate judges of the superior court and court of common pleas to hold circuits and special terms in that city. This designation must be in writing, and must specify the terms to be held, and the judge who is to hold them. The last paragraph was added in 1880, and is as follows: "And a judge thus designated may, after the expiration of the period of such designation, decide, finally determine, and dispose of any action, proceeding, or motion that may have been tried or heard before him, and such judge, during the period of designation, possesses within the city of New York all the powers of a justice of the supreme court in and out of court, to make orders in any action or special proceeding in the supreme court." This provision confers power upon a judge of the superior court or court of common pleas, who has heard a case in the supreme court, under a designation by the governor, to decide the same after the designation expires. But it applies only to a case where the judge who heard the case still continues to be a judge of the court from which he was designated, and not to a case like this, where both the designation and the judicial office have become vacant by resignation. When Judge Ingraham heard this case he was a judge of the superior court. When he decided it he was a justice of the supreme court. The designation of the governor empowered him to perform some of the duties of a justice of the supreme court, within a specified political division of the state, but he held the same office as before, and no other. The fact that he became a justice of the supreme court at the same moment of time that he ceased to be a judge of the superior court does not change the case. The question remains the same as if a period of time intervened between the two events, or another person had been appointed to fill the vacancy in the supreme court. All the jurisdiction which he had to make the order in question was acquired by and after his appointment to the supreme court. He did not carry with him into the new office any jurisdiction that he acquired in the old. He had the same power, and no other, to decide a case heard by him in the supreme court, as a judge of the superior court, that was possessed by any of his associates in the supreme court who had not heard the case at all. The jurisdiction which he acquired by the submission of the application did not survive his resignation, and attach to him in his new capacity. It has been held that, where the term of a justice of the supreme court expired during a trial, and he immediately entered upon a new term under a re-election, he had jurisdiction to conclude the trial, and decide the case. *Kelly v. Christal*, 16 Hun, 242. That case was mainly decided upon the fact that after the new term commenced the parties

appeared before the judge, and went on with the case without raising any question or making any objection until after the decision. Even if what was said in that case with respect to the continuous power of a judge who is his own successor be correct, it cannot well be applied here, as Judge Ingraham was not his own successor, nor were all his judicial acts performed as a judge of the same court. He was the successor of a justice of the supreme court whose office became vacant by death, and it cannot be said, as it was in that case, that he was a judge of the court at every moment of time while the cause was before him, and hence retained jurisdiction. We think that the views expressed by the general term are correct, and that the order should be affirmed, with costs. All concur.

(139 N. Y. 32)

PEOPLE v. CANNON.<sup>1</sup> SAME v. QUINN.  
SAME v. BARTHOLF.

(Court of Appeals of New York. Oct. 3, 1893.)

REGISTERED BOTTLE—STAMP ACT—CONSTRUCTION  
—CONSTITUTIONAL LAW—RESTRICTION OF TRADE  
—PROPERTY RIGHTS—POSSESSION OF BOTTLES—  
PRIMA FACIE EVIDENCE—CONDITIONAL SALE.

1. Laws 1887, c. 377, as amended by Laws 1888, c. 181, making it a misdemeanor for any one to fill up with soda water, etc., registered, stamped bottles of manufacturers of soda water, etc., or to deface the stamp thereon, or to sell, buy, give, take, or dispose of, or traffic in the same, without the written consent of, or unless the same shall have been purchased from, the person whose stamp is thereon, does not prohibit retail dealers from selling and delivering soda water, etc., in the original bottles, as it comes from the manufacturer, but merely from dealing in empty bottles after the original contents have been removed.

2. As the act merely forbids dealing in registered, stamped bottles without the consent of the owner of the stamp, or unless he has once sold them, it is not an unlawful interference with the trade in empty bottles, though it necessitates greater caution than would otherwise be required in making purchases. 18 N. Y. Supp. 25, affirmed.

3. The act does not destroy property in the bottles, by preventing their use, because, unless the owner of the stamp has given his consent to their use, or has once sold them, no one else can have any property right in them. 18 N. Y. Supp. 25, affirmed.

4. The provision of the statute that the possession by a dealer in second-hand articles of any registered, stamped bottles, without the written consent of the owner of the stamp, shall be presumptive evidence of unlawful use, purchase, and traffic therein, is a proper legislative enactment, there being such connection between the possession and an unlawful traffic therein as to make it proper presumptive evidence of guilt. 18 N. Y. Supp. 25, affirmed.

5. There being no other evidence than the fact of possession of the bottles, the presumption of guilt, arising therefrom, permits, but does not compel, the jury to convict.

6. Where a manufacturer of soda water delivers it to customers in bottles having his registered stamp thereon, and takes a money deposit as security for it, without any agreement that they

this is a condition of the one obtained deal in the

Appeal term, if

<sup>1</sup> Re-

William P. Cannon, Hugh Quinn, and George Z. Bartholf were convicted, under separate indictments, for violating the "hottling act," and, from judgments of the general term (18 N. Y. Supp. 25, 569, and 20 N. Y. Supp. 782) affirming the judgments of conviction, they appeal. Affirmed as to Cannon. Reversed as to Quinn and Bartholf.

The other facts fully appear in the following statement by PECKHAM, J.:

These are appeals from convictions of the above defendants, affirmed by the general term of the supreme court in the first department. Each defendant was convicted, upon a separate indictment and trial, of a violation of what is described in the various records as the "Bottling Act," and known as chapter 377 of the Laws of 1887, as amended by chapter 181 of the Laws of 1888. The first three sections of the act are here alone material. The title of the act, and the sections spoken of, read as follows:

"An act to protect the owners of bottles, boxes, siphons, and kegs used in the sale of soda waters, mineral and aerated waters, porter, ale, cider, ginger ale, milk, cream, small beer, lager beer, weiss beer, beer, white beer or other beverages.

"Section 1. Any and all persons and corporations engaged in manufacturing, bottling or selling soda waters, mineral or aerated waters, porter, ale, beer, cider, ginger ale, milk, cream, small beer, lager beer, weiss beer, white beer, or other beverages, or medicines, medical preparations, perfumery, compounds or mixtures, in bottles, siphons, tins or kegs, with his, her, its or their name or names or other marks or devices branded, stamped or engraved, etched, blown, impressed or otherwise produced upon such bottles, siphons, tins or kegs, or the boxes used by him, her, it or them, may file in the office of the clerk of the county in which his, her, its or their principal place of business is situated, and also in the office of the secretary of state, a description of the name or names, marks or devices so used by him, her, it or them, respectively, and cause such description to be printed once in each week for three weeks successively in a newspaper published in the county in which said notice may have been filed as aforesaid, except that in the city and county of New York and the city of Brooklyn, in the county of Kings, such publication shall be made for three weeks successively in two daily newspapers published in the cities of New York and Brooklyn, respectively.

"Sec. 2. It is hereby declared to be unlawful for any person or persons, corporation or corporations, to fill with soda waters, mineral or aerated waters, porter, ale, cider, ginger ale, milk, cream, beer, small beer, lager beer, weiss beer, white beer or other beverages, or with medicine, medical preparations, perfumery, compounds or mixtures, any bottle, box, siphon, tin or keg, so marked or distinguished as aforesaid, with or by any name, mark or device, of which a description may have been filed and published, as provided in section one of this act, or

to deface, erase or obliterate, cover up or otherwise remove, or conceal, any such name, mark or device thereon, or to sell, buy, give, take or otherwise dispose of or traffic in the same without the written consent of or unless the same shall have been purchased from the person or persons, corporation or corporations whose mark or device shall be or shall have been in or upon the bottle, box, siphon, tin or keg so filled, trafficked in, used or handled as aforesaid. Any person or persons or corporations offending against the provisions of this section shall be deemed guilty of a misdemeanor, and shall be punished for the first offense by imprisonment not less than ten days nor more than one year, or by a fine of fifty cents for each and every such bottle, box, siphon, tin or keg so filled, sold, used, disposed of, bought or trafficked in, or by both such fine and imprisonment, and for each subsequent offense by imprisonment, not less than twenty days nor more than one year; or by a fine of not less than one dollar nor more than five dollars for each and every bottle, box, siphon, tin and keg so filled, sold, used, disposed of, bought or trafficked in, or by both such fine and imprisonment in the discretion of the magistrate before whom the offense shall be tried.

"Sec. 8. The use by any person other than the person or persons, corporation or corporations, whose device, name or mark shall be or shall have been upon the same, without such written consent or purchase as aforesaid, of any such marked or distinguished bottle, box, siphon, tin or keg, a description of the name, mark or device whereon shall have been filed and published as herein provided, for the sale therein of soda waters, mineral or aerated waters, porter, ale, cider, ginger ale, milk, cream, beer, small beer, lager beer, weiss beer, white beer, or other beverages, or of any articles of merchandise, medicines, medical preparations, perfumery, compounds, mixtures or preparations, or for the furnishing of such or similar beverages to customers, or the buying, selling, using, disposing of or trafficking in any such bottles, boxes, siphons, tins or kegs by any person other than said persons or corporations having a name, mark or device thereon, or such owner without such written consent, or the having by any junk dealer or dealers in second-hand articles possession of any such bottles, boxes, siphons, tins or kegs, a description of the marks, names or devices wherein shall have been so filed and published as aforesaid, without such written consent, shall and is hereby declared to be presumptive evidence of the said unlawful use, purchase and traffic in of such bottles, boxes, siphons, tins or kegs."

There were three counts in each indictment,—one for unlawfully buying from a person to the grand jury unknown, one for unlawfully taking from a person to the grand jury unknown, and one for unlawfully trafficking in and disposing of in a manner and by means to the grand jury unknown, certain bottles; describing them as having marks on them, etc., as provided for in the first section of the above act. The defendants are dealers in, among

other articles, second-hand bottles of all descriptions. They are among the largest dealers in those articles in the city of New York, have been engaged in that business for a number of years, and their stock on hand, at the time when the occurrences herein spoken of took place, reached, in each case, to the number of several hundred thousand bottles. Neither of the defendants was able to tell of whom or where he purchased the bottles which are the subject of complaint in this case. They purchase all kinds of bottles from whoever comes with them, if satisfied they have not been stolen. Their purchases come from all over the country, by rail and in vessels, and packed in boxes and barrels, and they are ignorant of the kinds of bottles that thus come until they have been taken from the various railroad stations or vessels, and brought to their stores and sorted out. The defendants claimed to be ignorant of the possession of any of the classes of bottles described in the indictments until their places were visited by the police under a search warrant sworn out by a detective employed by an association of manufacturers of soda waters, beer, etc., and who were the owners of bottles registered as provided for by the law. Among all the bottles that were in the possession of the defendants, there are involved in this proceeding but very few, as the evidence shows there were only found an insignificant quantity of registered bottles, as compared with the immense numbers of others which were on hand, and dealt in by the defendants.

Everett P. Wheeler, Wm. J. Gaynor, and A. W. Tenney, for appellants. Thomas C. E. Ecclesine, Special Dist. Atty., (Wm. Travers Jerome, of counsel,) for the People.

PECKHAM, J., (after stating the facts.) These prosecutions have been instituted for the purpose of obtaining a decision in regard to the validity of the law under which the convictions have been secured. Counsel for both parties have so stated, and the courts below have distinctly ruled upon the various propositions raised, so that the constitutionality of the statute might be fairly tested. It is claimed that the act deprives all persons, other than the manufacturers, of the right to traffic in or give away sparkling or aerated liquors or beer which have ever been placed in a trade-mark bottle. It is said that, if the manufacturer refuses to sell the bottle, he, in effect, prohibits the sale or gift of that which is contained in it, except over the counter, and it is urged that the legislature cannot grant to the manufacturer such a monopoly. It is needless to speculate as to the powers of the legislature upon this subject, because we are of the opinion the statute is not susceptible of any such construction.

It is made unlawful for any one to fill up with soda waters, etc., any bottle marked and distinguished as in the first section of the act is provided, or to deface, erase, or obliterate any such mark on such bottle, or to sell, etc., or to otherwise dispose of or traffic in, the same, with-

out the written consent of, or unless the same have been purchased from, the person whose mark is on the bottle. This provision of the act refers to the use of these empty bottles by some one other than the owner of the marks thereon, and after the original contents of such bottles have been taken out, and then unlawfully using or trafficking in the empty bottles. After the retail dealer, or any one else, has purchased the soda water or beer from the manufacturer, and the same has been delivered to him, packed in the bottles thus marked, he is not prevented, by anything in the statute, from himself selling such soda water or beer, and delivering the same to the purchaser, packed in the same bottles in which it was delivered to him from the manufacturers. This process may be continued indefinitely. The act is not aimed at the sale and delivery of the water or beer packed in the original bottles, as it came from the manufacturer, but it is aimed at an unlawful dealing in empty bottles that have been marked, and after their original contents have been used. If otherwise, it is clear that an enormous amount of the business of the manufacturers would be curtailed. It is a fact, which every one knows, that large amounts of the liquors originally put up in these bottles are sold by the manufacturers to the retail dealers, who sell them to the customers, who take them away in the original bottles in which the manufacturers delivered them to the retail dealers; and it cannot be contended with any degree of plausibility, as it seems to us, that there is anything in the language of the statute, properly construed, which prohibits such a dealing in and delivery of the liquors by any one into whose possession and ownership they have lawfully come. Nor is there any just foundation for the assertion that the act necessarily destroys, or unlawfully decreases, the trade in empty bottles, which is a fair trade, and one entitled to the equal protection of the law. The act contains no provision in regard to empty bottles, in general. It forbids the use or traffic in certain kinds of bottles without the written consent of the owners of the marks on them, or unless they have themselves once sold the bottles. It is not necessary that they should have sold to the person using them. A sale of the bottles to any one thereafter precludes the application of the provisions of the statute. A bottle that has been marked as described in the first section, and has thereafter been used by the owner of the marks for the purpose of identifying in the market the particular goods manufactured by him, and put up in such bottles, ought not to be used for other purposes against the will of the manufacturer, so long as he has not sold the bottles to any one, nor authorized any one to use or traffic in them; in other language, so long as he continues the owner of the bottles. And this kind of use or traffic the law is intended to prevent. Under the broadest definition of the term "liberty," as used in the constitution, it is not probable that any one would contend that it covers, or ought to cover, the liberty of dealing in property

which the original owner has not sold to any one, or authorized any one else to deal in; and yet the claim that the act destroys the trade in second-hand bottles would lead to this result, if it were allowed. Because the act prohibits the dealing in the property of a third person without his consent, it may be that the business of the second-hand bottle dealer is affected so far as to necessitate further precautions in regard to making purchases than would otherwise be necessary. Before purchasing second-hand bottles, he must be assured that the person selling has the right to sell them, and that he (the dealer) has the right to buy them. This may require more of an inspection of the kinds of bottles purchased than the dealer has heretofore been accustomed to give, but there is nothing improper in such obligation; and, if he fail to perform it, he must omit it at his peril. The act in question has a tendency to prevent frauds upon the public, in the way of filling these bottles with articles of the same nature as originally put in them, but not manufactured by the owners of the marks. Even though there may already be a section or sections of the Penal Code which cover such a subject, that does not render the further enactment of the legislature upon the same subject void. If, naturally, there may be trouble in showing that the person of whom the second-hand dealer purchased had himself obtained the bottles of some one who had purchased them from the manufacturers, or who had their written consent to deal in, use, or traffic in them, such fact is only an additional reason for not purchasing such bottles until it is clear that they may be lawfully purchased. The act does, undoubtedly, in this respect, seriously hamper any one dealing in these kinds of empty bottles. I can, however, see no constitutional objection to the enactment, based on that ground. A mere possessor of one of these empty bottles may wish to fill it without using the trade-mark. It is true, he is prohibited from effacing the trade-mark, or erasing it; and this, it is said, destroys all property in the bottle, because the person who possesses it can make no earthly use of it. But, in the case to which the act is applicable, the person who has the bottle in his possession has no property right in it, and never did have. The consequence may be that he has no right to use the bottle himself, and that he does not stand in a position, with regard to the person from whom he procured the bottle and contents, to require such person to take it back, and give him its value, or an agreed sum, after the contents have been used. This may be his misfortune, but it does not create any right. As he never owned the bottle, or had any property right in it of that nature, that fact does not and cannot affect him. I fail to find any constitutional defect in this statute, so far as its general features under review in these cases are concerned.

There is a ground of invalidity now to be noticed that has been urged in regard to that portion of the act which relates to matters of evidence. That portion of section 3 of the act which provides that the

having, by any junk dealer or dealers in second-hand articles, possession of these kinds of marked bottles or kegs, without the written consent of the owner of such marks, shall be presumptive evidence of the unlawful use, purchase, and traffic in such bottles, is asserted to be unconstitutional, as an invasion by the legislature of the domain of the judicial branch of the government. It is said the legislature can create and define a crime, but it cannot declare what shall be prima facie evidence of its commission. Whether the crime, as defined by the legislature, has been committed by an accused, is a question for the court and jury, and it is claimed that no direction to the court or jury as to what shall be considered prima facie proof can be given by the legislature. It may be remarked, at the outset, that this question does not arise in the Case of Cannon. The defendant in that case agreed upon a state of facts upon which the judgment of the court and jury was requested, and in the statement it was agreed that the corporation which owned the marks and bottles in question had never granted any written or oral consent that the bottles should be used or trafficked in, and had never sold or given away any such bottle. In the other two cases the question is fairly up, and must be decided.

The legislature of this state possesses the whole legislative power of the people except so far as such power may be limited by our constitution. *Bank v. Brown*, 26 N. Y. 467. The power to enact such a provision as that under discussion is founded upon the jurisdiction of the legislature over rules of evidence both in civil and criminal cases. This court has lately had the question before it. *Board v. Merchant*, 103 N. Y. 143, 8 N. E. Rep. 484. The act in that case provided that whenever any person was seen to drink in a shop, etc., spirituous liquors, which were forbidden to be drank therein, it should be prima facie evidence that such liquors were sold by the occupant of the premises, or his agent, with the intent that the same should be drank therein. The defendant was an occupant of premises where liquor could not be legally sold to be drank there, and he was prosecuted for selling the same in violation of the act. The only evidence of a sale by the accused occupant was the fact that a person was seen to drink liquor upon the premises, and a conviction was asked for under the provisions of the act quoted. The defendant was convicted, and his counsel urged that the act was unconstitutional, on the ground that it violated the constitutional guaranties of due process of law and trial by jury. It was held the claim was unfounded, and that the general power of the legislature to prescribe rules of evidence and methods of proof was undoubted, and had not been illegally exercised in that case. It is true it was a case for the recovery of a penalty, and was brought by the commissioners of excise, and a civil judgment for damages was recovered. It was, however, treated as a quasi criminal case, and criminal prosecutions were cited in support of the prin-

ciple decided in it. It cannot be disputed that the courts of this and other states are committed to the general principle that, even in criminal prosecutions, the legislature may, with some limitations, enact that when certain facts have been proved they shall be prima facie evidence of the existence of the main fact in question. See cases cited in 103 N. Y. 143, 8 N. E. Rep. 484. The limitations are that the fact upon which the presumption is to rest must have some fair relation to, or natural connection with, the main fact. The inference of the existence of the main fact, because of the existence of the fact actually proved, must not be merely and purely arbitrary, or wholly unreasonable, unnatural, or extraordinary; and the accused must have, in each case, a fair opportunity to make his defense, and to submit the whole case to the jury, to be decided by it after it has weighed all the evidence, and given such weight to the presumption as to it shall seem proper. A provision of this kind does not take away or impair the right of trial by jury. It does not in reality change the burden of proof. The people must at all times sustain the burden of proving the guilt of the accused beyond a reasonable doubt. It, in substance, enacts that, certain facts being proved, the jury may regard them, if believed, as sufficient to convict, in the absence of explanation or contradiction. Even in that case the court could not legally direct a conviction. It cannot do so in any criminal case. That is solely for the jury, and it could have the right, after a survey of the whole case, to refuse to convict unless satisfied beyond a reasonable doubt of the guilt of the accused, even though the statutory prima facie evidence were uncontradicted. The case of *Com. v. Williams*, 6 Gray, 1, supports this view. Without the aid of the statute, the presumption provided for therein might not arise from the facts proved, although the statute says they shall be sufficient to authorize such presumption. The legislature has the power to make these facts sufficient to authorize the presumption, (*State v. Mellor*, 13 R. I., at page 669,) and the jury has the power, in the absence of all other evidence, to base its verdict thereon, if satisfied that the defendant is guilty. But the jury must in all cases be satisfied of guilt beyond a reasonable doubt, and the enactment in regard to the presumption merely permits, but cannot, in effect, direct, the jury to convict under any circumstances. The dissenting opinion of Mr. Justice Thomas, delivered in *Com. v. Williams*, supra, contains all that can be said against the validity of this kind of legislation.

It is argued, however, that assuming the validity of the provision in cases of excise sales and kindred cases, such as having in possession game out of season, (*Phelps v. Racey*, 60 N. Y. 10,) and in civil cases, such as providing that the comptroller's deed upon a sale of land for taxes affords a presumption of the regularity of all prior proceedings, (*Howard v. Moot*, 64 N. Y. 262; *Colman v. Shattuck*, 62 N. Y. 343,) yet the principle does not apply to a case like this. The reason alleged is that the

fact which is to be regarded as *prima facie* evidence of guilt, viz. the possession of the bottles by a dealer in second-hand bottles, without the written consent of the owner, was not one sufficiently identified, in ordinary circumstances, with guilt, to make it the foundation of such a presumption. The case of *People v. Lyon*, 27 Hun, 180, was a prosecution under the same section of the statute as that in *Board v. Merchant*, supra. One of the judges at the general term, in illustration of his meaning that the fact from which the inference of guilt may be drawn should have some kind of natural reference to or bearing upon the main fact, said that, if the legislature could provide for such a presumption, it could enact that the drinking of liquors a mile distant from such premises should be *prima facie* evidence of a sale on the premises, with intent that the liquors should be drunk there, or it might enact that, if a dead body were found in any house, it should be *prima facie* evidence that the occupier of the house had murdered the deceased. The learned judge thought the act in question was entirely arbitrary, and had no regard to the connection or want of connection between the fact from which the presumption was to flow and the guilt of the accused. Yet this particular enactment, thus condemned by the supreme court, was upheld by this court in *Board v. Merchant*, supra. The cases cited by way of illustration by the learned judge in his opinion in the supreme court are, in our view, far beyond the mark, and contain nothing in common with the enactment here under review. In the cases supposed, there would be, as the learned judge said, no kind of connection between the fact proved and the main fact in controversy. Such an enactment would be purely arbitrary. In this case, however, we think such connection exists. Of course, the fact from which the presumption is to be drawn may exist without the existence of the main fact. That is true in all cases. In other words, the two facts are not necessarily inseparable. But in this case the fact of the possession of these kinds of bottles by a dealer in second-hand articles, without the written consent of the owner, while it may be innocent, yet the presumption of an unlawful use or traffic in them is not so forced or so extraordinary as to be regarded by sensible and unprejudiced men as unreasonable or unnatural. It is some evidence of the main fact, and the strength of it is properly a matter for legislative enactment in the first instance, subject to its submission to the jury for its deliberation and determination. So the presumption, from the possession of certain birds out of season, that they were unlawfully killed or taken in the state, is not a certain presumption, in any sense. A person might, of course, have the birds, and have procured them in another state, and therefore not be guilty of a violation of the game law. Yet the presumption of a violation of the statute is not such a forced and unnatural one that the legislature may not enact that it shall be made, and thus leave the defendant to explain it. *Com. v. Williams*, 6 Gray, at page 6, in opinion of

Merrick, J. Nor can it be successfully maintained that this species of legislation is to be confined to those cases where the explanation of the fact from which the presumption is to arise is peculiarly within the knowledge of the party who is accused. There are many cases in the books (and they are cited in the cases already alluded to) where the principle is held that the burden of proving the existence of a fact peculiarly within the knowledge of the accused is, at common law, placed upon him. *Potter v. Deyo*, 19 Wend. 361; *People v. Nyce*, 34 Hun, 298. If legislation were confined to such cases, it is plain that it would be entirely unnecessary, and would accomplish nothing, as the law would place the burden of explanation upon the defendant without the aid of the statute. Within the limitations already alluded to and described, the statute may provide for the presumption, and call upon the defendant to explain the fact. In prosecutions for the sale of liquor without a license, the supreme court of Massachusetts held that under the old act the prosecution must prove by proper evidence that the accused had no license, and no presumption that he had none could arise from the fact of selling. *Com. v. Thurlow*, 24 Pick. 374. Thereupon, the legislature passed an act that in all prosecutions for selling liquors the legal presumption should be that the defendant had not been licensed, thus reversing what had been held to be the common-law rule in *Com. v. Thurlow*, supra. This was held to be within the power of the legislature. *Com. v. Kelly*, 10 Cush. 69, 70; *Com. v. Williams*, supra. It is true, the fact of having a license is one peculiarly within the knowledge of the party licensed. Yet the validity of legislation is recognized in these cases, although it enacts that a presumption shall be made from certain facts which at common law would not give rise to any such presumption. I do not know of any constitutional principle which, while permitting the legislature to enact that the legal presumption arising from the sale of liquor shall be that the person selling had no license, yet at the same time prevents the enactment of a provision like the one in the statute under discussion. If the legislature have the power in the first instance, I think it follows that it must have the power in the other. I can see no solid ground for distinction between the two cases. That it has the power in the first case is substantially conceded by all. The inference of guilt, under the provision in question here, is quite as strong as in many other cases that arise under statutory enactments, and we think it is sufficiently reasonable and natural to warrant a legislature in passing such an act. The opinion of this court upon the question of the policy of this kind of legislation is not at all material, and will not, therefore, be stated. The effect of the presumption is to call upon the accused for some explanation. If none be given, the jury may, as I have said, still refuse to convict; but, if they convict, the verdict may be upheld as founded upon sufficient evidence. The provision fills all the requirements of an

act of this nature, for it leaves an accused a fair opportunity to relieve himself from the presumption; to explain the circumstances under which the bottles came into his possession, and that they were of such a nature as to show him innocent of an unlawful use, purchase, or traffic therein. A dealer in second-hand bottles, intending to obey the law, would fairly be open to no danger of unjust conviction. While not giving personal supervision to the receipt of bottles coming by railroad or vessel, or brought to him for sale, he may direct his agents to receive none of the kind mentioned; and when they come from abroad he may so far conditionally receive them as to open their coverings, and see what they are, and reject those which he cannot lawfully buy or deal in. Such a momentary or conditional possession, fairly explained and believed by the jury, or in regard to which they were doubtful, would rebut the statutory presumption, and call for an acquittal. Proof that the bottles in question had been sold, or written authority to deal in them had been given by the owners to some one else, would also be a defense. It might be difficult of proof, it is said, and this may sometimes be true. If difficult of proof, the defendant should think of that before he purchases or deals in them, and decides to run the risk. The Rhode Island supreme court has held an act unconstitutional which, in substance, provided that the notorious character of the premises, or the notoriously bad or intemperate character of the persons frequenting the same, or the keeping of implements or appurtenances usually appertaining to a grog shop where liquors are sold, should be *prima facie* evidence that the liquors were kept on the premises for the purpose of sale within the state. *State v. Beswick*, 13 R. I. 211; *State v. Kartz*, Id. 528. The same court, and in the same volume of its Reports, held that a statute providing that evidence of the sale or keeping of intoxicating liquors for sale in any building should be *prima facie* evidence that the sale or keeping was illegal, and that the premises were nuisances, was constitutional. *State v. Higgins*, Id. 330; *State v. Mellor*, Id. 666. In the *Kartz* Case, *supra*, the court said that the introduction in the law of the principle that a person could be punished for what other people said about him was to render all constitutional provisions unavailing for his protection. The distinction is plain, I think, between the two classes of cases, and the statute under review here does not come within the principle which the Rhode Island court held to be a violation of constitutional rights. We conclude that the provision in question cannot be assailed upon any constitutional ground.

The statute, however, is so framed that if the proprietors or owners of these marked bottles have once sold them, no matter to whom, the bottles may thereafter be freely dealt in. In the *Bartholf* Case the evidence shows, as I think, a conditional sale of the bottles, at the option of the party who deposits the money as a security for their return. It does not show an agreement to return the bottles.

The evidence is that the drivers of the beer or soda-water carts who take out the liquors for the owners or manufacturers take them in these bottles, and that they deliver the beer, soda water, or other liquor in the bottles to the customers. They (the drivers) then give a receipt to the customers for the deposit given by the customers to the drivers for the safe return of the bottles. This deposit is taken to the manufacturers, and they credit the customer with its amount, keeping what is termed a "separate deposit account;" and when they return the bottles the manufacturers refund the money, and if the bottles are not returned the manufacturers keep the money. That a deposit was given as security for the safe return of the bottles does not prove there was an agreement to return them. The evidence here shows, as it seems to us, the existence of an understanding that the party may return the bottles, and get back his money, or keep the bottles, and regard the deposit as a payment, just as he might elect. This construction is strengthened by proof of the fact that the manufacturer acted on the theory that if the bottles were not returned he was to keep the money. The case is barren of any evidence proving an obligation to return the bottles. The bookkeeper said he did not know of any sales of bottles, but the above evidence is all there is on the subject of the delivery of bottles by the manufacturers; and whether it constitutes a sale thereof, at the election of the persons receiving them, and upon the condition of the deposit operating as a payment for the bottles, is a question of law. The taking of security for the return of the bottles, from the party to whom they were delivered, so long as there is no evidence of an agreement, and the party is under no legal obligation, to return them, he having the right to retain them if he choose to leave the money deposited as a payment for the bottles, amounts in law to a sale of them, at the election of the party to whom they were delivered. We think the evidence in this Case of *Bartholf*, at least, shows just such a state of facts. The case of *Westcott v. Thompson*, 18 N. Y. 363, is unlike this. An express agreement to return the barrels was there proved, and the agreement to thereafter pay two dollars for such barrels as were not returned was intended by the parties, as the court held, upon a view of all the facts, to mean that the manufacturers should have all the barrels after the ale was drawn, but they contemplated the possibility of the loss or destruction of some, and the consequent inability of the purchaser of the ale to return them, and they intended to fix by the agreement a price to be paid as the value of each barrel which should not, for the above reason, be redelivered to the manufacturers. Here no such agreement to return the bottles is proved, but on the contrary the evidence shows that the right to retain the bottles was with the party receiving them from the manufacturer of the beer or soda water, subject, however, in that case, to the payment of the deposit made for the purpose. This may



not be the actual truth of the case. The evidence is quite loose, and somewhat unsatisfactory, on this branch. The receipts given by the driver are nowhere put in evidence, and whether they contain anything further in the way of an actual agreement to return the bottles cannot be known from this record. Another trial may show the whole case more fully and accurately. The Quinn Case is not as specific in the offers and exceptions as the Bartholf Case, yet it is seen that even in the former case there was some attempt made to show the facts as to the deposit, and seemingly a ruling of the judge that it was immaterial, or that the court would take notice of such custom. We are not disposed to be technical in such a case, where the subject seems to have been presented to the mind of the court, and definitely ruled on by it, and when we think that possible injustice might result from a refusal to notice a point which was in reality raised by counsel, and actually passed upon by the trial court. We think the judgment in the Cannon Case must be affirmed, and in the other cases the judgments must be reversed, and a new trial ordered. All concur.

(139 N. Y. 93)

ROWLAND v. MILLER et al.

(Court of Appeals of New York. Oct. 3, 1893.)

## COVENANTS—RESTRICTIONS IN USE OF LAND.

1. The owner of a number of lots in a residence part of the city sold some of them under a covenant running with the land, prohibiting their use for a number of purposes designated, and continuing: "Nor shall any other buildings be erected, or trade or business carried on, upon said lots, which shall be injurious or offensive to the neighboring inhabitants." Complainant, who lived in her own house, on such a lot, sought to enjoin defendant, lessee of a house next door, from using it for its undertaking business. Held, that the premises could not be used for holding autopsies, or other post-mortem examinations, dissecting, receiving, and storing of dead bodies, and for the business of holding funerals; that, on proof that said uses had been abandoned, the office and parlors could be used to solicit orders and sell coffins by sample, and the room called a "chapel," for a place of worship, all within the limit of the spirit and purpose of the covenant. 18 N. Y. Supp. 793, affirmed.

2. The fact that a covenant restricting the use of lots for certain purposes is not observed by others is no defense in favor of any one violator against his immediate neighbor, who has observed the covenant, and who objects to his manner of breaking it.

Appeal from superior court of New York city, general term.

Action by Mary Eliza Rowland against Charles Miller and the Taylor Company. From a judgment of the general term (18 N. Y. Supp. 793) affirming a judgment of the special term for plaintiff, defendant Miller appeals. Affirmed.

The other facts fully appear in the following statement by EARL, J.:

In November, 1865, Miss Burr owned several lots of land in the city of New York, on the easterly side of Madison avenue, extending easterly to Vanderbilt avenue, between Forty-Second and Forty-Fourth streets, all of which were then vacant,

and on the 20th day of that month she contracted to sell eight of the lots to Pierson and Cochran. Those lots extended southerly from the southerly line of Forty-Third street half way to the northerly line of Forty-Second street. She still retained title to several lots in the same vicinity, and on the same day she and they entered into a mutual agreement, "for themselves and their representatives, heirs and assigns, owners of any of the said lots above described, that no buildings other than dwelling houses at least two stories high, of brick or stone, or churches, chapels, or private stables of the same material, shall be erected on any of said lots; that no livery or other stable shall be erected on lots fronting on Madison avenue; and that there shall not be allowed or erected on any part of said lots of land any tenement house, brewery, or lager-beer saloon, tavern, slaughter house, butcher's or smith's shop, forge, furnace, steam engine, foundry, carpenter's or carriage or car shop, manufactory of metals, gunpowder, glue, varnish, vitriol, turpentine, ink, or matches, or any distillery, or any establishment for dressing hides, skins, or leather, or any museum, theater, circus, or menagerie, nor shall any other buildings be erected, or trade or business carried on, upon said lots, which shall be injurious or offensive to the neighboring inhabitants; it being expressly agreed that this covenant runs with the land, and is binding on all future owners thereof." This agreement is called the "Restriction Agreement," and the lots have since been conveyed subject thereto. The defendant Miller has become the owner of the lot on the corner of Madison avenue and Forty-Third street, and the plaintiff owns the lot next southerly thereof, which she occupies as her residence; and no question is made that those lots passed into the ownership of the plaintiff and Miller subject to the restriction agreement. On the 1st day of December, 1890, Miller leased his lot, with the house thereon, to the Taylor Company, for the term of 10 years, and it entered into the possession thereof. This action was commenced on the 31st day of January, 1891, to restrain the defendants from violating the covenants contained in the restriction agreement, by carrying on a business condemned thereby. The action was brought to trial at a special term, and the trial judge described the business carried on upon the Miller lot as follows: "That the business of said company is, and for many years has been, that of undertakers, and that a part of that business consists in the reception of human dead bodies, their preparation for burial or other sepulture, involving embalmment in some instances, and in the sale of coffins, caskets, shrouds, and other paraphernalia generally used in the final disposition of dead human bodies. That said company, when it obtained said lease, intended to fit up the building on said premises, which for the most part is built and arranged like an ordinary first-class corner dwelling house in that locality, for the purposes of their business, and have fitted up the same, and are now carrying on their said business

in said building. That said company keeps and uses 14 wagons in its business, each of which (save one) is painted and otherwise fitted up after the manner of wagons used by undertakers in transporting dead human bodies or funeral appliances. That it has fitted up a room in said building called by said company a 'chapel,' and intended by it for the use of people who desire to conduct or hold funeral services, and not for religious worship or services, except so far as such worship or services may be incidental to such funeral ceremonies, which use of said chapel is a part of the business of the said company, and from which it expects and intends to make money. That said company has also fitted up the front basement of said building (which hitherto was like the front basement of an ordinary dwelling in that locality) with special reference to, and for the special purpose of, holding autopsies upon, and for the dissection and other post-mortem examination of, dead human bodies, having prepared a marble table for that special purpose, and closed up the windows and other means of looking into their said autopsy room, in order to prevent observation of idle or curious people, who might otherwise be tempted to congregate about and look into the basement windows while dead human bodies were undergoing such dissection or examination. That in order to prevent the escape into other parts of said building of the foul and noxious odors and gases which usually escape from dead human bodies during autopsical or other post-mortem examinations, said company have opened ventilating holes from said dissection room into two chimney flues, and placed gas jets in said flues, in the hope and expectation that such gases and odors would escape from said building into the air above said building by means of such chimney flues; but they have taken no other precaution to prevent the spread of such odors and gases after their expected escape from the chimney flues. That a part of the undertaking business consists in the receipt and temporary storage of dead human bodies, and in affording facilities for autopsical or other post-mortem examinations upon such bodies whenever it is desired or required. That the parlor floors of said building have been elegantly fitted up for funeral purposes, and are designed by said company for that use, not as a matter of charity, but as a matter of business, and for business profit. That said company have extensively advertised their said business, and the use which they propose to make and are making of said building, and that they will furnish professional embalmers, and that their premises will be kept open day and night for the purposes of their business, by means of advertisements in newspapers which circulate mainly among undertakers, and by means of circulars addressed to the members of the medical profession generally in New York city and vicinity, in which they offer the use of the said dissecting room and other autopsical facilities free of charge. That already there have been several funerals held at said company's

said rooms; one of them, a Chinese funeral. That already there have been held several autopsies and post-mortem examinations of dead human bodies in said dissecting rooms, and it is the hope and expectation of the said company to increase the use of their said premises for the foregoing purposes, as a matter of business in order to make money,"—and he found that the carrying on of such business was a violation of the restriction agreement, and he ordered judgment restraining it. 15 N. Y. Supp. 701.

The sixth clause of the judgment is as follows: "Sixth. The action having been tried by the parties on the theory that it involved the question whether the combination of purposes (the one associated with and depending on the other) to which the Taylor Company devoted the building occupied by it under the lease from the defendant Miller violated the covenants aforesaid, and the defendants having made no claim that any one particular use was exempt from the operation of the covenants, it is ordered that upon payment of the costs awarded, and proof that the combination of purposes has ceased, and the use of the premises for the business of holding autopsies or other post-mortem examinations, dissecting, receiving, and storing of dead bodies, and the use of said premises for the business of having funerals therefrom, has been abandoned, the said defendants may at any time apply to the court, on notice, to modify the injunction so as to permit the lessees to run the office and parlors connected with said premises to solicit orders and sell coffins by sample in the wareroom, and to use the room called a 'chapel' for the legitimate purposes of a chapel,—that is, as a place of worship,—all within such limitations as may be necessary to preserve the integrity of the covenants, and not offend its spirit and purpose."

Subsequent to the rendition of the judgment, the Taylor Company having complied with that clause, and shown that the business complained of by the plaintiff had ceased, upon its application to the court the following order was made: "Ordered, that the injunction contained in the said judgment or decree be, and the same hereby is, modified, in compliance with the provisions of the sixth paragraph of the said judgment or decree, so as to permit the said defendant the Taylor Company, the lessees of the premises mentioned and described in the said judgment or decree, and the said lessees are hereby permitted, to run the office and parlors connected with said premises to solicit orders and sell coffins by sample in the wareroom, and to use the room called a 'chapel' for the legitimate purposes of a chapel,—that is, as a place of worship,—so long as such uses do not impair the integrity of the covenants contained in the restriction agreement in said judgment or decree more particularly referred to, and so as not to offend the spirit and purposes of the said covenants, or of the said restriction agreement, without prejudice to the right of said plaintiff to apply to the court to pre-

vent or punish any abuses of said injunction as thus modified." The defendant Miller alone appealed from the judgment to the general term, where it was affirmed. (18 N. Y. Supp. 793,) and then he appealed to this court.

Burrill, Zabriskie & Burrill, (George Zabriskie and J. E. Burrill, of counsel,) for appellant. Lockwood & Hill, (John L. Hill, of counsel,) for respondent.

EARL, J., (after stating the facts.) The main contention of the parties is over the meaning and force of the restriction agreement. The claim of the appellant that it simply restrains nuisances cannot be sustained, and hence the numerous authorities cited by his counsel on the argument before us have little or no application. If the agreement was intended simply to restrain any trade or business which was per se a nuisance, or which was carried on in such a way as to make it a nuisance, then it was wholly unnecessary. The law will always, upon the application of a party aggrieved, restrain and abate a private nuisance. This case is not governed by the general law as to nuisances, but by the force and effect of the covenants contained in the agreement. When the agreement was made, the parties thereto, desiring to improve, protect, and benefit their lots, and consulting their respective interests, absolutely prohibited the carrying on of certain kinds of business specified upon the lots. They determined for themselves that those kinds of business were undesirable in the vicinity of residences, and covenants restraining them can be enforced without any proof whatever that they are "injurious or offensive." A person owning a body of land, and selling a portion thereof, may, for the benefit of his remaining land, impose any restrictions, not against public policy, upon the land granted, he sees fit, and a court of equity will generally enforce them. *Trustees v. Lynch*, 70 N. Y. 440; *Same v. Thacher*, 87 N. Y. 311; *Hodge v. Sloan*, 107 N. Y. 244, 17 N. E. Rep. 335. The business carried on by the Taylor Company is not among those kinds particularly specified in the agreement. But the claim of the plaintiff is that it is prohibited by the general clause in the agreement, as "injurious or offensive to the neighboring inhabitants." This clause enlarges the scope of the agreement. It is a too narrow construction to hold that it prohibits only trades or kinds of business which are nuisances per se, for reasons already given, and for the further reason that nearly, if not quite, all the trades and business specially named are not such nuisances. Any kind of business may become a nuisance by the manner in which it is carried on from its location, and a business may be offensive to neighboring inhabitants, and yet fall far short of being a legal nuisance, which a court of equity will abate as such. This clause in the agreement must have a reasonable construction. We cannot suppose that the parties had in mind any business which might be offensive to a person of a supersensitive organization, or to

one of a peculiar and abnormal temperament, or to the small class of persons who are generally annoyed by sights, sounds, and objects not offensive to other people. They undoubtedly had in mind ordinary, normal people, and meant to prohibit trades and business which would be offensive to people generally, and would thus render the neighborhood, to such people, undesirable as a place of residence. It cannot be doubted that the business of the Taylor Company was, within this definition, offensive to the neighboring residents. People of ordinary sensibilities would not willingly live next to a lot upon which such a business is carried on. An ordinary person, desiring to rent such a house as plaintiff's, would not take her house, if he could get one just like it, at the same rent, at some other suitable and convenient place. Indeed, her house would be shunned by people generally who could afford to live in such an expensive house. The courts can take judicial notice of the offensive character of such a business. Judges must be supposed to be acquainted with the ordinary sentiments, feelings, and sensibilities of the people among whom they live; and hence, in this case, the learned judge, after the character of the business carried on by the Taylor Company had been proved, could have found, as matter of law, that it was in violation of the restriction agreement, without any further proof. It was therefore unnecessary for the plaintiff, upon the trial, to call witnesses from the neighborhood to give their opinions that this business was injurious and offensive. Even if such opinions were erroneously secured, they were unnecessary and harmless, as, upon the undisputed evidence as to the character of the business carried on, the legal conclusion of the trial judge must have been the same.

But it is contended that the restriction agreement ought not, in this case, to be enforced, because most of the lots in the block between Forty-Second and Forty-Third streets and Madison avenue and Vanderbilt avenue are no longer occupied for residences, and are devoted to business purposes; and the counsel for the appellant cites as an authority on this point one decision, in the case of *Trustees v. Thacher*. The principles of that case are not applicable to the facts of this. There it appeared that the contract which the plaintiff sought to enforce was no longer of any value to it, and that its enforcement would result in great damage to the defendant, without any benefit to any one. Here the plaintiff has the right to occupy her house as a residence, and in such occupation to have the protection of the restriction agreement. She has never violated the agreement herself, or consented to, or authorized or encouraged, its violation by others. In order to have the benefit of the agreement, she is not obliged to sue all its violators at once. She may proceed against them serially, or she may take no notice of the violations of the agreement by business carried on remotely from her residence, and enforce it against a business specially offensive to her by its proximity.

This is not a case where the defendants can ask for immunity in an equitable forum because others are, in a greater or less degree, also violators of the agreement. The plaintiff has done nothing and omitted nothing which should authorize the occupant of an adjoining lot, in violation of the agreement, to make her residence uncomfortable and undesirable. Generally, whether an equity court will refuse to restrain the violation of such an agreement, and leave the parties to their legal remedies, on account of the changed condition affecting the premises to which the agreement relates, rests in the discretion of that court, and such discretion will not be reviewed upon appeal here. The question to be determined in the exercise of such discretion depends largely upon the facts, and mainly whether the enforcement of the agreement would greatly harm the defendant, without any substantial benefit to the plaintiff, so as to make the enforcement inequitable. We cannot say, reviewing all the evidence in this case, that it would be impossible for the plaintiff to enforce the agreement.

The appellant claims that the judgment is too broad in its restraints. But we think all his rights are fully protected by the sixth clause of the judgment, and the subsequent action of the court under that clause upon the application of the Taylor Company.

The matters to which we have thus given attention cover the whole ground of the appeal, and our conclusion is that the judgment must be affirmed, with costs. All concur, except GRAY, J., not voting.

(129 N. Y. 111)

#### POND v. HARWOOD.

(Court of Appeals of New York. Oct. 3, 1893.)

**CREDITORS' BILL—DISMISSAL—INJUNCTION AGAINST EQUITABLE ACTION—WHEN MAINTAINED—EQUITABLE SET-OFF—JUDGMENT—EXTINGUISHMENT.**

1. Where, on the trial of a creditors' bill, no assets, either legal or equitable, are discovered, the complaint should be dismissed.

2. A defendant in an action for an accounting cannot maintain an equitable action in the same or another court against the plaintiff in the first action and another for an accounting, and an injunction to restrain the further prosecution of the first action, where all the relief claimed by plaintiff in the latter action, and to which he shows himself entitled, could be secured in the first action.

3. The fact that such third person is a necessary party to the controversy between the parties to the first action does not entitle defendant to maintain the second action, since he could, by motion, or the court could on its own motion, make such third person a party to the first action.

4. Nor is such latter action maintainable for the purpose of enabling plaintiff therein to enforce an equitable set-off against plaintiff in the first action, in the form of a judgment purchased by him after the first action was commenced, since whatever equitable right of set-off he has is available in the prior action.

5. In an action by a client against an attorney for an accounting as to the proceeds of the sale of plaintiff's share of certain lands owned by her and her brother in severalty, the brother is not a necessary party, in the absence of the assertion by him of any equities in her share, or the attempt to charge her with

more than her share of the expense of the care and sale of the property.

6. Where a defendant, after the action is brought, acquires a debt against plaintiff, with knowledge of the latter's insolvency, and for which he pays nothing, he has no equitable right of set-off.

7. A judgment was rendered against a wife on notes executed by her in payment of annuities due to the payee from her husband, and the wife afterwards, without demand therefor, conveyed to the judgment creditor property exceeding in value the amount of such judgment, ostensibly as security therefor, but in fact to prevent other creditors from seizing it. The annuities were afterwards paid. *Held*, that the judgment on the notes was thereby extinguished.

Appeal from supreme court, general term, third department.

Action by Byron Pond against Caroline L. Harwood and William S. Judd for a discovery, an accounting, and for an injunction to restrain defendant Harwood from prosecuting a certain action for an accounting against plaintiff. Defendant Judd made default. From a judgment of the general term (14 N. Y. Supp. 842) affirming a judgment entered on the report of a referee in favor of plaintiff, defendant Harwood appeals. Reversed.

Oliver P. Buel, for appellant. Byron Pond, (Richard L. Hand, of counsel,) for respondent.

MAYNARD, J. The defendants, Caroline L. Harwood and William S. Judd, were the residuary legatees under the will of their father, David Judd, who died May 2, 1868, and each was entitled to an equal half of the estate. They thus succeeded to the title to 160 acres of land in Wisconsin, of which their father had become the owner by virtue of a bounty land warrant as a soldier in the war of 1812. The plaintiff is an attorney residing in Essex county, and, as appears from the verified account filed by him in this action, he was the attorney for the defendant Mrs. Harwood, who alone brings this appeal, from May, 1869, to October, 1882, with respect to various matters connected with her interests in her father's estate, including the Wisconsin lands. He was also, during the same time, the attorney for Mrs. Elizabeth Judd, the widow of David Judd, who, under his will, was entitled to a life estate in the homestead property at Elizabethtown, and to an annuity of \$300, which, for the purposes of this appeal, may be regarded as a charge on the entire estate left by him. Grove M. Harwood, the husband of the appellant, and a lawyer, and the brother, William S. Judd, were the executors of the will, and both qualified, but Harwood alone, in fact, acted. The plaintiff was also attorney for the executors in the settlement of the estate, and received assets for collection belonging to the estate, and a suit for an accounting brought by the executors was pending when this action was tried. The plaintiff, acting as the attorney for the appellant and her brother, sold the Wisconsin lands in 1882 for \$900. A controversy having arisen between the plaintiff and appellant in regard to the application of the proceeds of sale, she brought

an equitable action against him on April 7, 1888, in the supreme court of Kings county, where she resided, for an accounting, and for the recovery of the moneys due her upon the sale of these lands. Before the time to answer expired, plaintiff procured an order extending it 30 days. Meanwhile, on May 5th, he obtained from Mrs. Judd an assignment of a judgment against the appellant, entered by him as attorney January 10, 1879, for \$958, and docketed it, and issued execution to Kings county, which was returned unsatisfied May 18th. On May 24th another order extending the time to answer was obtained. June 5th he served his answer, and simultaneously brought this action in Essex county, and procured a preliminary injunction order, restraining the appellant from the prosecution of her action in Kings county during the pendency of this action. William S. Judd is also made a party defendant here, and the plaintiff seeks relief in this action of a threefold character: First, the discovery of assets, and their application to the payment of his judgment,—the usual judgment creditor's remedy; second, an accounting between himself and the defendants, and the set-off of his judgment against any balance found due the appellant from him; third, a perpetual injunction restraining the plaintiff from the prosecution of her action in Kings county. The referee to whom the cause was referred reported that the plaintiff was entitled to judgment (1) perpetually restraining and enjoining the appellant from prosecuting her action; (2) adjudging that the plaintiff had fully accounted and settled with the defendants concerning all matters between them, and upon such accounting there was nothing due from the plaintiff to the defendants, or either of them, but the defendants are indebted to the plaintiff, exclusive of the judgment, in the sum of \$622, of which the appellant should pay \$516, and William S. Judd, \$106; (3) for the enforcement of the judgment of Mrs. Judd, assigned to the plaintiff, against the equity of redemption of the defendants in the homestead property; and (4) for the recovery against the appellant of any balance due on the judgment after applying the avails of the sale of her equity of redemption, and the costs of the action. Judgment was accordingly entered, from which this appeal has been taken.

Upon the findings and proofs, we do not think the plaintiff was entitled to any of the relief which has been awarded him. As a creditors' bill, the plaintiff's complaint should have been dismissed, for no assets were discovered, either legal or equitable, which could be applied in satisfaction of his judgment. It is claimed that the appellant had an interest or equity in the homestead property which could be reached by a creditors' bill, and sufficient to support the action. There is no finding that such interest or equity, if it exists, has any value; and the plaintiff, in the complaint, avers that it does not exceed \$100, and in the affidavit of verification of the complaint he states that it is not worth anything. But in the view we take of the legal effect of the in-

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strument under which it is insisted that this interest is created, and which will be more fully referred to hereafter, the appellant is not shown to have such a vested right to or interest in the property as would render it liable to sequestration by her creditors. It is apparent from the structure of the complaint, and the course of the trial, that the real purpose of the action was to forestall the prosecution of the appellant's suit in equity, and that the vicinage of the forum where the controversy was to be determined was regarded as a point of great advantage. There can be no doubt that the supreme court may, in a proper case, perpetually stay the proceedings of the plaintiff in an equitable action at the suit of his adversary in another equitable action. Formerly, the court of chancery denied the existence of the jurisdiction, and said that an application for such a stay could scarcely be considered as seriously made. *Medlock v. Cogburn*, 1 Rich. Eq. 477; *McReynolds v. Harshaw*, 2 Ired. Eq. 196. Although the power now concededly exists, it cannot be arbitrarily asserted. The grant of a temporary injunction is usually discretionary, but not so with a decree allowing a perpetual stay. Facts must be shown, which, according to the established rules for the administration of equity, will authorize that kind of relief. A subsequent action cannot be maintained to restrain the prosecution of another action in the same court unless it clearly appears that full and complete justice cannot be obtained in the earlier action. *Hall v. Fisher*, 1 Barb. Ch. 53; *Hayward v. Hood*, 39 Hun. 596; *Cowper v. Theall*, 40 Hun. 520; *Railroad Co. v. Ramsey*, 45 N. Y. 637; *Savage v. Allen*, 54 N. Y. 458; *Wallack v. Society*, 67 N. Y. 23. As was said by Commissioner Reynolds in *Savage v. Allen*, supra: "The proposition that a separate action may, under our present system, be maintained to restrain by injunction the proceedings in another suit in the same or another court, between the same parties, where the relief sought in the later suit may be obtained by a proper defense to the former one, has long since been exploded, or, if not, should be without delay." As an action for an accounting, all the relief which the plaintiff claims, and to which he has been found entitled, in this action, could have been secured in the appellant's action. If William S. Judd was a necessary party to a complete determination of the controversy, he could have been made a party to that action upon motion of the plaintiff in this action, or the court could, upon its own motion, have directed that he be brought in, whenever it appeared, in the progress of the action, that his presence was required for a full and final adjudication of the rights of the parties. Code, § 452. But, upon the facts disclosed by the record, he does not appear to be a necessary party. The appellant was a tenant in common with him of the Wisconsin lands, and their shares were held in severalty. He has never asserted any equities in her share, or sought to charge her with more than one-half of the expense of the care and sale of the property. He has

made default in this action, where he might have been heard, if he had any equitable claim against the appellant. It is not shown that the plaintiff had ever received any notice from him that he claimed to be entitled to any part of his sister's share. As she only sought to recover her equal portion, the plaintiff would have been protected in dealing with her to that extent, in the absence of notice of any equitable demand upon it by her brother. It would thus seem that a complete and final accounting could have been had between the plaintiff and the appellant in her action, without his presence; but if, for any reason, it should be deemed proper by the trial court that he should be brought in, his power is ample to cause it to be done.

Nor was this action maintainable for the purpose of enforcing an equitable set-off of plaintiff's judgment against any balance which might be found due the appellant upon an accounting. Plaintiff was not the owner of the judgment when the appellant's action was brought. He purchased it subsequently with full knowledge of the situation, and of the appellant's insolvency, and paid no value for it. If there is anything due on it, he may enforce it by such appropriate proceedings as the law may authorize; but he cannot invoke the interposition of a court of equity to give him an advantage which, at law, the ownership of the judgment does not confer upon him. Something more than the mere existence of reciprocal and independent demands is required, to authorize a set-off in equity, when not allowable under the statute of set-offs. Circumstances must be shown from which it can be inferred that one debt was contracted on the faith of the other, or that there was an agreement between the parties that the one should be deducted from the other, or some other intervening equity which renders the interposition of that court necessary for the creditor's protection. Will. Eq. Jur. (Potter's Ed.) p. 1008. As was stated in *Hackett v. Connett*, (2 Edw. Ch. 73,) "equity decrees a set-off, independent of the statute, only where mutual debts exist, and where there was either an express or implied agreement of stoppage pro tanto, or mutual credits." In such cases it is allowed; otherwise, the just expectation of the parties might be disappointed. *Wolcott v. Sullivan*, 1 Edw. Ch. 399; *Greene v. Darling*, 5 Mason, 202; *Hatch v. Mayor*, etc., 82 N. Y. 442. It is clear that a purchaser of a debt after suit brought against him, for which he pays nothing, and with knowledge of the debtor's insolvency, is not in a position to demand the application of the rule. But, whatever equitable right of set-off the plaintiff had, it was available to him in the appellant's action. That was an equitable action, where the rule is different than in actions at law; and the right to judgment is not limited to the facts as they existed at the commencement of the action, but the relief administered is such as the nature of the case, and the facts as they exist at the close of the litigation, demand. *Peck v. Goodberlett*, 109 N. Y. 180, 16 N. E. Rep.

350; *Madison Ave. Baptist Church v. Oliver Street Baptist Church*, 73 N. Y. 82; *Worrall v. Munn*, 38 N. Y. 137; *Gay v. Gay*, 10 Paige, 369. If, upon the trial of the appellant's suit, it should appear that there were any equitable reasons why a set-off should be allowed, of a debt acquired after the action was brought, it cannot be doubted that the court would have jurisdiction to direct it to be done. We therefore think the plaintiff failed to establish any ground for the maintenance of this action, and that, upon the facts found by the referee, the complaint should have been dismissed.

We are also of the opinion that, upon the uncontroverted facts, it must be held that the plaintiff's judgment was fully paid before the assignment of it by Mrs. Judd. David Judd, the testator, left personal property of the value of at least \$15,000, after paying his debts, which was divided in 1868, by the agreement of the parties, and without any judicial proceeding, into three parts, the appellant and her brother taking \$5,000 each; and \$5,000 was left in the hands of the executor, Harwood, as a fund out of which to raise and pay Mrs. Judd's annuity in half-yearly installments. It may be inferred that Mrs. Judd assented to this arrangement, and from 1868 to 1875 her annuity was paid by Harwood in the manner stipulated. In 1878, Harwood became financially embarrassed, and involved the appellant, also, in his embarrassments. He had given Mrs. Judd his own drafts for three years' annuities, which were unpaid. He was, for purposes of his own, desirous of securing the payment of these drafts, and he was also, evidently, apprehensive that his wife's creditors would seize upon her interest in her father's estate; and at his instance she gave Mrs. Judd her note for \$928, November 2, 1878, to secure the payment of the past-due annuities. In a few weeks after, the plaintiff, acting as the attorney for Mrs. Judd, brought suit upon this note in the supreme court, at the request of Harwood, who procured a firm of attorneys to appear for his wife and make an offer, upon which plaintiff entered judgment January 10, 1879, for \$958. In the following May, Harwood requested the plaintiff to issue execution upon the judgment, and upon its return, nulla bona, to institute proceedings supplementary to execution, and have a receiver of his wife's property appointed, in order to anticipate the threatened action of other creditors. Harwood was then at Syracuse, but his wife was temporarily residing with Mrs. Judd, at Elizabethtown. She had been instructed by him to do whatever the plaintiff directed. The plaintiff did not institute supplementary proceedings on the judgment, as suggested by Harwood, but procured from the appellant a conveyance, May 30, 1879, of her interest in the real estate in Essex county owned by her father at his death, consisting mainly of the homestead property, a lot under contract to one French, and of the undivided one-half of a wild lot. This conveyance was made for an expressed consideration of \$400, to apply on the judgment, and appellant gave Mrs.

Judd a chattel mortgage upon all her personal property, for \$584, to secure the balance of the judgment. The plaintiff wrote Harwood, June 2, 1879, informing him that he had taken this course instead of instituting supplementary proceedings, and that he deemed it the better way; that he had issued an execution, and had it returned unsatisfied, and as he was on the spot, and would know if any hostile judgment creditor undertook to issue execution for the purpose of commencing supplementary proceedings, he could start such a proceeding at a moment's notice, and secure priority. It is plain that Mrs. Judd was not the moving party in these proceedings. She never demanded or requested any security from the appellant for the payment of her annuity. Conceding that the annuity was a charge upon the real property devised to the appellant, she was not personally liable for its payment. Over 11 years had elapsed since she had received her share of the personal property, with the assent of all the parties interested, and it is not seen how any action or proceeding could have then been maintained to reach that part of the estate. The record admits of but one conclusion. The note was given, the judgment confessed, and the deed and mortgage executed, not because Mrs. Judd sought or required them, but to protect the appellant, acting under the advice of her husband and the plaintiff, from the attack of other creditors; and the correspondence discloses that it was expected by both parties that, when the storm had gone by, there should be an adjustment of the matter upon the basis of the actual value of the property represented in the transaction. If there were any doubt upon this point, it would be dispelled by the correspondence between Harwood and the plaintiff in regard to the chattel mortgage. On March 3, 1881, Harwood wrote plaintiff, calling his attention to the existence of this mortgage, and saying: "Of course, both you and Mrs. Judd understand that the object was to protect Carrie in case any other creditor should undertake to make her trouble. I do not think there is any further danger on that score,"—and requesting plaintiff to secure a surrender or cancellation of the mortgage. Plaintiff replied on March 15th, requesting a description of the mortgage, its date, amount, and place of filing, and saying, if he had these things, he would draw a release, and Mrs. Judd would execute it. On the 16th, Harwood sent a release for Mrs. Judd to execute, and on the 19th the plaintiff returned it duly executed. The plaintiff and Mrs. Judd seem to have promptly acquiesced in the statements made by Harwood as to the object for which the mortgage was given. In 1880 the plaintiff sent to the defendant William S. Judd, who was living in the state of Minnesota, a deed to be executed by him to Mrs. Judd, of his interest in all the real estate in Essex county owned by his father at the time of his death, and being the same property described in the deed from the appellant to Mrs. Judd. This deed bore the same date as the deed from appellant, May 30, 1879, but was not exe-

cuted until February 14, 1884. It may here be noted that the value of the property conveyed by the appellant to Mrs. Judd, May 30, 1879, was more than sufficient, according to the estimate then placed upon it by the plaintiff, to satisfy the judgment. The consideration expressed was \$400, and it was taken subject to a judgment recovered by the executors of the Buck estate against the testator, upon which there was unpaid over \$700, making the value of the property conveyed over \$1,100. The Buck judgment was not paid out of this property, but the plaintiff ultimately satisfied it out of the avails of the Wisconsin land sold by him. Or, if the value of the estate then conveyed by the appellant and her brother be taken as estimated by the referee, it reaches the sum of \$1,660, or nearly \$700 in excess of the judgment. But the application of the proceeds of these conveyances was finally adjusted on September 14, 1885, when Mrs. Judd received from the executors money and securities to the amount of \$1,779. Included in this was a note of the plaintiff's upon which there appeared to be due, for principal and interest, the sum of \$539. The receipt stated that it was received by Mrs. Judd subject to the deductions which the plaintiff might be entitled to, if any, on settlement of his account with the Judd estate. Upon the trial of this action the plaintiff gave no evidence tending to show that he was entitled to any credit upon this note. Mrs. Judd at the same time executed, under her hand and seal, a written instrument in which she certified and declared that the two conveyances from the defendants to her, dated May 30, 1879, quoting the language used, "were made and delivered to and accepted by me in consideration of the sums then due and to become due to me on account of my annuity of three hundred dollars per annum under and by said last will of said David Judd, and to apply thereon to the extent of the value of the interests and property so conveyed to me." Then followed an agreement, reciting a consideration of one dollar, that in case she sold any of the real estate the avails should be credited upon the annuity, and accounted for to the defendant, after deducting all sums due her from the estate, and the value of her life estate therein, and that, whenever the sums due and to become due her on account of her annuity should be paid, she would reconvey whatever remained unsold of the real estate to the defendant, and that she would not sell any of the real estate without notifying the defendants, or one of them, of the proposed terms of sale, and giving them, or one of them, an opportunity to purchase or to procure a purchaser on more favorable terms. It appears by the evidence and findings that the present worth of the defendant's interest in this real estate was then at least \$2,030, which, with the payments then made and received for, amounted to \$3,809. The total of the past-due annuities, including those secured by the judgment, and computing interest upon the judgment and each subsequent annuity from the time it fell due, was at that time about \$3,700, according to the



figures given by plaintiff's counsel. We think that the legal effect of this transaction was to extinguish the judgment as a security in the hands of Mrs. Judd. According to the findings of the referee, the appellant had no personal property out of which it could be collected, and the only real property upon which it could be a lien was her interest in the real estate conveyed. But the plaintiff contends that the note upon which the judgment was recovered was given in payment of the annuities, and that the judgment was therefore the independent and absolute debt of the appellant, and that the transaction of September 14, 1885, had reference only to the annuities accruing and to accrue subsequently to the giving of the note. But the referee, upon the request of the appellant, has found that the note was given as security for the payment of the annuities then due, and, if there is any finding in the report of the referee which is in conflict with it, the finding made at the request of the appellant must control. When the note was merged in the judgment, the form, only, of the obligation was changed, and its character as collateral security remained. When the annuities were paid, which it was given to secure, its life was gone. The payments acknowledged in the receipts of September 14, 1885, amounting to \$1,779, would, of themselves, be more than sufficient to discharge the annuities secured by it, and in the absence of evidence of an application of them by the creditor, or by the agreement of the parties, or of any equities which would require a different application, they would be applied to the payment of the debts of the longest standing in preference to later demands, and to the discharge of a debt for which the debtor has given security in preference to an unsecured demand. *Dows v. Morewood*, 10 Barb. 183; *Thomas v. Kelsey*, 30 Barb. 268; *Thompson v. Bank*, 118 N. Y. 325, 21 N. E. Rep. 57; *National Park Bank v. Seaboard Bank*, 114 N. Y. 28, 20 N. E. Rep. 632.

It is insisted that the appellant is not entitled to credit upon the judgment for more than one-half of the value of the property conveyed, inasmuch as her brother was the owner of an undivided half, and the referee has found that the conveyance from him was a gift to Mrs. Judd. A search of the record will fail to disclose any evidence to support this conclusion. In the letter in which the plaintiff transmitted the deed to William for execution, he states that the object of the conveyance is to compensate Mrs. Judd, in part, for her lost annuities; and she subsequently declares, in a sealed instrument, that the conveyance was received upon that consideration. But, as between the appellant and her brother, his share of the estate was equally subject with hers to the annuity charge. Whatever sums she might pay or secure for the purpose of discharging the annuities, and thus relieving the real property in which he had an interest, she might still regard, in equity, as a charge upon his portion for her benefit, and enforce reimbursement out of the proceeds thereof to the extent of

one-half of the amount thus paid or secured. Hence, whether the conveyance by him to Mrs. Judd was a gift or not is immaterial. The property was equitably charged, as between himself and sister, with his share of the amount which she had paid or secured on account of the past-due annuities, and this charge would survive the conveyance to Mrs. Judd, as she was not a purchaser for value. The agreement of September 14, 1885, did not operate to divest Mrs. Judd of the fee of the land which she acquired from the defendant by the conveyance of May 30, 1879, or reduce her estate to that of a mortgagee, or invest the defendants with any interest or equity in the premises. These conveyances were absolute, and not conditional, and not subject, when made, to any agreement for their defeasance. By the subsequent writing she merely stipulated that if she sold the property she would give the defendant the refusal to purchase or to find a purchaser upon the same terms offered to others, and if she sold a portion, and realized enough to pay what was due or to become due upon her annuity, she would reconvey the residue of the property to the defendants. Such an agreement did not convert the fee into a defeasible estate. *Kraemer v. Adelsberger*, 122 N. Y. 467, 25 N. E. Rep. 859; *Randall v. Sanders*, 87 N. Y. 578; *Macaulay v. Porter*, 71 N. Y. 173. No recourse could be had to the land in case Mrs. Judd disregarded the terms of the agreement. In such an event the only remedy of the defendants would be an action for damages for a breach of the agreement. But the contingency upon which such a claim might be based has not happened, and the defendants have, as yet, not acquired any alienable interest in the property by any act of the grantees. The judgment must be reversed, and a new trial granted; costs to abide the event. All concur.

(129 N. Y. 127)

## MOORE v. BROWN.

(Court of Appeals of New York. Oct. 3, 1893.)

## EJECTMENT—WHO MAY MAINTAIN—MINES ON STATE LANDS.

Laws 1890, c. 411, §§ 1, 2, provide that all mines and minerals discovered on state lands "are and shall be the property of the people," subject to the provisions thereafter made to encourage the discovery thereof; that any citizen of the state who discovers any valuable mine or mineral on such lands, and files the notice in this title required, "shall be entitled to work the mine, and he and his heirs and assigns shall have the sole benefit of all products therefrom," on payment of certain royalty to the state; but nothing in the title shall be construed to give any person a right to enter on the lands of the state unless "the consent" in writing "of the commissioners" of the land office shall be previously obtained. Held, that a discoverer of minerals on state lands, who obtained such consent from the commissioners of the land office, acquires no estate in such lands, but a mere right, or incorporeal privilege, to take out the mineral, and to have only what is so taken out, and his grantee cannot maintain ejectment against a person in possession of such lands. 16 N. Y. Supp. 592, reversed.

Appeal from supreme court, general term, third department.

Action of ejectment by William Moore against Simeon Brown. From a judgment of the general term (16 N. Y. Supp. 592) reversing a judgment of nonsuit, defendant appeals. Reversed.

J. W. Houghton, for appellant. King & Ashley, (Richard L. Hand, of counsel,) for respondent.

GRAY, J. This was an action of ejectment, brought to recover the possession of a certain mine of garnet in the town of Minerva, in the county of Essex; and the main question is whether the plaintiff had such a legal title or such an estate in the premises as would authorize the maintenance of such an action. At the trial his complaint was dismissed, and that was one of the grounds upon which the motion for nonsuit proceeded. He was the grantee of the interests of Wood and Shields, who were the discoverers of the garnet deposit. They had filed and established their claim as such discoverers, and thereupon the commissioners of the land office of this state passed a resolution to the following effect: "Resolved, that \* \* \* consent is hereby given to Messrs. Wood and Shields, their successors and assigns, to work the mine or deposit of garnet, and other minerals in connection therewith." The provisions of the statute under which their proceedings were had, and this consent was given, are contained in chapter 411 of the Laws of 1890, and read as follows, viz.: "Section 1. All mines and all minerals and fossils discovered, or hereafter to be discovered, upon any lands belonging to the people of this state, are and shall be the property of the people, subject to the provisions herein-after made to encourage the discovery thereof. Any citizen of this state who shall have discovered, or who may hereafter discover, any valuable mine or mineral upon said lands, and shall file the notice in this title required, shall be entitled to work such mine, and he and his heirs and assigns shall have the sole benefit of all products therefrom, upon payment into the state treasury of a royalty of two per centum of the market value of such products. \* \* \* Sec. 2. Nothing contained in this title shall \* \* \* be construed to give any person a right to enter on or break up the lands of any other person, or of the people of the state, or to work any mine in such lands, unless the consent in writing of the owner thereof, or of the commissioners of the land office, where the lands belong to the people of this state, shall be previously obtained." It seems that before the proceedings were taken which resulted in the passage of the above resolution, Wood and Shields had supposed the mineral deposit to be upon the land of a private individual named Martin Connors, and, having obtained from him the right, were engaged in mining it. While so engaged, they made a contract with this defendant, purporting to sell to him certain mining rights in the property. When they ascertained that the mine was on state

land, and after they had obtained from the land-office commissioners the consent above mentioned, Wood and Shields then made the grant of their interests to the plaintiff. The defendant, however, claiming somehow under his previous contract with Wood and Shields, was upon the lands, and working the mine, and the plaintiff brought this action to eject him.

Unless, by the force of the statutory provisions, and the resolution of the land-office commissioners, his grantors had acquired either a legal title to the premises described, or, what would be equivalent, were the grantees of the mine or minerals in the land, an action of ejectment was not maintainable. What resulted from the action of the commissioners was a contract between the state and Wood and Shields, which invested them with certain exclusive rights, to be enjoyed and exercised upon the property of the state; but, as I read the statute, that contract gave them no legal estate in the premises, nor operated in any way as a grant of the minerals in the land. It amounted to a grant of a privilege to enter upon the state lands, and to work the mine upon them, and to possess only the products. It is hard to see how the terms employed by the legislature can be held to express any intention to grant any estate in lands or minerals. It is plain from the statute in question that the title to all mines and all minerals upon the lands of the state is reserved to the people. They "are and shall be the property of the people," the act explicitly declares; but, to promote their discovery, it is provided that any citizen who discovers them "shall be entitled to work the mine, and he and his heirs and assigns shall have the sole benefit of all products therefrom," upon making payment of royalty upon their market value. What is there in the language of this enactment which entitles the discoverer of a mine upon state lands to anything more than the mere right or privilege to take out the minerals and to retain the benefits which may accrue from marketing the product? And how can we imply from the action of the land-office commissioners anything like a grant of any estate in the property, when they formally grant merely a consent to work the mine? To construe such a grant, we should have not merely to strain unnaturally the words of the statute, but we should have to imply an estate in lands against the express reservation of the property in the mines and minerals to the people. That neither can nor should be done. The words of the statute are not ambiguous, and they do not conceal the intention of the framers. It is quite unnecessary, for any purpose, to give to them any other meaning or force than that which consists with the very clear purpose on the part of the legislature to grant only a right or privilege, and to part with the title of the state only with respect to minerals which are extracted and marketed by the miner. In this view we are supported by an opinion of the king's bench, delivered by Chief Justice Abbott, in a case I have been able to find, and which seems very much

in point. I refer to *Doe v. Wood*, 2 Barn. & Ald. 724. That was an action of ejectment, where plaintiff claimed under a formal indenture granting the right to search for, dig, work, and mine tin ore and all other minerals in the grantor's land, and to raise and make merchantable and dispose of the same, to the grantee's own use. This was held to operate as a license, merely, where the grantee had no grant of the ores and metals in the land, and "had a right of property only as to such part thereof as, under the liberties granted, should be dug and got," and that the grantee "had no estate or property in the land itself, or any particular portion thereof, or in any part of the ore ungot therein." It was held that the grantee's right was "very different from a grant or devise of the mines or metals or minerals in the land," and that an action of ejectment was not maintainable. I am not aware that there is any case in this state much in point; but reasoning upon the language used by the legislature, and upon the description of the rights which shall be accorded to a discoverer, I see no other conclusion possible than that what he obtains from the state is the grant of a mere right, or incorporeal privilege, to take out the mineral found within the land of the state, and to have, as his own, only what is so taken out. The act secures to him a right, in that respect, exclusive as to all the world, and of a duration measured by the existence of the mineral deposit, and by his compliance with conditions expressed and implied. Such rights are fully cognizable in courts of equity, and resort to them for purposes of protection against any infringement of those rights could not fail of accomplishing all that is requisite. As the plaintiff had no estate in the land, or in the mine upon the land, he could not maintain ejectment against the defendant, and for that reason his complaint was properly dismissed. The order of the general term should be reversed, and the judgment entered at the circuit should be affirmed, with costs at the general term and in this court. All concur, except EARL, J., not voting.

(139 N. Y. 123)

**VAN DEVENTER v. CITY OF LONG ISLAND CITY et al.**

(Court of Appeals of New York. Oct. 3, 1893.)

**TAXATION—ASSESSMENT—OMISSIONS.**

An assessment of taxable real estate is not invalid because other real estate in the same city, which was in fact taxable, was treated as exempt.

Appeal from supreme court, general term, second department.

Action by Jacob H. Van Deventer against the city of Long Island City and others to vacate certain taxes on real estate. From a judgment of the general term affirming a judgment dismissing the complaint, plaintiff appeals. Affirmed.

George F. Danforth, for appellant. William E. Stewart, (George W. Stephens, of counsel,) for respondents.

EARL, J. This is an equitable action to have certain city, county, and state taxes laid upon plaintiff's real estate in Long Island City in the years 1877, to and including the year 1886, and various sales thereunder, declared void and canceled, on the ground that the taxes were illegally imposed. The grounds of the illegality are that a large quantity of real estate was intentionally omitted from the assessment rolls in each of such years, and that in the years 1882 and 1883 the assessors resolved that no personal property within the city should be assessed, and in pursuance of such resolution no person resident within the city was assessed in either of the two years on account of any personal property. The real estate omitted from the assessment rolls was located within streets and parks laid down upon the official map of the city, which had not in fact been opened, and which remained in the ownership and possession of the individual owners thereof. The real estate omitted from assessment was probably liable to taxation, and none of it was exempt until 1889, when, by chapter 548 of the Laws of that year, amending the charter of the city, it was provided that "no taxes shall, after the passage of this act, be levied, assessed or collected upon any unimproved land included within the lines of streets, avenues and roads shown and laid out upon the official city map." While it was found by the trial judge that the assessors intentionally and purposely omitted to assess the real estate, it was not found that they made the omission knowing that the real estate was liable to assessment and taxation. It is a legitimate inference from the facts found that the assessment was omitted by the assessors in the exercise of their judgment, under the belief that real estate thus situated was not liable to taxation. There is no question that the plaintiff's real estate was liable to assessment, that the assessors had jurisdiction to assess it, that they acted within their jurisdiction, that they observed all the forms of law, and that the assessment rolls were proper in form. Was the entire assessment in each of the years mentioned absolutely illegal and void, so that any person assessed can assail it, and thus defeat the collection of the tax imposed upon him or his property because some real estate liable to taxation was omitted from the assessment roll? If we were obliged to answer this question in the affirmative, a Pandora box of litigation would be opened, and scarcely any taxation for governmental purposes could be upheld. Fortunately, upon principle and authority, the question can be answered in the negative. Most of the taxes complained of have been confirmed by subsequent legislation. Laws 1882, c. 883, § 1; Laws 1886, c. 656, § 15. There can be no doubt about the validity of these acts. Acts of the same purport and effect have frequently received the sanction of the courts. *Spencer v. Merchant*, 100 N. Y. 585, 3 N. E. Rep. 682; *Id.*, 125 U. S. 345, 8 Sup. Ct. Rep. 921; *Franklyn v. Long Island City*, 32 Hun, 451; *Id.*, 102 N. E. 692; *Ensign v. Barse*, 107 N. Y. 329, 14 N. E. Rep. 400, and

15 N. E. Rep. 401; In re Lamb, 51 Hun, 633, 4 N. Y. Supp. 856; Id., 121 N. Y. 703, 24 N. E. Rep. 1100; Cromwell v. MacLean, 123 N. Y. 474, 25 N. E. Rep. 932. The legislature could have originally exempted the land omitted from these assessment rolls from taxation, and could thus have cast the whole burden of taxation in the city upon the other property, and what it could originally have done it can do by ratification and confirmation subsequently. These acts relate only to the taxes prior to 1883, and do not touch the taxes for the years 1883, 1884, 1885, and 1886, and the validity of the taxes for those years must stand upon other considerations. The trial judge based his decision against the plaintiff upon the two acts above mentioned, and also upon the act chapter 656 of the Laws of 1886, section 10 of which provides that "any action or proceeding by any person or corporation to test the validity or regularity of any tax levied, or assessment or water rates, or rents made, shall be commenced within one year from the time of delivery of the roll in which said tax, or assessment, or water rates or rents are contained, to the village treasurer. That act may defeat this action as to the taxes of 1886, as the assessment rolls for that year may have been delivered to the treasurer before the passage of that act; but it can have no retroactive operation, so as to defeat the action as to the prior years. In re Trustees of Union College, 129 N. Y. 303, 29 N. E. Rep. 460.

The learned counsel for the defendants contends that the only remedy of the plaintiff for relief against the taxes complained of was by certiorari, under the act chapter 269 of the Laws of 1880. But that act is not applicable to a case where the whole assessment roll is claimed to be illegal and void. It applies only to cases where there is a valid assessment roll, in which some person has for some reason been illegally assessed, or where the assessment is excessive or unjust. *People v. Parker*, 117 N. Y. 86, 22 N. E. Rep. 752.

But we think there are fundamental reasons for defeating this action which have not yet received attention. The assessors, in making the assessments, acted judicially; and if they omitted any property from the assessment rolls, either by mistake or design, the entire assessments are not thereby rendered invalid. An assessment roll is in the nature of a judgment, and it was never heard that a judgment rendered by an officer exercising judicial functions was void because, by mistake or design, he had made it too large or too small, in a case where he had jurisdiction, and acted within his jurisdiction. That no action could be maintained against the assessors who made the assessments cannot be doubted, and this is so whether they omitted the property by mistake or design. They have the immunity of judicial officers. *Weaver v. Devendorf*, 3 Denio, 117. The only complaint the plaintiff can have is that he was taxed too much, because other property was omitted from the rolls; and that is a complaint which can nearly, if not always, be made in the case of all taxation for governmental purposes. It is doubtful if a vil-

lage, town, or city assessment roll is ever made from which some property is not omitted. If an assessment is void because some property is omitted, would it not also be void in those numerous cases where assessors agree to assess property at one-half, or some other fractional part, of its value? It is quite apparent that, if the plaintiff's contention is well founded, very few assessments could stand assaults, and that the collection of revenues for governmental purposes would be very uncertain, and that interminable litigation would attend their collection. The case of *Dillingham v. Snow*, 5 Mass. 547, is a very precise authority for the defendants in this case. There certain real estate was purposely omitted from the assessment roll by the assessors, and a taxpayer contended that the assessment was thereby rendered illegal and void; and the court held against that contention, expressing views quite pertinent to this case. Our assessment laws contemplate that assessors may, by mistake or design, omit property from the assessment roll, as provision is made for entering such property in the assessment roll for the subsequent year. The question may be asked, what is the remedy of the taxpayer, whose taxes are too high because some property has been omitted from the assessment roll? Where the omission is intentional, he may prosecute the assessors criminally for taking a false oath to the assessment roll. His remedies may be very inadequate, but he is in the position of every citizen aggrieved by official or governmental action. He must appeal to public opinion and to the ballot, and use his efforts to procure the election of better or more competent assessors. The mischiefs from unjust and unequal taxation are numerous, and most of them are without any adequate remedy. The learned counsel for the plaintiff cites as authorities for the maintenance of this action the cases of *Hassan v. City of Rochester*, 67 N. Y. 528; In re New York Protestant Episcopal School, 75 N. Y. 324; *Ellwood v. City of Rochester*, 122 N. Y. 229, 25 N. E. Rep. 238. These cases hold that where the law requires the expense of a local improvement to be assessed upon property within prescribed limits to be benefited thereby, in proportion to the benefits, the assessment is void if any of the property be omitted from the assessment. No public mischief can come from the establishment of such a rule. The property to be assessed generally consists of a few pieces of land within known limits, which are easily ascertainable. Mistakes must be quite rare, and when made are easily remedied, and can usually produce no great embarrassment. Assessments for local improvements, and taxation for governmental purposes, are in their nature essentially different, and the same rules of law may not be applicable to both. Local improvements for which assessments are made are not supposed to be beneficial to the general public. They are usually beneficial wholly, or mostly, to the locality in which they are made, and they are to be paid by the property specially benefited. The law

gives the precise authority under which the improvements are to be made, and that authority must be quite literally followed in all matters of substance. In making the improvements the public authorities, to a certain extent, and in a substantial sense, act as the agents of the property owners. *Dill. Mun. Corp.* (4th Ed.) § 810; *Lake v. Trustees of Williamsburgh*, 4 Denio, 520. The statute is the limit of their authority, and the measure of their agency for the lot owners, their principals, and it must be strictly pursued. Under the authorities cited above, if a single lot be omitted from assessment through ignorance or mistake, the mere fact of the omission renders the assessment illegal and void. Can such a rule be applied to such assessments as are here involved? Could a rule be tolerated that would render every such assessment invalid, if a single piece of real estate, or if any chose in action or any chattel, were omitted from assessment through the ignorance of the assessors, or by imposition upon them, or even by design? We need not pursue this line of argument further. These assessments were not invalid, and therefore this action cannot be maintained. The judgment must be affirmed, with costs. All concur.

(139 N. Y. 146)

**MANHATTAN LIFE INS. CO. v. FORTY-SECOND & G. ST. FERRY R. CO.**

(Court of Appeals of New York. Oct. 3, 1893.)

**CORPORATIONS—FORGED ISSUE OF STOCK—AGENCY.**

1. The president of a company took a blank certificate of stock, signed by a former president, since deceased; dated it back seven years; forged the signature of the then treasurer, also deceased; signed his own name, as the then secretary and transfer agent; and filled in his own name as stockholder. This instrument he used as collateral in obtaining a loan. *Held* that, all three signatures being in law forgeries, his office as president clothed him with no such apparent authority as to make the company liable on the certificate.

2. The president of a company, offering a certificate of stock therein as collateral for a loan to himself individually, does not bind the company by his representations that the certificate is genuine. 19 N. Y. Supp. 90, affirmed.

Appeal from supreme court, general term, first department.

Action by the Manhattan Life Insurance Company against the Forty-Second & Grand Street Ferry Railroad Company for money loaned to one Eben S. Allen. From a judgment of the general term (19 N. Y. Supp. 90) affirming a judgment dismissing the complaint, plaintiff appeals. Affirmed.

Hoyt & Schell, (Artemas H. Holmes, of counsel,) for appellant. Freling H. Smith, for respondent.

**MAYNARD, J.** In September, 1888, Eben S. Allen, the president of the defendant, a domestic railroad corporation, forged a certificate of 100 shares of its stock, of the face value of \$10,000, and pledged it as collateral security to the plaintiff for a personal loan of \$6,500,

which he then obtained. Default was made in the payment of the debt, and the plaintiff seeks to make the defendant liable for the amount of the loan, which is less in amount than the value of the stock, if it had been a genuine issue, and which represents the loss of the plaintiff by the fraud of the defendant's president. The certificate bore date November 10, 1881. At that time John Green was president, Charles Curtiss treasurer, and Allen secretary and transfer agent, of the defendant company. The certificate was one of the printed or engraved forms used by the defendant, which had been cut from its blank certificate book in 1881, and signed in blank by Green, and left with the other officers of the company at a time when he was to be absent from the office for some months. It was intended for convenient use in case a stockholder desired to transfer his stock in the president's absence, and to have a new certificate issued to the transferee. Allen obtained possession of it, and kept in his private drawer until 1888, when he filled up the blanks, dating it November 10, 1881, inserting his own name as stockholder, forging the name of Curtiss as treasurer, and signing his own name as transfer agent. Green ceased to be president in April, 1883, and at the same time Curtiss ceased to be treasurer. Allen was secretary and transfer agent from 1868 to April, 1888, and treasurer from 1883 to April, 1888, when he became president, and Ralph J. Jacobs became treasurer, and Charles P. Emmons secretary and transfer agent. When Allen issued the certificate, in September, 1888, both Green and Curtiss were dead, and every name attached to it was in a legal sense forged. While the signatures of Green and Allen were genuine, they were not then the officers of the defendant, which the certificate represented them to be, and the act of making and uttering the instrument was a forgery as to all the names written thereon, under sections 519 and 522 of the Penal Code. It is thus very plain that as president, in 1888, Allen had no authority, either actual or apparent, to issue the certificate of stock upon which this action is brought. The company had not invested him with any power as its then president to participate in the creation of certificates bearing date seven years previous. The authority which he possessed in 1881, as secretary and transfer agent, had then ceased to exist; and no state of circumstances has been suggested or can be conceived under which he was empowered to countersign the certificate as transfer agent in 1888, and antedate it as of the time when he held that office.

The rule which imposes a liability upon the principal for the unauthorized acts of his agent is founded upon public policy, and is well defined. It is limited to cases where there was an apparent authority to do the act in question, and it appeared to have been done in the course of his employment as agent, and was within the scope of his general powers. None of these grounds of liability have been shown here. The agency did not exist in 1888, which was necessary in order to deprive the principal of the right to disclaim re-

sponsibility for the unauthorized act. With respect to the creation of certificates bearing date in 1881, he was as destitute of authority as if he had been a stranger to the corporation. He not only could not issue them, but he could take no part in their issue, or do any act required by law or by the by-laws essential to give them validity. When he issued such a certificate in his own name, he was not apparently acting within the scope of any general authority conferred upon him by the corporation. The defendant cannot justly be held liable for the misuse of a power which it never created. This case has no feature in common with the Fifth Avenue Bank against the same defendant. 137 N. Y. 231, 33 N. E. Rep. 378. There Allen, at a time when he was treasurer and transfer agent, and invested with authority in both capacities to sign, countersign, and seal valid certificates of stock, forged the name of the president to a certificate, and issued it to a confederate, who negotiated a loan upon it at the bank, which, before receiving it, caused inquiry to be made at the office of the defendant, and was informed that the certificate was genuine. Allen was there acting within the scope of his apparent authority, and whether the certificate had been actually signed by the president, and was issued in the regular course of the administration of the affairs of the company, were facts peculiarly within his knowledge, and the countersigning and issue of the certificate in due form was a representation by him that these conditions had been complied with, and that the facts existed upon which his right to act depended. Here there was a total lack of delegated power to Allen to do a single lawful act in the issue of the certificate in the form in which it was presented to the plaintiff. There was no negligent or wrongful use by him of any authority derived from the defendant. It was a willful and criminal act, perpetrated for private gain, and not connected with the exercise of any official authority, or semblance of authority, which he possessed as the defendant's agent.

The plaintiff insists that there is another ground upon which a recovery is permissible. When Allen made the loan, and pledged the forged certificate, he represented to the plaintiff that it was a genuine certificate of the stock of the corporation; and, as he was then its president and chief administrative officer, the claim is made that the defendant is bound by his representations. This question, in its general bearings, was discussed at great length by counsel in the Fifth Avenue Bank Case, but we refrained from considering or deciding it, because not necessary to the decision of the case, and we do not think that it is involved in the present appeal. Allen, when he negotiated the loan, was not engaged in the transaction of the defendant's business, or in the discharge of any duty imposed upon him by the defendant. The declarations of an agent are only admissible against his principal when made as a part of a transaction undertaken in behalf of the principal, or in the performance of the duties of his

agency. *First Nat. Bank of Lyons v. Ocean Nat. Bank*, 60 N. Y. 278. Or, as is sometimes stated, the representations of the agent, when not expressly authorized by the principal, must, in order to bind him, be within the scope of his agency, which is but another form of expressing the same proposition. *Trust Co. v. Beebe*, 7 N. Y. 364. But without determining what are the duties of the officers of a corporation, when called upon to respond to the inquiries of intending purchasers of the stock, there is sufficient reason why the plaintiff cannot avail himself of the representations of Allen in regard to the genuineness of this certificate. They were made in a private and personal transaction, undertaken for his individual benefit, and so understood by the plaintiff. The plaintiff knew that Allen, in the negotiation of the loan, was not acting as the officer or agent of the defendant or in its behalf, and that his personal interest in the transaction might lead him to betray his principal. It is an old doctrine, from which there has never been any departure, that an agent cannot bind his principal, even in matters touching his agency, where he is known to be acting for himself or to have an adverse interest. *Stone v. Hayes*, 3 Denio, 575; *Bentley v. Insurance Co.*, 17 N. Y. 423; *Claffin v. Bank*, 25 N. Y. 293; *Wilson v. Railroad Co.*, 120 N. Y. 145, 24 N. E. Rep. 384; *Moore v. Bank*, 111 U. S. 156, 4 Sup. Ct. Rep. 345; *Farrington v. Railroad Co.*, 150 Mass. 406, 23 N. E. Rep. 109. The plaintiff in such a case assumes the risk of the agent's disloyalty to his trust, and has no occasion for surprise when he discovers that the agent has served himself more faithfully than his principal. The learned trial judge correctly decided when he held that, under the proofs, the certificate of stock was not admissible as evidence of the defendant's liability, and dismissed the complaint; and the judgment and order appealed from must be affirmed, with costs. All concur. Judgment accordingly.

(139 N. Y. 337)

## In re STILWELL'S ESTATE.

(Court of Appeals of New York. Oct. 3, 1893.)

MORTGAGE FORECLOSURE — DISTRIBUTION OF SURPLUS — JUDGMENT — RES JUDICATA — NOTICE OF ENTRY — JURISDICTION OF SUPREME COURT — ABRIDGMENT.

1. The question of the constitutionality of the provision of Code Civil Proc. § 2798, for depositing with the surrogate for distribution the surplus arising on a sale in an action to foreclose a mortgage on land belonging to the estate of a decedent, is *res judicata* as to a party to an action in which the judgment contains a provision for such deposit, this being a question on which the party had a right to be heard in such action. 23 N. Y. Supp. 65, affirmed.

2. If the provision in the judgment was made without notice to the party, and he had a right to notice thereof, he could not attack it in a proceeding before the surrogate for distribution, but the remedy would be by motion to set aside or correct the judgment.

3. The provision of Code Civil Proc. § 2798, for depositing with the surrogate for distribution the surplus arising on a sale in an action to foreclose a mortgage on land belong-

ing to the estate of a decedent, does not deprive the supreme court of its general jurisdiction in law and equity, secured to it by Const. art. 6, § 6; the distribution of such estates having always been a part of the jurisdiction of the surrogate, and the action of the surrogate being reviewable, on the law and facts, by the supreme court.

Appeal from supreme court, general term, first department.

Petition by Haunah M. Stilwell, a devisee under the will of Elizabeth Stilwell, deceased, for distribution of the proceeds of a sale of real estate of the decedent. From a judgment of the general term (23 N. Y. Supp. 65) affirming an order of the surrogate for distribution, Frances Dixon appeals. Affirmed.

Agar, Ely & Fulton, (John G. Agar and Abram F. Servin, of counsel,) for appellant. Payson Merrill, for respondents.

O'BRIEN, J. The order from which this appeal was taken made distribution of surplus moneys arising upon a sale of real estate after judgment, in an action to foreclose a mortgage on the same. Elizabeth A. Stilwell died seised of the property, subject to a mortgage, December 21, 1890, and by her will devised it to her heirs and next of kin, of whom the petitioner in this proceeding was one. The mortgage was foreclosed, and judgment of foreclosure and sale was entered in the month of November, 1891. The surplus arising upon the sale was paid into the surrogate's court, pursuant to section 2798 of the Code. The appellant, Frances Dixon, claims to be the daughter of Mrs. Stilwell; that the will was void; and that the surplus, or at least some part of it, passed to her as heir. She was a party to the action to foreclose the mortgage, and one of the questions that arises upon the appeal is how far she is bound by the provisions of that judgment. The surrogate made distribution of the surplus among the devisees under the will, and thus the appellant's claim has been ignored. On the 14th of September, 1891, she brought an action of ejectment to enforce her claim; and, this action being pending when the application for distribution was made to the surrogate, she interposed it as an answer or bar to the proceeding, and the objection was disregarded, but no evidence was offered with respect to her right to share in the distribution of the fund. The contention of the appellant is that the provisions of the Code, pursuant to which the surplus was deposited in the surrogate's court, are unconstitutional, in that they deprive the supreme court of its general jurisdiction in law and equity secured to it by the state constitution, (article 6, § 6.) There are, we think, two answers to this objection:

1. The appellant was a party to the foreclosure action, in which the direction to pay the money into the surrogate's court was made. She was entitled to be heard on this question, as well as any other in the case. The fact that she omitted to answer is not material. The judgment binds her as to every question litigated, or which could have been litigated, as a former adjudication between the par-

ties or their privies, and she cannot now question anything decided collaterally. It is urged that this provision in the judgment in that case was made without notice to her, and hence she never had an opportunity to be heard. If this is so, and she was entitled to notice, her remedy was by motion to set aside the judgment, or to correct or amend it, and upon such motion she could have appealed from any decision made. The validity or regularity of a provision in a judgment of foreclosure, not raised by a party to the suit by answer, appeal, or motion, cannot be raised collaterally, where the court rendering the judgment had general jurisdiction of the parties and the subject-matter of the action.

2. The surplus moneys in question were a part of the estate of a deceased person, and had been disposed of by will. The distribution of such estates between heirs, next of kin, legatees, and devisees was always a part of the jurisdiction of the surrogate's court, recognized by the constitution. The fund may have been devoted by the will or by law to the payment of debts or legacies in the ordinary course of administration, and at some time or in some way was liable to come within the jurisdiction of the surrogate. The sections of the Code, the validity of which are questioned, (sections 2798, 2799,) treat the surplus, in the cases there specified, in the same way as the proceeds of real estate sold under the order of the surrogate. They were intended to save the expense incident to the distribution of the surplus where the mortgagor is alive, and to facilitate the orderly settlement of the estates of deceased persons. The legislature cannot limit or abridge the general jurisdiction of the supreme court, as conferred by the constitution. But it seems to me that it may, without restricting its general jurisdiction, within the meaning of the constitution, designate the place where surplus moneys arising from the sale of lands in foreclosure or partition actions, where the owner is dead, may be deposited. Before an act of the legislature can be declared void, as repugnant to the constitution, the conflict must be manifest. A statute that provides for the deposit of surplus moneys, arising from the sale of the lands of a deceased person, in the surrogate's court having jurisdiction of the settlement and distribution of his estate, and providing for the proceedings in that court for its distribution among the parties entitled, subject to the appellate jurisdiction of the supreme court, upon the law and the facts, does not, in my opinion, violate any provision of the constitution. The jurisdiction of the supreme court to entertain, hear, and determine the action, and to execute its judgment, has not been touched. The Code deals only with a fund arising from the execution of the foreclosure judgment, not disposed of by the decree, and commits that fund to the custody and control of a court which, at the time the constitution was adopted, had extensive jurisdiction over the estates of deceased persons, and this jurisdiction was recognized by that instrument in various provisions for its future



organization and existence. The action of the surrogate's court with respect to the distribution of the fund is subject to review by the supreme court on the law and the facts. The general jurisdiction conferred upon the supreme court by the constitution does not operate to prevent the legislature from giving additional jurisdiction to other tribunals, or from changing the common law, or from regulating and altering the jurisdiction and proceedings in law and equity in the same manner and to the same extent as had been exercised by it before the constitution of 1846 was adopted. *People v. Green*, 58 N. Y. 301; Const. art. 6, § 8. These general powers are broad enough to sustain the provisions of the Code assailed upon this appeal. The order should be affirmed, with costs. All concur.

(129 N. Y. 290)

## FAIRCHILD v. McMAHON.

(Court of Appeals of New York. Oct. 3, 1893.)

VENDOR AND PURCHASER — FRAUDULENT REPRESENTATIONS OF AGENT—RIGHTS OF PURCHASER.

1. Where a purchaser of property for \$7,000, its full value, procures a deed to be made to him for \$12,000, and assures a purchaser from him that the latter sum was the amount paid by him, which statement is relied on by the purchaser, it is a good defense to the foreclosure of a mortgage given to secure part of the price. 20 N. Y. Supp. 31, affirmed.

2. The land in question stood in the name of a third party. The real owner procured a broker to sell the land, who made the alleged false representations. The nominal owner of the land took title to the bond and mortgage given in part payment of the price. *Held*, that the fraud of the real owner and the broker was imputable to the person in whose name they acted.

Appeal from supreme court, general term, second department.

Action by Clara Fairchild against Lucy Ann McMahon to foreclose a mortgage. From a judgment of the general term (20 N. Y. Supp. 31) affirming a judgment of the special term for defendant, plaintiff appeals. Affirmed.

Merrill & Rogers, (Payson Merrill and Geo. C. Cult, of counsel,) for appellants. McMahon & Handley and Dennis McMahon, for respondents.

O'BRIEN, J. The plaintiff sought to foreclose a mortgage assigned to her before the commencement of the action, executed and delivered by the defendant, upon certain real estate of which she was the owner, subject to other mortgage liens, and bearing date April 30, 1890, for \$1,500, payable one year from date, with semiannual interest. The mortgage was given to one Joseph H. Cain, with whom the negotiations and transactions which resulted in its execution and delivery were had, or with agents acting for him or in his interest. The defense is fraud practiced upon the defendant, and by means of which she was induced to make and deliver the mortgage and the accompanying bond. The facts to sustain this defense are stated with considerable detail, the substance of which, in brief, is as follows:

On the 9th of April, prior to the execution of the mortgage, the defendant, through her husband, acting for her, entered into an agreement with Cain to exchange real estate. Each owned a house and lot incumbered by mortgage, the equity of redemption in which was to be conveyed to the other, and the agreement was actually carried out by the execution and delivery of proper conveyances. The mortgage in question was executed and delivered in pursuance of this agreement. It is alleged, in substance, that one Yoran, the plaintiff's son, was the principal actor in the transaction, and the real party to be benefited; that, though the record title to the real estate to be conveyed to the defendant was in Cain, yet his title was nominal, as his name was simply used by Yoran in the purchase of the property, and in the negotiations for its sale to the defendant, and in the conveyance. It is then charged, in substance, that Yoran, Cain, and their broker, and another broker employed by and acting for the defendant's husband, her agent, conspired together to cheat and defraud the defendant by false and fraudulent representations concerning the value and condition of the house which the defendant by the agreement was to receive in exchange for her property, and which she subsequently conveyed, and that, in reliance upon the truth of the statements, she, through her husband, entered into and executed the agreement and made the exchange. It is further averred that upon discovery of the fraud the defendant offered to rescind the whole transaction. The courts below have sustained the defense, and the charges of fraud and other facts alleged by the defendant are found by the learned trial judge to be substantially true. The testimony upon the issues of fact was very conflicting, but, after considering it with all the circumstances, we are unable to say that any of the findings material to the defense, and challenged by exception, are without support, and therefore feel concluded by them as to the facts.

There are one or two questions of law, however, that should be noticed. One of the false representations made by Yoran and his broker to the defendant's husband, as appeared from the findings, which was relied upon, and which influenced her action in making the exchange, and giving the bond and mortgage in suit, and upon which the finding of fraud is based, was that the house and lot transferred to the defendant in the exchange was worth \$15,000; that Cain had just purchased it at the price of \$12,000 from the executors of the deceased owner, who were compelled to sell at a price below the real value; and that such was the consideration expressed in the deed to him from the executors, as would appear from the record in the county clerk's office. It is further found that the defendant's husband, before entering into the transaction, did examine the deed in the clerk's office under which Cain took the title, and that it appeared from the same that the consideration was \$12,000, and that the defendant and her husband believed the state-

ment; that, while it was true that the consideration stated in the deed was \$12,000, it was not true that the real consideration paid was that sum, but, on the contrary, the fact was that, about 24 days before the transaction, Yoran had purchased the property for \$7,000, which was its true value, and had taken the deed in the name of Cain, expressing a fictitious consideration, and for the purpose of deceiving investors, and that the defendant had procured the consideration to be falsely stated in the deed. This finding raises the question whether a false statement, deliberately made, by a party about to sell property, to the party about to purchase it, with respect to the price which he had paid for it to a former owner, is a sufficient basis upon which to predicate a finding of fraud when the statement is relied upon by the party to whom made. It has been held that a false statement by a vendor to a vendee concerning the value of property about to be sold will not sustain an action for fraud, but the vendee in such cases must rely on his own judgment. *Ellis v. Andrews*, 56 N. Y. 53. It may be that the rule in such cases would be different if the purchaser was prevented by any act or artifice of the seller from exercising his judgment in ascertaining the value. But the question here is not one arising out of a representation as to value. The representation was with respect to a fact which might, in the ordinary course of business, influence the action and control the judgment of the purchaser, namely, the price paid for the property about to be sold by the vendor within less than a month prior to the transaction; and so we think that a false statement with respect to the price paid, under such circumstances, which is intended to influence the purchaser, and does influence him, constitutes a sufficient basis for a finding of fraud. It was so held in *Sandford v. Handy*, 23 Wend. 260, where a new trial was granted to the plaintiff in an action of this character, on the ground that proof of such representations was improperly excluded at the trial. Chief Justice Nelson, delivering the opinion of the court, (page 269,) said: "I am also inclined to think that any misrepresentation as to the actual cost of the property is a material fact, and naturally calculated to mislead the purchaser. \* \* \* Misrepresentation as to the cost of an article stands somewhat on the same footing. It is a material fact, which not only tends to enhance the value, but gives to it a firmness and effect beyond the force of mere opinion. The vendor is not bound to speak on the subject, but, if he does, I think he should speak the truth." The same principle received the sanction of the court in *Van Epps v. Harrison*, 5 Hill, 63, and is apparently recognized in *Smith v. Countryman*, 30 N. Y. 655; *Hammond v. Pennock*, 61 N. Y. 151; and *Goldenbergh v. Hoffman*, 69 N. Y. 326.

There is another question in the case,—as to how far these statements as to the cost of the property made by a broker employed by Yoran can bind the plaintiff or Cain, her assignor. But it sufficiently ap-

pears that Yoran used Cain's name in the transactions with his consent, and that he also employed the broker to sell the property or negotiate the agreement for an exchange. All persons who acted for or in the name of Cain or with his consent in bringing about the transaction must now be deemed to be his agents; and as he accepted the fruits of their efforts in this regard, and took the title to the bond and mortgage, which was a part of the result of their negotiations, and transferred them to the plaintiff, all the methods employed by either Yoran or his broker to procure the agreement for an exchange and the mortgage in suit are imputable to the person in whose name they acted, and who voluntarily received the securities thus procured. He could not, even though innocent, receive a mortgage thus procured, and at the same time disclaim responsibility for the fraud by means of which the defendant was induced to deliver it. *Krumm v. Beach*, 96 N. Y. 398. The findings imply that the broker was the general agent of Cain, and as such his statements bound his principal, and those findings are sustained by the evidence. The plaintiff took no other or different title to the bond and mortgage than Cain had. The record discloses no estoppel or other principle of equity which can protect the plaintiff against any defense which might have been urged if the securities had remained in the hands of the original parties. We have examined the other exceptions in the case, and as they do not present any question requiring discussion, or any error that affects the judgment, it should be affirmed, with costs. All concur.

(129 N. Y. 261)

#### WESTON v. CITY OF TROY.

(Court of Appeals of New York. Oct. 3, 1893.)

#### ACTION FOR PERSONAL INJURIES—EVIDENCE OF DUE CARE.

Plaintiff fell on a ridge of ice formed on a sidewalk by the discharge of water from a conductor on a building. *Held*, in the absence of evidence by plaintiff that she was in the exercise of due care, she cannot recover.

Appeal from supreme court, general term, third department.

Action by Mary Weston against the city of Troy. From a judgment of the general term (20 N. Y. Supp. 269, mem.) affirming a judgment of the special term for plaintiff, defendant appeals. Reversed.

William J. Roche, for appellant. Charles E. Patterson and Frank J. Parmenter, for respondent.

ANDREWS, C. J. It is a fundamental principle in the law of this state that in an action for a personal injury, based on negligence of the defendant, the absence of negligence on the part of the plaintiff, contributing to the injury, must be affirmatively shown by the plaintiff, either by direct proof or by circumstances, and that no presumption arises from the happening of an injury and proof of negligence on the part of the defendant that the plain-

tiff was free from blame. *Reynolds v. Railroad Co.*, 58 N. Y. 248. The plaintiff was injured by falling on a sidewalk in Troy in March, 1885. Her leg was broken, and she recovered a moderate verdict. We think a case of neglect by the city was made out, and we should affirm the judgment of the general term, which sustained the recovery, but for the reason that it would make a precedent for overturning the rule to which we have adverted. The proof shows that the plaintiff was passing over a sidewalk on Madison street, in the forenoon of a clear, cold day in March, adjacent to the saloon of one Foley, and stepped upon a ridge of ice formed by the discharge of water from a conductor on the outside of Foley's building, and that she fell, sustaining the injury complained of. There is no shred of evidence as to the exercise by the plaintiff of any care on the occasion. An inch or two of light snow, which had fallen the night before, covered the ice, thereby rendering it more dangerous. The ridge, according to the plaintiff's witnesses, was formed by the water overflowing from a gutter leading from the house where the water was discharged across the sidewalk to the roadway, and then congealing, the ridge being several inches high and two or three feet wide. The evidence on the part of the plaintiff tends to show that the ridge of ice was plainly visible, and that it formed a dangerous obstruction to the use of the sidewalk was shown by the fact that two other persons had fallen there on the same day the plaintiff fell, and another person two or three weeks before. Whether the plaintiff saw the ridge before stepping upon it does not appear, nor was it shown whether she was walking fast or slow, or what attention she was paying, if any, to the condition of the sidewalk. If she discovered the ridge, she was not required to leave the sidewalk, but she might, without being subjected to the charge of negligence, using due care, have kept on her way. But she could not heedlessly disregard the precautions which the obvious situation suggested, and proceed as though the sidewalk was free and unobstructed. The presumption which a wayfarer may indulge that the streets of a city are safe, and which excuses him from maintaining a vigilant outlook for dangers and defects, has no application where the danger is known and obvious. If the plaintiff did not discover the ridge, and passed along relying upon the walk being safe, or supposing, if she saw the ridge, that it was made by compacted snow, and not by ice, these and other circumstances might have been shown to meet the burden the law places upon a plaintiff suing for negligence of being himself free from fault. But no evidence whatever was given by the plaintiff to meet this condition. It is said by counsel that this was a mere inadvertence, and he asks us, in substance, to hold that the mere happening of the accident by stepping upon the ridge, when it was covered with a light snow, made the question of contributory negligence one for the jury. We cannot assent to this view. The judgment should

therefore be reversed, and a new trial granted. All concur, except PECKHAM and O'BRIEN, JJ., dissenting.

(129 N. Y. 273)

### CONDUCT v. COWDREY.

(Court of Appeals of New York. Oct. 3, 1893.)

#### REAL-ESTATE AGENTS—RIGHT TO COMMISSIONS.

Defendant agreed to pay a real-estate broker a commission for the sale of certain land. Plaintiff procured certain persons, who agreed to pay the price asked for the land, and the deed was put in escrow. It was part of the agreement that the purchasers should examine the title before certain acceptances given for the property matured, and, if it was found there was not title, there was to be no sale. The title, on examination, proved thoroughly faulty. *Held*, that the negotiations failed because the buyers exercised their reserved privilege to withdraw from their propositions on a specified contingency which happened, without the fault of defendant, and plaintiff was not entitled to a commission. 19 N. Y. Supp. 699, reversed.

Appeal from superior court of New York city, general term.

Action by Jonathan D. Conduct against Jane H. Cowdrey to recover commissions for the sale of land. From a judgment of the general term (19 N. Y. Supp. 699) affirming a judgment for plaintiff, defendant appeals. Reversed.

William M. Ivins, for appellant. Cannon & Atwater, (Henry G. Atwater, of counsel,) for respondent.

MAYNARD, J. The defendant was the executrix of her husband's will and the devisee of his real estate. Among the title papers which came into her possession were conveyances to him of eight different tracts of land in various counties in the state of Kentucky, aggregating 435,000 acres, and what purported to be duly-certified abstracts of title, showing, upon their face, a complete chain from the commonwealth of Virginia. It does not appear that the defendant, or her managing agent, one Samuel R. Dickson, had any knowledge of the genuineness of these abstracts. In 1887, Dickson, acting for the defendant, employed the plaintiff, a real-estate broker, to effect a sale of these lands for her, and on May 10th she addressed, signed, and delivered to the plaintiff the following written memorandum of his employment: "Sir: I hereby agree to pay you a commission of ten per cent. on the price I may accept for the 435,000 acres of land in eastern Kentucky belonging to me, if sold through your agency. I hereby acknowledge your agency in bringing Jere Baxter and his associates to me, whereby a refusal until Sept. 10 next was given by me." On the same day a written option was given by her to Baxter for the purchase of these lands at ten cents per acre for a period of four months, and it was expressly stipulated in this writing "that he, the said Baxter, shall, at his own expense, time, and labor, have the titles to said property examined into, and the condition and character of the lands examined, and gather all information he may deem necessary for him to act intelligently in the premises, the vendors not

being able to give him such information." This option was to be renewed for 90 days, if Baxter desired it. Baxter resided at Nashville, Tenn., and endeavored to associate W. A. Milliken, a lawyer of that city, with him in the negotiations. Milliken visited the lands, and made some examination as to their location and quality and the extent to which they were occupied by squatters, but made no investigation of the title. Baxter's option expired without effecting a purchase, and Milliken then continued the negotiations in his own behalf. As the defendant required payment either in money or short-time paper, it seemed necessary for him to obtain the assistance of some one possessed of the requisite means to meet these requirements. In April, 1888, he succeeded in inducing Frederick Wolff, a banker and broker in New York, to consent to join with him in the purchase of the property. It was finally agreed between them and the defendant's agent that they would pay at the rate of 10 cents per acre, or \$48,500, for the property, as follows: \$2,000 down, and three acceptances of \$13,833.33 each, drawn by Milliken on Wolff to the order of defendant, and accepted by Wolff, payable at three, four, and six months, respectively, and the defendant should sign and acknowledge the deeds of the property, and that the acceptances and the deeds should be deposited as an escrow with the Second National Bank of New York, and upon the payment of the acceptances the deeds were to be delivered by the bank to Wolff and Milliken. On April 28, 1888, the \$2,000 were paid, and the acceptances signed and the deeds executed, and both deposited with the bank, as agreed, and a written receipt signed by the defendant, and delivered to Milliken and Wolff, showing that all these things had been done. At the same time there was left with the bank a written memorandum called "Conditions of Hypothecation," not signed by any one, and, as shown by the evidence, drawn by the defendant's agent without the knowledge or assent of the purchasers, reciting that there was placed with the bank, for safe-keeping and delivery, eight deeds transferring the title to 435,000 acres of land, situated in the state of Kentucky, from the defendant to Milliken and Wolff; also, three obligations for the payment of money, describing them, which three obligations are made for the purchase of said lands, and stating that, if the obligations are paid at maturity, the deeds are to be delivered, but, in case of any default in the payment, the deeds are to be delivered to the defendant, and that all moneys paid shall be forfeited in liquidation of damages sustained by virtue of the nonpayment of any of the obligations. As yet the title had not been investigated. The defendant was not willing to make any other conveyance than a quitclaim deed; the intending purchasers were not willing to complete the purchase and take the property unless the title was found, upon examination, to be good; and the proof shows that it was also a part of the agreement of the parties that Milliken and Wolff should examine the title before the

acceptances matured, and, if it was found that the defendant had no title, then there was to be no sale. Before the first acceptance fell due, Milliken went to Kentucky, and examined the title, and found that the abstracts which the defendant had were false in every material respect; that the signatures to the certificates were genuine, but the conveyances set forth in the abstracts did not exist, and had never existed; and that there was a complete chain of title to the lands in another upon the public records. The defendant therefore had no lands, and not even a colorable title to any lands, in Kentucky, which she could convey. Milliken and Wolff immediately notified the defendant and the bank of the discovery of the nonexistence of her title, and of their refusal to complete the purchase, and they demanded of the defendant the repayment of the \$2,000, and of the bank the surrender of the acceptances. They also brought an action against the defendant in the United States circuit court for the recovery of the money and the cancellation of the acceptances. The defendant was willing to refund the \$2,000, but Milliken and Wolff demanded damages for fraud in the transaction, which the defendant resisted. This suit was compromised June 20, 1889, by the defendant agreeing to repay the \$2,000, and to pay \$900 in addition for the expenses of Milliken and Wolff, and the acceptances were to be surrendered and the deeds returned. It appears from the testimony of Milliken why the investigation of the title was left to the last. He was acquainted with the reputation of the officer who certified to the abstracts, and knew him to be a prominent lawyer of Kentucky, and had confidence that the abstracts would, upon examination, be found to be correct. The plaintiff insists that there was a sale of the property by the defendant to Milliken and Wolff, and that he was entitled to his commissions under the agreement of May 10th, and he has recovered judgment for the full amount and interest, from which this appeal has been taken.

When the plaintiff rested, the defendant moved for a nonsuit upon the ground that this transaction, which we have detailed, was not a sale which entitled plaintiff to a commission, but simply an option, and that under the terms of that option the property was not finally taken; in other words, that the transaction was not consummated, and, failing in the consummation, the property not having been sold, nothing was earned by the plaintiff. This motion was denied, and also a like motion, at the conclusion of the evidence, and an exception taken. This case has been here on a former appeal, (123 N. Y. 463, 25 N. E. Rep. 946,) and it was then held, we think, that upon substantially the same proof as that made by the plaintiff's witnesses the transaction between the defendant and Milliken was not a sale, but a mere option to buy, and that the plaintiff failed to establish his cause of action. Upon that trial the plaintiff relied upon the receipt and the memorandum of the conditions of hypothecation as constituting a written contract which could

not be varied, explained, or modified by parol. But a single witness was examined by the defense,—the agent Dickson,—who testified that “they were not willing to pay for the land until they had searched the title, and to give them that opportunity the postponement of the cash purchase was deferred, as specified in the notes, upon the express agreement that the deeds and the notes should be placed in escrow till such time as they might be able to be satisfied as to the title, and if the title was satisfactory they would pay the paper and take the deeds. Those were the terms of the transaction.” The court upon that trial rejected this evidence, and directed a verdict for the plaintiff, upon the ground that all prior oral negotiations were merged in the written contract, which must control. This ruling was held to be erroneous by this court, and Judge Finch, commenting upon the testimony of Dickson which we have quoted, said: “If this evidence is true, what appears upon the face of the papers to have been an agreement of sale is in reality a privilege to purchase at a fixed price, and to refuse to purchase upon the forfeiture of a definite sum, or what seemed to be an agreement of sale, is, in truth, a mere option to purchase. If this evidence is true, the alleged vendees never bound themselves to take the land, but preserved their freedom to refuse, and the acceptances in Mrs. Cowdrey’s hands were so much waste paper, and incapable of being enforced. Her sole right was to retain the money paid, and the alleged vendees were never bound to take title or pay the purchase money. In other words, there was no absolute contract of sale, but merely an option.” The witness Dickson was sharply contradicted by the plaintiff upon other points, and this court held that, so long as the case rested upon his evidence, it should be submitted to the jury.

The course of the present trial was widely different. The plaintiff produced Milliken as a witness, who gave a detailed history of the negotiations between him and the defendant’s agent, from their inception to the time when they were finally broken off by the discovery of the failure of the title. He was corroborated by Wolff and by Montague, the president of the bank, both of whom were called by the plaintiff. His testimony makes it entirely clear that under the former decision of this court there was never a sale, but only an option to buy, which never ripened into an actual purchase. He states that he refused to complete the purchase because, upon examination of the records in Kentucky, he found that the defendant did not have the title which the abstracts purported to show; that “we never consummated the sale;” that the acceptances and deeds were deposited in the bank in escrow, there to remain until the acceptances were all due and paid, when the deeds were to be delivered, and meanwhile they were to examine into the condition, character of, and title to, the lands, and, if the title was not found to be as set out in the abstracts,

the contract of purchase was not to be carried out; that the contract was not to become absolute unless the title proved upon examination to be as represented; that they were negotiating for the purchase of the title as stated in the abstracts, and, if it turned out that there was no such title, there was no purchase. The plaintiff’s witness Wolff testified: “It was an agreement in this way: Mr. Milliken to examine the abstract of title in the different counties of Kentucky, and to verify it, and on his verification I had to pay the balance of the notes,” and the sale was conditional upon that. Again, he says: “The sale was made in this way: They furnished me with the abstract of title, and stated that these deeds as stated in the abstract were recorded in the different counties. I was willing to take the title, a quitclaim deed from Mrs. Cowdrey, provided that these deeds were in accordance with the abstract of title. I had an agreement with Milliken about this, based upon this agreement with Mrs. Cowdrey.” In his agreement with Milliken it is recited that the latter “has an option for the purchase of several tracts of land in eastern Kentucky” from the defendant. The witness Montague testified that he never delivered the deeds to Milliken. “They were returned by order of all parties to Mrs. Cowdrey, or rather to Mr. Dickson for Mrs. Cowdrey, and so the transaction was off. The escrow was surrendered, and the transaction was off.” It is therefore apparent that upon this trial the defendant was not required to rest her defense upon the evidence of the contradicted witness Dickson. By the contract between the plaintiff and defendant he was not entitled to commissions unless there was an actual sale of the property effected through his agency. It must appear to have been a binding and enforceable agreement for the sale and conveyance of the land; and it is not sufficient to show a provisional arrangement which has failed because of the nonfulfillment of a condition not dependent upon the action of the vendor. This is not a case where the owner refused to consummate the sale after the broker had found a purchaser upon the terms originally proposed, or where the vendor has been unable to give the stipulated title on account of some defect in it, either known at the time the contract was executed, or subsequently discovered. *Duclos v. Cunningham*, 102 N. Y. 678, 6 N. E. Rep. 790; *Sibbald v. Iron Co.*, 83 N. Y. 378; *Knapp v. Wallace*, 41 N. Y. 477; *Barnard v. Monnot*, 1 Abb. Dec. 110. There was no failure on the part of the defendant to abide by her offer or agreement to sell. The negotiations failed because the buyers availed themselves of the privilege, which they had reserved, to recede from the propositions to purchase, upon a specified contingency, which happened, and it was not the fault of the defendant that the bargain was never closed. The judgment and order must be reversed, and a new trial granted; costs to abide the event. All concur, except EARL, J., not voting. Judgment accordingly.

(139 N. Y. 224)

**FARMERS' LOAN & TRUST CO. v. WILSON.**

(Court of Appeals of New York. Oct. 3, 1893.)

**AGENCY—TERMINATION—DEATH OF PRINCIPAL.**

On the death of a principal for whom an agent has executed a lease, and collected rents from the lessee, the agency ceases, and payments made thereafter to the agent, before knowledge of the death of the principal, are no defense to an action for the rent by the heirs of the deceased lessor, the agent having failed to pay over the money collected; the fact that the agent was entitled to commissions on rents collected not creating an agency coupled with an interest, and therefore within the exceptions to the rule. 19 N. Y. Supp. 142, affirmed.

Appeal from supreme court, general term, second department.

Action by the Farmers' Loan & Trust Company, as guardian of the minor heirs of William Maden, deceased. From a judgment of the general term (19 N. Y. Supp. 142) affirming a judgment of the special term in favor of plaintiff, defendant appeals. Affirmed.

Hirsch & Rasquin, (Hugo Hirsch, of counsel,) for appellant. Turner, McClure & Rolston, for respondent.

O'BRIEN, J. The plaintiff, as general guardian of infants, heirs, and devisees of one William Maden, has recovered judgment against the defendant for rent claimed to be due under a lease of certain real estate, executed in the lifetime of the testator. Maden died in Cuba on the 6th of August, 1884, having by will devised the real estate in Brooklyn, the rent of which was claimed in this action, to his infant children, who are represented by the plaintiff. He had been for many years before his death a resident of Cuba, and the owner of the real estate in question. The will was duly proved and established under the laws of that country on the 27th of August, 1884, and such proceedings were afterwards had here that it was admitted to record in the office of the surrogate of New York on the 10th of June, 1885, and the plaintiff was appointed guardian December 19, 1888. The real estate had been for many years managed and rented by an agent of the owner, who acted under a verbal authority. The judgment was for rent accruing under the lease subsequent to the death of the owner from the month of September, 1884, to and including the month of May, 1885. It is undisputed that the defendant paid all the rent claimed to the agent subsequent to the death of his principal, but, as it does not appear that the agent ever accounted for the same, the sole question presented by this appeal is whether the defendant is protected by such payment in this action. On the 8th of April, 1884, the testator, by his agent, and the defendant, executed the lease, which appears to be under seal, acknowledged, and recorded. By this instrument, Maden, who is described as "of Cortenas, Island of Cuba," demised to the defendant for the term of five years from May 1st thereafter the buildings in respect to which the rent is claimed to have accrued, at the yearly rent of \$3,500, payable monthly in

advance. The lease contains a provision for renewal for five years, at \$4,000 per year, payable in like manner. The defendant, on his part, covenanted to pay the rent as stipulated, and to surrender the premises at the expiration of the term. The defendant had, during the four years prior to the execution of this lease, occupied the premises as tenant under agreement with the agent, and had paid the rent to him, and it appears that the defendant never had any personal dealing with the owner, though he knew he was in fact the landlord, and where he resided. At the time that the defendant paid the rent in question to the agent, neither of them had any knowledge or information in regard to the death of the owner.

The rule is well settled by authority that the power of an agent to collect and receive payment of rents falling due to his principal, when such power is not coupled with an interest, terminates and ceases upon the death of the principal, and that payment made thereafter to the agent does not bind the estate of the principal, though the payment be made in ignorance of the principal's death. *Weber v. Bridgman*, 113 N. Y. 600, 21 N. E. Rep. 985. The rule seems to have originated in the presumption that those who deal with an agent knowingly assume the risk that his authority may be terminated by death without notice to them. The case of an agency coupled with an interest is made an exception to the rule. *Grapel v. Hodges*, 112 N. Y. 419, 20 N. E. Rep. 542; *Hunt v. Rousmanier*, 8 Wheat. 204. It is urged that the exception applies to this case, for the reason that the agent was entitled to commissions upon the rents collected, and to be allowed his disbursements for repairs, insurance, and taxes. The trial court refused to find that he had such an interest as would prevent the revocation of the power upon the death of the principal. There was no proof to show that the agent, at the time of the death, had any claim on account of repairs, insurance, or taxes, and therefore it is needless to inquire how far, if at all, these elements, if shown to exist, would change the case. It may be assumed that the agent was entitled to compensation for his services, in the form of commissions, upon the money collected, while the agency was in force. But this would not give him such an interest as would continue his power after his principal's death. Agents are quite frequently paid by commissions upon sales of property, or upon moneys collected, and to hold that this constitutes such an interest as would save the power from revocation by the death of the principal would be, in effect, to abrogate the rule in most cases. The interest which can protect a power after the death of the person by whom it was created must be an interest in the thing itself. The power must be ingrafted upon some estate or interest in the thing to which it relates. *Hunt v. Rousmanier*, supra. Here the agent had no estate or interest in the property, nor in the rents as such. The most that can be said is that he was entitled to commissions upon what was to be produced by the exercise of the power, and hence it

cannot be said that the power and the interest are united in the same person at the time of their creation. It cannot, we think, be claimed for a moment that the principal, in the creation of the power, conferred upon the agent any interest in the subject to which it was intended to relate. At no time could the agent act except in the name of his principal, and a power thus limited must necessarily cease with the death of the person in whose name it is to be exercised. The learned counsel for the defendant, in an interesting and ingenious argument, has attempted to take this case out of the operation of the general rule; but, while much impressed with the equity of his position, we have not been able to make any satisfactory distinction between the facts as they appear in the record and those that appeared in the cases to which reference has been made. The result which we feel constrained to reach will illustrate how a rule or principle of law will operate harshly, and produce what might seem to be injustice in a particular case. This conclusion must, however, be modified when we consider that either the defendant or the infant children of the deceased must bear the loss which has occurred by the default of the agent. The defendant could have foreseen what has happened, and protected himself against loss by insisting upon payment to the owners alone, or by proper stipulations in the lease. There can be no doubt that a party may, by his contract, estop his personal representatives or his estate from recovering money paid to his agent in good faith, after his death, under such circumstances as appear in this case; but we see no reasonable way that the children of the owner, who are the real plaintiffs in this case, could have avoided the result. The presumption that every man knows the law implies that they will act with reasonable caution and vigilance in their business affairs, and that in entering upon contracts or carrying them out they will become informed by competent advice of the risks and dangers that beset them. When a man knowingly deals with the agent of a principal who resides in a foreign country, it must be assumed that he will guard against the perils that the transaction necessarily involves; and while courts are disposed to exercise all their power to relieve parties who have acted in good faith from the result of their neglect to provide, in the first instance, against accidents which might have been foreseen, there seems to be no way open for such a result in this case, without disregarding or refining away an important rule of law. This would practically be judicial legislation. We feel bound to follow the current of authority, and to leave the work of reforming the law on this question, if reform be necessary or desirable, to the legislature.

There would seem to be an incongruity in the law of agency with respect to the effect of a revocation of the agent's powers by the act of the principal himself, and a revocation produced by his death. In the former case, the revocation does not affect third parties, dealing with the agent in

good faith, without notice, (*Clafin v. Lenheim*, 68 N. Y. 301; *Williams v. Birbeck*, Hoff. Ch. 859; *Blake v. Garwood*, 42 N. J. Eq. 276, 10 Atl. Rep. 874; *Whart. Ag.* §§ 99-104; *Story, Ag.* § 470;) while in the latter, as we have seen, the revocation operates upon all parties, without notice, unless the power is coupled with an interest, in which case the agent may execute it in his own name, notwithstanding the death of the principal. The civil law protected third parties who dealt in good faith with the agent without notice in all cases, whether the power was revoked by the act of the principal or his death; but, as Chancellor Kent has observed, this equitable principle does not prevail in the English law, (2 Kent, Comm. [18th Ed.] 646,) from which the rule that obtains in this state was derived, though in other jurisdictions, and perhaps in England, the harshness of the common law has been modified by statute, (*Weber v. Bridgman*, 113 N. Y. 602, 21 N. E. Rep. 986.) The common-law rule has become too firmly established in this state to be disturbed by judicial action, though a change by the law-making power would be in harmony with more enlightened views, and would promote the interests of justice. The judgment must therefore be affirmed, with costs. All concur.

(139 N. Y. 251)

#### PEOPLE v. SHELDON et al.

(Court of Appeals of New York. Oct. 3, 1893.)

#### CONSPIRACY—COMBINATION TO FIX PRICES OF COAL.

An association formed by the retail coal dealers of a city, whose chief purpose is to fix minimum prices to be charged in the city and neighborhood, and whose conditions are calculated to prevent a dealer not a member from buying coal of the wholesalers, is a conspiracy to commit acts injurious to trade, though the fixing of prices be the only overt act, and the prices, as fixed, be reasonable. 21 N. Y. Supp. 859, affirmed.

Appeal from supreme court, general term, fifth department.

Carson J. Sheldon, Charles J. Ferrin, Sheldon N. Cook, and Edward S. Brown, convicted of conspiracy to commit acts injurious to trade, appeal from the judgment of the general term (21 N. Y. Supp. 859) affirming the special term's judgment of conviction, and order denying a new trial. Affirmed.

The facts appear in the following statement by ANDREWS, C. J.:

Appeal from the affirmation by the general term, fifth department, of judgment of conviction in the Niagara county sessions on indictment for conspiracy. The indictment set forth an agreement between the defendants and others, comprising all the retail coal dealers in the city of Lockport, except one, entered into in March, 1892, to organize the Lockport Coal Exchange, which agreement was as follows:

"Constitution and By-Laws.

"Name. The name of this exchange shall be the Lockport Coal Exchange.

"Objects. The objects of this exchange shall be to foster trade and commerce in



coal, wood, and all the products appertaining to the same; to protect and secure freedom from unjust and unlawful exactions; to diffuse accurate and reliable information as to the retail coal trade, and of the responsibility and standing of customers, and other matters, among its members, for their mutual protection and benefit; to settle differences between its members; to produce uniformity and certainty in the customs and usages of such trade; to promote a more enlarged and friendly intercourse between merchants and dealers in coal and wood; and to provide, establish, and maintain such rules and regulations as may be proper and necessary for the mutual co-operation, interest, and protection of the retail dealers in coal and wood in the city of Lockport, and in furthering the coal trade interests generally. It shall be the duty of all members to strictly obey all the provisions of the constitution, by-laws, and resolutions of the exchange, and permit to the secretary the free exercise of the duties imposed upon him in enforcing them.

**"Officers.** The officers of the exchange shall be a president and a vice president, who shall be elected by the exchange, and who shall be members of the exchange, and also a secretary and treasurer, elected by the exchange. The officers shall hold office for the term of one year, and until their successors are elected and shall have duly qualified; and any officer may be removed from office by the five-sixths vote of all the members of the exchange, at any regular or special meeting thereof.

**"Committees.** There shall be such committees as the president or the board of trustees may from time to time designate.

**"President and Vice President.** The president shall preside at all meetings of the exchange, or, in his absence, the vice president. In the absence of the president and vice president, a presiding officer shall be chosen from the members of the exchange. The president shall be, ex officio, a member of all committees.

**"Secretary.** The secretary shall not be a member of the exchange, nor in any manner personally interested in the coal trade. He shall be elected by at least a five-sixths vote of all the members of the exchange at a regular or special meeting, due notice of said intended election having been sent by mail to each member, at his regular business address, at least five days previous to the meeting. The secretary shall keep a record of the meetings of the exchange, a register of its members, officers, and committees, and conduct all correspondence of the exchange, and perform such other duties in connection with his office as may be imposed upon him by the exchange. He shall instantly investigate all charges preferred against the members of the exchange, on all well-founded suspicions, without fear or favor, and conduct the investigation, both to obtain proof, and when presented before the exchange, and shall render his decision in each case to the exchange within ten days from the date on which charges are made, unless further time is given him by the exchange. He shall be permitted to see any portion of the books of any

member, when in pursuit of evidence of wrongdoing, and may demand an affidavit, when he thinks necessary, to refute or sustain a specific charge. He shall also collect material for, and compile, a list of persons who are poor pay, for the mutual protection and benefit of the members of the exchange. He shall also be the keeper of the seal of the exchange, and receive such salary as may be determined upon by the exchange. Before the secretary shall enter upon the duties of his office, he shall make oath that he will honestly and fearlessly perform the duties prescribed by the constitution and by-laws, and that he will keep, in honor and secrecy, any and all information by him acquired, regarding the business of the various members, as he from time to time may investigate them, except any facts connected with any violation of the laws of the exchange which the exchange or any member is entitled to know. If practicable, the secretary shall be a notary public. The secretary shall not disclose to any member of the exchange any information regarding any investigation, while he is making the same.

**"Treasurer.** The treasurer, who shall also be the secretary, shall have charge of the funds of the exchange, disburse the same on the order of the board of trustees, countersigned by the president, and shall report at all regular meetings, and his accounts shall be open for proper inspection at all proper times. He shall give bonds for the proper protection of the exchange.

**"Membership.** The exchange shall be composed of active and associate members. Active members shall comprise any retail coal dealer, firm, or company who has a yard or dock, and the usual appliances for doing a coal business, in the city of Lockport. Associate members shall comprise any individual, company, or firm that sells coal in the villages around Lockport, and who approves the objects of, and agrees to co-operate with, the exchange. Associate members shall pay an annual fee of five dollars, and shall have all the privileges of active members, except the right of voting.

**"Discipline.** If a member is charged with violating any provision of these by-laws, or any rule or resolution of the exchange, or of being guilty of conduct unbecoming a member, or prejudicial to its interests, or of giving short weight or overweight, he shall be summoned before the secretary to answer the charge. If, upon the charge and defense being heard by the secretary, he shall decide to sustain the charge, the member shall be declared 'in default;' and the member shall be considered to be 'in default' until five-sixths of all the members, at a regular or special meeting, shall vote to reinstate him as a member of the exchange, in good standing. A member who shall be declared 'in default' shall absolutely and irrevocably forfeit all rights to all money, property, or other value held by the exchange, as its own or in trust, and shall also forfeit all rights of membership in the exchange, unless he be reinstated in good standing; and no member shall be so reinstated except by a

five-sixths vote of all members of the exchange at a regular or special meeting assembled after proper notice, and only after depositing with the treasurer \$100 as fee or renewal of membership. When a member shall be accused by the secretary, in any open meeting of the exchange, of having violated any provision of this constitution and by-laws, or of any resolution, and evidence is lacking to absolutely refute or sustain the charge, it shall be obligatory upon such member to make proper affidavit that he has in no instance sold or delivered coal for which he has not received the full price at which the majority of the other members were selling coal of the same size at the same time, and that he has not, directly or indirectly, given any rebate, commission, or other concession equivalent to cash, thereby actually reducing the established market price made by the Lockport Coal Exchange, and that not less than two thousand and not more than two thousand pounds have, in his knowledge, been sold by himself, his partner, or his employees, or delivered as a ton. Resignations shall be made in writing to the president or secretary, and be referred to the board of trustees for their action; but no resignation will be accepted until all dues, fines, charges, and penalties against such member shall have been paid and settled. When the exchange, or secretary thereof, shall declare a member 'in default,' the secretary shall notify every member of the exchange by mail, and such notice shall be authoritative. When a member defies the exchange by persistent wrongdoing, and is declared 'in default' and persistent, the secretary shall notify the shippers of coal to the Lockport market that the said member is 'in default' and persistent, and for this reason is not entitled to the privileges of membership in the Lockport exchange.

**"Election of Members.** A candidate for membership shall be proposed in writing by a member at a regular meeting of the exchange, and be recommended by two members in good standing, and at the next succeeding regular meeting be voted upon. A two-thirds vote of the members of the exchange shall be requisite to elect.

**"Price of Anthracite Coal.** The price of coal at retail, shall, as far as practicable, be kept uniform, and it shall require a five-sixths vote of all members of the exchange, at any meeting, to advance or reduce the retail price of coal, and no price shall be made at any time which amounts to more than a fair and reasonable advance over wholesale rates, or that is higher than the current prices of the exchanges at Rochester or Buffalo, when figured upon corresponding freight tariff; but at no time shall the price of coal at retail exceed one dollar above the costs of the same at wholesale, except by the unanimous vote of all the members of the exchange. All votes upon the price of coal shall be viva voce. The sale of coal shall be through the nominal channels of the trade. Soliciting shall be discouraged, and no club orders of associated buyers, to reduce prices, shall be considered or accepted. No member shall employ any person tempo-

rarily to solicit orders, either on salary or on commission, and no signs indicating, 'Orders taken for coal,' shall be displayed at groceries or other 'outside places,' and no habitual orders for second parties shall be received or filled when sent in by such agencies, whether on commission or other form of reciprocity, or only as a matter of friendship. Except that each member may have one place for taking orders, in addition to his regular yard office.

**"Meetings.** The annual meeting of the exchange shall be held on the first Monday of April of each year. The regular meeting shall be held on the first Monday of each month. Special meetings may be called by the president, or upon the written request of three members, which request shall be sent to the secretary, stating the object of such meeting; and the notices of any special meeting shall state the object of the same, and no other business shall be transacted at such meeting. At all meetings of the exchange, seven members shall constitute a quorum; but this shall not authorize them to transact any business which, under the constitution and by-laws, requires the vote of a greater number of the members. Any member may be represented at a meeting by an authorized person connected with his business, and such person shall be entitled to the privileges of such member. Any vacancies in any of the official positions of the exchange shall be filled by the board of trustees, when ordered by the president, (or in his absence by the vice president,) within two weeks after such vacancy occurs, or as soon thereafter as practicable.

**"Membership Fee.** There shall be a membership fee of one hundred dollars to be paid to the secretary by each member at the time of signing the constitution and by-laws, and during the first week of each month the further sum of five dollars for current expenses. At the end of the year, upon vote of the exchange, there shall be returned to such member the full amount of such monthly payment so paid in by the members, less the proper proportion due for each member for the current expenses of the exchange, which amount shall be deducted from each by the secretary. Any member of the exchange, retiring from the coal business in Lockport in good standing with the exchange, shall be entitled to receive from the treasurer the original amount paid in by said member for membership,—that is, one hundred dollars,—less any assessment for expenses or dues that may properly belong to such member to pay, upon filing an affidavit with the secretary that the said member has absolutely withdrawn from all direct or indirect interest in coal business in Lockport, and that during his term of membership he has not violated any of the provisions of the constitution and by-laws or resolutions of the Lockport Coal Exchange.

**"Order of Business.** At all meetings of the exchange, the order of business shall be: Calling of roll; reading of minutes; proposal of membership; reports of committees; communications, bills, or no-

ices; unfinished business; miscellaneous business. This order of business may be suspended at any meeting of the exchange by a vote of two-thirds of the members present.

"Records and Minutes. The minutes and records of the exchange shall be open at all times to the inspection of members.

"Amendments. This constitution and by-laws may be amended by an affirmative vote of five-sixths of the members of the exchange at a regular meeting, provided that notice of such proposed amendment shall have been presented in writing at a previous regular meeting.

"We, the undersigned, agree to abide by the above constitution and by-laws of the Lockport Coal Exchange. James Lennon & Son. Angevine & Hoover. P. H. Tuohy. Charles Whitmore & Co. J. Marc. Fowler. Sheldon N. Cook. Upson & Stevens. E. S. Brown. M. W. Carr. Ferrin Bros. Co., Inc. M. McManus. Edward B. Jelly."

The indictment, among other things, alleged that the agreement constituted an unlawful conspiracy to raise, increase, and augment the rates and prices of coal, at retail, in the city of Lockport, and to destroy free competition among the signers of the agreement and others, in the sale of coal in said city, and to compel the consumers of coal to pay therefor the prices fixed by the coal exchange. It alleged that, in pursuance of said conspiracy, the defendants and others, members of said exchange, organized the same, elected officers, and by resolution did "fix, determine, and establish the rate and price of anthracite coal at retail, in said city, at four dollars and seventy-five cents per ton for egg, chestnut, stove, and grate coal, and three dollars and seventy-five cents per ton for pea coal, and other higher rates for small quantities of the same; said rates and prices so fixed, determined, and established being over seventy-five cents per ton higher and in advance of the then market price of such coal at retail in said city." The indictment alleged an unlawful intent, and concluded by an averment that the "conspiracy as aforesaid, so carried into execution as aforesaid, is of grievous injury to trade and commerce, prejudicial to the public good and welfare, against the form of the statute," etc. The proof established the execution of the agreement as alleged; the organization of the exchange by the election of officers; the fixing of the price of coal at an advance beyond the then market price, which price was thereafter charged therefor; the notification of the wholesale dealers, by the secretary, of the organization of the exchange, with the names of the members. Other facts are set forth in the opinion.

E. M. Ashley, for appellants. P. F. King, Dist. Atty., for the People.

ANDREWS, C. J. Section 168 of the Penal Code makes it a misdemeanor for two or more persons to conspire (subd. 6) "to commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruc-

tion of public justice, or of the due administration of the laws." The Revised Statutes contained a similar provision. 2 Rev. St. p. 692, § 3, subd. 6. The fact that the defendants subscribed the constitution and by-laws of the Lockport Coal Exchange, and participated in its management, was not controverted on the trial. Nor was there any dispute that the object of the organization was to prevent competition in the price of coal among the retail dealers, acting as the Lockport Coal Exchange, by constituting the exchange the sole authority to fix the price which should be charged by the members, individually, for coal sold by them. Nor is there any dispute that, in pursuance of the plan, the exchange did proceed to fix the price of coal, and that the parties to the agreement were thereafter governed thereby in making sales to their customers. Nor is it questioned that the price first established was 75 cents in advance of the then market price, and that there was afterwards a still further advance. The defendants gave evidence tending to show (and of this there was no contradiction) that before and at the time of the organization of the exchange the excessive competition between the dealers in coal in Lockport had reduced the price below the actual cost of the coal and the expense of handling, and that the business was carried on at a loss. It was not shown that the prices of coal, fixed from time to time by the exchange, were excessive or oppressive, or were more than sufficient to afford a fair remuneration to the dealers. The trial judge submitted the case to the jury upon the proposition that if the defendants entered into the organization agreement for the purpose of controlling the price of coal, and managing the business of the sale of coal, so as to prevent competition in price between the members of the exchange, the agreement was illegal, and that if the jury found that this was their intent, and that the price of coal was raised in pursuance of the agreement to effect its object, the crime of conspiracy was established. The correctness of this proposition is the main question in the case.

If the confederacy into which the defendants entered was an act "injurious to trade or commerce," irrespective of its results in the particular case, then there is no difficulty in maintaining the conviction. If a combination between independent dealers, to prevent competition between themselves in the sale of an article of prime necessity, is, in the contemplation of the law, an act inimical to trade or commerce, whatever may be done under and in pursuance of it, and although the object of the combination is merely the due protection of the parties to it against ruinous rivalry, and no attempt is made to charge undue or excessive prices, then the indictment was sustained by proof. On the other hand, if the validity and legality of an agreement having for its object the prevention of competition between dealers in the same commodity depend upon what may be done under the agreement, and it is to be adjudged valid or invalid according to the fact whether it is

nade the means for raising the price of a commodity beyond its normal and reasonable value, then it would be difficult to sustain this conviction, for it affirmatively appears that the price fixed for coal by the exchange did not exceed what would afford a reasonable profit to the dealers. It was said by Parker, C. J., (Lord Macclesfield,) in his celebrated judgment in *Mitchel v. Reynolds*, 1 P. Wms. 81, which was the case of a bond taken from the defendant on the sale by him to the plaintiff of the lease of a bake house, claimed to be void as in restraint of trade: "In all restraints of trade, where nothing more appears, the law presumes them bad. But if the circumstances are set forth that presumption is excluded, and the court is to judge of these circumstances, and to determine accordingly; and if, upon them, it appears to be a just and honest contract, it ought to be maintained." If this agreement, and what was done under it, is to be judged as an isolated transaction, and its rightfulness is to be determined alone upon the particular circumstances, whether it did or did not produce an injury to trade, we might well hesitate. The obtaining by dealers of a fair and reasonable price for what they sell does not seem to contravene public policy, or to work an injury to individuals. On the contrary, the general interests are promoted by activity in trade, which cannot permanently exist without reasonable encouragement to those engaged in it. Producers, consumers, and laborers are alike benefited by healthful conditions of business. But the question here does not turn on the point whether the agreement between the retail dealers in coal did, as matter of fact, result in injury to the public, or to the community in Lockport. The question is, was the agreement one, in view of what might have been done under it, and the act that it was an agreement, the effect of which was to prevent competition among the coal dealers, upon which the law affixes the brand of condemnation, and which it will not permit? It has hitherto been an accepted maxim in political economy that "competition is the life of trade." The courts have acted upon and adopted this maxim in passing upon the validity of agreements, the design of which was to prevent competition in trade, and have held such agreements to be invalid. It is to be noticed that the organization of the "exchange" was of the most formal character. The articles bound all who became members to conform to the regulations. The observance of such regulations by the members was enforced by penalties and forfeitures. A member accused by the secretary of having violated any provision of the constitution or by-laws was required to purge himself by affidavit, although evidence to sustain the charge should be lacking. The shippers of coal were to be notified, in case of persistent default by the member, that "he is not entitled to the privileges of membership in the exchange." No member was permitted to sell coal at less than the price fixed by the exchange. The organization was a carefully-devised scheme to prevent competition in the price of coal among the re-

tail dealers, and the moral and material power of the combination afforded a reasonable guaranty that others would not engage in the business in Lockport except in conformity with the rules of the exchange. The cases of *Hooker v. Vandewater*, 4 Denio, 349, and *Stanton v. Allen*, 5 Denio, 434, are, we think, decisive authorities in support of the judgment in this case. They were cases of combinations between transportation lines on the canals to maintain rates for the carriage of goods and passengers, and the court, in those cases, held that the agreements were void, on the ground that they were agreements to prevent competition; and the doctrine was affirmed that agreements having that purpose, made between independent lines of transportation, were, in law, agreements injurious to trade. In those cases it was not shown that the rates fixed were excessive. In the case in 5 Denio, the judge delivering the opinion referred to the effect of the agreement upon the public revenue from the canals. This was an added circumstance, tending to show the injury which might result from agreements to raise prices or prevent competition. See, also, *People v. Fisher*, 14 Wend. 10; *Arnot v. Coal Co.*, 68 N. Y. 558.

The gravamen of the offense of conspiracy is the combination. Agreements to prevent competition in trade are, in contemplation of law, injurious to trade, because they are liable to be injuriously used. The present case may be used as an illustration. The price of coal now fixed by the exchange may be reasonable, in view of the interests both of dealers and consumers, but the organization may not always be guided by the principle of absolute justice. There are some limitations in the constitution of the exchange, but these may be changed, and the price of coal may be unreasonably advanced. It is manifest that the exchange is acting in sympathy with the producers and shippers of coal. Some of the shippers were present when the plan of organization was considered, and it was indicated on the trial that the producers had a similar organization between themselves. If agreements and combinations to prevent competition in prices are, or may be, hurtful to trade, the only sure remedy is to prohibit all agreements of that character. If the validity of such an agreement was made to depend upon actual proof of public prejudice or injury, it would be very difficult, in any case, to establish the invalidity, although the moral evidence might be very convincing. We are of opinion that the principle upon which the case was submitted to the jury is sanctioned by the decisions in this state, and that the jury were properly instructed that, if the purpose of the agreement was to prevent competition in the price of coal between the retail dealers, it was illegal, and justified the conviction of the defendants.

There is a single remaining question. The trial judge was requested by the defendants' counsel, in substance, to charge that the overt act required to be proved to sustain a conviction for conspiracy

must be one which might injuriously affect the public, and that the act of the defendants in raising the price of coal was, of itself, not such an overt act as was required. The request was, we think, properly refused. The offense of conspiracy was complete at common law on proof of the unlawful agreement. It was not necessary to allege or prove any overt act in pursuance of the agreement. 3 Chit. Crim. Law, §142; O'Connell v. Queen, 11 Clark & F. 155. In this state this rule of the common law was changed by the Revised Statutes; and, with certain exceptions, it was provided that no agreement should be deemed a conspiracy "unless some act beside such agreement be done to effect the object thereof by one or more of the parties to such agreement." 2 Rev. St. p. 692, §10. And this principle was reenacted in the Penal Code, §171. The object of the statute was to require something more than a mere agreement to constitute a criminal conspiracy. There must be some act in pursuance thereof, and done to effect its object, before the crime was consummated. A mere agreement, followed by no act, is insufficient. The overt act charged in the indictment, and proved, was the raising of the price of coal. The raising of the price of coal by a dealer, unconnected with any conspiracy, is not unlawful; but if there is a conspiracy to regulate the price, and that conspiracy is unlawful, then raising the price is an act done to effect its object, whether the price fixed is reasonable or excessive. The object of the statute is accomplished when it is shown that the parties have proceeded to act upon the agreement, and done anything towards effecting its object. We think there is no error in the record, and the conviction should therefore be affirmed. All concur.

(139 N. Y. 105)

#### JUDD v. HARRINGTON.

(Court of Appeals of New York. Oct. 3, 1893.)

CONTRACTS—PUBLIC POLICY—ENHANCING PRICE OF FOOD.

An agreement between sheep brokers to form an association to protect their interests and prevent competition,—each to pay the treasurer a certain sum for every head sold, and to receive an arbitrary proportion of the sum accumulated,—made in furtherance of a contract with a similar and contemporaneously formed butchers' association, whereby the brokers were to slaughter no sheep, and sell only to members of the butchers' association, or forfeit so much per head sold to others,—the butchers not to buy elsewhere, on a like penalty,—is a contract to enhance the price of food, and not enforceable against a member of the brokers' association. 19 N. Y. Supp. 406, affirmed.

Appeal from common pleas of New York city and county, general term.

Action by Sylvanus Judd, treasurer of the New York & New Jersey Sheep Brokers' Association, against Dennis Harrington, for a penalty for breach of contract. From a judgment of the general term (19 N. Y. Supp. 406) affirming a judgment for defendant, plaintiff appeals. Affirmed.

A. Prentice, for appellant. Boardman & Boardman, (Edward C. Boardman, of counsel,) for respondent.

O'BRIEN, J. The plaintiff, as treasurer, of an association called the New York & New Jersey Sheep Brokers' Association, sued to recover \$10,000, stipulated as liquidated damages in a contract entered into between the association and the defendant. He was defeated in the action, and one of the questions presented is whether the contract is of such a character as to entitle the plaintiff to invoke the aid of the court for its enforcement. The contract was executed, as appears from its date, on the 11th of April, 1897, and was to be operative from the 1st of January preceding. The parties who signed the agreement were brokers and dealers in sheep and lambs consigned to market in New York and vicinity. The paper recites that the persons signing the same, of whom the defendant was one, had associated themselves together for the purpose of guarding and protecting their business interests from loss by unreasonable competition, and that they had agreed to pool and make a common fund of all commissions earned in the sale of sheep and lambs, excepting such as it was agreed should be paid to the Sheep & Lamb Butchers' Benefit Association of the City of New York. All the members of the association thus formed by the agreement then proceeded to enter into various stipulations with each other. Those that are material to the question involved are as follows: (1) That all members of the association thus formed, and every one subsequently admitted, should keep a just and true account of the number of sheep and lambs sold by them or their firms, by correct entries to be made in a book to be kept for that purpose; that at the close of each week, or within two days thereafter, a written statement from the books was to be made by each member to the treasurer, showing the full amount of sheep and lambs sold during the week, which statement the treasurer was to enter in a book to be kept by him, and at the same time file the statement for reference. (2) At the close of each month a settlement between the members was to be made, and the treasurer was to ascertain the total number of sheep and lambs sold, and the total sold by each member, and make a statement of the same, a copy of which, within two days thereafter, was to be delivered to each member, who was, within three days thereafter, to pay to the treasurer eleven and three-fourths cents per head for each and every sheep and lamb sold by him or his firm during the month, as appeared from the treasurer's statement. Then the treasurer was to distribute the fund between the members according to the percentage of the whole fixed by the agreement. (3) All moneys which the treasurer was to receive from the butchers' association above mentioned were to be divided between the members in the same way. (4) For a violation of this agreement, each member is to pay the treasurer \$10,000, to be divided between the members in the same way. It

is alleged that the defendant carried out the agreement on his part until about February 1, 1889, when he refused to abide by it, and from that date wholly failed and refused to render to the treasurer the account and statement provided for in the agreement. On the 26th of December, 1886, the brokers' association, formed as above described, and represented in this action by the plaintiff, and the butchers' association above mentioned, and referred to in the agreement, entered into a mutual agreement with each other, to take effect at the same date as the one above described, to wit, January 1, 1887. This agreement recited that the brokers were engaged in selling, and the butchers in buying, sheep and lambs for slaughter, and that it was for the interest of both that they should be closely connected in business, and should mutually aid and protect each other as thereafter set forth. The brokers bound themselves to keep correct books of account, showing the number of sheep and lambs sold by them on the market, and at the close of every month to render a full and true statement of all such sales to the secretary of the butchers' association, and at the same time pay to said secretary three and one-fourth cents per head for each and every sheep and lamb sold. The brokers further agreed: (1) Not at any time during the term of the agreement to engage in, or be directly or indirectly engaged in, slaughtering sheep or lambs, except for export. (2) Not to sell any sheep or lambs to any one else except the members of the butchers' association, and if they did they were bound to pay the treasurer of the last-named association 15 cents per head for the same. Any sales so made were to be reported every week, and payment made on account thereof. The butchers agreed to report to the brokers the names of all members of the association, including new members to be added from time to time; that they would buy sheep and lambs from the brokers only, and, if from any other parties, they would pay over to the brokers, on account thereof, fifteen cents per head, which purchases were to be reported to the brokers every week.

These two papers must be read together, and, thus considered, they manifestly were intended for the purpose of creating a combination between the butchers engaged in buying, and the brokers engaged in selling, sheep and lambs, in order to control the market, fix the price, and destroy competition. The brokers were to sell only to the butchers, and the butchers to buy only from the brokers. The owners of sheep, or the drovers or consignees who had them for sale, and the public who were interested in the price of meat, as an article of food, might have been prejudiced by the agreement. Whether they were, in fact, is not material. The real purpose and intent of the agreement were to suppress competition in an article of food, and, as such agreements tend to enhance the price, they are regarded as detrimental to the public interest, and forbidden by public policy. That such agreements are illegal and void has been settled by the decisions of the courts from the earliest

times. These authorities are to be found in the learned opinion below, and upon the briefs of counsel in this court; but I do not consider it necessary to refer to them further, or to discuss the question at length, for the reason that at this very term of the court the whole question has been examined, elaborately discussed, and decided in another case. *People v. Sheldon*, (Oct., 1893,) 84 N. E. Rep. 785; *Id.*, 66 Hun, 590, 21 N. Y. Supp. 859. Courts will not aid parties seeking to enforce such an agreement, (*Leonard v. Poole*, 114 N. Y. 371, 21 N. E. Rep. 707,) irrespective of the question whether, in fact, it produced the evil results to which it tended, or was harmless. It is said that the purpose was to facilitate the transaction of business, and save useless expense. It is quite likely that the agreement did enable the parties to transact their business with less labor and expense, and that may be said of nearly all such combinations, but that circumstance cannot save them from condemnation, when they tend to prejudice the public. The illegal character of the agreement appeared upon its face, and was a necessary legal conclusion from its provisions. It was doubtless the duty of the court to dispose of the cases presenting a question of law, but the illegal intent and purpose having been found by the jury, when the court was bound to declare it, the plaintiff is not injured by the ruling at the trial submitting the case to the jury on the question of the purpose and intent of the agreement. The right of the plaintiff to recover when no actual damages have been alleged or proven, and some other questions, are involved in the case, but it is unnecessary to consider them, as the illegal nature of the agreement sued upon is a fundamental objection to a recovery. The judgment should be affirmed, with costs. All concur; GRAY, J., in result.

(130 N. Y. 266)

BENNETT et al. v. DRAPER.

(Court of Appeals of New York. Oct. 3, 1898.)

## BOND—CONSTRUCTION.

A bond payable to "B. & Co., their successors or assigns," recited that it was given to enable the obligors to borrow money "from B. & Co.," and as "a continuing security for any money" which the obligors owe or at any time might owe "B. & Co., their successors and assigns," and was conditioned on the payment to the "obligees, their successors or assigns," of all advances made by "said obligees, their successors or assigns," it being expressly understood not to require "said obligees, their successors or assigns," to advance any money whatever. *Held*, that the bond secured advances made by or debts due to B. & Co. as the firm then existed, and did not secure advances made by a firm succeeding B. & Co. under the same name, after the death of one of its members. 17 N. Y. Supp. 98, affirmed.

Appeal from supreme court, general term, first department.

Action by Daniel H. Bennett and Hiram C. Bennett against George T. Kellack, individually and as surviving partner of the firm of John H. Draper & Co., and Frances

**S. Draper, on a bond.** From a judgment of the general term (17 N. Y. Supp. 98) affirming a judgment of the special term sustaining the demurrer of defendant Draper to the complaint, plaintiffs appeal. Affirmed.

J. Woolsey Shepard, for appellants. Martin & Smith, (George A. Strong, of counsel,) for respondent.

**O'BRIEN, J.** The question in this case arises upon a demurrer by the defendant Mrs. Draper to the plaintiffs' complaint in an action against her as surety upon a written guaranty in the form of a bond with a penalty. The instrument was given by one mercantile firm to another to secure the payment of indebtedness and advances, the obligor firm being John H. Draper & Co., composed of the defendant Kellack, who has been sued as survivor, the other partner, John H. Draper, having died in July, 1890. The defendant who demurs was not, it seems, a member of the firm, but signed the obligation as surety. The obligee firm to which the guaranty ran was H. C. Bennett & Co., composed at the time of Hiram C. Bennett and Daniel H. Bennett; but the plaintiffs in this action, though the firm name and the individual names of the members thereof are in all respects identical with the obligee firm and its members, are not the firm to which the guaranty was given. This arises from a somewhat singular circumstance, which tends to obscure and confuse the real question in the case. The instrument was executed January 28, 1881, and on November 30, 1884, Hiram C. Bennett, one of the original obligors, died, and was succeeded in the firm by another person of the same name, so that, although the obligee firm was dissolved and terminated by the death of one of its members, there immediately came into existence a new firm, identical in name with the old one, and the names of the members in each case being also identical. The defendant's contract of suretyship ran to the old firm, and not, in terms, at least, to the new; and the debt or advances of money for which the defendant is sought to be charged were made to the obligors by the new firm. These facts, and the somewhat peculiar language of the instrument itself, have given rise to the present controversy. In the absence of language in the guaranty showing that the parties intended that it should survive changes in the partnership, and inure to the benefit of the new firm as well as the old, the defendant's contract terminated with the existence of the firm to which it was given. *Add. Cont.* 655; *Story, Partn.* §§ 244-251; *Strange v. Lee*, 3 East, 489; *Metcalf v. Bruin*, 12 East, 400; *Schmitz v. Langhaar*, 88 N. Y. 503.

The instrument was not negotiable or assignable, so as to secure new debts or advances made by the new firm, or parties other than the original obligees. *Barlow v. Myers*, 64 N. Y. 45; *McLaren v. Watson*, 23 Wend. 430; *Smith v. Starr*, 4 Hun, 124. Loans or advances made by the old firm on the faith of the guaranty could doubtless have been assigned to the

new firm, and such assignment would carry with it a right of action on the guaranty. The complaint does not allege any debt from the obligees to the old firm, but, on the contrary, it appears distinctly that the advances made were by the plaintiffs, the new firm. A copy of the instrument is set forth in the complaint, and the only question that remains is whether, from the averments of the pleading, or the language used by the parties in the contract, the plaintiffs have shown that the bond was to inure to their benefit. If that fact does not appear, or cannot be gathered from a fair construction of all the allegations of the complaint, it was, we think, fatally defective, and the demurrer was properly sustained below. After describing the existence and membership of the partnership firms referred to in the bond as already stated, and the changes therein by death, the complaint proceeds to aver that in January, 1881, when the instrument was given, the obligor firm was then indebted to the obligee, being the old firm, for money loaned and advanced, and applied for further credit and advances, whereupon the guaranty was executed and delivered whereby the obligors bound themselves to pay the obligees, "their successors or assigns, all sums of money not exceeding \$20,000 which shall at any time be due or owing from the said firm of John H. Draper & Co.," the obligors. This was more than three years before the firm to which the security was given and which had made the advances was dissolved by the death of one of its members. It cannot be presumed or found from any reasonable construction of this language that the parties contemplated a change in the firm to which the instrument ran, or that advances would be made by any new firm of the same name. The state of things that now appears was not foreseen, and it would be straining language to hold that it was within the fair scope and purview of the guaranty to secure the payment of moneys, not advanced by the obligee, but by a new and different firm that succeeded it. The words "successors and assigns" of the obligee are given effect when we hold that the debt secured was capable of being assigned or transmitted, and could be collected by another firm upon which it devolved. The complaint then states that at different dates between the 21 day of April and the 18th day of June, 1887, more than six years after the instrument was given, the plaintiff, a firm that did not exist until long after the security was given, made advances to the obligors amounting in the aggregate to \$13,500, for which sum, with the interest thereon, the defendant is sought to be charged as surety. There would be but very slight ground for the plaintiffs' contention in this case except for the frequent and somewhat unnatural, if not inappropriate, use by the parties, in the writing itself, of the words "successors or assigns." They are used in four places or paragraphs, one of which has been referred to. At the beginning, and in the first sentence, which contains the obligating clause, it is recited, after describing the parties, that the money is



to be paid to the obligee named, "their successors or assigns." This language would be quite important if the action was one by the plaintiffs to collect advances or loans made by the old firm on the faith of the guaranty, and which had been in some way transferred to them; but they furnish no ground for the claim that the guaranty was intended to cover advances or loans made long subsequently by the plaintiffs themselves. The broad claim of the plaintiffs is that by the use of these words in the instrument the defendant became bound to pay all loans or advances, not exceeding the limit specified, made to the obligors, not only by the old firm, but also by the new firm, which was its successor. It must be admitted that there are some words in the instrument which, standing alone, would seem to give color to this contention; but upon a careful reading of the whole paper, which appears in the report of the decision below, (*Bennett v. Draper*, 62 Hun, 524, 17 N. Y. Supp. 98,) and therefore need not be quoted further here, and a fair consideration of all the circumstances, including the situation of the parties, the unforeseen changes that occurred subsequently, and the general purpose that they evidently had in view, we think that the defendant's contract does not cover the claim stated in the complaint. It is no doubt true that the same rules of construction applicable to contracts in general apply here, (*Gates v. McKee*, 18 N. Y. 232,) and that is, the intention of the parties to be gathered from the language employed, and, if need be, from the surrounding circumstances, must govern. *Continental Ins. Co. v. Aetna Ins. Co.*, 188 N. Y. 16, 83 N. E. Rep. 724. The case must be disposed of in the same way, and the same principles applied, as if the old firm, to which the obligation in terms ran, had disappeared, in name as well as in fact, upon the dissolution produced by the death of Mr. Bennett. The plaintiffs' contention, if upheld, would hold the surety liable in such case for advances made at any time to the principal by any firm or party, providing it could be shown that they were the successors of the original obligee. It would be quite unreasonable to hold in such cases that a surety intended to contract indefinitely with parties unknown to him at the time, and that his obligation passed unimpaired through all changes and mutations of the firm to which it was given, and that a remote successor of the original obligee, by virtue of a purchase of its assets or otherwise, can use it in the same way as if it was made directly to him, and for his benefit. It cannot be supposed that such a result was within the contemplation of the parties. Nothing can be found in the record that would warrant the conclusion that the defendant contracted to be responsible to the plaintiffs for moneys advanced by them. Her obligation is limited to loans made by the firm, which it may be presumed she knew, and with which alone she had contractual relations. The judgment appealed from is right, and should be affirmed, with costs. All concur, except *ANDREWS, C. J.*, not voting.

(50 Ohio St. 490)

**BLAKESLEE v. HUGHES et al.**

(Supreme Court of Ohio. June 20, 1893.)

LIBEL—DEFACTION OF CHARACTER—JUSTIFICATION—EVIDENCE.

The plaintiff's action was for a libel. The defense was justification. On the trial of the action in the court of common pleas, that court, over the defendants' objection, permitted the plaintiff to give in chief to the jury evidence of his good character. The circuit court, solely on account of this ruling of the court of common pleas, reversed the judgment, and remanded the cause for a new trial. *Held*, that the circuit court did not err.

(Syllabus by the Court.)

Error to circuit court, Defiance county.

Action by one Blakeslee against Hughes and others for libel. From a judgment reversing a judgment for plaintiff, he brings error. Affirmed.

Statement by the court:

The plaintiff in error brought an action in the court of common pleas of Defiance county to recover damages for an alleged libelous article that the defendants in error caused to be published in a newspaper, reflecting on his character for honesty and veracity. The defendants filed separate answers in the action, setting up the circumstances of a transaction which they claimed established the substantial truth of the publication. Upon the trial the plaintiff in error introduced to the jury, in chief, over the objection of the defendants in error, evidence of his character for "truth, veracity, honesty, and fair dealing." The jury rendered a verdict in his favor, upon which the court of common pleas gave him a judgment. This judgment was reversed by the circuit court on the ground that the court of common pleas erred in permitting the plaintiff in error to give, in chief, evidence of his good character. To reverse this judgment of the circuit court, the present proceedings were instituted.

Harris & Cameron and Thompson & Farlow, for plaintiff in error. Coulter & Griffin, J. C. Ryan, and Hill & Hubbard, for defendants in error.

**PER CURIAM.** The law presumes the plaintiff's character to be good. 1 Hil. Torts, § 63. Notwithstanding this, some courts and authors hold that in actions of slander and libel the plaintiff may confirm the presumption by evidence. 3 Suth. Dam. 655; *Shroyer v. Miller*, 3 W. Va. 158. Contention is also made that, as the law only presumes an average character, the plaintiff should be permitted to establish, if he can, a character superior to that, in order to enhance the amount of his recovery. Claim is further made that the defendant in this class of cases is not injured by the plaintiff introducing evidence of his good character in chief, because it only tends to establish what the law would presume in the absence of the objectionable evidence. The force of this latter contention would be greatly increased if the evidence of good character actually introduced tended to establish a character of the same degree of excellence that the law would presume, if no evidence should be given, and if it could be certainly known

that the plaintiff's good character was no more forcibly presented to the minds of the jury by the favorable opinions of his neighbors, delivered under oath in their presence, than it would have been by a silent presumption of law. At best, the contention that the plaintiff in that class of actions should be allowed to establish by evidence a character superior to that presumed by law cannot be harmonized with the other claim; that there is no error in allowing it to go to the jury, because it only establishes what the law presumes. Without entering into any discussion of the principles involved in this question, we think the rule forbidding the introduction of such evidence in chief has prevailed in this state from an early period in its judicial history. The rule is plain, and of easy application, works no substantial injustice, and no sufficient reason has been adduced to justify its being overturned. Judgment affirmed.

(50 Ohio St. 484)

STERLING WRENCH CO. et al. v. AM-STUTZ et al.

(Supreme Court of Ohio. June 20, 1893.)

CORPORATIONS—AGREEMENT OF STOCKHOLDERS TO CONTRIBUTE TO PAY DEBTS—ENFORCEMENT—PLEADINGS.

1. An agreement entered into by the solvent shareholders of an embarrassed corporation, that they will severally contribute to raise a fund to pay the corporate liabilities, creates a valid obligation; and, if the share to be contributed by each is not expressly fixed by the terms of the agreement, each should contribute in the proportion that the number of shares of stock owned by him bears to the shares held by all the contributors.

2. Where, in such case, one of the shareholders agreed that, as part of his contribution, he would cancel and surrender a promissory note held by him against the corporation and a part or all of the other contributing shareholders, for a corporate debt, and such other contributors have performed the agreement on their part, they and the corporation may set up the contract in bar of a recovery in an action brought upon such note.

3. Where facts sufficient to defeat the plaintiff's right of recovery appear in an answer, it is error to sustain a demurrer to it, however unskillfully the material facts may be arranged with reference to each other, or with reference to other and immaterial facts.

(Syllabus by the Court.)

Error to circuit court, Wayne county.

Action on a promissory note by Amstutz and others against the Sterling Wrench Company and others. From a judgment affirming a judgment for plaintiffs, defendants bring error. Reversed.

Statement by the court:

Defendants in error brought an action in the court of common pleas of Wayne county on a promissory note, against the Sterling Wrench Company, the maker, and a number of its stockholders as guarantors thereof. The plaintiffs in error set up, in bar of a recovery on the note, the following amended answer: "The defend-

ants now come, and, on leave of court, file this, their amended answer, and say that said Sterling Wrench Company is incorporated as stated in the petition, and that said note was executed as stated in the petition. The defendants further say that on or about the 1st day of April, 1887, the said plaintiff was a member and stockholder of the Sterling Wrench Company, together with said defendants herein, and that at said time the Sterling Wrench Company was greatly embarrassed, and in debt in the sum of about \$80,000, which said \$30,000 was made up of this note sued upon in the petition, and other notes on which plaintiff was a joint maker, in the sum of about \$3,000. That on or about the 1st day of April, 1887, the said Sterling Wrench Company and said defendants herein, together with the plaintiff, as sureties, having theretofore executed and delivered their joint note to the Phoenix National Bank of Medina for the sum of about \$3,300, with accrued interest, and the said note then being due and not paid, the plaintiff herein and the defendants, all being members and stockholders of the Sterling Wrench Company, called a meeting to devise plans for liquidating their indebtedness and avoiding litigation by suits then threatened to be brought against the Sterling Wrench Company, the plaintiff and the defendants herein. That at said time all of said \$80,000 indebtedness was then due. That plaintiff was liable, as a joint maker with the defendants herein, on said note, to the Phoenix National Bank of Medina. That said defendants were indebted to him in the sum of about \$2,000, as represented by the note set out in the petition. That at said date the plaintiff and one Steiner were the only members of, and stockholders of, said company, who had advanced any money to said company individually. That said Steiner, as payee, had a note of even date and of like amount of the note sued upon herein, made and executed by the same defendants. That at said date it was mutually agreed, in order to save the Sterling Wrench Company and the defendants herein from the threatened lawsuit on said notes, aggregating about \$80,000, and to save said defendants and the plaintiff herein from the threatened lawsuits for the collection of said \$3,000 note made to the Phoenix National Bank of Medina as aforesaid, which said note was one of the notes included in said aggregate debt of \$80,000, that if the plaintiff and said Steiner would surrender, cancel, and hold for naught their said notes made to them, and signed by the same payors which signed the note set out in the petition, the stockholders of said company, who were liable for said debts, agreed to pay off and liquidate all outstanding debts, and to pay the note to the Phoenix National Bank of Medina, of which said plaintiff was a joint maker, and relieve plaintiff from further responsibility, if he, the said plaintiff, would no longer seek to hold said defendants herein on the note set out in the petition; and that said John C. Steiner, then and there, also agreed that he would not hold his note, which is like the note set out in the

petition against said defendants herein, is a valid claim, if said stockholders of said Sterling Wrench Company would liquidate the debts of said company in the manner aforesaid. That at the date aforesaid, the company being indebted in the sum of about \$30,000 as aforesaid, many of the stockholders of said company being totally irresponsible for their debts, and owning a large amount of the capital stock of said company, the said plaintiff herein, and the said John C. Steiner, Daniel Amstutz, C. E. Steiner, Joseph Ross, Jacob Krause, Christian Krause, A. A. Burkholder, Fred Amstutz, John Amstutz, and Joseph Amstutz, being the only responsible members of said company, owned about 55 per cent. of the capital stock of said company. That it was then and there mutually agreed by plaintiff and the defendants that the said plaintiff and the said John C. Steiner would cancel their debts, which is the note set out in the petition, and said note held by said John C. Steiner, heretofore described herein, being an indebtedness against the said company and said defendants, and contribute the same as a part of their aliquot share towards liquidating the whole of said indebtedness. That thereupon the said plaintiff and the said John C. Steiner did agree and accept of the terms hereinbefore mentioned. That John C. Steiner has wholly and fully carried out the terms of his said agreement, and has caused his said note to be canceled by way of contribution to the payment of said debts, and, as addition thereto, paid his aliquot proportion, to the amount of about \$5,000, including said note, and has fully liquidated his share of the indebtedness, as he had then and there agreed to do, pursuant to said agreement and understanding with the plaintiff and said stockholders of said company; and, in pursuance to said agreement, said stockholders, who were responsible, and relied upon the promises of the plaintiff to contribute said note and such further sum of money as would be necessary for the plaintiff to fully liquidate his share of the indebtedness of said corporation, did pay off and fully liquidate said note for which plaintiff was liable, as a joint maker, to the Phoenix National Bank of Medina, Ohio. That said defendants herein, said stockholders of said company, would never have advanced money to liquidate said note on which the said plaintiff herein was liable as a joint maker to the Phoenix National Bank of Medina, if they had not fully believed that said plaintiff would perform his part of said agreement. That, in consideration of the promise of the plaintiff, said defendants herein did stop the threatened suits about to be commenced against said company, these defendants, and the plaintiff, which they would not have done, if they would not have relied wholly upon the promises of the plaintiff to contribute said note as he has agreed to do, and the further sum necessary on the part of plaintiff to be contributed to liquidate said indebtedness, for which he was also liable with the defendants herein. The defendants further say that all of said stockholders did contribute towards the liquidation of

said indebtedness as they had agreed to do, and relied upon the statements and agreement of the plaintiff, which they would not have done, had they believed that the plaintiff would not perform his part of the agreement to be performed by him; and, by reason of the plaintiff not fulfilling his portion of said agreement, his proportionate share of said debts of said company, for which he was liable as a joint maker, are as yet unliquidated. That the plaintiff was at the time he made the said agreement, and is now, and ever since has been, able, financially, to pay and liquidate his proportion of said indebtedness as he agreed to do, and that the pretending to hold said note as a valid claim against defendants herein is in fraud of the rights of the defendants herein, and is, by reason of the premises, merely a sham and pretended claim of liability due him from the defendants, and it has been fully liquidated and paid in the manner aforesaid; and the defendants therefore pray, by reason of the premises, and the facts set forth herein, that said note sued on be ordered to be delivered up to be canceled, and that, in default of canceling the same, the order and decree of this court stand for such cancellation. And, by reason of the premises and the facts stated, the defendants deny each and every allegation in the petition not admitted to be true." To this answer a demurrer was interposed and overruled. No further pleadings were had, and judgment was rendered against the plaintiffs in error for the amount due on the note. This judgment having been affirmed by the circuit court, the cause was brought here for review.

Yocum & Taggart and John McSweeney, Jr., for plaintiffs in error. Johnson & Taylor, for defendants in error.

PER CURIAM. An inspection of the amended answer will disclose an attempt to set forth an agreement, by the terms of which the defendant in error was to cancel and surrender the promissory note upon which this action was founded. The statement of the terms of the alleged agreement wants precision and clearness while the acts of performance on the part of the plaintiffs in error, as well as the breach of the contract by the defendant in error, are still more obscurely stated, and the mind is left in doubt whether the answer is the product of an inartistic and careless effort to set forth a bona fide defense, or an artful attempt to arrange facts insufficient for that purpose so as to give them the appearance of constituting a valid defense. That doubt in this case, as in all cases where the contrary purpose is not fairly apparent, should be resolved in favor of an honest purpose; and under the liberal rules for the construction of pleadings, favored by the Code of Civil Procedure, the answer should be held sufficient if it contain the necessary facts, however awkwardly they may be stated. The amended answer, when tried by this test, we think, is sufficient. It shows, among other things, that the defendant in error was a solvent stockholder of the

**Sterling Wrench Company**, a body corporate under the laws of the state; that the corporation, although its insolvency was not averred, was embarrassed by a heavy debt, which was due, and actions for its collection threatened; that the defendant in error was personally liable as a joint maker of a note representing \$3,000 of this debt; that all of the solvent stockholders of the concern, including the defendant in error, agreed among themselves to pay off its entire debt, the defendant in error agreeing to cancel and surrender the note in suit as a part of the aliquot share to be contributed by him for that purpose. This was an original contract, made by and between parties financially interested in the success of the concern, to accomplish a lawful object, beneficial to each of them. Even if the mutual promises were not sufficient considerations for each other to make them binding obligations, while wholly executory, yet, after full performance by some of the contracting parties, those so performing could maintain an action upon the contract against those in default.

If claim should be made that the contract was too indefinite to support an action, in that it did not fix the aliquot share to be contributed by each shareholder towards paying the debt, reply may be made that, in the absence of an express stipulation in respect thereto, it would be held that each party should contribute such proportion of the entire debt as his stock bore to the stock of all the contributors. That inquiry, however, is not important here, because it is averred, and the demurrer admits, that the whole amount, except the share of the defendant in error, has been contributed, and it also appears that the share of the defendant in error is at least equal to the note in suit, for the answer alleges that he was to contribute the amount of the note in suit as a part of his aliquot share. The full performance by the other contracting parties of their obligations under the contract is expressly averred; it being stated in direct terms that they "did stop the threatened proceedings; \* \* \* that all of said stockholders did contribute towards the liquidation of said indebtedness, as they had agreed to do; \* \* \* that they "did pay off and fully liquidate said note \* \* \* upon which the defendant in error was liable as a joint maker; and that, "by reason of the plaintiff not fulfilling his portion of said agreement, his proportionate share of said debts of said company, for which he is liable as a joint maker, are as yet unpaid." If this is true, the contracting parties, other than the defendant in error, have fully performed their part of the agreement, and all the debts of the concern are paid, except some portion of that which he was to pay. If these facts are true,—and the demurrer admits their truth,—the conditions upon which the defendant in error was to cancel and surrender the note in suit have been fully performed, and their performance constitutes a good equitable defense to an action founded thereon. Judgment reversed, and cause remanded for further proceedings.

(146 Ill. 353)

# CHICAGO CITY RY. CO. v. McLAUGHLIN.<sup>1</sup>

(Supreme Court of Illinois. June 19, 1893.)<sup>2</sup>

## EVIDENCE—EXPERTS—PLATS—TRIAL.

1. In an action for injury caused by a collision between a grip car and a horse car, witnesses who have testified as to the distance within which the grip car could have been stopped may testify that they had theretofore seen grip cars stopped within a certain distance at the place of the collision, since such testimony tends to show the source of their knowledge.

2. A plat of the streets and car tracks at the place of collision may be introduced in evidence after a surveyor has testified that the plat is a correct survey.

3. Upon the judge asking a witness a question, counsel objected that the witness had already answered that question, to which the judge replied: "I don't think he answered it fairly." Held, that the judge's remark was not prejudicial error, not being the expression of opinion upon any question determinable by the jury. 40 Ill. App. 496, affirmed.

4. Where counsel offer incompetent evidence, which is rejected by the court, the failure of the court to rebuke counsel for offering such evidence is not reversible error, that being a matter within the discretion of the court. 40 Ill. App. 496, affirmed.

Appeal from appellate court, first district.

Action by Ellen McLaughlin, executrix, against the Chicago City Railway Company. Judgment for plaintiff. Affirmed on appeal. 40 Ill. App. 496. Defendant appeals. Affirmed.

W. J. Hynes, for appellant. Murphy & Cummings and Gibbons & Kavanagh, for appellee.

**MAGRUDER, J.** This is a suit brought by the appellee, executrix of the estate of her deceased husband, John McLaughlin, against the appellant, the Chicago City Railway Company, to recover damages for the death of her said husband. Verdict and judgment in the circuit court were in favor of the plaintiff. Said judgment has been affirmed by the appellate court, (40 Ill. App. 496,) and the case is brought here by appeal from the latter court.

At the time of the accident, the deceased was engaged in driving a horse car for the West Chicago Street-Railway Company, and was killed at the intersection of Randolph street with Wabash avenue, in Chicago, in a collision between the grip car of one of appellant's cable-car trains, running north on said avenue, and the horse car, which he was driving westward upon said street. The occurrence took place about 7 o'clock in the morning, while there were yet but few persons upon the streets. The rear end of the horse car was struck by the grip car, and knocked off the track. The force of the concussion threw the deceased over the dashboard, and the horses, becoming frightened, dragged the car over him, so that he was killed.

The judgment of the appellate court is

<sup>1</sup> Reported by Louis Bolsot, Jr., Esq., of the Chicago bar.

<sup>2</sup> Rehearing denied October term, 1893.

conclusive upon the facts. Our attention is not called to any error in the giving or refusal of instructions. Some of the witnesses were allowed to state in what distance the grip car could be stopped, going at the rate of speed at which it was then traveling. Appellant claims that it was error to permit these witnesses to state that they had theretofore seen grip cars stopped at a certain distance at the point of intersection between the cable-car tracks and the horse-car tracks where the accident happened. It was competent to show, as bearing upon the question of negligence, that the grip car was not so near the point where the horse car was crossing the cable track as to make it impossible to stop it before it should come in contact with the horse car. A witness who testified as to the possibility of stopping within a stated distance could answer as to the source and basis of his knowledge. The witnesses referred to had been in the service of street-car companies, and a reference to previous experience and observation was not improper, because it tended to show that they were qualified to give evidence as to the distance within which it was possible to stop such car.

It is objected that the court allowed a certain plat to be introduced, "without any proof to show that it correctly represented the situation and location of objects shown thereon, at the time of the accident." We think that there was evidence enough to justify the admission of the plat for the purpose for which it was introduced. A surveyor testified: "The plat presented is a correct survey of those intersections. It is a ground plan of streets and intersections at the intersection of Wabash and Randolph; also showing the position of the car tracks that cross," etc. The plat was not intended to be a pictorial or photographic representation of the cars, horses, men, and other objects, as they appeared when the collision took place.

One of the defendant's witnesses was asked, upon his cross-examination, if a certain paper shown to him contained his examination as previously taken before the coroner's jury. A number of questions were addressed to him, calling upon him to answer—First, whether he did, as a matter of fact, swear to the statements contained in the paper before the coroner's jury; second, whether the statements therein contained were true or false. The witness had been the driver or manager of the grip car at the time of the accident, and had been an eyewitness of the occurrences mentioned in the writing which was shown to him. He somewhat persistently limited his answers to those portions of the questions which had reference to the correctness of the writing as a statement of what he had formerly sworn to, but ignored the inquiries which had reference to the truth or falsity of the contents of the writing. The trial judge, apparently with a view of pointing out to the witness the distinction thus indicated, asked him a question for the purpose of directing his attention to the fact that he was directed to say whether the account

given in the paper of the occurrences which he had witnessed was correct or not, independently of the question whether the paper was or was not a correct reproduction of his former examination. Counsel for defendant, before the witness made reply, said to the court, "He has answered that." In response to the counsel, the court said, "I don't think he answered it fairly." To this remark of the court, the record recites that there was "exception by counsel for defendant," and the making of the remark is here insisted upon as error. It is claimed on behalf of the appellant that the words thus used by the court reflected upon the credibility and fairness of the witness, and had the effect of prejudicing the jury against him. Reference is made to the case of *Andreas v. Ketcham*, 77 Ill. 377, where it was said that the law would not permit a judge "to bias the jury by his own opinion as to any fact in controversy which had to be established by evidence." Reference is also made to the case of *Insurance Co. v. Pulver*, 126 Ill. 329, 18 N. E. Rep. 804, where it is said: "Owing to the regard which is paid by jurors to the opinion of the judge, he should use great caution in expressing his opinion on any question which it is the province of the jury to determine." We cannot see that there was here the expression of an opinion by the court upon any fact in controversy, or upon any question coming within the province of the jury to determine. The question raised by the remark of counsel was whether a previous answer made by the witness was a sufficient answer to the question addressed to him. The sufficiency of the answer of a witness is a matter for the determination of the court, and not the jury. The refusal of a witness to answer questions pertinent to the issue put to him in a proceeding before a court which has jurisdiction of the controversy is a contempt of court. If the witness be competent, and the question pertinent to the issue, he may be compelled to answer. *Rap. Wit.* § 303, par. 2, and cases cited in notes. The reply of the court to the remark of counsel was merely the announcement of the court's decision that the question asked had not been answered by the witness. It would have been better to have used some other word than "fairly." But after examining all the testimony of the witness, including the running fire of controversy and dialogue between opposing counsel, and between counsel and the court, we do not think there was any intention to reflect upon the credibility of the witness, or that the jury could have so understood what was said. The word "fairly" was intended to designate merely the fullness or sufficiency or responsiveness of the answer. But, even if the words used be regarded as designating a want of frankness, they were applied only to the mode of answering, and not to the subject-matter of the answer itself. It cannot be said that, if a court compels a reluctant witness to answer a legitimate question, such act of compulsion will authorize a reversal, upon the ground that it has a tendency to discredit the witness in the opinion of the jury. In the *Pulver*

Case, *supra*, it was said: "Every unguarded expression of the judge in stating reasons to counsel for his rulings cannot be treated as a ground for granting a new trial. To do so would be to greatly embarrass the administration of justice." Upon referring to the instructions given to the jury, we find that their language was sufficient to guard against any erroneous impressions as to the credibility of the witnesses for the defendant. We do not regard the making by the court of the remark thus commented upon as sufficient to justify a reversal of the judgment.

As a part of his original case, counsel for plaintiff below examined a witness named Knight, who was driving a horse car eastward at the time of the accident, and witnessed the collision which resulted in McLaughlin's death. Upon cross-examination, counsel for defendant questioned Knight as to what he had previously sworn to before the coroner, referring at the same time to what purported to be a written statement of the testimony theretofore taken before the coroner's jury. At the opening of court on the next morning, counsel for plaintiff, before proceeding with his evidence, which was not yet closed, said: "Before going on with the case, I would like to read the testimony of John Knight before the coroner, to show that his testimony there does not contradict his testimony here." Exception was taken by defendant's counsel to the statement thus made, and the court refused to allow plaintiff's counsel to read the proffered testimony. Counsel for defendant then said: "I ask the court to rebuke counsel for that statement, and to rule upon its propriety." The bill of exceptions then shows the following entry: "Because the court takes no action in the matter, attorney for defendant excepts." We do not understand that the exception, as thus set forth in the record, is to the language used by the court in overruling the offer to read the testimony, but merely to the fact that the court remained silent when asked to rebuke or reprimand plaintiff's attorney. The ruling of the court, which refused to allow the testimony to be read, was in favor of the defendant, and therefore he cannot be heard to complain of it. But the failure of the court to administer the rebuke is claimed to be error, upon the alleged ground that "the intention must have been to excite in the mind of the jurors a belief that counsel for appellant had been misrepresenting the testimony of Knight before the coroner, and that he held evidence in his hand to show that." The questions of defendant's counsel were evidently asked with a view of laying a foundation for contradicting the witness. A witness may be impeached by establishing an inconsistency between his testimony at the trial and the contents of a deposition sworn to by him. The evidence of a witness, taken before a coroner, can be used to contradict the evidence of the same witness, subsequently given on a trial in court. Rap. Wit. § 205; *People v. Devine*, 44 Cal. 452;

*Insurance Co. v. Vocke*, 129 Ill. 557, 23 N. E. Rep. 467. But the ordinary rule is that the deposition or letter or other writing which is to be used for impeaching purposes shall be read by the cross-examining counsel as a part of his own evidence, when he presents his side of the case. It may sometimes be read at once, at the request of the cross-examining counsel, when it appears to be necessary to found certain questions upon its contents. Rap. Wit. § 206. While, therefore, it would have been allowable for defendant's counsel, after plaintiff had rested, to introduce the evidence taken before the coroner, for the purpose of contradicting plaintiff's witness, if, in his opinion, it would have had that effect, yet the plaintiff had no right to introduce it for the purpose of showing that it did not contradict his own witness. Hence, the ruling of the court was unquestionably correct. But it does not follow that plaintiff's counsel should have been reprimanded because he offered to introduce testimony which was inadmissible. There is nothing to show that his offer was not made in good faith, or that he was not honestly mistaken as to his right to read it. It must be left largely to the discretion of the trial court to determine whether an offer to introduce evidence is made in a legitimate way, and for a legitimate purpose, or whether it is made for the purpose of improperly influencing the jury, by uttering in their presence what they ought not to hear. We are unable to say that there was here any abuse of the discretionary power thus lodged in the trial court. We are satisfied that the defendant was not injured by what took place in reference to this matter, because an instruction was given that, "in considering and deciding the case, the jury should look solely to the evidence for the facts," and because, after plaintiff's counsel had offered to read the coroner's minutes of the testimony taken before him, and after plaintiff had rested, and the defendant had begun to present its evidence, the counsel for defendant was permitted to examine the shorthand reporter who took the testimony of the witness Knight before the coroner, and to prove from the shorthand notes what the witness did actually say before the coroner. If the evidence of the reporter, given with a transcript of his notes in his hand, showed any contradictions, the defendant had the benefit of them, and they counterbalanced the injurious effect of any contrary intimation contained in the previous offer of plaintiff's counsel. The jury were instructed that if they believed from the evidence that any of the witnesses had made statements under oath, at the coroner's inquest, contradictory of the statements made upon the stand, they would have a right to take into consideration such contradictions, together with all the other facts and circumstances in the case, in determining the value of their evidence, and the weight to be given to it. The judgment of the appellate court is affirmed.

(146 Ill. 323)

**FIZETTE v. FIZETTE.<sup>1</sup>**(Supreme Court of Illinois. June 19, 1893.)<sup>2</sup>**DIVORCE—CRUELTY—EVIDENCE—HUSBAND AND WIFE—GIFT—PRESUMPTION.**

1. In a suit by a wife for divorce on the ground of "extreme and repeated cruelty," the evidence showed no acts of personal violence except one push, which did not injure her, or leave any marks on her person. There was evidence that the husband was disagreeable in his manners, and that he did not furnish his wife with all the money she desired for living expenses; but it also appeared that he had spent \$3,000 in buying a house, which was deeded to her. *Held*, that the evidence was not sufficient to sustain a decree of divorce. Shope and Bailey, JJ., dissenting.

2. Where a husband voluntarily has property paid for by him conveyed to his wife the presumption is that he intended it as a gift to her.

Error to circuit court, Cook county; M. F. Tuley, Judge.

Bill by Julia Fizette against Charles E. Fizette for divorce. Complainant obtained a decree. Defendant brings error. Reversed.

Warvelle, Walsh & Madden, for plaintiff in error. Benjamin F. Richolson, for defendant in error.

**CRAIG, J.** This was a bill for divorce, brought by Julia Fizette in the circuit court of Cook county against Charles E. Fizette on the 29th day of August, 1889. The grounds for divorce relied upon by complainant in her bill were extreme and repeated cruelty. The defendant answered the bill, in which he denied all cruel treatment. He also filed a cross bill, in which he charged the complainant with extreme and repeated cruelty. He also alleged that certain premises, No. 3216 Forest avenue, conveyed to the wife after marriage, belonged to him, and he prayed in the cross bill that the complainant be decreed to hold the premises in trust for him. The court, on the hearing, on the pleadings and evidence entered a decree of divorce in favor of the complainant in the bill. The property No. 3216 Forest avenue was vested in her, and the defendant was required to pay \$12 per month for the maintenance of Charles E. Fizette, Jr., the only child of complainant and defendant resulting from the marriage. It appears from the evidence that the parties were married on the 22d day of October, 1887, in Chicago. After the marriage they boarded with complainant's mother, a widow, about three weeks. Then they moved to the No. 3216 Forest avenue property, which was purchased about two weeks after the marriage. They remained at this place, keeping house, until about the 1st of March, 1889, when this place was rented, and they moved to 1603 Wabash avenue,—a flat over the store occupied by the defendant. The parties continued to reside at the last-named place until the last of August or

the first of September, 1889, when complainant moved back to No. 3216 Forest avenue, and filed her bill for divorce. It also appears that when the parties moved to Forest avenue, and commenced house-keeping, complainant's mother and her two brothers went with them, and continued to reside with them until the complainant returned to the home on Forest avenue, and filed her bill. The two brothers were there as boarders, while Mrs. Phillips, complainant's mother, assisted the complainant in her work about the house, and in this way rendered services sufficient to pay her board. From the time the parties commenced living together there is much evidence in the record tending to prove that they did not live pleasantly together; and from the testimony of the complainant, her mother, and brothers it is apparent that there is much in the conduct of the defendant towards his wife which may be condemned. She testified: "I first noticed a change in his behavior to me about a week after our marriage. He was ugly and sullen and morose, and never smiling or pleasant. No matter what I would do, I couldn't please him. He did not have occasional spells when he would be pleasant. I never knew him to be pleasing, or to smile. His habits and manner toward me were always ugly when we were alone. In the presence of strangers he was a little better,—that is, his own people, but if any of my friends came to the house he would deliberately insult them. Lady friends of mine came, and would never call again." She also testified before the birth of her first child, July 12, 1888, defendant refused to furnish her money to purchase baby clothing; that she was taken sick at 12 o'clock at night, and he did not go for a doctor until 7 in the morning; that he failed to furnish her sufficient clothing; that he was stingy and penurious. Complainant also testified that the evening before she was taken sick he wanted to visit a friend living on Thirty-Seventh street, and he wanted her to go with him, and it was about 18 blocks from where he lived. "I told him he had better take a car, and he said, 'no,' and he walked me there and back." This he denied, and said he never required or compelled her to walk any distance. The complainant also testified that he required her to exercise his horse in cold weather. This he denied, and stated that she drove the horse for her own pleasure, at such times as she saw proper. The complainant testified that the flat they occupied on Wabash avenue in the spring of 1889 was cold and disagreeable, and defendant refused to have it repaired, or to keep the rooms warm or comfortable. In this, however, she is contradicted by the janitor, who testified: "I am janitor of the Kenmore, corner Sixteenth street and Wabash avenue. I know Mr. and Mrs. Fizette. Knew them when they lived at Wabash avenue and Sixteenth street. Was janitor there. They lived at 1603 Wabash avenue. My duties were to take up coal and care for the building. I furnished Mrs. Fizette with both kinds of coal put in a box. I put half a ton of chestnut coal

<sup>1</sup>Reported by Louis Bolsot, Jr., Esq., of the Chicago bar.

<sup>2</sup>Rehearing denied October term, 1893.



in one box. Generally I called to know if coal was needed, and if they told me it was I brought it up. I generally noticed the box before the coal was all used up. On several occasions I made a fire for them in the kitchen stove. They had chestnut coal and soft coal. They had no furnace coal in the flat. I would know if they had. It was my business to furnish it. I never refused to furnish coal to Mrs. Fizette, and she never made any complaint about getting it. I don't know how much coal they used while they were there, but I know they used as much coal as any family in the building. There were no complaints about coal not being furnished them. I always told them to let me know when they wanted it, and I would give it to them. I had frequent occasion to go into the house. I found it comfortable, and there was a fire in the sitting room. I never heard any complaint by any one about the lack of warmth." The complainant also testified that the defendant would refuse to speak to her for a week at a time, and that he had not given her proper attention when riding in the street cars. She also testified to other matters of a like character. There is, however, no evidence in the record, that we have been able to find, that the defendant ever struck the complainant, or inflicted upon her any bodily harm. There is no claim that any act of violence was ever resorted to, except on one occasion, and this in July, 1888, before the birth of the first child. Complainant's account of this occurrence was, in substance, as follows: Complainant and her mother had gone out and procured a dish of ice cream. Defendant came in, and refused to pay for it. When told he would have to pay for it, he finally gave the parties 20 cents. The three parties then stepped on the sidewalk, and when the complainant undertook to take the defendant's arm she said he gave her a push, "and nearly threw me off the sidewalk." On cross-examination she said, "He gave me a pretty hard push with his elbow in the ribs." "I went to take his arm, and he gave me a nudge, and I nearly fell off the sidewalk. It did not leave any marks." The defendant's account of this transaction was as follows: He said: "I went to the ice-cream saloon and found them, complainant and her mother. They had finished their ice cream when I came there. I had forty cents in my pocket. I had been complaining of a pain in my back, and my wife said, 'You had better get a porous plaster.' When I got to Thirty-First street, I said, 'Where is my porous plaster coming from?' as I had to pay for the ice cream. She said, 'Never mind the plaster,' and I said, 'All right.' We then walked down the street, with her mother on the outside, my wife in the center, and myself inside. We were swinging while on the walk, and all of a sudden she stumbled and left my arm, and went towards her mother. The first I heard of my having pushed her or handled her harshly was when she stated it here."

The principal part of the complaint made, however, in this case is not what the defendant did, but what he failed to

do; that he neglected his wife, failed to furnish necessary provisions for the home, and clothing for the wife and child. The defendant, however, on this branch of the case testified that during his married life up to the time the bill was filed he paid out for household expenses for himself and family \$3,400, and presented a book containing an itemized statement of the amount paid out. Many of the items the complainant was compelled to admit. Aside, however, from the evidence of the defendant in reference to moneys advanced by him for the support of complainant, there is another fact which has an important bearing on this branch of the case. Within two or three weeks after the marriage the defendant purchased the property 3218 Forest avenue for \$7,000, including the furniture. Two thousand dollars was paid down; \$500 was furnished by complainant, and \$1,500 by the defendant. In one year from the purchase the defendant paid \$1,500 more, making in all \$3,000 paid by the defendant. For the residue of purchase money a mortgage on the property of \$3,500 was given. The property thus purchased was conveyed directly to the complainant, and she still holds the title. The defendant is a man of small means, a tailor by trade, conducting a small business. Under such circumstances, the gift of the Forest avenue property to his wife does not indicate that he was attempting to withhold from her the means of support or the necessities of life. Had he failed in his duty to furnish her with the necessities of life, she had it within her power to raise money on the property to supply her wants. This she has availed of since the filing of a bill by mortgaging the property to raise money to carry on this litigation.

But, conceding that the defendant neglected and failed to discharge the duties that a husband owes to a wife, and conceding that his conduct was not such as it should have been, the question to be determined by this record is whether the defendant has been guilty of extreme and repeated cruelty, within the meaning of the statute. If he has, then the decree was right, and will have to be sustained; otherwise, not. In *Henderson v. Henderson*, 88 Ill. 250, we had occasion to consider what the legislature intended by the use of the language, "extreme and repeated cruelty," found in the statute entitled "Divorce." It is there said. "The general assembly has in plain and unmistakable language defined the offense to be 'extreme and repeated cruelty.' This court, as well as all other courts acting under similar statutes, has held that it must be bodily harm, in contradistinction to mere harsh, or even opprobrious, language, or mere mental suffering—that the cruelty must be grave, and endanger life or limb, or, at any rate, subject the person to danger of great bodily harm. And this is the rule of the English ecclesiastical court. *Evans v. Evans*, 1 Hagg. Constat. 35. This is referred to as the leading case in that court. But the question as to what constitutes the cruelty contemplated by our statute has been before this court on several occasions, and has undergone

nature consideration. See *Vignos v. Vignos*, 15 Ill. 186; *Turbitt v. Turbitt*, 21 Ill. 38; *De La Hay v. De La Hay*, Id. 252; *Harman v. Harman*, 16 Ill. 90; *Birkby v. Birkby*, 15 Ill. 120; *Von Glahn v. Von Glahn*, 6 Ill. 185. In *Embree v. Embree*, 53 Ill. 394, it was held that mere angry or abusive words, menaces, or indignities do not constitute cruelty, within the meaning of the statute. There must be extreme and repeated cruelty, which must consist in physical violence. It was also held that a single act of cruelty does not constitute sufficient ground for divorce. In *Harman v. Harman*, 16 Ill. 90, in considering this statute, it is said: "There must be acts or threats which may raise a reasonable apprehension of bodily hurt. The causes must be grave and weighty and show a state of personal danger incompatible with the duties of married life. It is not mere austerity of temper, petulance of manners, rudeness of language, a want of civil attentions, occasional sallies of passion, denials of little indulgences and particular accommodations, and which do not threaten bodily harm. These are not equal cruelty." See, also, *Hitchins v. Hitchins*, 140 Ill. 326, 29 N. E. Rep. 888, and *Fritz v. Fritz*, 154 Ill. 436, 28 N. E. Rep. 658. Courts are powerless to grant divorces for crimes other than those specified in the statute, and the rule is well settled in this state, and also in other states, where the ground relied upon is extreme and repeated cruelty, that the cruelty must endanger life or limb, or at least subject the person complaining to danger of bodily harm. No proof of that character was introduced in this case. There is no pretense that the defendant was guilty of any act of personal violence, except on one occasion,—the night complainant alleges he gave her a "punch" with his elbow. This assault, viewing it according to the testimony of the complainant herself, was not of an aggravated character. No bruises or marks were left on the person of the complainant, nor was she injured. But, if the assault had been an aggravated one, it would not of itself be ground for divorce. One act of cruelty is not sufficient. The cruelty must, under the statute, be repeated; and where the proof fails to show a repetition of cruel treatment there is no ground for divorce.

It is also claimed that the court erred in refusing to grant any relief to defendant in regard to the Forest avenue property. The defendant paid, when the property was purchased, \$1,500 of the purchase money. Subsequently he paid \$1,500 more. He also paid interest on the incumbrance of \$3,500 on the property, and taxes. In regard to these facts there is no dispute; but when the property was purchased the defendant voluntarily had the conveyance made to his wife. The presumption is that the purchase was intended as a gift to the wife, and we find no sufficient evidence in the record to overcome that presumption. But, as the evidence was insufficient to sustain the decree, the decree of the circuit court will be reversed, and the cause remanded.

SCHOPE and BAILEY, JJ., dissent.  
v.34N.E.no.21—51

(146 Ill. 540)

LIBBY, McNEILL & LIBBY v. SCHERMAN.<sup>1</sup>

(Supreme Court of Illinois. May 9, 1893.)<sup>2</sup>

NEGLIGENCE—PLEADING—CORPORATIONS—VARIANCE—EVIDENCE—INSTRUCTIONS—NEW TRIAL—MASTER AND SERVANT.

1. In an action against a corporation by one of its employees for personal injuries, an averment in the declaration that the defendant did the acts complained of is sufficient to show that they were done by persons for whom the corporation was responsible. *Steel Co. v. Shields*, 25 N. E. Rep. 569, 134 Ill. 209, distinguished.

2. A variance between pleading and proof does not present a question of law for the determination of the supreme court, where the evidence is not objected to on that ground, no motion to strike out the evidence is made, and the motion for a new trial merely states in general terms the existence of such variance, without specifically pointing it out.

3. In an action for damages caused by the falling over of a pile of pork barrels shortly after the contents of one of the barrels had been removed, evidence of experiments made with similar piles of barrels, and inferences drawn by witnesses from such experiments, are inadmissible, as pertaining to mere collateral matters.

4. An instruction to the effect that if the person who ordered the barrel to be emptied "was in the employ of the defendant, and was authorized to take charge of a gang of men, of whom the plaintiff was one, in piling barrels of meat, and to direct the men under his charge in regard to the business in which the men were engaged, then while acting in the scope of such authority such person was the direct representative of the defendant, and his acts and directions, within the scope of his authority, were in law the acts and directions of the defendant," correctly states the rule governing the responsibility of a master for the acts of a vice principal.

5. Where the declaration avers that the plaintiff at the time of his injury was working for defendant near the pile of barrels in question, and that it was defendant's duty to keep the barrels from falling, an instruction that it was the duty of defendant to have used ordinary care in furnishing to the plaintiff a reasonably safe place in which to work, and to have used all reasonable precautions to keep such place in a reasonably safe condition, is pertinent to the issues.

6. In such case it is proper to modify an instruction stating that "where an employment is attended with danger, a servant engaging in it assumes the hazard of ordinary perils which are incident to it," by adding thereto the clause that this applies only to perils ordinarily incident to the service, and not to extraordinary ones, which did not exist when the servant engaged in the master's business, and which the servant did not subsequently assume, since without the modification the instruction implied that the peril arising from leaving an empty barrel in the pile was one of the ordinary perils of the service.

7. Where there is no ground for a new trial except excessive damages awarded by the jury, it is proper to allow the plaintiff to remit the excess, and then render judgment for the residue.

Appeal from appellate court, first district.

Action on the case brought by Michael Scherman against Libby, McNeill & Libby. Plaintiff obtained judgment, which

<sup>1</sup> Reported by Louis Bolsot, Jr., Esq., of the Chicago bar.

<sup>2</sup> Rehearing denied Oct. term, 1893.

was affirmed by the appellate court. Defendant appeals. Affirmed.

The other facts fully appear in the following statement by BAILEY, C. J.:

This was an action on the case, brought by Michael Scherman against Libby, McNeill & Libby, a corporation, to recover damages for a personal injury. The declaration originally consisted of two counts, but the first count was dismissed, and the trial was had upon the second count alone. That count alleges that at the time of the injury complained of the defendant was possessed of and operated a packing house; that the plaintiff was in the defendant's employ as a laborer, and as such was working for the defendant, with all due care and caution for his safety, at and near a certain pile of pork barrels, which were piled in rows, one upon another, to a great height, to wit, 12 feet; "that it then and there became and was the duty of the defendant to keep and maintain said piles of barrels in such condition that they would not spread, tilt, or fall upon plaintiff while working for the defendant at and near the same, and not to do anything with or to said piles of barrels which would cause them to spread, tilt, or fall upon the plaintiff while working at or near them, in the business of the defendant; yet the defendant, in utter disregard of its duty in this behalf, then and there carelessly and negligently kept and maintained said rows of barrels, defectively piled in rows one upon another, and, while so defectively piled, drove in the head of one of said barrels, and took therefrom the contents thereof, to wit, certain brine and pork, so that the said barrel was then and there greatly weakened and rendered unable to support the weight of the barrels piled above the same, and by reason of the carelessness and negligence of defendant, in manner as aforesaid, and while plaintiff was in the exercise of all due care for his own safety, the said barrels spread, tilted, gave way, and fell upon and against the plaintiff," thereby breaking the plaintiff's leg, and otherwise injuring him. To this count the defendant pleaded not guilty, and at the trial the jury found the defendant guilty, and assessed the plaintiff's damages at \$7,500. From this sum the plaintiff remitted \$2,500, and the court, after denying the defendant's motion for a new trial, and also its motion in arrest of judgment, gave judgment in favor of the plaintiff for \$5,000 and costs. That judgment, on appeal to the appellate court, was affirmed, and the present appeal is from the judgment of affirmance.

The facts, so far as they are necessary to a proper understanding of the questions raised by the assignments of error on this count, are these: The defendant is a corporation organized under the laws of this state, and is engaged in the business of maintaining and operating a packing house at the stock yards in Chicago. The plaintiff is a Pole, who does not speak the English language, and who, about four weeks prior to the injury complained of, entered the employment of the defendant as a laborer. A few days prior to the injury he was sent into the room where

the injury afterwards occurred to pile barrels containing beef, and from that time until he was injured he was engaged, with other of the defendant's employees, in that service. The room was 80 feet east and west and 70 feet north and south, and was divided up into sections by rows of posts, some 16 feet apart, running across it from north to south. The barrels were piled across the room in rows, five barrels high, running north and south, except between the posts, where the rows were formed by standing the barrels on end, two barrels high, with a third lying on top. The barrels had been piled in this manner until the room was filled, with the exception of a space at the end sufficient for two or three rows. In this space, which was about 10 or 12 feet in width, the plaintiff and three other men were engaged in lifting barrels from the floor, and placing them upon the pile or row they were constructing. Matters being in this situation, at about 5 o'clock in the afternoon of the day previous to the one on which the injury occurred, one Morgenweck, who, as the evidence tends to show, had sole charge and direction of the men, came along, and noticed that a barrel in the second tier from the floor was leaking. The row containing that barrel was already five barrels high, and Morgenweck sent for the cooper, and had him come and try to stop the leak. The efforts of the cooper being ineffectual, Morgenweck, not wishing to lose time in tearing down the pile, and having the defective barrel taken out, knocked in the head of the barrel, and had its contents removed, leaving the empty barrel in its place in the pile. After this was done, Morgenweck, as the evidence tends to show, said to or in the hearing of the plaintiff and those working with him: "Now everything is all right; go ahead to work;" and, after standing there a few minutes, he walked out of the room. The plaintiff and those with him thereupon went to work, but quit a few minutes later for the night. The next morning at 7 o'clock the work was resumed, and, as the testimony of the plaintiff's witnesses tends to show, another row of barrels was finished and a second row commenced, and, as they were at work on that row, at a point directly opposite the empty barrel, the barrels from the top of the two rows next to the one upon which they were working fell towards them, and in falling struck the plaintiff, and broke his right leg about two inches above the ankle.

Weigley, Bulkley & Gray, for appellant. Gibbons, Kavanaugh & O'Donnell, for appellee.

BAILEY, C. J., (after stating the facts.) The first proposition submitted by counsel for the defendant is that the declaration does not state a cause of action, and that its motion in arrest of judgment should have been sustained on that ground. The contention is that the defendant, being a corporation, could act only by its agents and servants, and that as the maxim respondeat superior has no appli-

cation to injuries resulting from the negligent acts of the fellow servants of the plaintiff, the declaration must show affirmatively, by express averments, that the injury complained of was caused by the negligent acts of agents or servants of the defendant who were not fellow servants of the plaintiff. This, in our opinion, was not necessary. The allegations of the declaration, so far as this point are concerned, are in the form which has been universally recognized by the rules of common-law pleading as sufficient to charge a corporation with negligence. They are that the defendant—that is, the corporation itself—negligently did the acts complained of; allegations which exclude, *ex vi termini*, the theory that they were performed by parties for whose conduct the defendant was not responsible. Counsel refer, in support of their contention, to the recent case of *Steel Co. v. Shields*, 134 Ill. 209, 25 N. E. Rep. 569. Upon examination of that case it will be found that the negligent acts complained of were there affirmatively alleged to have been done by the defendant's servants, without showing that they were done by the class of servants whose acts would charge the principal with responsibility. It was held that such allegations were not sufficient to show a right to recover against the principal. The distinction between that case and this is clear. It should also be noticed that in that case the ordinary presumptions which obtain after verdict, and by operation of which a defective statement of a good cause of action is said to be cured, were excluded by an instruction given by the court to the jury. In this case no such instruction was given; so that, even if the declaration is one which might have been held to be defective on demurrer, the defect is one which is cured by verdict.

Counsel on both sides have filed in this court the same printed briefs and arguments prepared and used by them in the appellate court, and in which much space is devoted to the discussion of questions which are not open for consideration here. Among other things, it is urged on behalf of the defendant that the evidence does not accord with the declaration, and that it does not sustain the verdict and judgment. These propositions present mere questions of facts, or, at most, mixed questions of law and facts, as to which the judgment of the appellate court is conclusive.

The point made that the evidence varied from the declaration, as we understand it, does not assume that there was no evidence tending to prove the allegations of the declaration as made, but that the negligence proved by the preponderance of the evidence differs in its character and circumstances from that alleged. The proposition stated in this form manifestly presents a mere question of fact, which this court cannot review. To present the question of variance as one of law, the evidence should have been objected to at the time it was offered on that ground, or, when the variance became apparent, counsel should have moved to exclude the evidence, or in some other appropriate way the question

should have been so raised that the trial judge could have passed upon it; and, to properly raise the question in any of these modes, the variance should have been distinctly pointed out, so as to enable the trial judge to pass upon it understandingly, and to enable the plaintiff, if such course should become necessary, to obviate the objection by an amendment to the declaration. In none of these ways was the objection raised. It is true that one of the grounds assigned by the defendant in its motion for a new trial was in these words, "There is a variance between the declaration and the proof," but even there the variance was not pointed out. This was not sufficient. It was not incumbent upon the trial judge, upon such challenge, to grope through the record in an endeavor to discover a variance, but it was the duty of the defendant's counsel, if one existed, to point it out, and call attention to it specifically; and, having failed so to do, he must be deemed to have waived the objection.

The defendant called Morgenweck, its foreman, and Haddlesey, its timekeeper and paymaster, as witnesses, and sought to prove by them experiments with piles of barrels similar to the one from which the barrels fell upon the plaintiff, and from which a barrel, located relatively the same as the empty barrel in question, was entirely taken out without causing the pile to fall. These witnesses were also asked whether an empty barrel located as was the one in question could be taken out of the pile without causing it to fall or give way, or whether knocking out the head of the barrel thus situated, and removing its contents, would affect the stability of the pile. This evidence was excluded by the court, and an exception to such ruling was preserved by the defendant.

We are clearly of the opinion that experiments of that character and their results, and inferences drawn from them by witnesses, were mere collateral matters, which could have no legitimate bearing upon the issues before the jury. Besides, the impossibility of showing that the conditions under which these experiments were made were in all respects identical with those existing at the time the plaintiff was injured, and the multitude of collateral issues which an attempt to prove identity of conditions would raise, the fact that one experiment had been conducted to a successful issue would have little, if any, tendency to show that in another case precisely like it an accident might not happen. A thousand men may pass an impending wall with safety, or at least without injury, but the next man who attempts to pass it may be crushed by its fall. The question is not whether a pile of barrels might not stand with an empty barrel situated as was the one in this case, but whether leaving such barrel in the condition shown rendered the support of the barrels above it less secure, and that to such a degree as to constitute negligence, and whether the plaintiff's injury occurred as the result of such negligence. So far as these witnesses were sought to be examined as experts, it does not ap-

pear that they had any special knowledge or skill on the subject, unless it was that gained by means of the experiments which counsel attempted, but was not permitted, to prove. Nothing therefore is proved which tends to show that they were any better qualified to express an opinion on the subject than were any of the jurors before whom the cause was being tried; and, even admitting that the subject was one for expert testimony,—a proposition which may well be doubted,—their answers to questions put to them, calling for their opinions, would obviously have been merely a means of getting before the jury by indirection the results of the experiments, if not the experiments themselves.

Numerous errors are assigned upon the rulings of the court in the instructions to the jury, only a portion of which, however, seem to us to be of sufficient importance to require extended discussion. The first instruction given at the instance of the plaintiff held that if Morgenweck was in the defendant's employ, and authorized to take charge and control of a gang of men, of whom the plaintiff was one, in rolling and piling barrels of meat, and to govern and direct their movements in the branch of the defendant's business in which they were engaged, then, while acting in pursuance of, and within the scope of, such authority, he was the direct representative of the defendant, and his acts and directions, within the scope of his authority, were the acts and directions of the defendant; but, if he was not so authorized, his acts and directions were not those of the defendant, and his negligence, if any, was not the negligence of the defendant. This instruction does not attempt to lay down the law as to fellow servants, as counsel assume, but merely to state the rule governing the responsibility of a master for the acts and directions of a vice principal. It holds that one who has charge and control of other servants, and has authority to govern and direct their movements in the branch of the principal's business in which they are engaged, is, while acting in pursuance of, and within the scope of, such authority, a vice principal, so as to make his acts and directions the acts and directions of the principal; but that if he has no such authority, his acts, directions, and negligences are not those of the principal. It must be admitted that the last part of the instruction is scarcely accurate as a general proposition, since many servants who have no control over other servants may so represent their principal as to render the latter responsible for their acts and negligences. Such would be the case with all servants not standing in the relation of fellow servants to the plaintiff; but in this respect the instruction is manifestly more favorable to the defendant than the law warrants, and is therefore no ground for just complaint on its part. In other respects the instruction seems to us to state the law correctly. It may be that some of the acts of Morgenweck, as shown by the evidence, were not within the scope of his authority over the other servants of the defendant, or that as to

such acts he even assumed the position of a fellow servant with the complainant, but there is nothing in the instruction from which the jury could have been led to suppose that as to those acts he was to be regarded as a vice principal, but rather the contrary.

Complaint is made of the plaintiff's fourth instruction, which was as follows: "It was the duty of the defendant in this case to have used ordinary care and prudence in furnishing to the plaintiff, at the time of the accident, a reasonably safe place in which to work, and to have used all reasonable precautions to maintain and keep such place in a reasonably safe condition." It is not claimed that this instruction does not state a correct proposition of law, but only that it is applicable to no issue in the case. In this we think counsel are mistaken. The declaration avers that the plaintiff, at the time he was injured, was working for the defendant near the row of barrels in question, and that it was the defendant's duty to keep and maintain such row of barrels in such condition that they would not spread, tilt, or fall upon the plaintiff while working near the same; yet the defendant, in disregard of this duty, carelessly and negligently kept and maintained the row of barrels defectively piled, and, when so piled, drove in the head of one of the barrels, and removed the contents thereof, so that the barrel was greatly weakened, and rendered unable to support the weight of the barrels piled above it, by means whereof the barrels spread, tilted, and fell upon the plaintiff, and injured him. The duty which is here alleged is the common-law duty incumbent upon every employer, and which he cannot delegate to others in such manner as to relieve himself from the consequences of its nonperformance, to furnish to his employe a reasonably safe place in which to work, and to use proper diligence to keep such place in a reasonably safe condition, and the negligence charged is merely a breach of that duty. The failure of the defendant to keep the place assigned to the plaintiff for the performance of his work is of the very gist of the action, and we think, therefore, that the instruction above quoted was directly applicable to the main issue submitted by the pleadings.

The third instruction asked by the defendant was modified by the court by adding thereto the words in italics, and was given to the jury thus modified. That instruction was as follows: "The jury are instructed that, where an employment is attended with danger, a servant engaging in it assumes the hazard of ordinary perils which are incident to it, and, if he receives an injury from an accident which is an ordinary peril of the service undertaken by him, he cannot recover damages for the injury; *but this applies only to perils or risks ordinarily incident to the service, and not to those which are extraordinary, and which did not exist at the time the servant engaged in the master's business, and which the servant did not subsequently assume.*" Several other instructions asked by the defendant were modified in substantially the same way. We think

there was no error in the modification. The instruction, as asked, though announcing a proposition of law which is abstractly correct, yet, when applied to the facts of this case, was likely to mislead the jury. The material question in the case was not whether the plaintiff had assumed the risk of other perils incident to the service in which he was engaged, but whether he had assumed the risk of the particular peril which caused his injury, viz. that arising from leaving an empty barrel of the character of the one in question, with the head knocked out, near the bottom of the pile, and thus weakening the pile, and causing the barrel above it to fall. Other perils incident to the service were wholly immaterial. The instruction, as asked, then, had no application to the case before the jury, except upon the assumption that the particular peril in question was one of ordinary perils incident to the service, and, standing alone, it would have been likely to convey that assumption to the jury. To render it applicable to the case, so as not to be misleading, it should have submitted to the jury the question whether that peril was, in point of fact, one of the ordinary perils of the service, and then laid down the rule applicable in case that question should be decided in the affirmative; or it should have been modified, as was done, so as to lay down the rule which should govern in case of its negative decision.

As to the remaining criticisms upon the rulings of the court in the instructions to the jury, all we need say is that we have examined them all with care, and fail to find that in any of them any substantial error is pointed out. So far as we can see, no useful purpose would be subserved by prolonging this opinion in discussing them.

It is urged that the court erred in rendering judgment for \$5,000, after finding that the damages awarded by the jury were excessive, and requiring the plaintiff to remit \$2,500 from the amount awarded, under penalty of setting the verdict aside, and granting a new trial. The practice of requiring the plaintiff to remit a portion of his damages, and rendering judgment for the residue, where there is no ground for a new trial except that the damages awarded by the jury are excessive, is so well established in this state that it cannot now be successfully called in question.

We find no material error in the record, and the judgment of the appellate court will accordingly be affirmed.

(146 Ill. 481)

#### KEATING v. SPRINGER.<sup>1</sup>

(Supreme Court of Illinois. June 19, 1893.)<sup>2</sup>

LANDLORD AND TENANT—EASEMENT—LEASE—FORCIBLE DETAINER—RES JUDICATA.

1. A lessee of a building surrounded by land of the lessor has no implied right to the use of light and air from the adjoining land.

2. Where a lease contains a provision that

the lessor "shall not build at the rear of said premises nearer than 25 feet, and no obstruction higher than six feet shall be placed in such manner as to obstruct light to said premises," the erection by the lessor of a building at the side of the leased premises so as to obstruct the light thereto is such a breach of the lease as will entitle the lessor to recover damages therefor, either in an action brought by him for that purpose, or as an offset to an action for rent accruing while he remains in possession.

3. A judgment for the lessor in an action of forcible detainer is not conclusive as to the amount of rent claimed to be due.

Appeal from appellate court, first district.

Action by Warren Springer against Michael Keating for use and occupation. Plaintiff obtained judgment, which was affirmed on appeal. 44 Ill. App. 547. Defendant appeals. Reversed.

The other facts fully appear in the following statement by MAGRUDER, J.:

On March 15, 1884, appellee executed a written lease of certain premises to appellant for the period, extending from April 1, 1884, to April 1, 1894, for \$30,000, payable in monthly installments of \$250 each. The premises are described in the lease as follows: "All those premises situated \* \* \* in the city of Chicago, \* \* \* known and described as follows, to wit: 'The basement of the building known as Nos. 201, 203, and 205 So. Canal street, Chicago, being a space 50 feet by 70 feet, more or less; also the store floor of part of said building, and known as Nos. 201 and 203 So. Canal street, being a space 50 feet by 50 feet, more or less; also a space in the yard at the rear of said building, commencing at the N. W. quarter of said building, then west 25 feet, then south 25 feet, then east 25 feet, to building,—together with steam power not to exceed ten horse power, said steam power to be furnished ten hours per day, Sundays and holidays excepted. Said premises hereby leased to be used and occupied as a marble works and kindred business, and in no manner as to damage or interfere with tenants of adjoining property.'" The lease contained, among others, the following provisions, to wit: "Party of the first part [Springer] shall not build at the rear of said premises nearer than twenty-five feet, and no obstruction higher than six feet shall be placed in such manner as to obstruct light to said premises, and party of the second part shall at all times have the use and free access through all now existing alleys leading to rear of said premises." Appellant occupied the premises under the lease from its date until July 17, 1888, when he left them. The building was a two-story and basement frame building, fronting east on Canal street, between Van Buren street, on the south, and Jackson street, on the north, and having a depth of 50 feet. It had windows in the front and rear, and on the north and south sides. The territory around it was practically vacant at the date of the lease. There was then no building to the south of it nearer than 40 or 50 feet, except, perhaps, a small shed; none in the rear or to the west of it nearer than about 60 feet; and none to

<sup>1</sup> Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

<sup>2</sup> Rehearing denied October term, 1893.

the north nearer than 30 feet, or more. There were some sheds and platforms to the north, and some rubbish to the west, but nothing to obstruct the light needed for cutting and polishing marble. In the space on the south there was an alley running west from Canal street to Clinton street, connecting with which was another alley running north and south in the rear of the premises in question. In 1885 appellee erected a large brick building, called the "Springer Building," having five stories above the basement, fronting 26 feet on Canal street, and having a depth of 75 feet. Its north wall was immediately against the south wall of appellant's building, called the "Keating Building;" and it extended 25 feet further west than the Keating building, the extension of 25 feet being on the south line of the space in the rear of the Keating building, as described in the lease. The proof tends to show that appellee dug excavations on the lines of the alleys, and built boiler and machine shops in the rear of the Keating building, and placed obstructions of various kinds in the alleys and in the space to the rear of the Keating building. From the differences growing out of these transactions various suits have resulted. Appellee brought against appellant a suit in assumpsit for the use and occupation of said premises, to which nonassumpsit was pleaded; a suit upon a note alleged to have been given for rent, to which pleas of nonassumpsit and set-off were filed; three proceedings of distress for rent, in which the general issue and certain special pleas of set-off and general replications to the latter were filed. And appellant brought an action in case against appellee to recover damages for cutting off his light by the erection of the Springer building and other obstructions, to which the plea of not guilty was filed. The said special pleas set up violations of the covenants of the lease by alleging: that the light was shut off on the south and in the rear of the Springer building, and its extension to the west, and by the erection of shafting and machinery and other obstructions more than 15 feet high; and that the alleys were closed up by the placing therein of iron boilers, castings, engines, building materials, etc.; and that steam power was not furnished, etc. The suit for use and occupation was begun in the circuit court of Cook county. Of the other suits, one was begun in said circuit court, one in the superior court of said county, and three in the county court of said county. The four suits last named were transferred by proper order to the circuit court, and an order was entered by the latter court in the suit for use and occupation consolidating the other suits with it. A stipulation was entered into between counsel that there should be one trial, which should determine the matters in controversy in all the suits. A jury was waived, and by agreement the consolidation cause was submitted for trial before one of the judges of the circuit court, without a jury. Upon the trial, the plaintiff, Springer, introduced the written lease, and proved the amount of unpaid rent due thereon from October, 1887, to July 17,

1888. A large mass of evidence was introduced by the defendant, Keating, principally in support of the contentions that buildings and obstructions were erected in the rear of the premises nearer than 25 feet, and that the use of the alleys and free access through the same were interfered with and cut off. In contradiction of this evidence a large number of witnesses were examined by the plaintiff. At the close of his testimony thus introduced, the plaintiff offered in evidence, and the court received, over defendant's objection and exception, the proceedings in a forcible entry and detainer suit begun by Springer against Keating before a justice of the peace on April 25, 1888, wherein the complainant alleges that Springer was entitled to the possession of said premises, and that Keating unlawfully withholds the same, wherein judgment was rendered in favor of Springer on May 8, 1888, and an appeal was taken and perfected to the superior court, which appeal was dismissed on July 9, 1888, and a further appeal was taken and allowed to the appellate court upon filing bond and bill of exceptions within 20 days. On October 3, 1891, judgment was entered by the circuit court in favor of Springer for \$2,907.50 against Keating, and in the suit of Keating against Springer the latter was found not guilty. This judgment has been affirmed by the appellate court, (44 Ill. App. 547,) and the case is brought here by appeal.

Haney & Merriek, for appellant. Allan C. Story, for appellee.

MAGRUDER, J., (after stating the facts.) In this case many questions of fact and law are discussed by counsel in their briefs, but the record is not in such shape as to authorize us to consider any of these questions, except that which arises out of the refusal of the trial court to admit certain offered evidence, as hereinafter stated. The trial was, by agreement, before the court, without a jury, and resulted in a judgment for the plaintiff, which has been affirmed by the appellate court. The judgment of the latter court is conclusive as to the findings of fact. No "written propositions to be held as law in the decision of the case" were submitted to the court on the trial below by either side, in accordance with section 42 of the practice act; and hence no question of law is presented for our determination, unless the errors assigned as to the admission or exclusion of evidence necessarily involve the consideration of such a question. *Bank v. Haskell*, 124 Ill. 587, 17 N. E. Rep. 59; *Myers v. Bank*, 128 Ill. 478, 21 N. E. Rep. 580; *Hall v. Cox*, (111. Sup.) 33 N. E. Rep. 33.

The evidence tends to show that a strong light is necessary for such business of manufacturing and polishing marble, as appellant was engaged in, and that the demised premises were selected by the appellant for that business mainly because of their freedom from surrounding obstructions to the supply of light. Accordingly, the defendant below offered to prove that the erection of the Springer building on the south side of the Keating



building prevented the entry of light into the latter from the south and west. Upon objection by the plaintiff, the court refused to receive the testimony, and an exception was taken to its rulings by the defendant. The action of the trial court was correct, if there is no express covenant or agreement in the lease obligating the landlord to permit the light to pass over the south lot into the leased premises. The English doctrine is that, "if one who has a house with windows looking upon his own vacant land sell the same, he may not erect upon his vacant land a structure which shall essentially deprive such house of the light through its windows." Washb. Easem. marg. p. 492, par. 5. This doctrine, however, does not prevail in the majority of the American states. It is held to be inapplicable in a country like this, where the use, value, and ownership of land are constantly changing. Air and light are the common property of all. The owner of a lot cannot be presumed to have assented to an encroachment thereon if he has permitted the light and air to pass over it into the windows of his neighbor's house, situated upon the adjoining lot. The actual enjoyment of the air and light by the latter is upon his own premises only. The prevalent rule in the United States is that an easement in the unobstructed passage of light over an adjoining close cannot be acquired by prescription. 2 Woodf. Landl. & Ten. marg. p. 703, and notes; 1 Tayl. Landl. & Ten. §§ 239, 380, and notes; Keats v. Hugo, 115 Mass. 204; Mullen v. Stricker, 19 Ohio St. 135. In the early case of Gerber v. Grabel, 16 Ill. 217, this court held that such a right might be so acquired; but in the later case of Guest v. Reynolds, 68 Ill. 478, the Gerber Case was, in effect, overruled, and it was held that "prescription right, springing up under the narrow limitation in the English law, to prevent obstructions to window lights," "cannot be applied to the growing cities and villages of this country without working the most mischievous consequences, and has never been deemed a part of our law." It is established by the weight of American authority that a grant of the right to the use of light and air will not be implied from the conveyance of a house with windows overlooking the land of the grantor; and that, where the owner of two adjacent lots conveys one of them, a grant of an easement for light and air will not be implied from the nature or use of the structure existing on the lot at the time of the conveyance, or from the necessity of such easement to the convenient enjoyment of the property. Keats v. Hugo, supra; Mullen v. Stricker, supra; 1 Woodf. Landl. & Ten. § 209, pp. 422-424, and note; Morrison v. Marquardt, 24 Iowa, 35. "A grant by the owner of two adjoining lots of one of them does not imply the right of an unobstructed passage of light and air over the other." 2 Woodf. Landl. & Ten. marg. p. 703, and note. "The law of implied grants and implied reservations, based upon necessity or use alone, should not be applied to easements for light and air over the premises of another." Mullen v. Stricker, supra; Haverstick v. Sipe, 33

Pa. St. 368; Kelper v. Elein, 51 Ind. 316. It follows that a landlord will not be liable for obstructing his tenant's windows by building on the adjoining close, in the absence of any covenant or agreement in the lease forbidding him to do so. Myers v. Gemmel, 10 Barb. 537; Palmer v. Wetmore, 2 Sandf. 316; Kelper v. Elein, supra; 2 Woodf. Landl. & Ten. marg. p. 703, and note.

But the authorities all agree that the right to have the light and air enter the windows of a building over an adjoining lot may exist by express grant, or by virtue of an express covenant or agreement. Rillhard v. Coal Co., 41 Ohio St. 662; Brooks v. Reynolds, 136 Mass. 31; Keats v. Hugo, supra; Morrison v. Marquardt, supra. The question then arises whether the erection of the Springer building could have been regarded as a violation of the express terms of the lease, if proof had been admitted showing that it obstructed the light necessary to carry on the business. The lease contains the following provision: "Party of the first part shall not build at the rear of said premises nearer than 25 feet, and no obstruction higher than six feet shall be placed in such manner as to obstruct light to said premises." The meaning of the word "premises," as here used, is not to be restricted to the Keating building alone, but embraces also the space in the rear thereof. The lease speaks of "all those premises \* \* \* described as follows;" and then mentions, as constituting those premises—First, the basement; second, the store floor; "also a space in the yard in the rear," 25 feet deep. The space in the rear is as much a part of the premises demised as the basement and the store floor. Therefore the appellee agreed that he would not build nearer than 25 feet to the west line of the demised space west of the Keating building, which space was 25 feet wide from east to west. The Springer building was 75 feet deep, while the Keating building was only 50 feet deep. It follows that the extension of the former west of the rear of the latter was along the south line of said space in the yard at the rear. The north wall of the Springer building did not extend further west than the west line of said space in the yard, and consequently the whole of the Springer building was south of the demised premises; hence we think counsel for appellee is right in the contention that no part of that building can be considered as an obstruction placed in the rear or to the west of the premises leased to appellant. But we cannot agree with counsel in so construing the language of the provision as to limit it to obstructions placed in the rear. The landlord does not agree that no obstruction higher than six feet shall be placed in the rear in such manner as to obstruct light to said premises. His agreement is that no obstruction higher than six feet shall be placed, whether to the north or to the west or to the south, in such manner as to obstruct light to said building; that is, to said space in the rear, as well as to said building. The Springer building—a brick structure, five stories high—was so constructed that its

north wall joined the south wall of the Keating building, and the south line of the space in the yard at the rear thereof. In view of the express provision in the lease, as above quoted and construed, we are of the opinion that the defendant below was entitled to prove, if he could, that the Springer building was an obstruction placed in such manner as to obstruct light to said premises, and that the trial court should have admitted the proof upon that subject when offered.

It is claimed, however, that the offered evidence was properly rejected, because this suit is for rent accruing during a period while the tenant was in possession. In order to constitute an eviction, it is not necessary that there should be an actual physical expulsion. Acts of a grave and permanent character, which amount to a clear indication of intention on the landlord's part to deprive the tenants of the enjoyment of the demised premises, will constitute an eviction. *Hayner v. Smith*, 63 Ill. 430. If the acts of the landlord are such as merely tend to diminish the beneficial enjoyment of the premises, the tenant is still bound for the rent, if he continues to occupy the premises. Unless he abandons the premises, his obligation to pay the rent remains. *Skally v. Shute*, 132 Mass. 367. We said in *News Co. v. Browne*, 103 Ill. 317: "The rule is well settled that the wrongful act of the landlord does not bar him from a recovery of rent, unless the tenant by such act has been deprived in whole or in part of the possession, either actually or constructively, or the premises rendered useless. *Edgerton v. Page*, 20 N. Y. 234; *Haligan v. Wade*, 21 Ill. 470; *Leadbeater v. Roth*, 25 Ill. 537." To "evict" a tenant, according to the original signification of the word, is to deprive him of the possession of the land. But the landlord, without being guilty of an actual physical disturbance of the tenant's possession, may yet do such acts as will justify or warrant the tenant in leaving the premises. The latter may abandon the premises in consequence of such acts, or he may continue to occupy them. If he abandons them, then the circumstances which justify such abandonment, taken in connection with the act of abandonment itself, will support a plea of eviction, as against an action for rent. If, however, the tenant makes no surrender of the possession, but continues to occupy the premises after the commission of the acts which would justify him in abandoning them, he will be deemed to have waived his right to abandon, and he cannot sustain a plea of eviction by showing that there were circumstances which would have justified him in leaving the premises; hence it has been held that there cannot be a constructive eviction without a surrender of possession. It would be unjust to permit the tenant to remain in possession, and then escape the payment of rent by pleading a state of facts which, though conferring a right to abandon, had been unaccompanied by the exercise of that right. *Edgerton v. Page*, supra; *Boreel v. Lawton*, 90 N. Y. 293; *De Witt v. Pierson*, 112 Mass. 8; *Warren v. Wagner*, 75 Ala. 188; *Wright*

*v. Lattin*, 38 Ill. 293; 1 *Tayl. Landl. & Ten.* (8th Ed.) §§ 380, 381, and notes; *Wood, Landl. & Ten.* (2d Ed.) § 477, pp. 1104-1106; *Alger v. Kennedy*, 49 Vt. 109; *Scott v. Simons*, 54 N. H. 426; *Jackson v. Eddy*, 12 Mo. 209. But though the tenant will not be allowed to plead eviction as a bar to the recovery of rent where he has remained in possession after the performance of the acts which would have justified him in leaving the premises, yet he is not for that reason without remedy. In those states where the doctrine of recoupment is recognized, he may recoup such damages as he may have sustained by reason of the acts of the landlord, against the rent sought to be recovered. 1 *Tayl. Landl. & Ten.* § 374; 2 *Tayl. Landl. & Ten.* § 631; 2 *Wood, Landl. & Ten.* § 477, p. 1107; *Edgerton v. Page*, supra; *Warren v. Wagner*, supra. Taylor, in his work on *Landlord and Tenant*, (section 631,) says: "By the law of recoupment, as now established in many of the United States, the tenant can avail himself, as a defense pro tanto to an action of debt for rent, of the landlord's breach of his covenants." The doctrine of recoupment is recognized in this state, and has been applied in proceedings begun by the issuance of distress warrants, and in actions for rent. *Wright v. Lattin*, supra; *Lindley v. Miller*, 67 Ill. 244; *Lynch v. Baldwin*, 69 Ill. 210; *Pepper v. Rowley*, 73 Ill. 262. In *Lynch v. Baldwin*, supra, where the landlord had issued a distress warrant, we said: "As to recouping damages for any loss or injury sustained by the tenant, we have no doubt that it may be done, as they grow out of the same transaction. The object of this inquiry is to ascertain the amount of rent due; and, if the acts of the landlord impaired the value of the use of the premises, then the tenant should not pay the same rent as if the landlord had done no act to reduce such value." In *Pepper v. Rowley*, supra, which was an action to recover rent due under a lease, we said: "If there has been a breach of any covenant contained in the lease, whatever damage appellee has sustained in consequence thereof may be recouped in this action from the amount of rent due under the lease." In the case at bar the consolidated proceeding not only includes a suit for rent, but also several proceedings begun by the issuance of distress warrants; and the stipulation permits the defendant to introduce, under the general issue, "any defense and also any set-off, whether matter of contract or tort, that he may have, in the same manner \* \* \* as if specifically pleaded." We therefore think that the offered testimony as to the effect of the erection of the Springer building upon the supply of light should have been received, in order that any damages which the defendant may have sustained thereby might be recouped in reduction of the amount of recovery, and that defendant was not precluded from showing such damages by his failure to surrender possession at an earlier date.

Even if the offered testimony was not admissible as tending to show damages by way of recoupment, it was competent, under the declaration in the action

brought by Keating against Springer, to recover damages for cutting off the light by the erection of the Springer building. Under the stipulation, not only were the suits brought by Springer to be tried together, but also with them was consolidated for trial at the same time the action in case which Keating brought against Springer. It is well settled that, although the omission of the landlord to perform his covenants may not amount to an eviction, nor operate as a bar to his claim for rent, yet the lessee has his remedy by an action to recover damages for a breach of the covenant. *Warren v. Wagner*, supra; *News Co. v. Browne*, supra; *Lounsbury v. Snyder*, 31 N. Y. 514; *Wright v. Lattin*, supra; *Royce v. Gugenheim*, 106 Mass. 201; 1 Tayl. Landl. & Ten. §§ 379, 381, and notes; 2 Wood, Landl. & Ten. § 477, p. 1107.

It is furthermore claimed by the appellant that all the matters set up in defense or as ground of recovery by the defendant in the present consolidated suits were extinguished by the judgment in the forcible detainer suit, and that said judgment operates as *res judicata*, so as to bar all appellant's rights of recovery or recoupment. We are unable to yield our assent to this view. The judgment in forcible entry and detainer is conclusive only as to the right of possession, and, in a certain class of cases, as to the existence of the relation of landlord and tenant between the parties, and as to the tenant's wrongful holding over. *Doty v. Burdick*, 83 Ill. 473; *Norwood v. Kirby*, 70 Ala. 397; *Hodgkins v. Price*, 132 Mass. 196; 8 Amer. & Eng. Enc. Law, p. 176. It was said, in *Robinson v. Crummer*, 5 Gilman, 218, that "damages are not recoverable in this action, but the only judgment for the plaintiff is that he have restitution of the premises," etc. For the error committed in the refusal to receive the evidence offered by the defendant as hereinbefore mentioned, the judgments of the appellate and circuit courts are reversed, and the cause is remanded to the circuit court for further proceedings, in accordance with the views herein expressed.

#### BOARD OF COM'RS OF ADAMS' COUNTY v. COLE.<sup>1</sup>

(Supreme Court of Indiana. Sept. 29, 1893.)

##### COURTS—TRANSFER TO APPELLATE COURT.

An action for the recovery of money only, where the amount in controversy, exclusive of costs, does not exceed \$3,500, and does not fall within any of the exceptions to the jurisdiction of the appellate court, as made by Act Feb. 16, 1893, § 1, amending the act creating that court, will be transferred to it by the supreme court.

Appeal from circuit court, Adams county.

Erwin & Mann, for appellant. Hooper & Coverdale, for appellee.

HOWARD, J. This is an action seeking the recovery of a money judgment only,

where the amount in controversy, exclusive of costs, does not exceed \$3,500, and does not fall within any of the exceptions to the jurisdiction of the appellate court, as made in section 1 of the act creating that court, as amended by the act approved February 16, 1893. The case is therefore transferred to the appellate court.

(135 Ind. 15)

#### GARARD v. GARARD.

(Supreme Court of Indiana. Sept. 29, 1893.)

##### SUPREME AND APPELLATE COURTS—JURISDICTION—SUITS IN EQUITY.

A party who, in the court below, has moved to submit an issue raised by the pleadings to the court for trial without a jury, and also, on appeal to the supreme court, has assigned the overruling of the motion for error, on the ground that such issue is one of exclusive equitable cognizance, cannot, on motion for a rehearing, urge that jurisdiction is not in the supreme court, but in the appellate court; since Act Feb. 16, 1893, § 1, amending the act creating the appellate court, provides that such court shall not have jurisdiction of suits in equity.

On motion for rehearing. Overruled. For former report, see 34 N. E. Rep. 442.

HOWARD, J. The appellant has filed a petition for rehearing, claiming that jurisdiction on this appeal is in the appellate court, and asking that the case be transferred to that court. In section 1 of the act approved February 16, 1893, amending the act creating the appellate court, it is provided that "the appellate court shall not have jurisdiction of suits in equity, hereby meaning by the terms, 'suits in equity,' such cases as were known and recognized prior to the 18th day of June, 1852, as suits of equitable cognizance, and wherein specific decrees are appropriate and essential." The tenth reason given by appellant in his motion for a new trial, the overruling of which was assigned as error, was "that the court erred in overruling defendant's motion to submit the issue joined on the second paragraph of the complaint to the court for a trial without a jury." In support of this assignment, counsel for appellant argued in this court that, "if the second paragraph of complaint states any cause of action, it is one of exclusive equitable cognizance." In this contention we agreed with counsel; and the action of the court in submitting the cause to a jury was upheld only on the ground that the court treated the verdict as advisory, and that the judgment was based upon the finding of the court, and not upon the verdict of the jury. It has therefore already, in effect, been decided that this cause was one of equitable cognizance, as contemplated by the statute, and, consequently, that jurisdiction was in this court. See *Quarl v. Abbott*, 102 Ind. 233, 1 N. E. Rep. 476; *Ex parte Sweeney*, 126 Ind. 533, 27 N. E. Rep. 127; *Elliott*, App. Proc. Co. 4. See, also, *Schunk v. Moline*, etc., 18 Sup. Ct. Rep. 417. The petition for a rehearing is overruled.

<sup>1</sup> Transferred to Appellate Court, 36 N. E. 912.

(135 Ind. 42)

**GARSIDE v. WOLF et al.**

(Supreme Court of Indiana. Sept. 28, 1893.)

**APPEAL—PARTIES.**

On appeal by plaintiff from a foreclosure decree declaring interests in certain defendants not subject to the mortgage, the mortgagor and his wife, the principal defendants foreclosed, must be joined as appellees, and a failure to bring them in is not waived by joinder in error.

Appeal from circuit court, Fayette county; F. S. Swift, Judge.

Action by Martha Garside, executrix, against William H. H. Wolf and others, to foreclose a mortgage. From the judgment of foreclosure, plaintiff appeals. Dismissed.

Florea & Broadbus, for appellant. Little & McKee, for appellees.

MCCABE, C. J. This was an action brought by appellant against William H. H. Wolf and Martha Wolf, to foreclose a mortgage on certain described real estate, executed by them to appellant to secure the payment of a promissory note. Clinton A. Sanders, Ann Sanders, Charles B. Sanders, Charles G. Wolf, Stella B. Wolf, John S. Wolf, and John Payne were also made parties defendant to said complaint on the ground that they claimed some interest in the real estate mortgaged, which claim it was alleged was wholly unfounded. Prayer for a foreclosure, and that all said claims be declared null and void. Charles G. Wolf answered by a general denial, and filed a cross complaint against appellant, setting up his interest. Margaret E. Wolf, Stella B. Wolf, and John S. Wolf, minor defendants, by their guardian ad litem, Daniel W. McKee, also filed a cross complaint against appellant, setting up their interest in the real estate, and an answer of general denial. There was also an answer to the appellant's complaint by William H. H. Wolf and Martha Wolf in denial. After demurrers had been overruled to said cross complaints, issue was joined upon them. There was a trial, and judgment of foreclosure against William H. H. and Martha Wolf, and that Ann and Clinton Sanders were junior lienholders, and that Charles G., Margaret E., Stella B., and John S. Wolf had a certain interest in said real estate not subject to the mortgage foreclosed. The appellant, being the sole plaintiff below, has made no one a party to this appeal but herself as appellant, and as appellees, Charles G. Wolf, David W. McKee, guardian ad litem for Martha E. Wolf, Stella B. Wolf, and John S. Wolf, and assigns as error the overruling of the demurrers to each of said cross complaints, and that the court erred in its finding, etc. Appellees have moved to dismiss the appeal on the ground that the principal defendants against whom there was a judgment of foreclosure have not been made parties to this appeal. The case of *Hunderlock v. Investment Co.*, 88 Ind. 139, is decisive of the question in support of the motion. To the same effect is *State v. East*, Id. 602; *Elliott, App. Proc.* 138. Appellant contends that joinder

in error waived the defect, and cites some cases where this court has held that where a part of several coparties appeal, and fail to notify the other coparties of such appeal, though sufficient to justify a dismissal of the appeal, yet an agreement to submit the cause to this court is a waiver of the defect. It might be sufficient answer to that to say that there was no agreement here to submit. But this is not an appeal by a part of several coparties, but it is a case where all the party that there was on one side of the case is here properly as appellant, but the defect in her appeal is that she has not brought all the parties on the other side of the case into this court against whom judgment was rendered in the court below. This court cannot very well disturb the judgment below as to some of the parties without disturbing it as to all, and this court has no jurisdiction to disturb it as to those parties that are not parties to this appeal. Therefore joinder in error does not waive the defect. Therefore the appeal is dismissed, at appellant's costs.

(135 Ind. 136)

**MYERS v. JACKSON et al.**

(Supreme Court of Indiana. Sept. 28, 1893.)

**EJECTMENT—PLEADING—TENANTS IN COMMON—RESULTING TRUSTS.**

1. In an action for the possession of land under the Code, an allegation that plaintiff is the owner and entitled to the possession is sufficient as against a demurrer, the remedy, if any, being by motion to make the complaint more definite and certain.

2. In an action by a tenant in common against her cotenants for the possession of her undivided interest in the land, an allegation in the complaint that defendants in possession refuse to allow plaintiff to take possession, and have unlawfully kept plaintiff out of possession, sufficiently shows that the tenant in actual occupancy has denied the right of his cotenant to possession, or done something equivalent to such denial, or amounting to an ouster of the cotenant.

3. A conveyance of land to secure a debt owing by the grantor to the grantee, made without any intent to defraud the grantor's other creditors, under an oral promise by the grantee, among other things, to immediately reconvey an undivided third interest to the grantor's wife, in consideration of her parting with her inchoate interest in the whole of said lands, creates a resulting trust in the wife's favor as to the undivided one-third, under Rev. St. 1881, § 2976, which provides for a resulting trust when the person to whom a conveyance is made agrees to hold the land in trust for the person paying the purchase money or some part thereof.

4. Since the grantee paid nothing for the undivided one-third, and had no right of possession or control over it, except to reconvey to the wife, the trust in the grantee was a mere verbal or nominal trust, within the meaning of Rev. St. 1881, § 2981, which provides that such a trust is void as to the trustee, and which vests the legal title in the beneficiary.

5. Parol evidence is admissible to prove a resulting trust in land.

6. A husband need not be joined as plaintiff with his wife in an action by her to recover possession of land in which he has no interest.

Appeal from circuit court, Washington county; M. S. Mavity, Judge pro tem.

Action by Catherine Myers against Berilla Jackson and others to recover the possession of land. From a judgment sustaining demurrer to the several paragraphs of the complaint, plaintiff appeals. Reversed.

John R. East, Joseph Giles, Wm. Farrell, and Hottel & Zaring, for appellant. M. F. Dunn and N. Crooke, for appellees.

HOWARD, J. This is the second appeal in this case. Jackson v. Myers, 120 Ind. 504, 22 N. E. Rep. 90, and 23 N. E. Rep. 86. The amended complaint is in four paragraphs, and the only error assigned is the sustaining of the demurrers to the several paragraphs. In the first paragraph appellant states that she is the owner and entitled to the possession of the undivided one-third part, in her own right, of certain lands described; that the defendants, (the appellees,) have possession of the same without right, and refuse to allow appellant to take possession of said lands, and have unlawfully kept her out of possession of the same for 11 years last past, to her damage, etc. It is said that the kind of interest claimed by appellant is not sufficiently stated. So far as this paragraph goes, the action is one for possession under the Code, and the pleading will be "liberally construed with a view to substantial justice between the parties." If the simple allegation of ownership be indefinite or uncertain, the court may require the pleading to be amended in this particular. Section 376, Rev. St. 1881. Similar complaints have frequently been held good. Lash v. Perry, 19 Ind. 323; Cromie v. Hoover, 40 Ind. 49; Vance v. Schroyer, 82 Ind. 114; Swaynie v. Vess, 91 Ind. 584.

It is also contended that the paragraph is bad for the reason that the action is by one tenant in common against her cotenants, and there is no averment that the defendants deny the plaintiff's right to the land, nor any act averred equivalent to such denial. We think that the authorities relied upon (Bethell v. McCool, 46 Ind. 303, and Vance v. Schroyer, 77 Ind. 501) are both against appellees' contention. The paragraph states that the defendants in possession "refuse to allow plaintiff to take possession of said lands," and that "they have unlawfully kept plaintiff out of possession of the same for eleven years last past." This sufficiently states that "the tenant in actual occupancy has denied the right of his cotenant, or done something equivalent to such denial, or amounting to an ouster of the cotenant," as held necessary in Vance v. Schroyer, last above cited. While it is necessary that the provisions of the statute be complied with in order to render the complaint good against demurrer, yet, as said in Swaynie v. Vess, cited above, "it is not necessary to use the exact words of the statute. It will be sufficient if words of similar import are used, or the averments of the complaint be such as to show the plaintiff's right to such possession, and the defendant's unlawful detention."

The second paragraph of the complaint states that on the 3d day of May, 1872,

the appellant was and now is the wife of Peter Myers, and on that day the said Peter Myers was the owner in his own right of certain described lands; that on said day the said Peter Myers and this appellant, without any fraudulent intent, and by the solicitation of one John Holland, and for the betterment of the inchoate interest of appellant, and for the purpose of placing the title of the one undivided one-third of said lands in appellant, and retaining the possession thereof, conveyed all the above lands to said John Holland, who paid no consideration therefor, but who took the title to said lands for the purpose of reconveying the same to appellant; that after receiving such conveyance said Holland wrongfully and fraudulently set claim to said land as his own property in fee simple, and declared himself the owner thereof; that in 1875 the said Holland departed this life, leaving the appellees as his only heirs at law, who are also claiming title to said land, and now hold possession thereof without right; that, prior to the death of said John Holland, appellant demanded a deed of conveyance and possession of said land, which he refused, and that prior to the bringing of this suit she demanded of appellees a deed and possession of said lands, which they refuse, and wrongfully assert absolute ownership of the same; that they have committed waste; that she is the owner in fee simple of said lands, and demands judgment for possession and damages, etc. The third paragraph is similar to the second, with the additional averments that the said Peter Myers, husband of appellant, was of feeble mind, and intrusted all his business to said John Holland, who was on the most intimate terms with appellant and her said husband; that the said Holland well knew the condition of the mind of the said Peter Myers; that long prior to said date the said Holland had been the adviser, counselor, and close neighbor of appellant and her said husband, and at said date and long prior thereto the relations of appellant and her husband with said Holland were of a very intimate and confidential character; that at said date the said Holland induced the said Peter Myers and this appellant to believe that he, the said Peter, would become the security for one Daniel Myers and others, until he would lose his entire farm, and deprive his family of a home; that at said time the said John Holland held an indebtedness of his own against the said Peter Myers for \$2,341.50; that the said Holland then represented to appellant that, if the said Peter Myers and this appellant would join in a deed to him of all of said land, he, the said Holland, would immediately reconvey to appellant the undivided one-third of all of said land, and hold the other two-thirds in trust for said Peter Myers until he should pay said indebtedness to said Holland; that said indebtedness was so paid in September, 1874; that on said 3d day of May, 1872, appellant, placing full reliance and confidence in the statements of said John Holland, and believing that he in good faith would hold said lands for her benefit, and reconvey the same, and

without any consideration being paid by the said Holland, she and her husband executed a deed, absolute on its face, for the entire tract of land, but which she says was then agreed to be a deed of use for her benefit, and to pass the title of one-third of said lands to this appellant,—alleging also a partition of the lands of John Holland among his heirs, the appellees, in which suit appellant and her husband were not made parties. The fourth paragraph alleges the same facts substantially; also that, at the date of the deed to Holland, Peter Myers was desirous of conveying the undivided one-third of his lands to the appellant, his wife, and entered into an agreement with the said Holland to take the title of said land, and to reconvey the undivided one-third thereof to appellant; that said agreement was made at the solicitation and inducement of said Holland, who was then and there an intimate friend of appellant and her said husband, who transacted the business of said Peter Myers as a friend and confidential adviser, and in whom they placed full confidence that he would reconvey said undivided part of said lands to appellant; that there was no consideration other than such reconveyance to her; that said Holland paid no consideration whatever for said undivided one-third of said land; that it was further agreed that said Holland was to have no power of disposition or management of said lands, except to make the deed to the one-third part thereof, as herein set forth; that, in violation of the trust reposed in him, the said Holland set up a claim as absolute owner of said lands, and ejected her husband therefrom,—asking for judgment of possession of her one-third of said lands; that her title be quieted thereto; for waste and damages, and for partition.

Counsel for appellees plead with much skill and ingenuity against the sufficiency of these paragraphs of complaint. They claim that appellant has been guilty of laches in not bringing her suit earlier; that fraud cannot be pleaded after six years; that the ejection of Peter Myers and appellant from their farm should be held conclusive against appellant; that the agreement to reconvey the one-third of said land should have been in writing, and there was no demand made on Holland to reduce such agreement to writing; that the action is stale and worn out; that the deed to Holland, being absolute on its face, is conclusive against appellant; that, at most, Holland was guilty of a moral wrong,—a failure to keep his promise. Counsel, however, adduce no reasons why the facts disclosed in the three paragraphs under consideration do not show good causes of action to declare a trust as claimed for appellant in the undivided one-third part of the lands in question. The action, being for the recovery of the possession of real estate, is brought in time. From the facts as pleaded and admitted by the demurrers, it appears that by agreement, and without any fraudulent intent, the party to whom the conveyance was made, John Holland, was to hold an undivided one-third interest in the lands, in trust to reconvey the same to

appellant, who, as consideration therefor, had parted with her inchoate interest in the whole of said lands. For the purposes of this suit, it is immaterial what has become of the remaining two-thirds of the lands. We are here concerned only with the resulting trust in the one-third in favor of the appellant. She is not claiming any part of the two-thirds, to which she parted with her inchoate right in exchange for the ownership in her own right of the one-third. The consideration for a resulting trust provided for in section 2976, Rev. St. 1881,<sup>1</sup> may be not only money, but anything of value. 10 Amer. & Eng. Enc. Law, p. 9, and authorities cited. Appellant's inchoate interest in this case in the lands of her husband was unquestionably in itself a thing of value. Moreover, had the debt of her husband to John Holland been pressed to judgment and execution against the land, such inchoate interest would have vested in her, and she would have been entitled to have her one-third set off to her by partition. The facts pleaded further show that this was a naked or mere nominal trust. John Holland paid nothing for the one-third of the land. He had no right of possession and no control over it, except to reconvey the same to the appellant. In such case the law puts the legal title at once in the beneficiary. Section 2981, Rev. St. 1881.<sup>2</sup> The ownership of this one-third was never in John Holland, and has not descended to his heirs. The statute against frauds cannot be used as a cover for fraud, and it has often been decided, in conformity with the provisions of section 2969, Rev. St. 1881, that resulting trusts, such as that claimed in this case, may be proved by parol. *Elliott v. Armstrong*, 2 Blackf. 198; *McDonald v. McDonald*, 24 Ind. 68; *McCollister v. Willey*, 52 Ind. 382; *Teague v. Fowler*, 56 Ind. 569; *Derry v. Derry*, 74 Ind. 560; *Cox v. Arnsmann*, 76 Ind. 210; *Catalani v. Catalani*, 124 Ind. 54, 24 N. E. Rep. 375; 1 *Perry, Trusts*, § 124, 226. See, also, *Prow v. Prow*, (Ind. Sup.) 32 N. E. Rep. 1121.

One of the causes assigned for demurrer is that the husband, Peter Myers, was not joined with appellant as plaintiff. He had no interest in the land in question, and was therefore not a necessary party plaintiff. The judgment is reversed, with instructions to overrule the demurrers to

<sup>1</sup> This section provides for resulting trusts where the alienee shall have taken an absolute conveyance in his own name without the consent of the person with whose money the consideration was paid; or where such alienee, in violation of some trust, shall have purchased the land with moneys not his own; or where it shall be made to appear that by agreement, and without any fraudulent intent, the party to whom the conveyance was made, or in whom the title shall vest, was to hold the land or some interest therein in trust for the party paying the purchase money, or some part thereof.

<sup>2</sup> This section provides: "A conveyance or devise of lands to a trustee whose title is nominal only, and who has no power of disposition or management of such lands, is void as to the trustee, and shall be deemed a direct conveyance or devise to the beneficiary."

the several paragraphs of the complaint, and for further proceedings in accordance with this opinion.

(136 Ind. 484)

### THOMPSON v. McCORKLE.<sup>1</sup>

(Supreme Court of Indiana. Sept. 26, 1893.)

JUDGMENTS — DIRECT AND COLLATERAL ATTACK — FRAUD — PARTIES — SERVICE BY PUBLICATION — CONVEYANCE BY MARRIED MAN — TAX SALE — RIGHTS OF WIDOW — LIMITATION OF ACTION.

1. An action to vacate a default judgment on the ground that no jurisdiction was acquired of defendant, service having been only by publication, while defendant was not a nonresident, though the record contained the proper affidavit as to nonresidence, is a direct attack on the judgment when fraud is alleged, but otherwise is collateral.

2. A finding in an action to vacate a judgment that, in the action in which it was rendered service was by publication, based on an affidavit stating that defendant therein was a nonresident, which was not the fact, but his residence was unknown to the plaintiff therein or the person making the affidavit, does not show fraud on the part of plaintiff in such action.

3. A collateral attack on a judgment for want of jurisdiction of a party thereto, which must be shown by facts outside the record, can be made only by one not a party to the judgment.

4. Service by publication addressed to "— M.," further described as wife of J. M., who was then dead, does not make the person attempted to be described a party to the action, and a default judgment rendered thereon is void.

5. A married man conveyed land by deed in which his wife did not join. The land was then sold for taxes. *Held*, that the purchaser at tax sale took it subject to the inchoate right of the wife of the grantor, and that, on the death of her husband, she was entitled to a third interest in the land, free from any liability to refund to the purchaser any part of the taxes paid by him on the land prior to the death of the husband.

6. The statute of limitations begins to run against an action by a woman to recover the interest which she has on the death of her husband in land which he had conveyed in his lifetime, without her joining in the deed, only from the death of the husband.

Appeal from circuit court, Jasper county; P. H. Ward, Judge.

Action by Maria McCorkle against Alfred Thompson to vacate a judgment, and for partition of land. Judgment for plaintiff. Defendant appeals. Reversed.

S. P. Thompson, for appellant. Adams & Carter, for appellee.

DAILEY, J. The appellee, as widow of John McCorkle, who died at Shelbyville, Ind., May 20, 1880, on the 18th day of January, 1890, brought an action in the Jasper circuit court against appellant, alleging, in substance, that her husband, prior to August 23, 1859, owned the N.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  of section 21, township 31 N., range 7 W., containing 80 acres, in said county; that plaintiff is the owner of the undivided one-third of said real estate, and defendant is owner of the undivided two-thirds part thereof; that the same is susceptible of equitable partition between the owners according to their respective rights and interests; that defendant, with the wrong-

ful intent to cheat and defraud plaintiff, on December 3, 1883, filed in the Jasper circuit court a complaint in two paragraphs, in which he falsely alleged that he was the owner in fee of said tract and certain other lands therein described; that, when the same was filed, he knew he was the owner in fee of but two-thirds, and that plaintiff was the owner in fee of the one-third part thereof; that plaintiff was at the time of filing said complaint, and ever since has continued to be, such owner; that said Thompson in his complaint falsely alleged that "the defendants claim some interest in said land, the nature of which is unknown to plaintiff, but plaintiff says that said claim casts a cloud upon his title to said real estate;" that in pursuance of his fraudulent design, and to carry the same into effect, he caused and procured an affidavit to be made by one Austin averring that said action was brought to quiet title to certain land in said county; that defendants were necessary parties thereto, and were nonresidents of the state of Indiana; that on said false affidavit, and pursuant to his fraudulent design, and to carry the same into effect, he caused and procured the clerk of the Jasper circuit court to issue and publish in the Rensselaer Republican, a certain weekly newspaper of general circulation, printed and published in said county, a notice to certain parties, among whom were John McCorkle and — McCorkle, his wife, notifying them that plaintiff had filed his complaint in said court, to quiet his title to, and foreclose a tax lien on, said premises, and that the same would stand for trial on Saturday, January 26, 1884; that afterwards he procured the publisher of said paper to make affidavit of the proper publication of said notice, and caused the same to be filed in the office of the clerk of said court as proof of the pendency of said cause and of the subject-matter thereof, and procured the clerk to indorse the filing thereon; that no other notice was ever issued or given to the defendants, or either of them, in said cause; that no summons was ever issued in said cause, and no notice of the pendency of said suit was ever served upon or given to the plaintiff herein; that she did not, either by person or attorney, enter her appearance to said suit; that she did not waive the service of process upon her in said suit, and did not acknowledge process or the service of process upon her therein, and had no notice or knowledge that such suit had ever been brought or judgment taken in the same until November 6, 1889, and there was no attempt to bring her into court in said suit, except by publication as stated; that afterwards said Thompson, pursuant to his fraudulent design, and to carry out the same, presented to the court said notice and said affidavit of publication as proof of notice to defendants in said suit, and moved the court thereupon to default the defendants in said cause for want of appearance and answer, which motion was sustained, and said defendants were called in the names as set out in said notice, and as such defaulted; that thereupon said Thompson moved the court for judgment against defendants

<sup>1</sup> Motion to modify decision and mandate denied, 26 N. E. 211.



upon such default, which motion was sustained, and judgment was then rendered quieting the title to, and foreclosing his tax lien on, said real estate, and adjudging him to be the owner in fee thereof; that the court also found the notice sufficient to give the court jurisdiction of both the subject-matter and the parties defendant to said suit. Plaintiff further avers that John McCorkle died intestate, at Shelby county, Ind., on May 20, 1886, and that she has resided continuously in said Shelby county for 70 years last past; that at no time during her life has she lived in any state, territory, district, or county other than where she now resides; that her name is Maria McCorkle; and plaintiff further says that, by reason of the fraudulent conduct of defendant, he procured said fraudulent judgment to be rendered; that the court had no jurisdiction of her person to render any judgment against her in said suit to quiet title to said real estate; that said judgment is both fraudulent and void, but is a cloud upon her title to one-third of said real estate; wherefore she asks that said judgment be adjudged void as to her, and set aside and held for naught; that she have partition of said real estate; that she be adjudged the owner in fee of the one-third of the same; that commissioners be appointed to make partition; and that she have all other further and proper relief. To this complaint there was an answer filed in five paragraphs. To the third and fifth a demurrer was sustained. The fourth paragraph of what purported to be the answer was a counterclaim. To this paragraph plaintiff filed an answer in three paragraphs. A demurrer was sustained as to the second of these, and overruled as to the third. A reply to the second paragraph of the answer was filed in three paragraphs. To the first and third of these a demurrer was overruled. The issues as made, and upon which the cause was tried, were upon the complaint, the first, second, and fourth paragraphs of answer, the reply to the second paragraph of the answer, in three paragraphs, and first and third paragraphs of answer to the counterclaim. The court found the facts specially, and stated his conclusions of law thereon. The defendant excepted to each conclusion of law, and thereupon moved for judgment in his favor, which motion was overruled. The plaintiff moved for judgment in her favor, which motion was sustained. The appellant has assigned many errors, being numbered in the record from 1 to 13, inclusive. Some of these have not been discussed by him, and are therefore waived. We will endeavor to consider such questions as were assigned as error, and have been discussed.

The complaint sets forth evidentiary facts, as well as facts which the statute requires shall be pleaded. This was evidently done that plaintiff's cause of action might be tested by demurrer. "Ordinarily, an action for partition does not present the question of title for adjudication, but the pleadings may be so framed as to present that question. Where a plaintiff undertakes to set forth the facts

which constitute his title, he will fail, unless the facts are sufficient to clothe him with the title asserted; and it is the facts sufficiently pleaded which will control, and not the general averments." *Spencer v. McGonagle*, 107 Ind. 412, 413, 8 N. E. Rep. 266; *McPheeters v. Wright*, 110 Ind. 521, 10 N. E. Rep. 634; *City of Logansport v. McConnell*, 121 Ind. 417, 23 N. E. Rep. 264. The complaint before us must be tested by applying the law to the facts specially pleaded, for it is the rule that if, under the law, the defendant's appears to be the better title, or if the plaintiff's title appear not sufficient to entitle her to recover on its own strength, then the complaint should be held bad. The demurrer was for want of facts. The complaint shows that plaintiff resided in Shelby county, Ind., for 70 years continuously, and that the only service as to her was by publication, addressed to—McCorkle, wife of John McCorkle; that the husband had died May 20, 1886. We recognize the rule that, even on constructive service, the question of the jurisdiction of a court of record over the parties to any domestic judgment must in all collateral proceedings, where fraud is not shown, be determined by the record, where the jurisdiction affirmatively appears from the record. In such case it would import absolute credit and verity, and parties could not be heard to impeach it. In such case it will be conclusively presumed that the court acted upon ample evidence, and with due deliberation, before making such statement; and the judgment will be impregnable to any collateral assault by proof aliunde. In *Muncey v. Joest*, 74 Ind. 412, the court say: "There is a clear distinction between cases in which there is no notice whatever and those in which there is a mere defective or irregular notice. The general rule upon the subject, deducible from the authorities, may be thus stated: If there is no notice whatever, and this affirmatively appears upon the face of the proceedings, the judgment will be void, and may be overthrown by a collateral attack. If a court having jurisdiction, and being required to determine all jurisdictional questions, either expressly or impliedly adjudges that notice was given, its decision will repel a collateral attack, unless the record of the court affirmatively shows that no notice was given; and this is so although the record shows a defective or irregular service." The later decisions of this court seem to establish the rule that at an action of this character, where no fraud is alleged, is not a direct attack upon the judgment, and that "any attack upon a judgment for want of jurisdiction in the court to render it, predicated upon a matter dehors the record, is collateral." *Cully v. Shirk*, 131 Ind. 79, 30 N. E. Rep. 882. The complaint in this action assails the complaint on which the judgment was rendered which is sought to be set aside, the notice thereof by publication, and the judgment rendered in said cause also, on the ground that Maria McCorkle is only attempted to be made a party by the following definition or description of herself: "John McCorkle, ——— McCorkle, his

life;" and it appears that all this transpired more than 2½ years after the death of the husband. Would such attempted description or identification of a person, ——— McCorkle, his wife," following a name which applied to no person then in being, constitute notice to Maria McCorkle? The husband being dead when the suit was instituted, with the cessation of life he was placed beyond the jurisdiction of all earthly tribunals, and such proceeding thus far was a nullity. By the death of John McCorkle, appellee could no longer sustain the relation of wife to him. His companion had become his widow, and as against the widow, from the complaint, no suit was ever instituted or prosecuted, and no judgment ever obtained. We think that such complaint and notice could not alone create jurisdiction over the person of Maria McCorkle, so as to bind her by a decree, and that a record containing such indefinite and uncertain description would be void as to her. This court, in *Schissel v. Dickson*, 28 N. E. Rep. 540, say: "A judgment is void if the court rendering it had no jurisdiction of the subject-matter. It is not, however, necessarily void because the court did not have rightful jurisdiction of the person against whom it is rendered. If there has been service of process, although irregular, but which the court adjudges regular and sufficient, the judgment rendered is not void, and although it may be set aside in a direct proceeding for that purpose, it will withstand a collateral attack. \* \* \* One of the questions upon which the court was required to pass was the sufficiency of the affidavit, and whether or not in fact the service by publication on the parties named in the affidavit and notice was sufficient to give the court jurisdiction of their persons. So far as these questions thus decided may be brought in question collaterally, that decision, although erroneous, is conclusive on the parties. It is, however, only parties to judgments and those who are in privity with them who are thus bound." And the court further say "that constructive service addressed to ——— Hilton, without other description or identification, will not suffice to bring into court Cora B. Hilton or Cora B. Dickson, and she is in no manner affected by the decree." This court, in *Clark v. Hillis*, 34 N. E. Rep. 13, held that notice to ——— Clark by publication is not binding upon Helen I. Clark, and she may attack the proceeding collaterally. It is the law that "where the complaint alleged that the defendant was not a resident of the county where he was returned as served by a copy left at his last and usual place of residence, that he never made his home, or even stayed over night at the house where the copy was left, and it is also alleged that he was not at the time within the jurisdiction of the court in which the action was pending, and it is averred that the pretended service and return to summons were procured by the fraud of the attorney of the plaintiff,"—"such charge would be a direct attack on the judgment. The features of nonresidence and fraud are the controlling elements that make it so." *Dobbins v. Mc-*

*Namara*, 118 Ind. 54, 14 N. E. Rep. 887; *Penrose v. McKinzie*, 116 Ind. 85, 18 N. E. Rep. 384; *Cavanaugh v. Smith*, 84 Ind. 380. In *Nietert v. Trentman*, 104 Ind. 390, 4 N. E. Rep. 306, the court held "that in a proceeding under section 99, p. 82, 2 Rev. St. 1876, to set aside a default, and to be relieved from a judgment, the plaintiff may show, as an excuse for not appearing to the action in which he was defaulted, that summons was not in fact served upon him, and that he had no notice of the pendency of the action or of the rendition of the judgment, notwithstanding the fact that the sheriff's return shows service by reading. "One not a party to a judgment has a right to collaterally impeach it wherever in any case it is attempted to be enforced against him to the prejudice of his rights." *McAlpine v. Sweetser*, 76 Ind. 78.

As the complaint in this case alleges residence in the state, no actual notice and fraud in its procurement, it constitutes a direct attack; in other words, it shows that the court acquired no jurisdiction over the person of the appellee, as well as the existence of fraud. There was no motion to separate causes of action, nor was there any demurrer on account of actions improperly joined; and, if the facts stated show that the judgment should be set aside as to the defendant therein, then the complaint was good against the demurrer for want of sufficient facts. If there were two causes of action joined in one paragraph of complaint, misjoinder would not be cause for reversal. Rev. St. 1881, § 341. Tersely stated, if the defendant is not made a party, and is not served with process, then there is no jurisdiction, and without jurisdiction there can be no valid judgment as to her. It would be a mere nullity, and a complaint stating these facts would resist a demurrer. "A void judgment is, in legal effect, no judgment. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars any one. All acts performed under it, and all claims flowing out of it, are void. The parties attempting to enforce it may be responsible as trespassers. The purchaser at a sale by virtue of its authority finds himself without title and without redress. \* \* \* If it be null, no action upon the part of the plaintiff, no inaction upon the part of the defendant, \* \* \* can invest it with any of the elements of power or of vitality." *Freem. Judgm. § 117*. It is considered unjust and unconscionable to allow a cloud to remain upon title where the proceeding has been without notice and opportunity of defense. The conclusion we have reached from the averments of the complaint—that the appellee was not a party to the judgment she seeks to vacate and set aside as a legal wrong—renders it unnecessary for us to determine what the effect of section 609, Rev. St. 1881, would have been had she been a party to the action which she seeks to avoid. No tender of taxes was necessary before the suit. *Schissel v. Dickson*, supra. The complaint states facts sufficient to constitute a cause of action. If the appellant and appellee were tenants in

common at, before, and ever since the pretended judgment was taken, one tenant in possession cannot get title to the premises against his cotenant by allowing the property to be sold for taxes. *Bender v. Stewart*, 75 Ind. 88.

With reference to the ruling of the court in overruling a demurrer to the third paragraph of answer to the appellant's counterclaim, we only need state that appellee owned no part of the land sold for taxes at the time it was sold, and was under no legal obligation to pay them. The most she then had was an inchoate right to the one-third part, which would ripen into a title in the event she survived her husband. When appellant bought the land at tax sale, he got no more than the man had who purchased it from John McCorkle. There would be no pretense that, if Thompson's title depended upon a conveyance to him by McCorkle's grantee, the appellee would not own the interest she asserts, or that she would be liable for taxes accrued prior to the death of her husband. By his death her status was changed, and she became legally bound to pay one-third of the taxes to accrue thereafter during the cotenancy. The counterclaim asks that, if the judgment be set aside, appellee be required to pay him money for taxes assessed and paid by him before she was his tenant in common. Appellant, when he bought the land at tax sale, was bound to know that appellee had not joined in the deed with her husband, and, in the event she survived him, she would inherit the interest now claimed. He took the risk just the same as if he had bought directly from John McCorkle. As he acquired no title against appellee at tax sale for what he paid, he became the legal owner of the land, subject to her inchoate interest, and as such was bound to keep the taxes paid. *Snoddy v. Leavitt*, 105 Ind. 357-362, 5 N. E. Rep. 13; *Wright v. Tichenor*, 104 Ind. 185, 3 N. E. Rep. 553.

Concerning the action of the court in overruling a demurrer to the first paragraph of answer, it is the law that the statute of limitations never begins to run against a person until a cause of action in his favor accrues. There was no cause of action against appellee until the husband died, May 20, 1880. *Wright v. Tichenor*, supra. The same reasoning applies to the assignment of error "that the court erred in overruling a demurrer to the third paragraph of reply to the second paragraph of answer."

We find no error in the rulings upon the pleadings. The eighth assignment of error—"that the court erred in overruling the motion of appellant for judgment in his favor on the special findings"—raises a somewhat different question. These findings, as we construe them, show no breach of duty on the part of the appellant. There does not appear in them a single element of fraud practiced by appellant either on the court or the appellee. The findings that in appellant's action to quiet his title to the land in controversy against the plaintiff, appellee be in, the service was by publication based upon affidavit setting up that she was a non-

resident of the state of Indiana, which was not true in point of fact, she being at the time a resident of Shelbyville, in this state, but the place of her residence was unknown to defendant, and to W. B. Austin, who made the affidavit; that on the 20th of March, 1884, upon proof of publication of notice to her, as a nonresident of the state, she was called, and defaulted, and a decree entered foreclosing a tax lien in favor of said Thompson, and the land sold at sheriff's sale, of which proceedings she had no knowledge; that the decree of the Jasper circuit court foreclosing said lien against her is null and void, because the court had no jurisdiction to enter the same; that it is a cloud upon her title, and should be set aside as to her,—show that appellee was a party to the judgment she seeks to vacate. There is nothing in the finding that tends to show that appellee was not a party to the record. On the contrary, the finding shows she was a party to both the notice and record containing the decree of said court. Had the finding recited the form of what purported to be the notice given and the record thereof, as they really existed, "—— Mr. McCorkle, wife of John McCorkle," it would have been apparent to the court that there was no notice to appellee, and no record to which she was a party, and hence nothing which she was estopped to deny. Having failed to find such facts, and having found that there was a complete record of service as to appellee made in good faith, the record concludes her from asserting the contrary. Where the special facts found show that the assault was purely collateral, it would violate well established rules to allow it to prevail upon matters dehors the record. The conclusions of law from the facts found are erroneous. Being of the opinion that justice will be best subserved by instructions to the court to grant a new trial, rather than to restate conclusions of law, judgment is reversed, with instructions to the court to grant a new trial.

(135 Ind. 185)

#### MICHENER v. BENDEL et al.

(Supreme Court of Indiana. Sept. 27, 1893.)

##### APPEAL—REVERSAL—REVIEW OF EVIDENCE.

1. The reversal of a judgment as to the sole appellant leaves the judgment undisturbed as to parties not appealing.

2. While a finding is conclusive on appeal when there is evidence for and against it, yet the supreme court has the power to decide whether there is a failure of evidence to support a material issue involved.

On rehearing. Overruled.

For former report, see 34 N. E. Rep. 664.

HOWARD, J. In asking for a rehearing of this case, counsel for appellee says that the reversal of the judgment as to the appellant could not have the effect to reverse it as to any party or parties not appealing. We agree with counsel in this. James B. Michener is the sole appellant here, and the reversal as to him leaves the judgment undisturbed as to those not appealing. *Marsh v. Morris*, (decided at last term,) 33 N. E. Rep. 290.

While it is true, as counsel insists, that, where there is evidence for and against the finding of a necessary fact, we will not review it, yet it is our duty in a proper case to decide, as we have done in this case, whether there was a failure of evidence to support a material issue involved. *Butterfield v. Trittippo*, 67 Ind. 338; *Railway Co. v. Wynant*, (decided at this term,) 4 N. E. Rep. 509. The petition for a rehearing is overruled.

(135 Ind. 38)

### FRAZER v. STATE.

Supreme Court of Indiana. Sept. 28, 1893.)

#### CRIMINAL LAW—REMARKS OF PROSECUTING ATTORNEY—BURGLARY—EVIDENCE.

1. In a criminal case, a remark of the prosecuting attorney, in his closing argument, that "not a particle of evidence has come to you from defendant, from his side of the case," is not a comment on defendant's failure to testify, within the prohibition of Rev. St. 1881, § 1798, cl. 4.

2. Evidence that stolen property was found shortly after a burglary on one with whom defendant had frequently associated both before and after the crime is admissible against defendant, in connection with other evidence that defendant was present at the burglary.

3. Evidence as to other burglaries committed on the same night as the one charged in the indictment is admissible, in connection with proof that one of the tracks at each of the houses burglarized corresponded with the tracks made by defendant.

Appeal from circuit court, Huntington county; J. S. Dailey, Judge.

Theodore F. Frazer was convicted of burglary, and appeals. Affirmed.

C. W. Watkins, for appellant. W. A. Branyan, for the State.

COFFEY, J. The appellant was indicted, tried, and convicted in the Huntington circuit court upon a charge of burglary and larceny. He appeals to this court, and assigns as error that the circuit court erred in overruling his motion for a new trial. We will consider the alleged errors of the court in the order in which they are treated by the appellant in his brief.

It appears from the record before us that the appellant, on the trial of the cause, did not testify in his own behalf. During the argument of the cause before the jury, the prosecutor used the following language: "Not a particle of evidence has come to you from the defendant, from his side of the case." It is contended by the appellant that this language was a violation of clause 4, § 1798, Rev. St. 1881, which forbids comment on the fact that a defendant in a criminal case does not testify in his own behalf, but we think the point is not well taken. The statute was not intended to prohibit the prosecutor from arguing that the jury should return a verdict in accordance with the testimony of the state because it was uncontradicted. If the contention of the appellant were sustained, such argument, which is perfectly legitimate, would be cut off. It is true such argument may call to the mind of the jury the fact that the defendant did not testify in his own

behalf, but it cannot be said to be a reference to, nor a comment upon, the fact that he did not so testify.

The burglary and larceny with which the appellant was charged and tried occurred on the night of the 7th of June, 1892. On that night the house of one Gusman was burglarized, and a gold watch and about \$30 in money stolen therefrom. It was the theory of the state that the crime was committed by the appellant, one Manning, and others. In support of this theory, the prosecutor was permitted to prove that, when Manning was arrested, he had in his possession part of the stolen property, and that he fled from the officers, and attempted to avoid arrest. After proof that the appellant and Manning were seen frequently together both before and after the burglary, and that they were together on the evening preceding the night of the burglary, the state was permitted to prove that other burglaries had been committed on the night of the 7th of June, 1892. At the house of Gusman were found certain tracks supposed to be made by the burglars. One of these tracks was imperfect, but, so far as it was plain, it exactly corresponded with a shoe worn by the appellant at the time of his arrest. At the other houses burglarized, the tracks were perfect, and the shoes worn by the appellant exactly fitted one of the tracks. The evidence tended to prove that all these tracks were made on the night of June 7, 1892.

We do not think the court erred in permitting the state to prove that a part of the stolen property was found on Manning at the time of his arrest, and his conduct tending to show that he was one of the thieves. Of course, such proof would not have been admissible for the purpose of proving a conspiracy to commit the crime charged, because it occurred after the crime was committed; but we think, when taken in connection with the appellant's association with Manning both before and after the crime, that it was a circumstance proper to be considered by the jury in determining the guilt of the appellant. His association with one of the thieves, together with proof tending to show that he was present at the house of Gusman, tended strongly, we think, to prove that he was one of the burglars.

Nor do we think the court erred in permitting the state to prove that burglaries other than the one charged in the indictment were committed on the same night, in connection with the proof that one of the tracks at each of the houses burglarized corresponded with the track made by the appellant. It tended to prove not only that the appellant on that night was out on a mission of burglary, but also that he was present at the time Gusman's house was burglarized, and thus tended to establish that he had participated in that crime. "A series of mutually dependent crimes may be shown where they tend to prove that they were committed under a system which becomes relevant to the inquiry." "It is always proper to introduce evidence of identity, though it may involve a collateral crime." Gillett, Crim.

Law, 653; Abb. Tr. Brief, 349; Rosc. Crim. Ev. (7th Ed.) 90. We think the evidence in the cause tended strongly to show the guilt of the appellant of the charge preferred against him. We cannot reverse the judgment on the evidence. Judgment affirmed.

DAILEY, J., took no part in the decision of this cause.

(135 Ind. 54)

**PORTLAND NATURAL GAS & OIL CO.  
v. STATE ex rel. KEEN.**

(Supreme Court of Indiana. Sept. 26, 1893.)  
NATURAL GAS COMPANIES—DUTY TO FURNISH GAS  
—MANDAMUS.

1. A natural gas company, occupying the streets of a town or city with its mains, owes to the owners and occupants of houses abutting on such streets the duty of furnishing them with such gas as they may require, where they make the necessary arrangements to receive it, and comply with the regulations of the company; and, on its refusal or neglect to perform such duty, it may be compelled to do so by writ of mandamus.

2. To entitle the owner of such a house to the right of being supplied with natural gas, it is not necessary that he should own an interest in the company, different from that held by other citizens.

3. In mandamus to compel a natural gas company to furnish relator's house with gas, an allegation in the answer that relator is already being provided with natural gas by another company is not sufficient to show that it will be necessary for defendant, in order to supply relator's house, to violate Acts 1891, p. 332, § 1, which makes it unlawful for any one to change, alter, or extend any service or other pipe or attachment owned by a gas company without the latter's consent.

Appeal from circuit court, Jay county;  
D. D. Heller, Judge.

Mandamus by the state of Indiana ex rel. William W. Keen against the Portland Natural Gas & Oil Company to compel defendant to supply relator's home with natural gas. From a judgment in relator's favor, defendant appeals. Affirmed.

J. W. Headington, J. F. La Follette, and D. T. Taylor, for appellant. John M. Smith, for appellee.

COFFEY, J. This was an action by the appellee against the appellant to compel the latter, by mandamus, to supply the residence of the relator with natural gas to be used as lights and fuel. It appears from the complaint that the appellant is a corporation duly organized under the laws of this state for the purpose, among others, of supplying to those within its reach natural gas to be used for lights and fuel. By permission of the common council, it has laid its pipes for that purpose in the streets and alleys of the city of Portland, in this state, and has pipes laid in Walnut street, of that city. The relator resides on Walnut street, on the line of one of the appellant's main pipes. His house is properly and safely plumbed for the purpose of obtaining natural gas. In May, 1890, the relator demanded of the appellant gas service, and tendered to it the usual and proper charges for such service; but it refused, by its officers, to

furnish the gas demanded, whereupon this suit was brought to compel it to furnish the gas desired by the relator. The court overruled a demurrer to the complaint. It also sustained a demurrer to the second, third, and fourth paragraphs of the answer filed by the appellant. Over a motion for a new trial, the court awarded a peremptory writ against the appellant, requiring it to furnish the relator with gas, as prayed in the complaint. These several rulings are assigned as error. Very many of the objections urged against the complaint go to the question of its uncertainty, and are technical in character. It has been so often decided that a demurrer is not the remedy for uncertainty that we need not cite authority upon the subject.

The vital question in the case relates to the right of the relator to compel the appellant, by mandamus, to supply his dwelling house with natural gas for lights and fuel. There are cases which hold that in the absence of a contract, express or implied, and where the charter of the company contains no provision upon the subject, a gas company is under no more obligation to continue to supply its customers than the vendor of other merchandise,—among which is the case of *Com. v. Lowell Gaslight Co.*, 12 Allen, 75. But we think that the better reason, as well as the weight of authority, is against this holding. Mr. Beach, in his work on *Private Corporations*, (volume 2, § 835.) says: "Gas companies, being engaged in a business of a public character, are charged with the performance of public duties. Their use of the streets, whose fee is held by the municipal corporation in trust for the benefit of the public, has been likened to the exercise of the power of eminent domain. Accordingly, a gas company is bound to supply gas to premises with which its pipes are connected." Mr. Cook, in his work on *Stock and Stockholders and Corporation Law*, (section 674,) says: "Gas companies, also, are somewhat public in their nature, and owe a duty to supply gas to all." To the same effect are the following adjudicated cases: *State v. Columbus Gaslight & Coke Co.*, 34 Ohio St. 572; *New Orleans Gaslight Co. v. Louisiana Light & Heat Producing, etc., Co.*, 115 U. S. 650, 6 Sup. Ct. Rep. 252; *People v. Manhattan Gaslight Co.*, 45 Barb. 136; *Gibbs v. Gas Co.*, 130 U. S. 396, 9 Sup. Ct. Rep. 553; *Williams v. Gas Co.*, 52 Mich. 499, 18 N. W. Rep. 236; *Gaslight Co. v. Richardson*, 63 Barb. 437. Our general assembly, recognizing the fact that natural gas companies were, in a sense, public corporations, conferred upon them the right of eminent domain by an act approved February 20, 1889, (Acts 1889, p. 22.) It has often been held that mandamus is the proper proceeding by which to compel a gas company to furnish gas to those entitled to receive it. 8 Amer. & Eng. Enc. Law, pp. 1284-1289; *People v. Manhattan Gaslight Co.*, supra; *Williams v. Gas Co.*, supra; *Gaslight Co. v. Richardson*, supra. In view of these authorities, we are constrained to hold that a natural gas company, occupying the streets of a town or city with its

nains, owes it as a duty to furnish those who own or occupy the houses abutting on such street, where such owners or occupiers make the necessary arrangements to receive it, and comply with the reasonable regulations of such company, such gas as they may require, and that, where it refuses or neglects to perform such duty, it may be compelled to do so by writ of mandamus. As to the sufficiency of an answer averring that the company had not a sufficient supply to furnish all those demanding gas, we intimate no opinion, as no such defense was interposed in this case. It follows that the complaint in this case states a cause of action against the appellant, and that the court did not err in overruling the demurrer thereto.

The second paragraph of the answer avers that, at the time of the demand for gas alleged in the complaint, the relator was being furnished with natural gas by the Citizens' Natural Gas & Oil-Mining Company of Portland, Ind., and that said company has ever since continued to furnish him with gas for fuel and lights, and is ready and willing to continue doing so, so long as he may pay for the same. The third paragraph avers that the relator has no interest in the appellant, except what he may have and hold, under the laws of the state, in common with all other citizens of the city of Portland, as shown by the allegations in the complaint. The fourth paragraph avers that the demand which the relator alleges he made on the appellant to furnish him natural gas is couched in general terms merely, and is not express and distinct, and does not clearly designate the precise thing which is required, but is vague, indefinite, and uncertain, as shown by the facts alleged in the complaint.

It is contended by the appellant, in support of the second paragraph of its answer, that, in view of the facts therein averred, it could not comply with the demand of the relator without a violation of the provisions of an act of the general assembly approved March 9, 1891, (Acts 1891, p. 381.)<sup>1</sup> It would seem to be a sufficient answer to this contention to say that it does not appear by any averment in this answer that it was necessary to change, extend, or alter any service or other pipe or attachment belonging to the Citizens' Natural Gas & Oil-Mining Company in order to supply the relator with the gas he demanded. For anything appearing from this answer, the gas required by relator from the appellant could have been furnished without interfering with that company. But, if it appeared otherwise, we would not be disposed to place a construction upon that act which would

give a gas company furnishing unsatisfactory service, or charging an unsatisfactory price for its service, the perpetual right to furnish gas to a particular building because it had been permitted to attach its appliances for the purpose of furnishing gas. In our opinion, the court did not err in sustaining a demurrer to this answer.

The third paragraph of the answer was wholly insufficient to bar the relator's cause of action. It was not necessary that he should own an interest in the appellant different from that held by the other citizens of the city of Portland. It was sufficient that the appellant owed him a duty, in common with other citizens, to furnish him gas, which duty it had refused to perform.

The fourth paragraph of the answer states no issuable fact, and is clearly bad.

The evidence in the cause tends to support the finding of the circuit court, and we cannot, for that reason, disturb the finding on the evidence. There is no error in the record for which the judgment of the circuit court should be reversed. Judgment affirmed.

(136 Ind. 331)

#### MARTIN v. McCULLOUGH et al.<sup>1</sup>

(Supreme Court of Indiana. Sept. 27, 1893.)

##### GIFTS INTER VIVOS—DELIVERY.

A father, desirous of making an antemortem settlement of all his notes and bonds on his children, selected one of the sons, to whom he delivered the property, with direction to first equalize the children for advancements made, and then divide the remainder equally among them. All the notes and bonds regarded as solvent were accordingly distributed among the children during the father's lifetime, and the balance was by mutual consent of the children left in the son's hands for collection and subsequent distribution. *Held* that, by thus exercising dominion over the property, the children not only signified an acceptance of the gift, but constituted the son as their agent for the collection and distribution of the balance, thus completing the delivery to them of the undistributed portion, and that, therefore, the death of the father before final distribution did not defeat the gift even as to the undistributed portion, nor revoke the son's authority to proceed with the collection and distribution.

Appeal from circuit court, Harrison county; William T. Zenor, Judge.

Action by James S. McCullough, administrator, etc., of Edmund W. Martin, deceased, and others, against George Martin, to recover certain personal property alleged to be assets of the estate. From a judgment in plaintiffs' favor, defendant appeals. Reversed.

Alsbaugh & Lawler, Cook & Ridley, and C. L. Jewett, for appellant. Zaring & Hottell, Hostetter & Tracewell, and Mitchell & Mitchell, for appellees.

HACKNEY, J. The special finding in this case shows that Edmund W. Martin, who was 89 years of age, and confined to his bed from paralysis, had six adult children and a second wife, by whom he had no children. That he had accumulated a large sum, which he had invested in notes, bonds, mortgages, and other securities,

<sup>1</sup> Rehearing denied.

<sup>1</sup>This statute makes it unlawful for any person, in any manner whatever, to change, extend, or alter, or cause to be changed, extended, or altered, any service or other pipe, or attachment of any kind, connecting, or through which natural or artificial gas is furnished from, the gas mains or pipes of any person, company, or corporation, without first procuring from said person, company, or corporation written permission to make such change, extension, or alteration.

and that he had also real and personal property of considerable value. That his children, excepting the son Amos, who resided in Illinois, lived near him, and all maintained for him and for each other the most friendly feeling. To his children, excepting his daughter Polly, who resided with him, he had made advancements in various sums, and it required \$7,113 to equalize them, including said daughter Polly. In the fall of 1889, he concluded to make an ante-mortem settlement upon his children of a portion of his estate, including all of his notes, bonds, securities, and surplus cash, of which fact he advised his sons George, Amos, and Silas, and his daughter Elizabeth May, and directed that his children be first made equal in their advancements, and that the balance be divided equally among them, and directing that some one of them be selected to take charge of and care for the distribution to which Polly would be entitled, she then being of unsound mind. "That, agreeable to this intention and expressed wish, he selected as an agent, trustee, and medium through which to carry out and effectuate this arrangement his son George," and caused this fact to be communicated to him. Pursuant to his father's said desires, and about the 1st of February, 1890, George visited his father, who explained his purposes and desires as aforesaid, and "authorized and directed George to take charge of the notes, bonds, and securities, and to first equalize the children, and then divide and distribute the remainder equally among the children." On the 6th and 7th days of February, 1890, George made a list of the notes, bonds, and securities of his father, at his father's house, and in the presence of his father and other members of the family, and took and assumed charge and control of said notes, bonds, and securities, with the consent and for the purpose of carrying out the said desire of his father. On the 12th day of May, 1890, and pursuant to the said direction of his father, George called together all of said children, excepting the daughter Polly, and by mutual agreement George was chosen to act in behalf of Polly, and thereupon an accounting was had, "and with said notes and bonds and the proceeds of such as had in the mean time been paid in to said George they did equalize said children on the basis of the highest amount received as advancement by such children," thereby distributing \$7,113. In May or June and in December, 1890, the children made further distributions, consisting of the remaining notes and bonds that were regarded as solvent, the amount not appearing, "and by mutual agreement left the remaining notes and securities in the hands of George Martin, to collect and attend to, and be thereafter divided, or the proceeds thereof, as they might prove to be solvent and collectible." That the several amounts distributed aggregated \$22,019.59, and the face value of the notes and securities so remaining in the hands of George Martin was \$4,718.56, but that of the sum so distributed \$5,000 was distributed after November, 1890, the date of the death of said Edmund W. Martin, and be-

ing \$1,000 each to Polly, Sallie, Elizabeth, Amos, and George. It is further found that George received the notes, bonds, and securities from his father "in trust, and as his agent, to divide and distribute among the children, including himself, equally. That at the time of the delivery thereof the said Edmund W. Martin intended to transfer the possession thereof to his son George as his agent, and in trust as aforesaid, \* \* \* and George now holds and claims the remainder thereof as his own and as trustee for his brothers and sisters." In December, 1890, George was appointed guardian for his sister Polly, and is charged with the amount of her proportion of the distributions so found. A demand was made before this suit for the return to the administrator of Edmund W. Martin's estate of all of the notes, bonds, and securities so received by George Martin from his father.

Upon the facts so stated the court found as a conclusion of law (1) that the distributions made by the appellant before the death of Edmund W. Martin were valid, and passed the cash and securities to the children; (2) that of the \$5,000 distributed after the death of his father, George was liable for \$3,952.25, the remaining \$1,047.75 having been a note transferred to and chargeable against the guardianship of said Polly; (3) that said \$4,718.56 of notes in the hands of said George from said last distribution belong to the assets of said estate; (4) that said George, as guardian of Polly Martin, should deliver to the appellee said note of \$1,047.75 so distributed after the death of said Edmund. These findings were made upon a complaint by the appellees against the appellant and George (rim, but, as the findings were in favor of Crim, we have omitted such of them as relate to his interests. The findings are manifestly upon the first paragraph of complaint, which avers a wrongful taking of said notes, bonds, and securities from the possession of the plaintiff's decedent, and from his premises after his death, and an appropriation and conversion thereof, and a demand therefor by the plaintiff. The assignment of errors is upon the overruling of a demurrer to each of the two paragraphs of complaint, and upon the conclusions of law stated by the court upon the findings of fact.

The disagreement between the parties in this court arises upon the value and effect of the facts specially found. It is conceded that the gift, if complete, was a gift *inter vivos*, and not *causa mortis*. The elements constituting such a gift furnish no dispute, but the differences arise upon the conclusion of the court that the appellant was an agent for the decedent, having in his possession for delivery the subject of the gift, not having completed his agency at the death of his principal, and that such death operated as a revocation of the agency. The theory of this conclusion is supported by the appellees, while the appellant insists that the facts found establish a completed gift, not only by the creation of a trustee, and by a delivery of the subject of the gift to such trustee, but by the loss of dominion over it by the donor, and the assumption of



dominion over it by the donees. We think it manifest from the facts stated, omitting mere conclusions, that the decedent not only desired to do so, but that the action taken by him was for the purpose of then making an ante-mortem settlement of all notes, bonds, etc., upon his children. He directed the manner in which this object should be accomplished, and selected the person through whom it should be effectuated. The person so selected was one of the donees. The notes, bonds, etc., were actually delivered into the custody of this donee, and this without condition as to time, place, or event upon which the gift should become effective. By the agreement of the donor and of the donees, except Polly, George was to represent her, not only in the settlement, but in receiving, holding, and caring for her distributive interest in the subject of the gift. He thereby not only became vested with his own proportion of the notes and bonds, and entitled to exercise full dominion over the same, but became the exclusive custodian, and held the exclusive dominion, over the distributive interest of said Polly. On the 12th day of May, 1890, and before the death of the donor, which occurred in November of that year, the donees came together, and exercised dominion over the notes and bonds by distributing to the several donees numbers of them; and again in May or in June of that year they exercised dominion over said notes and bonds by the further distribution of all of said notes and bonds that were regarded as solvent, "and by mutual agreement left the remaining notes and securities in the hands of George Martin to collect and attend to, and be thereafter divided, or the proceeds thereof, as they might prove to be solvent and collectible." By this exercise of dominion the donees not only signified an acceptance of the gift, but they so far became possessed of the subject of the gift as not only to hold in their own right and possession a large proportion thereof, but to constitute said George their trustee to hold, collect, and distribute any further sums which might thereafter be realized from said notes and securities. This act on the part of the donees was as effective in completing the delivery to them of the notes and securities as if they had constituted a stranger their representative, and George had made a physical delivery of them to such stranger. The \$5,000 distribution in December, 1890, consisting of notes and cash, was long after the agreement quoted as above from the special finding, and after the said several acts of dominion over the notes and securities so exercised by the donees before the donor's death. In this view of the findings it is immaterial whether the appellant was chosen by the donor as an agent or a trustee, as nothing remained for him to do in executing his office, when the father died, which such death could revoke. The mere conclusion of the court, as a finding of fact, that George Martin was the agent of the donor for the purpose of executing his gift, is not warranted, and the conclusion of law evidently drawn from such finding is without support. The facts very clearly

show that the donor parted with all dominion over the notes and securities to George, imparting to George an absolute and unconditional interest in them in his own behalf and as trustee for Polly. The only restraint upon the interests of the several donees was that George should take possession of the securities, and that the donees should own them in equal proportions after being made equal in their advancements from the donor. No word is found to have been uttered by the donor retaining to himself an interest in, possession of, or dominion over the securities; on the contrary, the intention is apparent that the ownership was to pass to the children at once, and that George was but their trustee to hold the securities for division on the basis directed by the father. After the custody passed to George, the donor exercised no dominion over any portion of the securities, and sought to recall no interest in them. We do not deny the rule contended for, that an unexecuted gift is revocable by the death of the donor, as held in *Smith v. Ferguson*, 90 Ind. 229, and other cases. Nor do we ignore the rule that a mere agent of the donor, holding the naked possession only to execute the direction of the donor, cannot defeat such revocation by acts performed after the donor's death. But our holding is that, where one "clearly and intelligently manifests an intention to make a present gift of personal property to another, and in consummation of his intention makes such a delivery to a third person for the use of the intended donee as he is then capable of making, considering the character and situation of the property, the person to whom delivery is thus made will be presumed, in the absence of countervailing circumstances, to take the property as trustee of the intended donee, and not merely as the agent of the donor. *Shackleford v. Brown*, 89 Mo. 546, 1 S. W. Rep. 390; *Michener v. Dale*, 23 Pa. St. 59; *Sessons v. Moseley*, 4 Cush. 87; *Devol v. Dye*, 128 Ind. 321, 24 N. E. Rep. 246. And we maintain that when it appears, in addition to these circumstances, that the person to whom such delivery is made is one of the immediate beneficiaries, and receives the deposit, coupled with an interest, there can be no reasonable doubt that this possession is that of a trustee for the donees. This conclusion would defeat the contention of the appellees, even if we were in error in assuming that the gift was completed by a delivery to the donees in the donor's lifetime by the exercise of dominion over the subject of the gift by the donees in the manner found, but of the correctness of such assumption we have no doubt. As further sustaining our conclusions, we cite *Wyble v. McPheters*, 52 Ind. 393, a case in its essential features much like the present; also, *Gannon Theological Seminary v. Robbins*, 128 Ind. 85, 27 N. E. Rep. 341; *Haxton v. McClaren*, 132 Ind. 235, 31 N. E. Rep. 48; *Miller v. Billingsly*, 41 Ind. 489. The judgment of the lower court is reversed, with instructions to restate its conclusions of law, and render judgment for the appellant in accordance with this opinion.

(135 Ind. 46)

**FULLER v. COX.**

(Supreme Court of Indiana. Sept. 28, 1893.)

**TITLE OF STATUTES—PLEADING—EXHIBITS—AIDED BY FINDINGS—ACTS.**

1. Act Feb. 28, 1883, entitled "An act supplemental to an act entitled 'An act fixing certain fees to be taxed in the offices therein named,' \* \* \* approved March 31, 1879, and to all acts amendatory thereof," is not unconstitutional as to sections of the act of 1879, which had been amended before the passage of the act of 1883, since the amended sections took the place of the originals.

2. In an action to recover money paid on a judgment for costs embracing alleged illegal fees, the payment of the money, and not the judgment, is the foundation of the action; and the court cannot, for the purpose of supplying defects in the complaint, look to exhibits filed with it, purporting to be transcripts of the fees taxed, with separate columns showing what fees are legal and what are illegal.

3. Where defendant does not stand on his demurrer to the complaint, but joins plaintiff in submitting the cause to the court for trial on its merits, and the court makes full and explicit findings, and renders judgment thereon, the pleading demurred to will be cured by the findings, unless there is a total failure to allege some fact essential to a cause of action, or at least a failure to allege facts from which such necessary facts may be inferred.

4. An action against a clerk of court, under Act Feb. 28, 1883, for the recovery of fees overcharged and damages therefor, is not an action growing out of contract, within the meaning of the statute authorizing the taxation of costs against plaintiff in an action on contract where he recovers less than \$50.

Appeal from circuit court, Monroe county; G. W. Grubbs, Judge.

Action by Willis G. Cox against Enoch Fuller for the recovery of alleged illegal fees taxed by defendant as clerk of the circuit court. From a judgment in plaintiff's favor, defendant appeals. Affirmed.

Duncan & Bateman, for appellant. Edwin Corr, for appellee.

HOWARD, J. This action was brought by the appellee to recover certain alleged illegal fees taxed and collected by appellant as clerk of the Monroe circuit court. There was a trial by the court, and a finding and judgment in favor of the appellee. The principal question discussed by counsel relates to the sufficiency of the complaint. The action was brought under the provisions of "An act supplemental to an act entitled 'An act fixing certain fees to be taxed in the offices and the salaries of officers therein named,' \* \* \* approved March 31, 1879, and to all acts amendatory thereof;" approved February 28, 1883. Elliott, Supp. p. 630. It is argued by appellant that this act is unconstitutional in so far as it is attempted to apply its provisions to clerks of the circuit courts, for the reason that the act of March 31, 1879, to which this act is supplemental, was itself by the fee and salary act of April 16, 1881, amended as to section 16, which fixes the fees of clerks of the circuit courts, and consequently that, so far as concerns such clerks, the act of 1879 no longer exists, and the act of 1883, purporting to be supplemental to an act which had ceased to exist, is void. This reasoning is clearly

fallacious. Sections 16, 20, and 28 of the act of 1879 were amended by the act of 1881, and the amended sections took the place of the originals. In addition, the act of 1883 purports to be supplemental not only to the act of 1879, but "to all acts amendatory thereof," which plainly includes the act of 1881.

Appellant contends further, that the complaint is fatally defective, inasmuch as it does not aver facts sufficient to constitute a cause of action without resorting to the exhibits or bills of particulars filed in aid thereof. The so-called "exhibits" filed with the complaint purport to be transcripts of the fees taxed, with separate columns, showing what fees are legal and what are illegal. This action is, in effect, to recover money paid on a judgment for costs, embracing these alleged illegal fees. It has been frequently decided that in an action to recover money paid on a judgment a transcript of the judgment is not a necessary or proper exhibit with the complaint, since the payment of the money, and not the judgment, is the foundation of the action. We cannot, therefore, look to the exhibits filed in this case to supply any defect that may appear in the complaint. *Holcroft v. Halbert*, 16 Ind. 256; *Lytle v. Lytle*, 37 Ind. 291; *Wilson v. Vance*, 55 Ind. 584; *Dumbould v. Rowley*, 113 Ind. 353, 15 N. E. Rep. 463; *Armstrong v. Bank*, 130 Ind. 508, 30 N. E. Rep. 695. Appellant, however, did not stand on his demurrer to the complaint, but joined with appellee in submitting the cause to the court for trial upon its merits, and the court made a full and explicit finding and rendered judgment thereon. In such a case the pleading demurred to will be cured by the finding, unless there is a total failure to allege some fact essential to the cause of action, or, at least, a failure to allege facts from which such necessary facts may be inferred. *Jenkins v. Rice*, 84 Ind. 342; *Puett v. Beard*, 86 Ind. 104; *Martin v. Holland*, 87 Ind. 105; *Clegg v. Waterbury*, 88 Ind. 21; *Jones v. White*, 90 Ind. 255; *Boyd v. Caldwell*, 95 Ind. 336; *Eberhart v. Reister*, 96 Ind. 478; *Jackson v. Weaver*, 98 Ind. 307; *Hedrick v. Osborne*, 99 Ind. 143; *Hyneman v. Roberts*, 118 Ind. 187, 20 N. E. Rep. 656; *Linder v. Smith*, 131 Ind. 147, 30 N. E. Rep. 1073; *Taylor v. Hearn*, 131 Ind. 537, 31 N. E. Rep. 201. The complaint in this case was drawn under section 8 of the act of 1883, which provides that if any public officer of the state shall obtain any fee denied him by the act the person from whom he received such money shall have his right of civil action for the recovery of the same, and shall also recover damages, not less than \$10 nor more than \$30, but such suit shall be preceded by demand. We think that the complaint substantially complies with the statute, and that, although subject to criticism by reason of vagueness and uncertainty in some respects, it is nevertheless to be held good after the finding. A motion to make more specific would perhaps have been proper for the purpose of reaching the defect complained of, and if the complaint might have been amended on such motion it will on appeal be considered as so amended. Sufficient facts

are stated in the complaint to render the judgment thereon a complete bar to any other suit for the same cause of action, and this is all that is necessary in such a case. *Shappendoela v. Spencer*, 73 Ind. 128; *City of Huntington v. Mendenhall*, Id. 460; *Sheeks v. Erwin*, 180 Ind. 81, 29 N. E. Rep. 11; *Work*, Pr. § 493.

There was a motion to tax the costs of this action against the appellee, for the reason that the amount of the recovery was less than \$50, being \$28.45 for illegal fees, and \$10 as damages under the statute; and the overruling of the motion is assigned as error. We think the ruling of the court was correct. This was not a suit growing out of contract, but one authorized by special statute for the recovery of fees overcharged, and damages therefor. Appellant relies upon *Thompson v. Doty*, 72 Ind. 336, and *Thompson v. Jacobs*, 74 Ind. 598; but the act of 1883, upon which this action is based, renders those cases inapplicable to the case at bar. The judgment is affirmed.

(8 Ind. App. 179)

**SMITH v. DOWNEY et al.<sup>1</sup>**

(Appellate Court of Indiana. Sept. 19, 1893.)

**PLEA OF RES JUDICATA—STOCK OF FOREIGN CORPORATION—LIABILITY TO GARNISHMENT.**

1. In replevin for a certificate of stock in a foreign corporation, defendant claimed under an attachment against the supposed owner of the stock, who was a nonresident, and served by publication. The answer alleged that one H., who had possession of the certificate, and such corporation, were garnished, and H. produced the certificate; that it was ordered to be sold to satisfy defendant's judgment; that, on failure of defendant in such action and of such corporation to answer, they were called in open court, and made default; that such defendant "at one time, by counsel, appeared in said suit;" and that plaintiffs "were represented by counsel," who "defended said suit as to the attachment and garnishment proceedings for and on behalf of" plaintiffs, "and with their knowledge and by their authority, for the purpose of protecting the said certificate and stock from being held by said attachment proceedings as the property" of defendant therein. *Held*, that the answer showed that no defense was made or attempted by or in the name of defendant in the attachment suit, or by plaintiffs herein, and was insufficient as a plea of res judicata, even if it would constitute a bar if such defense had been made.

2. The stock of a nonresident in a foreign corporation, held in trust in this state, cannot be garnished in an action in this state.

Appeal from superior court, Marion county; D. W. Comstock, Judge.

Action of replevin by Mary J. Downey and others against Julia B. Smith to recover possession of a certain certificate of stock in the Snow Storm Mining & Milling Company, of Durango, Colo. From a judgment for plaintiffs, defendant appeals. Affirmed.

A. C. Harris, for appellant. Ayres & Jones, for appellees.

DAVIS, J. In the court below, in an action of replevin, appellee recovered judgment against appellant for the possession of "a certain certificate of stock issued by the Snow Storm Mining & Milling Com-

pany, of Durango, Colo., an incorporated company, existing in and created under the laws of the state of Colorado, and doing business therein, the said certificate consisting of 110,000 shares of said stock." The principal question presented for our consideration on this appeal arises on the ruling of the court below in sustaining a demurrer to appellant's answer. The material facts alleged in the answer are that appellant, in 1887, instituted an action in the Marion superior court against James E. Downey to recover damages for breach of covenants in a deed of warranty for conveyance of real estate; that said Downey was a nonresident of the state, and due notice was given him of the pendency of the action by publication, as required by statute; that an affidavit in attachment against Downey, and an affidavit in garnishment against Theodore P. Haughey, a citizen of Marion county, Ind., were duly filed, alleging that Haughey had in his possession, and under his agency and control, property, credits, and effects of said James E. Downey, which could not be reached by a writ of execution, and that proper writs of attachment and garnishment were issued, and said Haughey was duly served as such garnishee defendant, and that said corporation was also duly served with a writ of garnishment, issued on proper affidavit, charging that said company had property, rights, and credits of said James E. Downey which could not be reached by execution; that said Haughey afterwards appeared and filed his answer in said cause, admitting that he had at the time of said service the said property of said Downey, hereinbefore described, in his possession. It is also alleged in said answer that said corporation had its office and place of business and its books and papers in Indianapolis, in said county, and that its officers and directors were citizens of, and resided in, said county of Marion; that, on failure of said James E. Downey and said company to answer, they were each duly called in open court, and made default, and that the cause, being at issue as to Haughey, was submitted to the court for trial on the 5th day of June, 1888, on said answer of Haughey and the default of the other defendants, and resulted in judgment in favor of appellant against James E. Downey for \$5,950, also sustaining the attachment proceedings, and ordering the sale of the shares of stock evidenced by said certificate. It is also averred in said answer, in general terms, that said James E. Downey "at one time, by counsel, appeared in said suit," but when, how, or for what purpose he so appeared is not stated; and also it is in like manner alleged that appellees were represented in said suit by counsel, who defended said suit as to the attachment and garnishment proceedings for the purpose of protecting said certificates and stock from being held by said attachment proceedings as the property of James E. Downey, but when, how, or through what issue such defense was made or attempted is not stated. The answer of Haughey was an admission that he held the certificates of stock now in controversy as the prop-

<sup>1</sup> Rehearing denied, 35 N. E. 568.

erty of James E. Downey, and the other defendants made default.

It is earnestly insisted by counsel for appellant that this answer is good as a plea of *res adjudicata*. In the first place, notwithstanding the unsatisfactory character of the averments in relation to the connection of appellees with the former suit, and the apparent inconsistencies between such averments and the other facts which appear in the answer, it might be conceded, if it appeared that any answer had been filed or defense made by or in the name of James E. Downey, that appellee would be bound by the result as fully as said Downey might be. *Roby v. Eggers*, 130 Ind. 415, 29 N. E. Rep. 365. Yet the difficulty remains, so far as shown in the answer, that no defense was made or attempted by, or in the name of, Downey or any other defendant to the action. The doctrine of *res adjudicata*, as to persons who are not parties to the record, can only arise by virtue of some issue joined or contest made in the name of another, and it logically follows that, when there is no such issue joined, there can be no former adjudication. For the same reasons the answer cannot be sustained on the theory that it shows there is a prior action pending between the same parties. The appellees cannot be regarded, under the facts stated therein, as attachment defendants, under section 1266, Rev. St. 1881. If appellees had been joined as defendants in the former action, or if they had appeared therein by counsel, to sustain or contest any issue joined between the parties, a different question would be presented. The facts disclosed in the answer, however, clearly show there was no such issue tendered or contest made. The statement that James E. Downey "also at one time, by counsel, appeared in said suit," should not be construed as an averment that he appeared to the attachment and garnishment proceedings; but, if such construction was given, it could not in any event be so extended as to hold that an answer had been filed or issue joined by him as to the attachment proceedings. For aught that is shown, he may have appeared on the occasion referred to for the purpose of ascertaining the amount of the claim, or in order to be heard, notwithstanding the default, on the question of the measure of damages. The general allegations that appellees "in said suit were represented by counsel," and that such counsel "defended said suit as to the attachment and garnishment proceedings for and on behalf of the plaintiffs (appellees) in this action, and with their knowledge and by their authority, for the purpose of protecting the said certificate and stock from being held by said attachment proceedings as the property of said James E. Downey," and "because their interests were represented and the litigation controlled by them for the purpose aforesaid," cannot overcome the affirmative showing that no issue was joined as to the attachment proceedings, and that no answer was filed therein, (except the admission of Haughey, as garnishee defendant, that he held the certificate of stock for, and as the property of, James E.

Downey,) and that there was no defense or contest in the case, and that there was no appearance to attachment and garnishment proceedings except by Haughey, and that judgment was rendered as to other defendants by default. If issue had been joined or defense made either by or in the name of Downey, the question would arise whether such appearance, defense, and judgment would constitute a former adjudication in the event it should be determined that the court had no jurisdiction over the thing in controversy. *Brown*, Jur. § 10.

The vital question is, can the stock of a nonresident in a foreign corporation, created and existing by virtue of the law of another state, be garnished in an action in a court in this state, where the certificate of stock is held here in trust? On investigation, we find the great weight of authority is against the proposition. Mr. Cook, in his excellent work, says: "Shares of stock in a corporation are personal property, whose location is in the state where the corporation is created. It is true that, for the purpose of taxation and some other similar purposes, stock follows the domicile of the owner; but, considered as property separated from its owner, stock is in existence only in the state of the corporation. All attachment statutes provide for the attachment of a nonresident debtor's property in the state, and generally, under such statutes, the stock owned by a nonresident in a corporation created by the state wherein the suit is brought may be attached, and jurisdiction be thereby acquired to the extent of the value of the stock attached. But under no circumstances can an attachment be levied on a defendant's shares of stock in an action commenced outside of the state wherein the corporation is incorporated. For purposes of attachment, stock is located where the corporation is incorporated, and nowhere else. The shares owned by a nonresident defendant in the stock of a foreign corporation cannot be reached and levied upon by virtue of an attachment, although officers of the corporation are within the state, engaged in carrying on the corporate business. Nor can such an attachment be levied although the foreign corporation has a branch registry office in the state where the attachment is levied, and although the certificates of stock are also in such state. Certificates of stock are not the stock itself; they are but evidence of the stock, and the stock itself cannot be attached by a levy of the attachment on the certificate. As was well said by the supreme court of Pennsylvania, stock cannot be attached by attaching the certificate any more than lands situated in another state can be attached by an attachment in Pennsylvania levied on title deeds to such land." *Cook, Stock, Stockh. & Corp. Law*, § 485. See, also, *Plimpton v. Bigelow*, 33 N. Y. 592; *Christmas v. Biddle*, 13 Pa. St. 223; *Winslow v. Fletcher*, (Conn.) 4 Atl. Rep. 250; *Banking Co. v. Smith*, (Mo. Sup.) 20 S. W. Rep. 690; *Freem. Judgm.* § 607a; *Drake, Attachm.* § 474; *Wap. Attachm.* § 245. It is not necessary, in this case, to enter

upon the discussion of the question as to the power of the legislature to authorize the seizure and sale, under judicial process, of certificates of stock in foreign corporations that maintain agents and officers, keep the books, and conduct business in this state. Sections 913, 1285, 3022, 3023, and 5501, Rev. St. 1881, do not in any respect authorize such proceeding. Sections 3022 and 3023, which provide that agents of foreign corporations, before entering upon the duties of their agencies in the state, shall deposit in the clerk's office of the county the power of attorney or authority under or by virtue of which they act as agents, authorize actions against such corporations in the courts of this state on claims or demands "arising out of any transaction in this state with such agents." This controversy did not arise out of any transaction with any agent of the corporation. In Missouri the statute provides that shares of stock in any corporation may be attached in the same manner as the same may be levied upon under execution, but it was held that such provisions applied to domestic corporations alone. *Banking Co. v. Smith*, supra. Section 723, Rev. St. 1881, authorizes the levy of an execution on shares of stock, and section 913, supra, provides the manner in which shares of stock in a corporation may be reached through process against the corporation as a garnishee defendant. Such authority, however, under the authorities cited, does not extend to shares of stock in a foreign corporation, although such corporation may have a branch of its principal office in this state, where its books and records are kept, the meetings of its directors are held, and its principal business is transacted. *Plimpton v. Bigelow*, supra. In the case of *Young v. Iron Co.*, 85 Tenn. 189, 2 S. W. Rep. 202, the principles enunciated in the authorities cited are recognized as correct statements of the law, but it was held that, under the policy and legislation in that state, and the acts of the corporation in question, the situs and status of said corporation were those of a domestic corporation. In conclusion, we repeat that James E. Downey was a nonresident of the state. The only process against him was by publication. No answer was filed or defense made by him or in his name. The shares of stock which it was sought to attach were issued by a foreign corporation. In the language of Judge Andrews: "It seems impossible to regard the stock of a corporation as being present for the purpose of judicial proceedings, except at one of two places, viz. the place of residence of the owner, or the place of residence of the corporation." *Plimpton v. Bigelow*, supra. Therefore, in view of our opinion that appellees, under the facts disclosed in the answer, stand in the position of strangers to the proceedings in the former action, and that the stock in a foreign corporation, under the authorities, is not subject to attachment in this state, it is not necessary to consider the other questions of minor importance presented by the record further. Judgment affirmed.

(7 Ind. App. 417)

# CHRISTIAN v. STATE ex rel. HEASTON, Auditor.

(Appellate Court of Indiana. Sept. 19, 1893.)

## LIMITATION OF ACTIONS—PART PAYMENT—PLEADING—CHANGE OF VENUE—INSTRUCTIONS.

1. Part payment by a county treasurer of a debt due by him for funds collected, and not paid over to his successor, will revive his own liability on his official bond, and not merely his personal liability as on his implied contract as treasurer.

2. The fact that such part payment cannot revive the liability of the sureties on the bond does not prevent its reviving the principal's liability thereon.

3. A voluntary part payment on a debt, made as such, is prima facie sufficient to revive the debt, although the prima facie case may be rebutted by circumstances inconsistent with a revival.

4. In such case, whether or not the payments were such as to remove the bar of the statute from the entire debt is a question for the jury.

5. A complaint is not demurrable on the ground that it shows on its face a cause of action barred by the statute of limitations, unless it affirmatively shows that the case is not taken out of the operation of the statute by exceptions.

6. The principal in an official bond cannot complain because, after the action is taken to another county on change of venue, paragraphs are added to the complaint counting on a second bond given by him, where the sureties are not complaining, as the paragraphs, each being a suit on contract, may be properly joined in one complaint, even though some are filed after the change of venue.

7. A reply to a plea of the statute of limitations which alleges that defendant paid on each of plaintiff's causes of action, on a certain date, a certain sum, sufficiently pleads that the payment was made on account of the debt sued on, and as a part thereof.

8. Instructions are properly refused unless they are correct in all particulars.

Appeal from circuit court, Wells county; J. S. Dailey, Judge.

Action by the state, on the relation of Israel H. Heaston, auditor, against Daniel Christian, on his official bonds as treasurer of Huntington county. From a judgment for plaintiff, defendant appeals. Affirmed.

L. P. Milligan, O. W. Whitlock, B. M. Cobb, and C. W. Watkins, for appellant. J. B. Kenner and U. S. Lesh, for appellee.

GAVIN, C. J. The facts from which this suit arose are as follows: The appellant, Christian, was duly elected treasurer of Huntington county for two successive terms, extending from November 7, 1876, to November 7, 1880, and as such executed for each term his bond, with different sureties, conditioned that he should faithfully perform and discharge his duties as such treasurer, and pay over on demand, to the person entitled thereto, all moneys that might come into his hands as such treasurer. In July, 1878, appellant received the sum of \$12,000 as the proceeds of certain Stultz Gravel-Road bonds, with which, through mistake, he failed to charge himself in his reports, or upon final settlement with the commissioners. In 1883 the error was discovered by the auditor, and appellant's attention called to

it. After having the accounts examined by his son, who had been his deputy, appellant acquiesced in the conclusion that there had been such a mistake, and arranged with the treasurer of the county to report the money as paid, agreeing that he would pay it to him. This was done, and the \$12,000 paid in installments, commencing January, 1884; the last payment being made July 15, 1886, and the first payment being made more than five years after the expiration of his first term of office, during which term the money had been received. This suit was commenced October 16, 1886, by filing a complaint in two paragraphs on the first bond. After a change of venue had been taken to Wells county, the second and third paragraphs were filed upon the second bond. There were answers of general denial, payment, set-off, and the statute of limitations. To the answer of the statute of limitations a reply was filed, setting up part payment within the statutory period of five years. The demurrers of all the sureties were sustained, and the cause was tried on the issues made with appellant alone, against whom judgment was rendered for \$2,376. From this judgment he appeals.

The second paragraph of complaint is not bad on the ground that it shows upon its face a cause of action barred by the statute of limitations. There are several exceptions contained in our statutes, notably concealment and nonresidence, which prevent the statute from running, (Rev. St. 1881, §§ 297, 300,) and there is nothing in the pleading to negative these exceptions. In order that the statute of limitations may be available as a defense, it must be pleaded, unless the complaint shows affirmatively that the plaintiff is barred notwithstanding the exceptions. *Potter v. Smith*, 36 Ind. 231; *Hogan v. Robinson*, 94 Ind. 138; *Medsker v. Pogue*, 1 Ind. App. 197, 27 N. E. Rep. 432. Then, and then only, is it available on demurrer.

The appellant moved to dismiss the third and fourth paragraphs of complaint for want of jurisdiction, because they were based upon the second bond, and were filed after the cause went, on change of venue, to Wells county. In this there was no error. Whatever might be the rule applicable, were the sureties on the second bond complaining, there is no error of which appellant can complain, he being the principal on each bond. Errors affecting the sureties, against whom no judgment was rendered, could not be available to the principal. In considering the question as to appellant, we are not required to resort to the statute of 1889, (Elliot, Supp. § 15,) which authorizes a suit on two bonds to be joined in one action, although the sureties may be different. As to appellant, each paragraph of the complaint was a suit on contract, and properly joined in one complaint, even though some were filed after the change of venue. As a matter of fact, but one question was really presented on the trial by all these paragraphs, viz. whether or not appellant had really accounted for, and paid over, the \$12,000 received from the sale of the Stultz Gravel-Road bonds. *Ross v. State*, 181 Ind. 548, 30 N. E. Rep. 702.

For the same reasons, the court did not err in sustaining demurrers to the plea in abatement setting up the same matters. So far as the motion or the plea set up the statute of limitations, that was properly raised by plea in bar subsequently filed and held good. None of the other objections to the complaint, suggested by counsel, are well taken.

The third paragraph of appellee's reply was addressed to the answer of the five-years statute of limitations, and pleaded part payment on the appellee's claim within the statutory period. Fairly construed, these allegations are sufficient to bring them within the rule laid down in *Prenatt v. Runyon*, 12 Ind. 174, cited by counsel, which requires that the payment shall be made on account of the debt sued on, and as a part thereof, the allegation being that appellant paid on each of said causes of action, January 4, 1884, \$134.16.

It is further insisted that the reply is bad because the lapse of five years after the cause of action accrues forever bars any action upon the bond, without any power of revivor. Counsel for the appellant say, in support of this proposition: "The subject-matter or basis of the action in this case was the bond sued on. The alleged payments could be no more than an acknowledgment by the appellant of his personal liability on account of the breach of his own implied contract that he would do and perform the duties of his office,—a new promise to be responsible on account of the alleged failure to do his duty. Such payment could not increase his liability on his bond. A renewal of the bond could be made only by the consent of all the parties thereto. No new or different obligation could be made without the consent of all the parties to said undertaking. One of the parties to said obligation could not make a contract to bind the others. The obligation sued on was an entirety in itself. If the bond sued on is binding on one, it is binding on all who executed it." It is undoubtedly true, as asserted by counsel, that this action is founded upon the bond. As such we regard it. For this reason the five-years statute of limitations provided for in subdivision 2, § 293, Rev. St. 1881, applies, and is a good defense, unless its force is avoided by the part payment. It is true, also, that the appellant, the principal on the bond, could not, by any act of his alone, revive, against his sureties, a right of action which had been once barred by the statute. *Hunter v. Robertson*, 30 Ga. 479; *Bottles v. Miller*, 112 Ind. 584, 588, 14 N. E. Rep. 728; 13 Amer. & Eng. Enc. Law, 763; Rev. St. 1881, §§ 304-306. But, while this is true, it is also equally well settled that an obligation of one of several joint obligors may be, by his part payment, revived as to himself, although not as to the others. *Bottles v. Miller*, 112 Ind. 584, 14 N. E. Rep. 728; *Shoemaker v. Benedict*, 11 N. Y. 173; *Littiefield v. Littlefield*, 91 N. Y. 203. Counsel contend that the payment made was upon appellant's individual and personal liability or debt, and not upon the bond. Counsel's theory seems to be that the payment could not

operate to revive both the individual liability and that upon the bond. Both the personal liability and the liability upon the bond are created by one act,—appellant's failure to pay; and, where both liabilities may arise in the first place from a single act, we can see no good reason why both may not be revived by one and the same act,—a part payment. Both the bond and the personal liability are means provided by law to accomplish the same purpose,—the payment of the money due from appellant. There appears to us no sound foundation, either in law or equity, for a distinction which would say that the bond cannot be kept alive or revived by a part payment within its statutory period. There being different periods of limitation fixed by law for the different forms of action, the personal liability might be continued when the right of action on the bond was lost, and resort could not then be had to the fact that the personal liability was still in force, to give vitality to the bond. Here, however, the payment is made within five years,—the statutory period applicable to the bond. We do not find in the cases relied upon by appellant (*Pickett v. State*, 24 Ind. 366; *Carr v. State*, 81 Ind. 342; and *State v. Foulke*, 83 Ind. 374) anything which supports appellant's theory that after the statutory period has run the bond becomes functus officio, and is not susceptible of revival by part payment. The reasoning of counsel—that the bond was dead, and if a new promise to pay the debt was made, or might be inferred from the part payment, this was a new cause of action—is as applicable to all other forms of obligations as to this bond; but it is now generally accepted as the law that, when a debt has been revived by a new promise or part payment, the action is still to be maintained upon the original obligation, and not upon the new one, although it is true that without the new one there would be no vitality in the old. *Ang. Lim.* § 288; 1 *Wood, Lim.* §§ 81, 249; 13 *Amer. & Eng. Enc. Law*, 771, and note 7.

Some further objection is made to the sufficiency of the reply, which goes to its form, rather than its substantial merits. The reply is not to be approved as a model of exact and technically accurate pleading, yet, construed as we have already decided it should be, it contains all that has been deemed by the supreme court necessary to give the pleader the benefit of a revivor of the debt by part payment. *Ferguson v. Ramsey*, 41 Ind. 511; *Bottles v. Miller*, 112 Ind. 544, on pages 590 et seq., 14 N. E. Rep. 728.

The last assignment of error is based upon the overruling of the motion for a new trial. Counsel for appellant argue earnestly, and with great ingenuity and plausibility, that the evidence does not support the verdict. We have given both the evidence and their calculations careful examination. The figures presented by counsel point quite strongly towards the result which they assert, and appear to be supported by some of the evidence, at least, yet the accounts are not presented to us in such detail as will enable us to

say that they absolutely overthrow the other evidence in the case, which, beyond question, amply sustains the claim of appellees that the \$12,000 was not charged to appellant, and was never accounted for by him during his term of office. Whether or not the payments made were such as would remove the bar of the statute from the entire debt was essentially a question for the jury, and we do not feel justified in disturbing their conclusion. Our own cases, as well as those from other states, sustain the proposition that a voluntary part payment upon a debt, made as such, is *prima facie* sufficient to revive the debt, although such *prima facie* case may be rebutted by attendant circumstances inconsistent with such revivor. *Carlisle v. Morris*, 8 Ind. 421; *Ketcham v. Hill*, 42 Ind. 64; 1 *Wood, Lim.* §§ 97-101, and notes; *Ang. Lim.* § 240, and note; *Jewett v. Pettit*, 4 Mich. 508; *U. S. v. Wilder*, 13 Wall. 254; *Slanett v. Slinnett*, (Me.) 19 Atl. Rep. 468; *Parsons v. Clark*, (Mich.) 26 N. W. Rep. 657. In *Manson v. Lancey*, (Me.) 24 Atl. Rep. 880, it is said that it is well-recognized and familiar law that the effect of payment of any principal or interest, made and intended as payment of part of a debt, is an acknowledgment of that debt, and a renewal of the obligation to pay it. In *Kendall v. Tracy*, (Vt.) Id. 1118, it is said: "A payment of interest, or part of the principal, renews the mortgage, so that an action may be brought to enforce it within the statutory period thereafter." In *Day v. Mayo*, (Mass.) 28 N. E. Rep. 898: "Where a partial payment is made on account of an existing indebtedness, the whole debt upon which such payment is made is thereby taken out of the statute of limitations up to that time." The rule is thus expressed in *Blaskower v. Steel*, (Or.) 81 Pac. Rep. 253: "The authorities are uniform that where a general payment is made on account of a greater debt, unless accompanied at the time by some qualifying declarations on the part of the party making the payment, indicating a contrary intent, it is considered an unequivocal admission of a subsisting contract or liability, and revives the debt, because it is deemed a recognition of it, and assumption of the balance due."

The last reasons presented for a new trial are based upon instructions given and refused. We deem it unnecessary to discuss the sufficiency of each instruction separately. Several of the questions presented under this head have been considered in passing upon the pleadings. When considered with reference to the evidence in this cause, we find no harmful error in either the giving or refusing of instructions. The second and fifth instructions asked, if otherwise correct, are unquestionably inaccurate, in at least one respect. The evidence shows without contradiction that appellant, in 1888, admitted he had never charged himself with, nor accounted for, the \$12,000 received from the gravel-road bonds, and that he owed it to the county, and also that he arranged with the county treasurer to report this money as though it were in his hands, and then paid the amount to the treas-



urer in installments during the years 1884, 1885, and 1886. The first payment made, and the circumstances connected therewith, amounted to an unequivocal acknowledgment of an indebtedness of \$12,000 at that time, and revived this much of the debt, at least. There being, then, a present enforceable obligation to pay that sum at that time, the money being then due, the county was entitled to interest from that time forth in any event. Instructions, when offered, must be correct in all particulars, else there is no error in refusing them. Elliott, App. Proc. 735. We may also add that it is exceedingly doubtful if the motion for new trial does more than question the correctness of the instructions given or refused as a whole, in which case there could be no available error, because the correctness of some of the instructions given is not denied, while the correctness of some of those asked is not even urged, by counsel. *Railway Co. v. McCartney*, 121 Ind. 385, 23 N. E. Rep. 258; *Rees v. Blackwell*, (Ind. App.) 33 N. E. Rep. 988. It has not, however, been necessary for us to determine this point.

After a very full consideration of all the errors presented and discussed by counsel, we are constrained to hold that there is no reversible error in the record. Judgment affirmed.

(7 Ind. App. 379)

CLODFELTER et al. v. LUCAS.

(Appellate Court of Indiana. Sept. 20, 1893.)

PLEADING—GENERAL DENIAL—JUDGMENT ON EVIDENCE.

1. In an action for money loaned, where the answer pleads general denial, and partnership between the parties, it is not error to strike out the latter plea, since the proof is admissible under the general denial.

2. Defendant was not prejudiced by the fact that the court rendered judgment against him before the arrival of plaintiff's deposition, taken in his own behalf, the court having before granted plaintiff's counsel's request to hold the testimony open till it came.

Appeal from circuit court, Fountain county; J. M. Rabb, Judge.

Action by Charles F. Lucas against Felix Clodfelter and William H. Lucas for money loaned. Judgment for plaintiff. Clodfelter appeals. Affirmed.

V. E. Livengood, for appellant. F. M. Dice, for appellee.

DAVIS, J. This was an action by the appellee against the appellant and one William H. Lucas to recover a judgment for money alleged to have been loaned by appellee to said Clodfelter & Lucas, as partners, in the business of buying and selling timber. The answer was in three paragraphs,—general denial, payment, and answer that all three of the parties to the suit were partners. The court below sustained a motion to strike out the third paragraph. On trial by the court, appellee recovered judgment for \$1,253, from

which appellant alone appeals. The errors assigned are: (1) That the court erred in overruling the demurrer to the complaint; (2) that the court erred in striking out the third paragraph of the answer; (3) that the court erred in overruling the motion for a new trial.

The first error assigned has not been urged. No objection has been pointed out. On reading the complaint, we are clearly of the opinion that the demurrer was properly overruled.

Conceding that the facts pleaded in the third paragraph of the answer are sufficient to constitute a defense to the action, there was no available error in the ruling on the motion to strike out, for the reason that, under any view of the case, the evidence was admissible under the general denial.

It is next contended that the finding of the trial court is not sustained by sufficient evidence. We have carefully read the evidence, and find that it is conflicting. There was evidence in behalf of appellee tending to sustain the theory of the complaint, and in behalf of appellant the evidence tends to prove that said appellant, William H. Lucas, and appellee were partners, and that the money was advanced to the firm by appellee in pursuance of the alleged partnership agreement. In other words, if the money was loaned by appellee to appellant and William H. Lucas as partners, then appellee was entitled to recover, but if all three were partners, as claimed by appellant, the judgment should be reversed. This was the question which the trial court was called upon to determine, and, the decision having been favorable to appellee, we cannot enter into a discussion of the credibility of the witnesses, or the weight of the evidence.

It is next urged that the court erred in deciding the case before the arrival of the deposition of appellee, taken in his own behalf. The record discloses that, when the case was called for trial, appellee was not present, and his counsel asked that the evidence should not be considered as closed until the deposition of appellee, which was supposed to have been taken in his interest in a foreign state, should arrive. This was agreed to by the parties, and the trial proceeded with. The court thereafter, and before the arrival of such deposition, announced his finding in behalf of appellee. Appellant had made no effort to take appellee's deposition. The request for the delay was not made by him, or in his interest. There is no showing that he could have proven anything to his advantage by appellee, or that he was in any manner injured by reason of the decision before the arrival of such deposition. There was no error in this ruling.

We have failed to find any error in the record, in relation to any question discussed by counsel for appellant, that would justify a reversal of the judgment of the court below. Judgment affirmed, at costs of appellant.

(3 Ind. App. 278)

**FRUITS, Constable, et al. v. ELMORE.**<sup>1</sup>  
(Appellate Court of Indiana. Sept. 21, 1893.)**REPLEVIN—PROPERTY SEIZED ON EXECUTION.**

1. A demurrer lies to the second paragraph of an answer in replevin, pleading property in a third person, that defense being provable under the general denial of the first paragraph.

2. Though a mere finding for plaintiff, without assessment of damages, is no proper basis for a judgment, yet the judgment, while it stands, is so far valid as, with the writ of execution, to be evidence in favor of the officer levying thereunder, in replevin for the property seized.

3. There being no proof of his actual or constructive possession, replevin does not lie against a justice of the peace, who rendered judgment and issued execution, for the property seized thereunder.

Appeal from circuit court, Montgomery county; J. F. Harney, Judge.

Replevin by Mary A. Elmore against Noah Fruits, a constable, and others. Judgment for plaintiff. Defendants appeal. Reversed.

Kurley & Clodfelter, for appellants. Paul & Bruner, for appellee.

LOTZ, J. The appellee was the plaintiff, and the appellants the defendants, in the court below. The action was to recover the possession of a certain horse. There was a trial by jury, and the appellee had judgment in her favor against all the appellants. The appellants have severally assigned errors in this court.

The first error discussed by counsel is that the court erred in sustaining a demurrer to the second paragraph of the separate answer of Noah Fruits. In this paragraph said appellant pleaded that he was the duly qualified and acting constable of Ripley township, in Montgomery county, and that a writ of execution was duly issued and delivered to him by John L. Hawkins, a justice of the peace of said township, on a judgment duly made and given in favor of one Jacob Elmore, and against one James Elmore; that as such constable he levied said writ upon the property described in the complaint, as the property of said James Elmore, and that the same was the property of said James Elmore. There was no error in sustaining a demurrer to this answer. It is only equivalent to an answer of property in a third person. It is well settled that, where the real defense in replevin is property in a third person, such defense may be given under the general denial. *Branch v. Wiseman*, 51 Ind. 1; *Lane v. Sparks*, 75 Ind. 278.

The next assignment of error discussed by counsel is the overruling of the motion for a new trial. On the trial the appellants, after sufficiently identifying the same, offered in evidence a judgment rendered by the appellant John L. Hawkins, as a justice of the peace of Ripley township, in the case of Jacob Elmore against James Elmore, and a writ of execution issued thereon by the appellant John L. Hawkins, as such justice of the peace, which was levied upon the property in controversy by the appellant Noah Fruits, as constable of said township. This evidence was excluded,

over the objection of the appellants. Replevin is a mere possessory action. Title to the property is usually but an incident in determining the right to possession. It may or may not be a controlling circumstance. One person may have the title, and another have the right to the possession. Usually, title is a strong circumstance tending to show the right of possession. In the case in hearing, it was proper, under the issues, for the appellants to show that the horse was the property of James Elmore, and that the possession under the writ and judgment was lawful and right. The general issue admits any evidence relevant to the right of possession asserted by the plaintiff, including evidence of a right of possession in the defendant, or even in a stranger. *Smith v. Harris*, 76 Ind. 104. Appellee, however, contends that the judgment, on its face, is a nullity, and that it conferred no rights upon appellant Hawkins to issue an execution, and that the writ affords no protection to the other appellants in making the levy. The judgment offered in evidence shows that it was an action on account for work and labor done, in which a judgment in the sum of \$3 was demanded. There was a trial by jury, and a verdict as follows: "We, the jury, find for the plaintiff." Upon this verdict the justice rendered judgment in favor of the plaintiff in the sum of \$3 and costs of suit,—costs taxed at \$14.75. The writ was issued for \$3, with interest, and for \$14.75 costs. This writ was levied upon the property in controversy. It has often been decided that where there is a mere finding for the plaintiff, without any assessment of damages, no judgment can properly follow. *Railroad Co. v. Washburn*, 25 Ind. 259; *Trout v. West*, 29 Ind. 51; *Mitchell v. Geisendorff*, 44 Ind. 358; *Nicholson v. Carress*, 76 Ind. 24; *Bunnell v. Bunnell*, 93 Ind. 595. If a judgment is a nullity, the party against whom it is rendered may assail it whenever and wherever it confronts him. But is the judgment offered in this case a nullity? In the cases above cited there was a direct attack upon the judgment. Here the attack is a collateral one. We do not consider the judgment offered in evidence as being absolutely void. The justice had jurisdiction of the subject-matter, and of the person of the judgment defendant. The judgment rendered by him was erroneous, but not void. It was sufficient to support an execution, until set aside. A constable or sheriff, as a general proposition, is not bound to look beyond the face of the writ delivered to him to execute. If it is legal on its face, he is bound to execute it, and he can plead it as a justification, though the proceedings before the magistrate which led to the issue of the writ are illegal. But the rule is different where the suit is against the person who procures, or the justice who issues, the writ on such void proceedings. *Ewing v. Robeson*, 15 Ind. 26; *Rutherford v. Davis*, 95 Ind. 245; *Davis v. Bush*, 4 Blackf. 330. The judgment here being merely voidable, the constable had the right to levy the same on the property of the judgment defendant. Of course, if the constable levied it upon the property of appellee,

<sup>1</sup> Rehearing denied.

neither the judgment nor the writ afforded him any protection. The right to the possession was the issue to be determined. There was some evidence which tended to show that James Elmore was the owner of the horse. This being true, the judgment and writ were proper evidence to go to the jury to show the right of possession under said levy.

Again, there is no evidence in the case which tends to show that the appellant John L. Hawkins ever had the actual or constructive possession of the property. The only connection he had with the case was to issue an execution against the property of James Elmore. He gave no command to levy it upon the particular property in controversy. Replevin cannot be maintained unless the evidence shows the actual or constructive possession of the property in the defendant at the time when the suit was instituted. *Oil Co. v. Bretz*, 98 Ind. 231; *Louthain v. Fitzer*, 78 Ind. 449; *Krug v. Herod*, 69 Ind. 78. Judgment reversed, at the costs of appellee, with instructions to sustain the motion for a new trial as to all the appellants.

(7 Ind. App. 595)

#### HOWE v. PROVIDENT FUND SOC.

(Appellate Court of Indiana. Sept. 22, 1893.)

##### ACCIDENT INSURANCE—MISSTATEMENT OF INCOME.

1. In an application for accident indemnity, when the applicant states his income truly, but the agent, without his knowledge or consent, increases the amount so as to place the applicant in another class of assured, an agreement that the society shall not be bound by any statement made to, or knowledge possessed by, the agent not written in the application, and that such person is the applicant's agent to enter his answer, does not relieve the insurer of its estoppel to contest the policy.

2. A clause in an application for mutual accident indemnity, agreeing that the benefits to which the applicant shall become entitled shall be governed and paid in the same ratio that his income shall bear to the amount of indemnity insured, is binding on the insured, though the agent, by false statements as to his income, has put him in a higher class, paying larger premiums.

Appeal from circuit court, Bartholomew county; Marshall Hacker, Judge.

Action by James Howe against the Provident Fund Society on a policy of insurance. Judgment for defendant. Plaintiff appeals. Reversed.

John W. Donaker, for appellant. Finch & Finch, for appellee.

**REINHARD, J.** We take the following statement, which we find substantially accurate, from the brief of appellee's counsel: This was an action brought by the appellant against the appellee upon a policy of accident insurance, to recover for eight weeks' disability, at the rate of \$25 per week. The questions to be discussed arise under the fifth and sixth paragraphs of answer, and the replies of appellant to the said paragraphs of answer. The fifth paragraph of answer alleges that the appellee is "a corporation of the state of New York, organized for the purpose to collect and accumulate a fund to be held

and used for the mutual benefit and protection of its members, (or their beneficiaries,) the business of the society being divided into life, sick benefits, and accident departments; its accident department being for the purpose of furnishing to its members indemnity to amount of actual loss suffered by them by reason of accidental injuries, within the terms of the certificate of membership, and the application made therefor. That it is purely mutual, and derives its funds to meet claims of members solely by assessments made on members. That applicants for membership are admitted upon written applications for membership. \* \* \*

That said James Howe, plaintiff, in said application for membership, stated as follows: 'I hereby apply for membership, to be based on the following statements of facts, which I warrant to be true.' And that said plaintiff further stated in said application: 'My weekly income exceeds the amount of weekly indemnity herein applied for.' Defendant says that the statement of said plaintiff as to his weekly income was false and untrue, and a breach of the warranty contained in the application and policy, in this, to wit, that whereas, in the application for membership in defendant society, the plaintiff applied for membership in 'Class A,' with weekly indemnity of twenty-five dollars per week, the weekly income of plaintiff did not exceed fifteen dollars per week." The sixth paragraph of answer alleged the same facts as to the mutuality of the society, and, further, "that it is provided in said application as follows: 'And I agree that the benefits to which I shall be entitled shall be governed and paid in the same ratio that my weekly income bears to the amount of weekly indemnity insured for.' \* \* \*

Defendant says that the weekly indemnity applied for by plaintiff, and insured to him by said policy, was twenty-five dollars (\$25) per week; and that the weekly income of plaintiff at the time of his injury complained of was fifteen dollars, (\$15); wherefore defendant says that, if plaintiff be entitled to recover anything by reason of said alleged accidental injury, plaintiff is only entitled to recover, under the terms of said agreement, the sum of fifteen dollars (\$15) per week, weekly indemnity, for the time he may have been disabled by reason of said alleged injuries." To the said fifth and sixth paragraphs of answer the appellant filed special replies, alleging that he had told the agent that his weekly income was but \$15 per week, and that the agent, without his knowledge or consent, had inserted the false answer in the application, and that the application was wholly written and filled out by the agent of the appellee, and that he had no knowledge of any false answers in said application. To these replies a demurrer was filed, and sustained by the court. The appellant then withdrew the general denial, and judgment was rendered on the pleadings in favor of appellee.

The errors assigned for argument here by the appellant are—First. The court erred in sustaining defendant's (appellee's) demurrer to plaintiff's second paragraph of reply to defendant's fifth paragraph of

answer to plaintiff's (appellant's) complaint. Second. The court erred in sustaining defendant's demurrer to plaintiff's second paragraph of reply to defendant's sixth paragraph of answer to plaintiff's complaint.

The first question we are to decide, and which is involved in the ruling of the court upon the demurrer to the reply, relates to the alleged misrepresentation respecting the appellant's weekly income. The statement in the application concerning this is a warranty, and it is not controverted in appellant's brief that the averment contained in the fifth and sixth paragraphs of the answer upon this subject will work a forfeiture, unless they are overcome by the allegations in the reply. The fifth paragraph of the answer makes the application an exhibit, and in it the following provision is contained: "In closing fee of \$5.00, I hereby apply for membership, to be based upon the following statement of facts, which I warrant to be true; and I agree to accept a certificate of membership subject to all its conditions and provisions, and also agree that said society shall not be bound by any statement made to, or knowledge possessed by, any agent or broker not written in this application, hereby appointing such person my agent to enter my answers to the following statements." Is the appellant concluded by this statement in his application, so that he may not show that the person who wrote the same was in fact the agent of the company, and not his agent, and that the language ascribed to him was in fact not his, but that of the agent? This question, we do not hesitate to say, must be answered in the negative. Whether the writer of the instrument is the agent of the applicant or of the company must depend, not solely upon the stipulation of the parties, either in the application or in the policy, or in both, but upon the facts and circumstances surrounding the transaction, and disclosing the actual relations of the parties sustained to each other when the application was made. The mere fact that the representative of an insurance company writes in an application the words, "This man is my agent," and causes the applicant to sign the same without disclosing to him the contents of such application, does not necessarily constitute him the applicant's agent, if he be not such in fact. It is, at most, but an admission, and admissions are never conclusive. If the facts constituting the agency are in dispute, so as to leave the question as to whose agent he is in doubt, then an admission may serve to assist in solving the doubt, and bind the party making it. But, when the facts are established, the law determines whether or not there is an agency, and no admission can change it. If A. says he stole B.'s horse, but the facts show that he did not steal it, the admission does not make him a thief in the eyes of the law. The stipulation is but an attempt to evade the law of agency, and cannot be given a controlling force when it is shown that in fact there was no such agency. *Insurance Co. v. Hartwell*, 100 Ind. 566; *Insurance Co. v.*

*Crutchfield*, 108 Ind. 518, 9 N. E. Rep. 458; *Insurance Co. v. Allen*, 109 Ind. 273, 10 N. E. Rep. 85; *Commercial Union Assur. Co. v. State*, 113 Ind. 331, 15 N. E. Rep. 518; *Gelas v. Insurance Co.*, 123 Ind. 172, 24 N. E. Rep. 99; *Insurance Co. v. Golden*, 121 Ind. 524, 23 N. E. Rep. 503; *Rogers v. Insurance Co.*, 121 Ind. 570, 23 N. E. Rep. 498; *Insurance Co. v. Stark*, 120 Ind. 444, 22 N. E. Rep. 413; *Insurance Co. v. Pickel*, 119 Ind. 155, 21 N. E. Rep. 546; *Pickel v. Insurance Co.*, 119 Ind. 291, 21 N. E. Rep. 898; *Insurance Co. v. Lunkenheimer*, 127 Ind. 536, 26 N. E. Rep. 1082.

Counsel for appellant contend, however, that the rule is different where the stipulation restricting the scope of the agency is contained in the application, instead of in the policy, and cites some cases in other jurisdictions than our own strongly supporting his position. But, in the case last above cited, the doctrine under consideration was applied where the clause limiting the agency was contained in the application itself, and it was there held to be void. In that case the language of the provision was that "each of which statements and answers, whether written by his own hand or not, every person whose name is hereto subscribed adopts as his or her own." There is no substantial difference in the stipulation just quoted and that contained in the application in the case in hand. Here the applicant agrees that the society shall not be bound by any statement made to its agent which is not written in the application, and that the person writing such application shall, for that purpose, be the agent of the applicant. In the case cited, the applicant adopts all statements and answers in the application, whether written by himself or the person soliciting the insurance, as his own. It seems to us that in each instance precisely the same result is aimed at, viz. that the applicant shall be bound by the written answers, and shall not be permitted to assert that they do not contain the truth. In either case it is an attempt to make the applicant responsible for the acts of the company's agent, in case the latter himself should undertake to fill out the blanks in the application. In the case cited it is expressly held that this cannot be done. The statements in either case are those of the company, and not of the applicant. The latter, as is admitted by the demurrer to the answer, responded accurately and truthfully to the questions asked him, but the answers were falsified by the person whom the company had intrusted to solicit the application. The doctrine here enunciated is based upon the principle of equitable estoppel. The company sends its representative to one desiring insurance. The former is required by his principal to gain certain information concerning the risk. The person desiring insurance gives the information correctly, but the trusted servant of the company, either by fraud or mistake, gives the company false information. The agent had knowledge of the facts as they existed. This being so, the company also had such knowledge, and it is estopped to deny it. In this respect an application for insur-

ance is easily distinguished from an ordinary contract in writing, and the rule that such contract cannot be varied by a contemporaneous one in parol does not apply. The principle underlying this distinction is that the writing is not the act of the party whose name is signed to it, "that it was procured under such circumstances by the other side as estops that side from using it, or relying on its contents,—not that it may be contradicted by oral testimony, but that it may be shown by such testimony that it cannot be lawfully used against the party whose name is signed to it." May, Ins. § 144, and authorities cited. It was not the duty of the applicant to see that the company's trusted agent would make a correct report of his statements. He had a right to assume that such trusted agent would do this. He had sufficiently imparted to the company the correct information as to the risk by imparting it to its agent, and if the latter failed to communicate the knowledge to the company, it alone must suffer. *Insurance Co. v. Hartwell*, supra. See, also, *Herm. Estop.* § 1198 et seq., and cases cited. This court fully recognized the doctrine of equitable estoppel in *Insurance Co. v. Lorenz*, (Ind. App.) 33 N. E. Rep. 444, and 84 N. E. Rep. 495. In that case the court went so far as to hold the company estopped by the agent's knowledge of an intention on the part of the assured to place future incumbrances upon the insured property,—a view in which the writer of this opinion was not able to concur, as, in his judgment, the doctrine of estoppel could not be invoked in respect to information of future occurrences, but was applicable only to knowledge of existing facts. See, also, *Bowling v. Insurance Co.*, (Ind. Sup.) 32 N. E. Rep. 319. The appellee contends, however, that, as there is no averment in the reply that the appellant did not know that the clause in question was contained in the application when he signed it, he has given no reason why he should not be bound by it. We do not think such an averment was necessary. The reply does contain the averment that the appellant gave the company's agent correct and truthful answers to all questions asked; that the application was wholly prepared by such agent, and all the statements and answers were written by the latter; and that such agent informed appellant that the application had been made out by him as agent of the company, and as required by the latter, and that all questions had been properly answered. Under these circumstances, we do not think it devolved upon the appellant to show affirmatively that he had no knowledge of the clause in the application making him responsible for the acts of the agent. The courts judicially know that applications for insurance are usually made with agents in their capacity as representatives of the company, and, if there are any restrictions or limitations on their powers as such, it is the duty of the company to bring the same to the knowledge of the applicant. See *Commercial Union Assur. Co. v. State*, supra. In the language of the supreme

court of the United States, "the powers of the agent are, prima facie, coextensive with the business intrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals." *Insurance Co. v. Wilkinson*, 13 Wall. 222; *Insurance Co. v. Malone*, 21 Wall. 152; *Eames v. Insurance Co.*, 94 U. S. 621. The courts of Massachusetts and some other states, it is true, hold to the opposite view on this question, but this court is bound to follow the decisions of our own supreme court, and we believe the conclusion here reached to be fully in harmony with the cases decided by that tribunal.

Nor can we yield to the appellee's contention that a different rule should be applied because the appellant was dealing with a mutual company, operating under the assessment plan. Nothing is shown in the pleadings by which it is made to appear that the by-laws of the company contained any provision upon the subject in controversy. But, even if it had been averred that there was such a provision in the by-laws, the appellant was not bound to take notice of it when he made his application, because he was not a member of the company at that time, becoming such only after the policy had been delivered to and accepted by him. May, Ins. § 552, and notes.

The conclusion reached renders it necessary to reverse the judgment for the error of sustaining the demurrer to the second paragraph of the reply to the fifth paragraph of the answer. But we are to consider, also, the ruling of the court upon the demurrer to the second paragraph of the reply to the sixth paragraph of the answer. The paragraph of answer just named contains, in substance, all the averments of the fifth paragraph, with the additional averment that the application signed by appellant contained the stipulation following, viz.: "And I agree that the benefits to which I shall be entitled shall be governed and paid in the same ratio that my weekly income bears to the amount of weekly indemnity insured for." The reply contains substantially the same averments as the second paragraph of the reply to the fifth paragraph of the answer, upon which we have already ruled, together with the additional allegation that the appellant was ignorant of the above-named provision in the application. The sixth paragraph of answer seeks to limit the appellant's recovery to the amount of \$15 per week, instead of \$25, as provided in the policy. We are of the opinion that the reply was insufficient as an avoidance of the matters set up in the third paragraph of the answer. The clause referred to in the application was contractual in its nature, and not a mere matter of information to the company, as in the case of the answers to the questions propounded. It is a part of the contract of insurance, and limits the amount of recovery to the actual loss of services. The entire policy proceeds upon the theory of indemnity. In fact, the appellant admits that he only contracted for indemnity to the amount of \$15 per week when he concedes that he informed the agent that his weekly income

was but that amount. The company, it is true, cannot be permitted to profit by the agent's mistake; but neither can the appellant be allowed to profit by his own negligence, and obtain a greater amount of insurance than he now insists he contracted for. Equity will not suffer the appellant to thus profit by his inadvertence, or even by the mistake of the company, and place him in a better position than that in which he himself intended to be placed. The answer does not confess to cover the entire complaint, and is good as a bar to a portion of the amount sued for. The mere fact that he paid a higher premium than the company was entitled to collect will not give him the right to recover the full amount of the face of the policy. Possibly, he might be entitled to recover the excessive premium in another action, but as to this we give no opinion. We think there was no error in sustaining the demurrer to the reply under consideration. Judgment reversed, with directions to the court below to overrule the demurrer to the second paragraph of the reply to the fifth paragraph of the answer.

(7 Ind. App. 551)

### FAYLOR v. BRICE.

(Appellate Court of Indiana. Sept. 22, 1893.)

#### LANDLORD AND TENANT—FORFEITURE OF LEASE—PLEADINGS—SET-OFF AGAINST RENT—STRIKING OUT PLEADINGS.

1. As forfeitures are not favored by courts, such covenants in a lease are construed the most strictly against the party seeking the forfeiture.

2. In an action seeking a forfeiture of a lease providing that the same should at once terminate, without notice, on a failure to pay the rent when due, an allegation that "plaintiff, just before sunset, duly demanded payment of \* \* \* the amount due on the premises," shows a sufficient demand for the rent to terminate the lease.

3. A lease provided that it should at once terminate, without notice, on the failure of the lessee to pay the rent when due. *Held*, the provisions of Rev. St. 1881, § 352, that when cross demands have existed between persons, so that one could be pleaded as a counterclaim or set-off to an action upon the other, neither can be deprived of the benefit thereof by the assignment or death of the other, and the two demands must be deemed compensated, so far as they equal each other, do not prevent the forfeiture of the lease pursuant to its terms, where the lessor is indebted to the lessee in an amount equal to the rent, in the absence of an agreement between the parties to set off such amounts.

4. In an action by the lessor on a lease which provided that the same should be forfeited on a failure to pay rent when due, defendant alleged in answer that plaintiff had agreed with him to set off the rent against a note due him from plaintiff. *Held*, that sustaining a motion to strike out such answer was error.

Appeal from circuit court, Wells county; J. S. Dailey, Judge.

Action by James F. Brice against John L. Faylor. Plaintiff had judgment, and defendant appeals. Reversed.

Mock & Simmons, for appellant. Martin & Vaughn, for appellee.

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ROSS, J. The appellee brought this action against the appellant, asking the forfeiture of a lease, and to recover possession of the leased premises.

The first error assigned calls in question the sufficiency of the complaint. The lease declared on, under the terms of which the appellee, by his complaint, seeks a forfeiture, was to run for a term of one year from the 1st day of June, 1890, with the privilege of an additional two years. The complaint seeks to have a forfeiture declared for failure to pay rent as provided in the lease. Courts do not look with favor on covenants of forfeiture; hence, hold that such covenants must be construed most strictly against the party seeking the forfeiture. The term for which the lease declared on was to run was one year, with the privilege to the lessee to hold thereunder for three years. That he had taken advantage of the privilege, and was holding under the three-year term, is apparent from the allegations of the complaint; the installments of rent falling due on 1st days of October, November, and December, 1891, for the failure to pay which a forfeiture is asked, not having occurred until after the first year of the term had expired. While forfeitures are never favored in law, yet when, by a reasonable construction, it appears that the contracting parties agreed that a forfeiture should take place upon the failure of one of the parties to the contract to comply with a material part thereof, courts will decree a forfeiture. When the covenants of a lease are that the lessee shall pay a certain rental at stipulated intervals, and in case of failure to pay shall forfeit all rights to a continuance of the lease, it cannot be said that such failure to pay is not a material covenant upon which to base a forfeiture. It is urged that the following allegation in the complaint is insufficient to show a demand, viz.: "The plaintiff, just before sunset, duly demanded payment of \$120, the amount due on the premises." In this contention we cannot agree with counsel. The demand is sufficiently alleged. The lease declared on was for a term of three years, the rent being payable monthly, and, in case the rent was not paid when due, it was provided that said lease should terminate at once, without notice. Inasmuch as forfeitures are not favored by law, a landlord cannot re-enter, declaring a forfeiture for the nonpayment of rent, except upon a strict compliance with all the formalities required by the common law. "In every case, before a landlord could enter for the nonpayment of rent, he must have made a formal demand of the precise sum due for the last current quarter; and, if the demand included any portion of the rent of a previous quarter, it would have been bad." *Tayl. Landl. & Ten.* § 493. In *Phillips v. Doe*, 3 Ind. 132, it was held that a demand for the rent must be made on the premises before sunset of the day it fell due. See, also, *Jenkins v. Jenkins*, 63 Ind. 415, and cases cited; 8 Amer. & Eng. Enc. Law, p. 448. The lease under consideration contains a provision that no notice of forfeiture is necessary, for a failure to pay

rent, in order to terminate lease. If no notice of forfeiture is necessary, no demand for the rent was necessary. Under the terms of the lease, it was incumbent upon the lessee to pay the rent at a specified time, and a failure on his part worked a forfeiture without notice. *Fifty Associates v. Howland*, 5 Cush. 214. We think the complaint stated a cause of action.

The court below did not err in sustaining the demurrers to the second and third paragraphs of answer. These answers seek to show a payment of the rent due under the terms of the lease, by the entry of a credit on a note held by the appellant against the appellee; the credit, so far as the answers show, having been made without the knowledge or consent of the appellee. The contention of the appellant is that, inasmuch as the appellee was indebted to him on a note which appellant held against appellee, appellant could not become indebted to the appellee until the rent equaled the note. As counsel put it, "appellee's claim for rent, as we understand it, was extinguished by an equal amount of the said note appellant held against him. The theory of the answer is not that of set-off, and the note was not pleaded as such, but upon the theory that the demand for rent was compensated, and that the appellant was not indebted to appellee, and hence was not wrongfully holding the leased premises." In support of this contention, section 852, Rev. St. 1881, has been cited, and is relied on, by appellant. This section reads as follows: "When cross demands have existed between persons, under such circumstances that one could be pleaded as a counterclaim or set-off to an action brought upon the other, neither can be deprived of the benefit thereof by the assignment or death of the other, and the two demands must be deemed compensated, so far as they equal each other." The provisions of this section are simply to preserve the rights of parties to have one claim or demand set off against another, and to prevent the assignment of one to avoid its being set off by another. When the appellant failed to pay the first month's rent, he forfeited all rights to the possession of the property under the terms of the lease. From the time of the forfeiture, unless forfeiture was waived by the appellee, he was wrongfully in possession; and in an action brought against him to recover such possession, and for damages for the unlawful detention thereof, the claim set up in these answers could not be enforced as a set-off.

The fourth paragraph of answer, in addition to the facts alleged in the second and third paragraphs, contains the further allegation that the appellant and appellee set off the rent due under the lease against so much of said note. If the appellant and the appellee, by agreement, set off the rent against that amount of the note, as averred in this paragraph of the answer, that was a good defense, and established the fact that there was no forfeiture for failure to pay rent, as alleged in the complaint. The appellee filed a motion to strike out this paragraph of the answer, which motion was sustained by the

court, and the appellant now insists that the court erred in its ruling thereon. According to the decisions of the supreme court, it is not necessary to examine into the sufficiency of the answer as a defense to determine the correctness of the court's ruling on this motion. The motion to strike out, in this case, by the ruling of the court, is made to perform the office of a demurrer for want of sufficient facts, which, it is settled by numerous authorities, is error. *Burk v. Taylor*, 103 Ind. 399, 3 N. E. Rep. 129; *McCammack v. McCammack*, 86 Ind. 387; *City of Elkhart v. Simonton*, 71 Ind. 7. In *Port v. Williams*, 6 Ind. 219, the court says: "Whether it was a sufficient defense to bar the action was wholly immaterial. It was, at least, such pertinent matter as the court ought not to strike out on motion. It was not so irrelevant as to warrant that. It was not a sham defense. \* \* \* We are therefore of opinion that the court erred in sustaining the motion to strike out." The motion to strike out admitted the truth of the facts alleged in the answer, and unless the answer showed on its face that the facts alleged constituted a sham defense, or that the same facts were admissible under another paragraph of the answer, it was error to strike it out. "While it is true that a motion to strike out a pleading is not the equivalent of a demurrer thereto, yet, where the motion has been sustained, it must be held, we think, that such motion, like a demurrer, admits the truth of all the facts well pleaded, for the purposes of the motion." *Railway Co. v. Summers*, 113 Ind. 10, 14 N. E. Rep. 733; *Mabin v. Webster*, 129 Ind. 430, 28 N. E. Rep. 863. The facts alleged in this paragraph of the answer could not have been proven under any other answer, neither did the answer show the defense to be a sham. The court therefore erred in sustaining appellee's motion to strike out the fourth paragraph of appellant's answer, for which the judgment of the court below is reversed, at the cost of appellee, with instructions to overrule the motion to strike out, and for further proceedings not inconsistent with this opinion.

LOTZ, J., absent.

(7 Ind. App. 639)

#### LOETSCHER v. STATE.

(Appellate Court of Indiana. Sept. 29, 1893.)

#### WEIGHING EVIDENCE ON APPEAL.

Where the evidence, though conflicting, fairly tends to support the finding, which has been approved by the trial court, the judgment thereon will not be disturbed on appeal.

Appeal from circuit court, Lake county; J. H. Gillett, Judge.

Gottfried Loetscher, having been convicted on a criminal charge, appeals. Affirmed.

Robt. Gregory, for appellant. W. C. McMahan, for the State.

GAVIN, C. J. The only error assigned is the overruling of the appellant's motion for new trial. The only ground of new trial is that the evidence is not suffi-



cient to sustain the finding. While the evidence is not strong, it comes to this court with the approval of the trial court, and the cause can only be reversed if there be an entire want of evidence, direct or fairly inferable. Keeping this rule in view, we cannot say there is such a failure. There is in this case evidence which fairly tends, at least, to support the finding, far within the rules applied in *Dant v. State*, 106 Ind. 79, 5 N. E. Rep. 870, and *Pierce v. State*, 109 Ind. 535, 10 N. E. Rep. 302. Judgment affirmed.

(7 Ind. App. 514)

**KENTUCKY & I. BRIDGE CO. v. EASTMAN.**

(Appellate Court of Indiana. Sept. 27, 1893.)  
INJURY TO EMPLOYE — DEFECTIVE APPLIANCES —  
KNOWLEDGE OF DEFECTS.

In an action by an employe for injuries caused by a defective car, a charge that defendant was liable if he failed to provide suitable cars, and "you are further satisfied that, if the defendant had exercised reasonable care and skill in providing such cars," then the defendant is liable, besides being confused and incomplete, is defective, in that it ignores the essential fact of want of knowledge of the defect by plaintiff.

Appeal from circuit court, Floyd county; G. B. Cardwell, Judge.

Action by William S. Eastman against the Kentucky & Indiana Bridge Company. Judgment for plaintiff. Defendant appeals. Affirmed.

A. Dowling, for appellant. C. L. & H. E. Jewett, for appellee.

**GAVIN, C. J.** The appellee was a brakeman employed on appellant's road, running over the bridge and trestle between New Albany and Louisville. He recovered judgment for damages resulting from an injury received by reason of the negligence of appellant in failing to supply a safe car, the defect being the insufficiency of a gate placed on the platform at the end of the car, against which appellee fell. By reason of its opening, he was thrown from the train. Two causes for new trial are asserted here,—the insufficiency of the evidence, and error of law in giving the second instruction asked by appellee. The instruction complained of reads as follows: "If you find from the evidence that the defendant did not provide suitable cars, appliances, and implements for the safe performance of the plaintiff's duties as brakeman, and you are further satisfied that if the defendant had exercised reasonable care and skill in providing such cars, appliances, and implements, then the defendant is liable for any injury sustained by the plaintiff in the performance of his duties in consequence of such failure, if the plaintiff was himself without fault contributing to such injury." The rule is thoroughly established that the master must use reasonable care to provide his employes with a safe working place and appliances. *Matchett v. Railway Co.*, 132 Ind. 334, 31 N. E. Rep. 792; *Rogers v. Leyden*, 127 Ind. 50, 26 N. E. Rep. 210; *Railway Co. v. Roesch*, 126 Ind. 445, 26 N. E.

Rep. 171; *Pennsylvania Co. v. Burgett*, (Ind. App.) 33 N. E. Rep. 914. It has also been repeatedly decided by our supreme court that the employe cannot recover from the master for injuries suffered by reason of defects in the machinery or appliances used by him, where the danger is known to the employe, although the employer may have been negligent, the employe being deemed to have assumed the danger as one of the risks of his service, if he voluntarily remains in the employer's service after he has acquired a knowledge of the danger. *Railway Co. v. Stupak*, 108 Ind. 1, 8 N. E. Rep. 630; *Railway Co. v. Dailey*, 110 Ind. 75, 10 N. E. Rep. 631; *Railway Co. v. Sandford*, 117 Ind. 265, 19 N. E. Rep. 776; *Railway Co. v. Corps*, 124 Ind. 427, 24 N. E. Rep. 1046; *Rogers v. Leyden*, 127 Ind. 50, 26 N. E. Rep. 210; *Coal Co. v. Hoodlet*, 129 Ind. 327, 27 N. E. Rep. 741; *Becker v. Baumgartner*, (Ind. App.) 32 N. E. Rep. 786; *Beach, Contrib. Neg.* § 382. If, however, the employe be induced to continue in service by the employer's promise, express or implied, to remedy the defect, then an exception to this rule arises. *Becker v. Baumgartner*, supra; *Railway Co. v. Watson*, 114 Ind. 20, 14 N. E. Rep. 721, and 15 N. E. Rep. 824; *Coal Co. v. Hoodlett*, 129 Ind. 327, 27 N. E. Rep. 741. In the last case referred to, it is also held that the risk is not thus assumed by the employe where, by the direction of his employer, he undertakes some work outside of the line of, or away from, the place of his regular employment. These cases also establish the proposition that it is incumbent upon the employe, in an action for damages, to allege in his complaint his want of such knowledge, and that, without such allegation, it will be bad on demurrer. Earlier cases regarded the employe's knowledge of the defect as simply an element of contributory negligence, but these later cases fix it beyond our power to question, as an independent factor of the plaintiff's case, the want of which must be alleged and proved separate and distinct from want of contributory negligence. We find the law thus laid down in *Wood, Mast. & Serv.* § 414: "The servant, in order to recover for defects in the appliances of the business, is called upon to establish three propositions: (1) That the appliance was defective; (2) that the master had notice thereof, or knowledge, or ought to have had; (3) that the servant did not know of the defect, and had not equal means of knowing with the master." Following these rules, the appellee made the allegation in his complaint. The charge in question is, as it comes to us, confused and manifestly incomplete, yet it undertakes to prescribe the facts upon which appellee shall be entitled to a recovery, and entirely ignores the essential fact of want of knowledge of the defect upon the part of the appellee. The case of *Railway Co. v. Corps*, and others cited above, hold that the allegation that he was free from contributory negligence does not include the averment as to want of knowledge, nor dispense with a direct allegation upon that point. Being an essential element of the complaint, it follows, of course, that it is es-

sentential that it be found by the jury to be true before they can be authorized to find for the plaintiff. Counsel for appellee insist that the charge is good so far as it goes, and therefore not liable to the objection made. This view we cannot support. We cannot adjudge the charge to be good as far as it goes. It undertakes to fix the basis upon which appellee is entitled to found a recovery. In doing this, the omission of an essential feature is fatal. We have examined the instructions carefully, and find nothing therein to cure the error, nor to supply the omission. Under the evidence, there were facts and circumstances shown from which the jury might have inferred knowledge upon appellee's part, notwithstanding his own denial of it. This being true, we are unable to say that the error is harmless, but are constrained to hold, with appellant, that the instruction was materially wrong, and that for this reason a new trial should have been granted. As to the other ground of the motion, it is unnecessary to now determine. Judgment reversed, with instructions to sustain the motion for a new trial.

(7 Ind. App. 529)

**ELEY v. MILLER**, County Auditor.

(Appellate Court of Indiana. Sept. 29, 1893.)

COUNTY AUDITORS—FEES—VOLUNTARY PAYMENTS.

1. Rev. St. 1881, § 4293, requiring the county auditor to give notice of the proceedings on the report of drainage viewers by publication, and posting written notices, does not authorize the auditor to charge for these services, and the rule against "constructive fees" applies.

2. Illegal fees collected by a public officer from a private person may be recovered back by such person.

3. Money voluntarily paid to a public officer not as fees, but for services, which he had no right to render unless gratuitously, cannot be recovered.

Appeal from circuit court, Adams county; W. H. Carroll, Judge.

Action by David Eley against Lewis C. Miller to recover back the amount of certain illegal charges made by and paid to defendant, as auditor of Adams county. Judgment for defendant. Plaintiff appeals.

La Follette & Adair, for appellant. France & Merryman, for appellee.

LOTZ, J. The appellant was the plaintiff in the court below. In his complaint he charged that he was a resident taxpayer and owner of real estate in Adams county, Ind., and that the appellee was the duly-qualified and acting auditor of said county; that, while appellee was acting as such auditor, certain public ditches were established under and by virtue of the drainage laws then in force, one of which was known as the "William Miller Ditch;" that of the costs of such proceeding the appellee taxed and collected of appellant the sum of \$4.75 more than he was entitled to receive, and also added the sum of \$1.50 thereto, which he also collected of appellant. There are other similar allegations with reference to another proceed-

ing, known as the "Frederick Hahnet Ditch," in which the amount of fees charged to have been illegally collected is stated as \$2.20, with the further sum of \$1.50 added thereto. It is also alleged that all fees, costs, and moneys so collected were excessive, extortionate, wrongful, and without authority of law; that appellant made demand of appellee to refund the same, but that he refused so to do. The appellee answered: (1) The general denial; and (2) specially setting out and itemizing the various charges for services. The court overruled a demurrer to the second paragraph, and appellant then replied in denial. There was a trial by the court, and, at the request of the appellant, the court made a special finding of the facts, and stated the conclusions of law thereon. Appellant excepted to the conclusions of law. The errors assigned are (1) the overruling the demurrer to the second paragraph of the answer; and (2) that the court erred in its conclusions of law. The gravamen of the action as made by the complaint is the illegal collection of certain fees and moneys. The second paragraph of the answer sought to show that such fees and charges were legal. It is only an argumentative denial. There is no available error in overruling the demurrer to it. The special findings show, in brief, that, in the year of 1890, William Miller and others filed their petition for the location of a public ditch in the auditor's office of Adams county, and with the appellant, who was the auditor of said county. That said petition was presented to the board of commissioners of said county. That said board appointed viewers, and that said viewers made their report to said board, and that said board approved the report of said viewers, and ordered that said ditch be constructed. That all such proceedings were regular and according to law; that the appellant, as the auditor of said county, taxed in said proceedings the following costs therein, to wit: Approving and recording bond, \$1; recording petition and order of board, \$1.50; certified petition and order of board, \$2; recording report, \$3.50; advertising, \$2.50; copy of record, \$2. That said costs were by the viewers afterwards duly apportioned among all the landowners according to their respective interests and assessment for benefits therein. That the amount apportioned to plaintiff as his share therein was \$8.12, of which the appellee received as his own costs the sum of \$4.75. That afterwards the appellee, as such auditor, sold the allotments of work on said ditch as required by law. That the appellant became a purchaser of one allotment at said sale. That appellee, as such auditor, contracted in writing with the appellant to complete the allotment so bid off by him, and in accordance with the plans and specifications of the same. That the appellee did individually, and not as such auditor and officer, make and write for said appellant the said contract and bond, and did exact of and from him the sum of \$1.50, and did not exact and take the same as costs in said cause, but simply exacted the same as a remuneration for his work and labor in preparing

the same. That the labor in preparing the same was reasonably worth the sum of \$1.50. The findings with reference to the Hahnet ditch are similar, except as to the amount of costs taxed and money collected, the items being as follows: Approving and recording bond, \$1; recording petition and order of board, \$1.50; certified copy of petition and order of board, \$2; recording report, \$6.50; advertising, \$2.50; copy of record and specifications, \$10; posting notices, \$2.80. That the amount thereof duly apportioned to the appellant as his share thereof was \$3.65, of which amount the appellee, as such auditor, received as his own costs the sum of \$2.50. The court stated the conclusions of law as follows: 'First. That the taxation of said costs by the defendant as such auditor, as set out in the above findings, was legal and right, and that said defendant, as such auditor, was legally and justly entitled to tax and collect the same. Second. That the defendant was legally entitled to charge the real value of his services for making and writing the said bonds and contracts mentioned and set out in the above findings, and that his charges therefor were just, equitable, and right, and that the plaintiff ought not recover in this cause.'

By the statutes of this state, the board of county commissioners is clothed with various and extraordinary powers. It sometimes exercises judicial functions, and sometimes administrative and executive functions. Sometimes it serves the public interests exclusively, and at others it acts for private individuals only. It is sometimes a court, and sometimes an executive body. These functions are often combined in the same proceeding, at the various stages. The act which went into effect September 19, 1881, (sections 4285-4317, inclusive, Rev. St. 1881,) gives the power and prescribes the procedure for the location and establishment of public ditches by the board of commissioners. It is apparent from the whole tenor of the act that, in constructing such improvements, the board serves, primarily, the individual persons whose lands are to be benefited. The public interest is only subserved incidentally. The board is made the medium by which quasi public improvements are promoted and secured. The method of procedure is prescribed by the statute. In such proceedings the board, at some stages, acts judicially, as a court, and at other stages in an administrative or executive capacity. The clear intent of the statute is that the whole cost of the improvement shall be ultimately borne by the lands benefited, and that no part thereof shall be borne by the county. Whatever acts are done by the board, or services rendered by any officer thereof, are done at the instigation and for the persons whose lands are to be improved. It is the settled policy of the legislature of this state to deny to public officers constructive fees and salaries. A public officer cannot successfully assert a claim for fees, unless he can produce a statute conferring such right, either in express terms or by fair implication. This has often been decided in this state. *Hawthorn v. Board*, 5 Ind. App. 280, 30 N. E. Rep. 16; *Stiffner v.*

*Board*, 1 Ind. App. 368, 27 N. E. Rep. 641; *Board v. Johnson*, 127 Ind. 238, 26 N. E. Rep. 821; *Board v. Barnes*, 123 Ind. 403, 24 N. E. Rep. 137; *Board v. Gresham*, 101 Ind. 58; *Noble v. Board*, Id. 127; *Board v. Harman*, Id. 551; *Wright v. Board*, 98 Ind. 88; *Donaldson v. Board*, 92 Ind. 80; *Nowles v. Board*, 86 Ind. 179. In the cases cited, the effort was to collect fees from the county. Appellee's counsel assert that a different rule prevails when the effort is to compel a public officer to restore money illegally collected from an individual person. In this view we do not concur. A public officer is under no compulsion to remain in office. If he is not satisfied with the compensation allowed by law, he may resign. He has no more right to tax and collect fees from an individual person than he has to tax and collect them from the county, unless he can produce a statute which expressly or by implication confers that right.

We do not agree with the first conclusion of law, that the taxation of all costs as set out in the finding was legal and right, and that the auditor was entitled to collect the same. Some of such charges are legal, and there are others for which we find no warrant in the statutes. Appellee's contention is that both of the proceedings set out in the findings are "litigations," within the meaning of that word as used in section 5909, Rev. St. 1881, and that the auditor is entitled to charge the same fees as county clerks in like cases. Conceding, without deciding, that such contention is correct, still there are certain moneys collected as fees, to wit, advertising and posting notices, for which we find no authority in either the statute governing the auditor or the clerk. It is true that section 4293, Rev. St. 1881, requires the auditor to give notice, both by publication and posting written notices, upon the filing of the report of the viewers, but there is no provision for special compensation for such services. Following the rule adopted by the supreme court in *Board v. Johnson*, 127 Ind. 238, 26 N. E. Rep. 821, we do not deem it necessary, under the circumstances of this case, to enter upon a discussion as to the legality of the other fees set out in the findings.

As to the second conclusion of law—that the defendant was legally entitled to charge the real value of his services for making and writing the bonds and contracts—we entertain grave doubts. Public policy requires that a public officer should make no charges for performing any services in matter pertaining to or relating to his official duties. The statutes expressly prohibit the auditor from practicing law. Sections 2020, 5901, Rev. St. 1881. It may be said that writing and preparing the contract and bond is not practicing law. As the term is generally understood, the "practice" of the law is the doing or performing services in a court of justice, in any matter depending therein, throughout its various stages, and in conformity to the adopted rules of procedure. But in a larger sense it includes legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured, al-

though such matter may or may not be depending in a court. The mere act of a scrivener who writes something dictated by another would not be practicing law. The statute, however, requires that the auditor shall contract with the party to whom a share or allotment is sold, and to take from such person a bond, to be approved by said auditor, conditioned for the faithful performance of the contract. The auditor, in a certain capacity, is made a party to the contract, and in the case in hearing he made a charge for performing services for himself, as well as for the opposite party. The preparation of the contract and bond is but a step in a legal proceeding depending before the board of county commissioners, of which board the auditor is the clerk. We are of the opinion that unless he can show that such services are a part of his official duties, and that the statute expressly or impliedly provides a compensation therefor, he is not entitled to make a charge for such services. There is no pretense that the statute provides any compensation for such services. It may be true that the auditor is under no obligation to perform such services, but public policy forbids that a public officer should perform services in any matter in connection with his official duties, and make a charge therefor not provided by statute. These charges, however, stand upon a different basis from the items designated as "fees." The complaint does not proceed upon the theory that such charges were made as fees. In the case of fees which have been illegally collected, the statute provides that the person from whom the same may have been received shall have a right to recover the same. Elliott, Supp. § 1976. But if any money was voluntarily paid, not as fees, then no recovery can be had under the findings. There is nothing in the findings to show that such payment was not voluntarily made. *Benson v. Christian*, 129 Ind. 585, 29 N. E. Rep. 26. For the error in stating the first conclusion of law, the judgment is reversed, at the costs of appellees, with instructions to grant a new trial, if asked for by appellant.

(7 Ind. App. 399)

**SHINKLE et al. v. SHEARMAN et al.**  
(Appellate Court of Indiana. Sept. 19, 1893.)

**COMPOSITION WITH CREDITORS—PREFERENCES—EFFECT OF.**

Where defendants entered into a composition agreement with their creditors, among whom were plaintiffs, and partly performed the same, the fact that plaintiffs were given a preference over other creditors by a collateral agreement whereby the composition was not to affect certain collateral security held by them does not entitle defendants to refuse complete performance of the composition agreement, and also, because of the composition, repudiate the original debt.

Appeal from superior court, Marion county; D. W. Howe, Judge.

Action by Bradford Shinkle and another against John D. Shearman and others. Defendants had judgment, and from an

order denying a new trial plaintiffs appeal. Reversed.

Baker & Daniels, for appellants. E. F. Ritter, for appellees.

**LOTZ, J.** The appellants sued the appellees, declaring on several promissory notes. One note was for the sum of \$1,399.12. There were eight other notes for the sum of \$103.36 each, and one note for the sum of \$103.37. The appellees answered the complaint jointly and severally. The first and second paragraphs were payment, and the third alleged that after the execution of the notes the appellees made an assignment under the laws of the state of Indiana for the benefit of their creditors; that after such assignment they made a proposition to their creditors for a composition; that such proposition was accepted by appellants and their other creditors; that their assignee was thereupon discharged by the court, and such proceedings were discontinued; that they have fully complied with such composition agreement on their part, and have offered to pay appellants the amount due them by the terms of said composition agreement, but that appellants refuse to accept such offer. The appellants replied, (1) the general denial, and (2) specially to the third paragraph admitting the assignment for the benefit of creditors and the signing on their part of the composition agreement, but charge that at the time the composition agreement was signed appellees agreed in writing, and as a part thereof, that the signing of such composition should not invalidate the pledge of certain merchandise held by appellants for the security of their claims; that appellees have failed to comply with such composition agreement, and that appellants are entitled to treat it as rescinded, and recover on their notes. No question is raised as to the sufficiency of any of the pleadings, and we have deemed it unnecessary to give but the substance thereof. There was a trial by jury, and at the conclusion of the hearing of the evidence the appellants dismissed the first paragraph of their complaint. The court then of its own motion instructed the jury as follows: "The evidence in the cause established the defense set up in the third paragraph of defendants' answer. You will therefore find for the defendants." A verdict was returned in accordance with such instruction, and final judgment in favor of appellees followed. The only assignment of error is the overruling of the motion for a new trial.

It appears from the evidence that in the year of 1884 the appellants were wholesale grocers, engaged in that business in the city of Cincinnati, Ohio, by the firm name of Shinkle & Kreis. At that time there was in said city a firm known as Shearman Bros., composed of John D. and Joseph T. Shearman, engaged in the business of manufacturing and selling mincemeat, fruit, butters, and preserves. Shearman Bros. became indebted to Shinkle & Kreis in two separate amounts, for which said firm executed its promissory notes. The first note was for the sum of \$1,399.12,

dated January 10, 1884, and due on or before July 10, 1886, with interest at 6 per cent. from July 10, 1885. The second note was for the sum of \$1,360.27, dated December 30, 1884, and due on or before January 10, 1886, with interest of 6 per cent. from January 10, 1885. Shearman Bros. pledged to Shinkle & Kreis certain mince-meat stock in barrels. Whether or not such pledge was given to secure the payment of both notes or only the last named the evidence is conflicting. The firm of Shearman Bros. was dissolved in the latter part of the year of 1885, and the firm of Adams & Shearman was formed. This last-named firm was composed of the appellees Henry G. Adams, James C. Adams, and John D. Shearman. The firm did business in the city of Indianapolis as manufacturers of fruit preserves, butters, mince-meats, etc. With the consent of Shinkle & Kreis, John D. Shearman removed the mince-meat stock which had been pledged to Indianapolis, and stored it in the cellar of Adams & Shearman, and it was placed among the assets of that firm, subject to the pledge. By an arrangement entered into between Adams & Shearman and Shinkle & Kreis, Adams & Shearman became the sureties of Shearman Bros. on the note for \$1,399.12. Adams & Shearman also paid Shinkle & Kreis \$100, and executed 13 notes, each for \$103.36, except the last one of the series, which was for \$103.37, all dated January 13, 1886, and payable to the order of Shinkle & Kreis, one of said notes falling due on the 13th of each month thereafter until all became due; the said 13 notes and the \$100 cash paid being equal to the note of \$1,360.27, with the interest thereon. It was also agreed that Shinkle & Kreis should retain the note of \$1,360.27, and should credit the \$100 cash, and as the small notes should become due and were paid should make credits of such payments on said note of \$1,360.27. It was further agreed that Shinkle & Kreis should retain the mince-meat stock as an additional security. The four notes first to fall due were paid, and \$513.44 was credited on the \$1,360.27 note. On May 21, 1886, the firm of Adams & Shearman made an assignment of all their property for the benefit of their creditors. Some of the unsecured creditors of said firm met on the 3d day of June following, and adopted a resolution that they would accept 25 per cent. of their claims by taking notes of Adams & Shearman, one-half due in 8 months and one-half due in 18 months, with 6 per cent. interest, and secured by chattel mortgage on certain machinery and tools. June 24, 1886, Shinkle & Kreis signed the composition agreement, and at the same time, and as a part thereof, Adams & Shearman signed an agreement as follows: "In order not to vitiate the collateral held by Shinkle & Kreis, we hereby agree that the signing of the compromise of Adams and Shearman by Shinkle and Kreis will in no way affect their ownership of collateral (held by us and belonging to them) of 77 half bbls. stock mince-meat, 17,248 lbs., at 9 cents, \$1,552.32; and 20 quarter bbls., 2,880 lbs., at 9 cents, \$259.20; totals, 1,811.52 dollars,—given by Shearman Bros. to se-

cure the amount due them. We also further agree to use 350 lbs. of the stock mince-meat each working day during the month of November, 1886, and agree to pay 9 cents per pound for same, remitting them the amount in cash as fast as used. Also agree to use all the balance of the stock mince-meat at the same price, remitting as used, on or before December 1st, 1887, which Shinkle and Kreis will apply upon amount due by Shearman Bros." Adams & Shearman executed a chattel mortgage as agreed, and their assignee was discharged by the court. On the 3d day of June, 1886, when the composition agreement went into effect, there was a balance due Shinkle & Kreis on the first note of Shearman Bros. of \$1,352.14, and on the second note \$952.11, and on both notes of \$2,304.25. A controversy arose between appellants and appellees as to the construction of the composition agreement, and of the agreement signed by Adams & Shearman. Appellants contended that the 25 per cent. should be calculated on the balance due them on both notes, and that the mince-meat stock was pledged to secure both of the Shearman Bros.' notes, while the appellees contended that the 25 per cent. should be calculated upon the balance due on the first note only, and that the mince-meat stock was pledged to secure the second note only, and that when that note should be paid the remainder of the mince-meat stock, if any, should be the property of appellees, free from said pledge. On November 22, 1886, the appellees sent by mail to appellants two notes signed by Adams & Shearman, dated June 3, 1886, each for the sum of \$169.02, one due in 8 and one in 18 months, with 6 per cent. interest, being 25 per cent. of the amount due on the first note. Shinkle & Kreis refused to accept these notes, but returned them to appellees. The appellees used part of the mince-meat stock under the agreement made on June 24, 1886, and remitted to Shinkle & Kreis the sum of \$787 on account thereof. If appellees' contention is correct, that the pledge was given to secure the last note only, then this sum, with the former payment, would entitle them to a credit thereon of \$1,300.94, and there would still remain an unpaid balance thereon of \$164.61, not counting the interest from June 3, 1886. At the time this action was commenced, February 17, 1888, both of the notes which appellees sent to appellants by mail were past due. Appellees did not pay any money into court, nor did they bring their compromise notes into court with their pleadings, nor did they on the trial keep good their tender either of notes or money, but simply introduced such notes in evidence.

We are informed by appellants' brief that the trial court was of the opinion that the collateral agreement above set out gave an improper preference to the appellants as against the other creditors of Adams & Shearman, and that the appellees had tendered sufficient performance under the composition agreement. It will be conceded that, if the debtor performs his part of a composition agreement, no action will lie for the original debt. *Pontious v. Durlinger*, 59 Ind. 27. But if he

falls in good faith to perform his part, the creditor has his action upon the original debt. *Kahn v. Gumberts*, 9 Ind. 430. The theory of the law in a composition contract is that it is an agreement between the creditors themselves, as well as between them and the debtor. They agree that each shall receive the sum or security stipulated, and nothing more; and it is on this consideration that the debtor shall be wholly discharged from all the debts owing the creditors who signed the composition contract. The law requires the utmost good faith on the part of the debtor towards all of his creditors, and on the part of the creditors towards each other. If any creditor secure a secret preference, an element is introduced into the contract to which the other creditors have not assented, and it is no longer their agreement, and they may treat the composition as null and void whenever such discovery is made. So careful are the courts to preserve the highest degree of good faith among the creditors that the debtor himself may, on the grounds of public policy, set up the preference to defeat his own agreement. *Kahn v. Gumberts*, 9 Ind. 430; *McFarland v. Garber*, 10 Ind. 151; *Evans v. Gallantime*, 57 Ind. 367, 371. We fail to see how these rules can have any controlling effect on the case in hearing. Even if it be conceded that the collateral contract is voidable by reason of a preference given by the appellees, yet as it was voluntarily performed in part, and to the extent of the performance it is binding upon them, they are not entitled to have the moneys so voluntarily paid returned, or credited upon the notes in suit. The small notes which were given in lieu of the second note, and which are declared upon, have never been paid in full. The appellees will not be permitted to repudiate both the composition contract and the collateral contract. The part performance of one will not operate as a discharge of the other.

There is still another serious objection to the instruction of the court in directing a verdict for the appellees. It assumes that the composition agreement as a defense has been established as to the whole complaint remaining after the first paragraph was dismissed. The evidence entirely fails to support such defense. If the tender of the notes was a good tender in the first instance, the appellees should have kept the tender good. When a tender is pleaded with a protest, the article must be in court, not only with the pleading, but upon the trial, so that the court may render a proper judgment protecting the right of all the parties litigant. When a stipulation to be performed or a thing to be done rests upon one party to a contract, and is independent of any obligation resting upon the opposite party, the tender must not only be strictly made, but must be kept good, in order to effect a discharge of the contract. *Eichholts v. Taylor*, 88 Ind. 88; *Smith v. Felton*, 85 Ind. 223; *Hazelett v. Butler University*, 84 Ind. 230. Every composition, to be complete, must have in it the element of accord and satisfaction. An accord is the proper term for an agreement between a single

creditor and the debtor for the discharge of the debt, by accepting something other than agreed upon, or by payment of a less sum. Accord and satisfaction is the proper term for such agreement consummated by actual payment and acceptance in full. A composition is an engagement in which several of the creditors (not necessarily all, but a number) agree with the debtor, and in effect with each other, that the debtor shall be released on making the partial payments he proffers. 1 Abb. Law Dict. p. 257. An accord without satisfaction is not good. Whart. Cont. § 999. As a result of the judgment rendered below we have this anomalous condition: The appellees were permitted to go out of court without ever having paid or performed the composition agreement, although such agreement was permitted to defeat a recovery. Judgment reversed, with instructions to sustain the motion for a new trial.

(9 Ind. App. 581)

#### EMERSON v. OPP et al.<sup>1</sup>

(Appellate Court of Indiana. Sept. 29, 1893.)

APPEAL — WAIVING OBJECTIONS TO PLEADINGS — ACTION ON NOTE — ALTERATION — BURDEN OF PROOF — RATIFICATION.

1. Where the answer, filed in term pursuant to a rule of court, is considered as a part of the record throughout the trial, it will be so considered on appeal, though it was not made a part of the record by an order-book entry.

2. In an action on a note, where an alteration therein is shown, the burden is on plaintiff to show that such alteration was made with the consent of defendant.

3. Where the maker of the note retains the consideration for which it was given, the alteration of the note by another person signing it as maker is one which the maker may legally ratify, and such ratification is binding in an action on the note.

Appeal from circuit court, Benton county; E. P. Hammond, Judge.

Action on a promissory note by John Opp against James Emerson, Sr., and others. Judgment was rendered against James Emerson, and in favor of the other defendants, and defendant Emerson, Sr., appeals. Affirmed.

U. Z. Wiley and Frazer & Isham, for appellant. Walker & Gray, for appellees.

DAVIS, J. This was an action instituted in the court below by the appellee, John Opp, against James Emerson, Sr., appellant, and his sons, George T. Emerson and James A. Emerson, on a note purporting to have been executed by all three of the Emersons. The complaint was filed in vacation, on the 24th day of October, 1891. The November term commenced on the second Monday, — the 11th day of the month. The defendants were, on the first day of the term, ruled to answer the complaint on the 4th day of the term. The clerk recites that the answers, which are set out in the transcript, were filed on the 16th day of November, "but no order-book entry was ever entered thereof." The appellant's answer, so filed, was a non est factum. As judgment was rendered in favor of the other defendants, who are joined as appellees herein, it is not neces-

<sup>1</sup> Rehearing denied, 37 N. E. 24.

ary to consider the answers filed by them. On the trial the jury returned a verdict finding the facts specially, in substance and effect, so far as material to the questions involved in this appeal, that said Opp, in 1875, made a loan of money to appellant, for which debt he executed his note, bearing interest; that the note in suit was executed by him in renewal of the debt, and was afterwards changed, at the instance of Opp, by procuring the signatures of the sons of appellant thereto; that, after the maturity of the note, appellant, with full knowledge of such change, promised and agreed to pay it. Judgment was rendered against appellant for \$1,327.66, the amount due on the note. Several questions arise on the errors assigned, and the argument of counsel, which we will proceed to determine.

It is contended by counsel for appellee that the cause was tried without an issue, for the reason that the answer of appellant is not shown to have been made a part of the record by an order-book entry. In *Gilbert v. Hall*, 115 Ind. 549, 18 N. E. Rep. 28, Judge Mitchell says: "Where proceedings or motions are required to be taken or made in a cause during its progress in term time, such motion and proceedings must be presented to the court, and its attention called thereto, and not merely filed in the clerk's office." There are many cases in which it has been held that when a defendant pleads an affirmative answer, and the trial is entered upon and proceeded with without a reply, his answer will be deemed to be denied; but, so far as our investigation has extended, we have not found any case where the doctrine has been applied on failure to answer the complaint. If this principle, however, was applicable, and the case should be treated as though an answer of general denial had been filed, the appellant would not have been entitled to prove the non-execution of the note under a general denial. Conceding that the transcript of the record before us does not show the filing of appellant's answer, yet, in view of the fact that throughout the proceedings and trial the answer of non est factum was treated and considered by the parties, and also the court, as a part of the record, we will so regard it on this appeal. *Earnhart v. Robertson*, 10 Ind. 9.

It is agreed by counsel that the addition of names to a promissory note, after the same has been signed and delivered by the maker of the note, without his knowledge or consent, will discharge him from liability on the note. *Bowers v. Briggs*, 20 Ind. 189. It is further agreed that the special finding of the jury, eliminating the contradictory statements therein, contains no finding of fact as to whether the appellant did or did not consent to, or authorize, the alteration of this note. The question is, upon whom, then, rested the burden of proof? If the appellant was required to show that the additional signatures to the note were made without consent, judgment was rightfully entered against him. If, upon the contrary, after a material alteration was made in the note, sufficient to render it voidable, the burden of the proof was upon the appellee,

claiming under it, to explain this alteration, then the facts found were not sufficient, in law, to authorize this judgment, (unless the facts show such ratification as binds appellant,) because the alteration, in this respect, is wholly unexplained. The authorities on this proposition, as we understand them, sustain appellant's position. In *Eckert v. Louis*, 94 Ind. 90, Judge Howk says: "When once it appeared that the notes in suit were altered after their execution, the presumption arose, and would continue until the contrary was shown, that the alteration was made by the appellees." *Bowman v. Mitchell*, 79 Ind. 84; *Brooks v. Allen*, 62 Ind. 401. It is true, the burden of proof as to the alteration rested on the appellant. *Melkel v. Institution*, 36 Ind. 355; *Insurance Co. v. Brim*, 111 Ind. 281, 12 N. E. Rep. 315. But when appellant established the fact that, after he had signed and delivered the note to appellee, the appellee, through his son, and in the absence of appellant, procured the other signatures to the note, it was incumbent on the holder of the note to show that such material alteration was made with the knowledge and consent of appellant.

The remaining question is, do the facts found by the jury establish a ratification of the note by appellant? It is found in the verdict that appellant, after the maturity of the note, and before the commencement of the suit, with full knowledge of the fact that the names of his sons had been subscribed as makers to the note, promised to pay the same. In this case, appellant had borrowed the money of appellee, for which he executed the note in suit. The note was afterwards changed in the material respect indicated, but the appellant owes the debt. The note, it is true, cannot be enforced against him, unless he affirms and ratifies the change which was made after he signed it. Did his direct and express promise, which he made to the holder of the note, constitute such ratification? As applicable to the case in hand, we adopt the following: "With some exceptions, not necessary to be adverted to here, the general proposition is, however, undoubtedly correct, that he who may authorize in the beginning may ratify in the end." *Bank v. Gay*, 63 Mo. 33. See, also, *Negley v. Lindsay*, 67 Pa. St. 217; *Catlett v. Trustees*, 62 Ind. 365; *Love v. Wells*, 26 Ind. 503; *Heady v. Boden*, 4 Ind. App. 475, 30 N. E. Rep. 1119. It is well settled, as a general rule, that void contracts cannot be ratified, and that the addition of another name as maker to a note, by the payee or holder, after its delivery and execution by the maker, renders it void, but if the maker consents to such change the obligation continues binding. Therefore, may he not, under the circumstances of this case, ratify and confirm such change? It should be borne in mind that appellant received and retained the consideration mentioned in the note; that his name was not forged; that he signed the note. Further, the promise to pay, in this case, was not made for the purpose of concealing any crime, or suppressing a prosecution. The reasoning of Judge Mitchell in *Henry v. Heeb*, 114 Ind. 275, 16 N. E. Rep. 606, it



seems to us, enunciates the correct principles applicable to such cases. In this case, it does not appear there was any purpose to commit a crime; and public policy does not, in our opinion, forbid the adoption or ratification of the change by appellant; nor can it be said to be without consideration, in view of the fact that appellant has and retains the borrowed money. It appears to us that the cause has been fairly tried and determined in the court below. Section 658, Rev. St. 1881. Judgment affirmed, at costs of appellant.

(7 Ind. App. 609)

**SWEETZER et al. v. SNODGRASS.**

(Appellate Court of Indiana. Sept. 28, 1893.)

**ASSUMPSIT — BANK — MONEY PAID DEPOSITOR — FORGED CHECK — JUDGEMENT — SUFFICIENCY OF FINDINGS.**

1. In an action by bankers against a depositor for money paid defendant at her request, defendant filed a cross complaint for money loaned plaintiffs. The principal dispute related to five items, one of which was money paid by plaintiffs on a forged check supposed to have been drawn on them by defendant and her agent; but there were other items, all of which were put in dispute by the issues joined. *Held*, that a judgment for defendant, based on findings in her favor as to such check, was not supported by findings which failed to show that, at the time the action was commenced, she had any money on deposit with plaintiffs.

2. Findings in such case that certain sums were "charged as interest on an overdraft," and "as interest on the B. draft," and "as a balance averred to be due" on a certain remittance, are insufficient to support a conclusion that plaintiffs are entitled to recover therefor.

3. It appeared that defendant shipped a car of grain to a person in a foreign state, and negotiated at plaintiffs' bank a draft on the purchasers of the grain, with the bill of lading attached. The bank sent the draft for collection, and it was paid to the collecting agent. While in the agent's hands, it was garnished in such state in an action against defendant; but it did not appear that she or plaintiffs were served with any process in, or were in any way bound by, the garnishment proceeding, or that any judgment was rendered therein. Only part of the amount collected on the draft was remitted to plaintiffs. *Held*, that the facts were insufficient to support a conclusion that defendant was liable for the difference between the amount collected on the draft and the amount remitted.

Appeal from circuit court, Grant county; R. T. St. John, Judge.

Action by George B. Sweetzer and others against Florence B. Snodgrass for money paid defendant at her request, in which she filed a cross complaint for money loaned to the Marion Bank, operated by plaintiffs as partners. There was a judgment entered on facts found in favor of defendant, to which each party excepted. Plaintiffs appeal. Reversed, and new trial ordered.

Carroll & Dean, for appellants. Harvey & De Wolf, for appellee.

GAVIN, C. J. The appellants sued appellee, Snodgrass, for money paid to her at her special instance and request. To the complaint, she filed a general denial. In addition to this answer, she also filed a cross complaint, seeking to recover \$92-

697.20, money lent by her to the Marion Bank, operated by appellants as partners. To this cross complaint, appellants filed answers of general denial, payment, settlement, and set-off. To the affirmative answers, replies of general denial were filed. Upon the trial the court found the facts specially, with his conclusions of law thereon, and rendered judgment in favor of the appellee, Snodgrass, for \$67.81. Each party excepted to the conclusions of law, and each urges its exception here; the one by assignment in error, and the other by cross assignment. The only objections argued by appellants are to the correctness of the court's conclusion, by which it held that appellee was entitled to recover from appellants the amount of a certain \$210 check. The facts found, so far as they bear upon the question considered under this assignment, are as follows: (1) That there are but five disputed items in the cause which require any consideration, and [these] are as follows:

Item 8, 1889, the check signed by defendant, and which is averred to have been a forgery.....	\$210 00
Item May 9, 1890.....	21 74
" Feb'y 16, 1891.....	2 19
" " " ".....	111 50
" " " ".....	6 76

(2) That appellants were partners doing a banking business as the Marion Bank, at Marion, Ind., during the times hereinafter mentioned. (3, 4) Florence B. Snodgrass, defendant, was during this time engaged in the purchase and shipping of grain under the name of Florence B. Snodgrass & Co., and transacted business with appellants as her bankers, making deposits, and checking out the same, in the course of business. (5) That her husband was her general agent in control of her business. (6) That one Stillwell was her agent at Swayzee in said business. (7-9) That, in accordance with a custom, she furnished Stillwell with blank checks signed by herself, to fill up and use in payment of grain purchased, he first signing them himself. He, expecting to be absent, signed some of the blank checks, and left them with his clerk to use, if necessary, in the business. During that day (whether during his absence does not appear) a blank check thus signed was stolen by some person unknown, filled up for \$210, payable to William Legg. It was presented by some one, a stranger to the bankers, who represented himself to be the payee, and, after indorsing thereon the name of William Legg, received payment thereof from appellants, who charged it to appellee's account. (13) Appellee ceased to transact business with appellants February 16, 1890. (14) On October 11, 1889, and February 7, March 26, and May 10, 1890, statements of all accounts between the parties, and balances, were made out and presented to the defendant, (appellee,) and interest on overdrafts was charged to her, and not objected to by her. Each of said statements included all matters of account between said parties prior to said dates. No objection was then made by appellee to the account containing the \$210 check, although the bank did know of objection thereto before the final balance was made

by appellants. Upon these facts, the court concluded "that the plaintiffs are liable to the defendant for the amount of the \$210 check paid on the indorsement of Legg." For this \$210, less \$142.19, the amount of the other four items stated by the court to be in dispute, judgment was rendered in favor of appellee.

In order to justify a recovery by appellee upon her cross complaint, all the facts essential to a recovery must be found, and stated in the special finding. *Kehr v. Hall*, 117 Ind. 405, 20 N. E. Rep. 279; *Town of Freedom v. Norris*, 128 Ind. 377, 27 N. E. Rep. 869. A careful examination of the findings discloses that they fail to show that appellee had on deposit with appellants, when the suit was brought, any money whatever. The findings do not show any specific amount of money deposited at any time. They simply show that appellee did business with appellants as her bankers, and made deposits, and checked them out. They show that accounts were rendered at various times, and balances shown, but what the balances were, or in whose favor, does not appear. For aught that appears in the findings, the charge of this \$210 check to appellee's account may have overdrawn the account just that much, or it may have been overdrawn without this charge. There is, it is true, a finding that only five items were in dispute, but the issues joined put all items in dispute, and this finding cannot take the place of a finding as to the amount of deposits. Under these circumstances, there is no foundation on which an affirmative judgment in favor of the appellee can be sustained.

We now come to the consideration of the cross assignment, which questions the correctness of the court's ruling in concluding that "the defendant is liable to the plaintiffs for the amount of" the other four items said to be in dispute, viz. \$142.19. In addition to the facts already given, the finding contains the following facts upon which this conclusion was based: (10) "That the item of \$2.19 is charged as interest on overdraft by defendant; that the item of \$6.76 is charged as interest on the draft known as the 'Bolivar Draft,' and mentioned hereafter; that the item of \$21.74 is charged as a balance averred to be due on what is called the 'Hazelton Remittance,' and for interest and exchange." (12) "The defendant bargained a car load of corn to a party in Bolivar, Ohio, and shipped the corn to that place, to the order of Snodgrass & Co., taking a bill of lading from the railroad company for the same. On the 16th of February, 1891, the defendant negotiated at plaintiffs' bank a draft for \$178.46 drawn on the purchaser of said corn, to which draft said bill of lading was attached, and the plaintiffs gave the defendant credit for the amount of said draft. The draft was sent to Bolivar, Ohio, by the plaintiffs for collection, and was there paid by the drawee to the express company. While the money was in the hands of the express company, certain parties in Ohio commenced an action against Snodgrass & Co., and garnished the express company. The plaintiffs re-

ceived on account of said draft \$68.96, and charged the balance, \$111.50 to the defendant." These findings are manifestly incomplete, and insufficient to sustain the conclusion. To say that a sum is "charged as interest on overdraft," or "on the draft known as the 'Bolivar Draft,'" or "as a balance averred to be due," is certainly not such a finding of the facts as will enable this or any other court to say that the sums were properly charged, and are recoverable in this action. The twelfth finding shows a draft for a load of corn sold by the drawer, forwarded for collection, and paid to the collecting agent. When paid, the money belonged to the owner of the draft, not to the vendor of the corn. It does not appear that either Snodgrass or the appellants were ever served with any process in the garnishee proceeding, or were in any manner bound thereby. It does not even appear that any judgment was ever rendered in that proceeding. Before the bank could charge the appellee with the loss on that draft, the facts must be shown which justify it. The facts that the express company was garnished, and that the bank only received \$68.96, are not, of themselves, unaided by further facts, sufficient for this purpose. We do not feel, in this case, justified in ordering judgment upon the facts, as found, but deem it a case which requires us to direct a new trial. The judgment is therefore reversed, with instructions to the trial court to award a new trial; each party to pay one-half of the costs of this appeal; all other costs to abide the final event of the suit.

(7 Ind. App. 614)

#### SMITH v. WALKER.

(Appellate Court of Indiana. Sept. 26, 1893.)

ACTION ON NOTE—PLEADING—MISTAKE IN PAYEE'S NAME—NECESSARY PARTIES—BILL OF EXCEPTIONS—REFERENCE TO EVIDENCE.

1. A complaint, in an action on a note, alleging that, at the time of the execution thereof to plaintiff, defendant, through inadvertence and the mutual mistake of parties, wrote therein, as payee, the name of defendant's father, instead of plaintiff's name, states sufficiently, as against a general demurrer, that the mistake was a mistake of fact.

2. It appearing by the complaint, in an action on a note, that the note was executed to plaintiff for property sold by him to defendant, and that the name of another person was by mistake written in the note as payee, such person is not a necessary party defendant.

3. A bill of exceptions, purporting to contain all the evidence, recited that plaintiff gave in evidence "the note marked 'Exhibit A,' as follows." Then followed a blank space. Attached to the complaint was a copy of the note sued on, marked "Exhibit A." *Held*, that the note offered in evidence was not identified as the note sued on, so that the blank could be filled by reference to the copy attached to the complaint, and therefore the record did not contain all the evidence, so as to allow a review of it.

Appeal from circuit court, Vigo county; D. N. Taylor, Judge.

Action by Adriel Walker against Heber S. Smith on a note. Judgment for plaintiff. Defendant appeals. Affirmed.

Samuel C. Stinson, Robert B. Stinson, Alvin M. Higgins, and H. Allen Condit, for appellant. I. N. Pierce, Hugh D. Roquet, and Faris & Hamill, for appellee.

DAVIS, J. Appellee brought suit in the court below against appellant on a promissory note payable to the order of one C. C. Smith, alleging that, at the time of the execution of the note to said appellee, the appellant, through inadvertence and the mutual mistake of the parties, wrote the name of said C. C. Smith, his father, as payee thereof, instead of appellee. The complaint is in due form, and properly alleges the execution of the note to appellee, with the exception of the mutual mistake of the parties in the name of the payee inserted therein. The note discloses on its face that it was executed as the evidence of the unpaid purchase price for a mare, "and that the title or ownership does not pass from the said Adriel Walker until this note, with interest, is paid in full." A memorandum across one end of the copy of the note filed with the complaint shows that Charles C. Smith was a dealer in agricultural implements, stoves, and tinware at Terre Haute, Ind., and he was not made a party defendant to the action. Appellant demurred to the complaint on the ground that it did not state facts sufficient to constitute a good cause of action, and also for defect of parties defendant, in the omission of said Charles C. Smith, named as payee of the note. The demurrer was overruled, and appellant answered in four paragraphs, — a denial, no consideration for the note, failure of consideration, and fraudulent representations. An alleged breach of warranty was also pleaded in cross complaint. The case was tried by a jury, and resulted in verdict and judgment against appellant. The errors assigned are: (1) That the complaint does not state facts sufficient to constitute a cause of action; (2) that the court erred in overruling the demurrer to the complaint; (3) that the court erred in overruling appellant's motion for a new trial.

In support of the first two errors, it is urged that the alleged mistake does not appear to be a mistake of fact. The averments on this subject are not, perhaps, as clear and specific as the rules of good pleading require, yet we think they are sufficient to withstand the demurrer. *Keister v. Myers*, 115 Ind. 312, 17 N. E. Rep. 161.

It is next insisted that the complaint shows a defect of parties defendant. This action was not brought by an assignee. Section 276, Rev. St. 1881. The facts alleged show that Charles C. Smith never, at any time, had any interest in the note. The note was executed to Adriel Walker for a mare sold by him to appellee. The appellant, through inadvertence, and on account of the mutual oversight and mistake of the parties, wrote the note payable to his father, but delivered the same to appellee. This is the fair intent and effect of the averments. Under such circumstances, it was not necessary to make said Smith a party defendant to the action. Conceding the facts to be true, as

alleged, there could be no defect of parties. If the note had been executed to Charles C. Smith, or if it otherwise appeared that he at any time had any interest in the note, he would undoubtedly have been a necessary party. It was incumbent on appellee to prove on the trial the facts alleged in the complaint. If he had failed to establish the alleged mistake as charged, (or, perhaps, if it had appeared that Smith ever, at any time, had any interest in the note,) there would have been a fatal variance between the pleading and proof. All, however, that it is necessary for us to decide, and all we do decide, on this proposition, is that, on the facts alleged, there was no defect of parties apparent on the face of the complaint.

We will next proceed to determine whether any question is presented by the record on the third error assigned. On the 15th day of August, 1891, appellant's motion for a new trial was overruled, and he was granted 60 days in which to file bill of exceptions. Afterwards, on the 26th day of May, 1892, bill of exceptions No. 1, containing instructions, was filed; and it is shown in the bill of exceptions that it was presented to and signed by the judge on the 13th day of October, 1891, and also, on the same day, a bill of exceptions, containing the longhand copy of the shorthand manuscript of the evidence, was filed, and it also appears in said bill of exceptions that the same was presented to and signed by the judge on the 13th of October, 1891. It is insisted that the bills of exceptions are not in the record, but, without entering into the discussion at length, we are of the opinion that under the principles enunciated in *Gish v. Gish*, 6 Ind. App. —, 34 N. E. Rep. 305, and the authorities there cited, this contention cannot prevail. It is next contended by counsel for appellee that the bill of exceptions affirmatively shows that it does not contain all the evidence introduced on the trial, and, therefore, that no question is presented in relation to the evidence or the instructions. The bill of exceptions, purporting to include all the evidence given on the trial, contains the following: "The plaintiff offered and read in evidence the note marked 'Exhibit A,' which is in the words and figures following, to wit." Then follows a blank space, in which we presume it was intended to copy the note. No note is copied into the bill of exceptions. There is no "(Here insert,)" or other reference to any note. The copy of the note filed with the complaint is marked "Exhibit A." It is contended by counsel for appellant that the reference to Exhibit A identifies the note read in evidence as being the same as Exhibit A filed with the complaint; and it is insisted that, by reason of such identification, it was not necessary to copy the note into the transcript of the evidence. *Voorhees v. Hushaw*, 30 Ind. 488; *Binkley v. Forkner*, 17 Ind. 178, 19 N. E. Rep. 753.

In the last case cited, Judge Mitchell, speaking for the court, said: "When a paper is once copied into the transcript, it is not necessary to copy it again, when introduced into subsequent parts of the

record, provided it be so referred to as that it can be identified with certainty." We concur in the principle above stated, but the difficulty arises in its application to the facts in this case. The Exhibit A referred to in, and filed with, the complaint, is a copy of the note sued on. The Exhibit A referred to in the bill of exceptions appears to have been an original note, not a copy. The Exhibit A in the bill of exceptions is not identified with certainty as referring to the same note previously copied into the transcript. If it was clearly shown in the bill of exceptions, in some manner, with certainty, that the note read in evidence was the note sued on, a copy of which was filed with the complaint, then, under the authorities cited, it would not be essential that it should be again copied into the bill of exceptions, but in this case inference alone leads to such conclusion. We might, if allowed, presume that the note read in evidence was the note in suit, but the court cannot indulge in such presumption. A note was read in evidence which is not copied into the bill of exceptions, and, in the absence of any statement or showing that a copy of such note appears elsewhere in the transcript, we are constrained to hold that all the evidence is not in the record. The rule has long been established that in such cases—where the evidence is not all in the record—the appellate court will not consider any question in reference to the evidence or instructions. (*Gish v. Gish*, supra; *Railway Co. v. Lavender*, 6 Ind. App. —, 34 N. E. Rep. 109; *Patchell v. Jaqua*, 6 Ind. App. —, 33 N. E. Rep. 132.) except as stated in *Rapp v. Kester*, 125 Ind. 79, 25 N. E. Rep. 141. Whether the omitted evidence is material or immaterial seems to make no difference. When it is affirmatively shown, in such case, that any evidence was given on the trial which does not appear in the bill of exceptions, such omission is treated and considered as a vital defect. This may be, in its practical operation, sometimes a harsh, technical rule. It is true, however, that in many cases the entire evidence is not necessary to present the questions on which decision is sought on appeal; but when the effort is made to so present the questions growing out of rulings on the trial, to the appellate court on appeal, by bringing all the evidence before the court, as was attempted to be done, the omission of any part of the evidence is fatal. There should be, in such cases, settled and well-defined rules, calculated to secure a uniform system of practice, and to promote the ends of justice, and attorneys who prosecute appeals should see that a perfect transcript of the record, or so much thereof as may be necessary to present the questions in controversy, is filed in this court. Without continuing the discussion, it will suffice to say, that, applying the principles enunciated in a long and unbroken line of decisions in the supreme court, and which this court has followed, we are of the opinion that no question arising on the third assignment of errors is presented by the record. Judgment affirmed, at costs of appellant.

(7 Ind. App. 603)

# HASLETT v. NEW ALBANY BELT & TERMINAL R. CO.

(Appellate Court of Indiana. Sept. 27, 1893.)

## RIPARIAN RIGHTS—TITLE TO FEE IN STREET—ELEVATED ROAD—DAMAGES.

1. W. street lies along the north shore of the Ohio river with a defined width, but no lots were ever laid out between the street and the river. The land between the street and river is uninclosed, but has been regularly sold by the original owners and their grantees. *Held*, that an owner of a lot abutting on the north side of the street owns the fee to the middle of the street only, and has no riparian rights along the river bank.

2. An owner of the fee in the north half of a street has no right of action against an elevated road built on the south half, under Rev. St. 1881, §§ 905-908, providing for an assessment of damages in case of the actual taking of property.

Appeal from circuit court, Floyd county, G. V. Howk, Judge.

Action by George Haslett against the New Albany Belt & Terminal Railroad Company. Judgment for defendant. Plaintiff appeals. Affirmed.

C. L. & H. E. Jewett, for appellant. A. Dowling, for appellee.

ROSS, J. The appellant filed his application in the court below for a writ of assessment of damages, under sections 905-908, Rev. St. 1881. The appellee was duly notified, a jury impaneled, and damages assessed in the sum of \$510. The appellee filed exceptions to the award. After issues joined, the cause was submitted to a jury for trial, and a verdict returned in favor of the appellee. The appellant thereupon filed his motion and causes for a new trial, which was overruled by the court, and judgment rendered on the verdict in favor of the appellee. The appellant has assigned but one error in this court, namely, that the court erred in overruling appellant's motion for a new trial. The causes upon which appellant's motion for a new trial was based, in addition to the statutory ones, relate to the giving and refusal to give instructions. The facts, as stated by the parties, and as disclosed by the evidence, are substantially as follows: That the appellant, at the commencement of this action, and for more than 20 years prior thereto, was the owner of the east half of lot 14, on Upper Water street, in the city of New Albany, Ind., fronting 30 feet on said street, and extending back therefrom the same width northward 130 feet. Upper Water street is located along the north shore of the Ohio river, with a defined width marked by given lines, but no lots were ever laid out between said street and the river. There is a bank and strip of ground lying between the south line of said street and the river, which varies in width as the water is high or low. That it is uninclosed, but had been regularly sold and conveyed from time to time by the original owners and their grantees. Said street was so laid out and platted in the year 1816, by the original proprietors of the land on which said city is situated, 100 feet in width, and that part thereof in front of and adjoining ap-

pellant's property is improved to the width of about 27 feet, the residue of the street in front of his property being unimproved. Under the terms of a resolution passed by the common council of said city in 1890, the appellee constructed an elevated railroad along the south side of Upper Water street, no part of said railroad being constructed on or occupying the north half or part of said street adjacent to appellant's property. That, by reason of the constructing of appellee's railroad, the appellant's property has depreciated in value, and he is discommoded and disturbed in its use thereby. The appellant's contention is that, upon the facts presented, two questions arise, entitling him to recover: First, that as the owner of the east half of lot 14, fronting on Upper Water street, he was the owner of all of said street in front of his property, subject to the right of the public to use the same as a street; and, second, that, as the owner of said lot, he had such an easement in the street for light, air, and access that the building of an elevated railroad upon the same beyond the middle of the street was such an appropriation as would entitle him to damages. In support of these contentions, the appellant insists that the south line of Upper Water street, as originally laid out and platted, was upon the north shore line of the Ohio river, and that no land was reserved by the original owners between said street and the river; therefore the owners of lots abutting on the north side of said street not only owned the entire width of the street, but were the riparian owners of the banks and river.

In this state it is now settled that ordinarily the owner of a lot or parcel of ground bordering on a street in a city or town is the owner of the fee to the middle of the street in front of such premises, subject only to the easement of the public to use the same as a street. *Cox v. Railroad Co.*, 48 Ind. 178; *Railroad Co. v. Scott*, 74 Ind. 29; *Railroad Co. v. Rodel*, 89 Ind. 128; *Board, etc., of Hamilton Co. v. Indianapolis Natural Gas Co.*, (Ind. Sup.) 33 N. E. Rep. 972. Until the decision in *Cox v. Railroad Co.*, supra, it was unsettled in this state just what interest a property owner had in an abutting street. That he had some interest separate and distinct from that of the general public, and greater than any interest of a stranger, was always conceded. *Conner v. President, etc.*, 1 Blackf. 43; *Common Council v. Croas*, 7 Ind. 9; *Haynes v. Thomas*, 7 Ind. 38; *Tate v. Railroad Co.*, Id. 479; *Protsman v. Railroad Co.*, 9 Ind. 467; *City of Delphi v. Evans*, 36 Ind. 90. Upon just what theory it has been held that the fee in one-half the street belongs to the property on the side adjacent thereto is not clear. We may assume, however, that it is upon the hypothesis that the property owners on both sides thereof have each donated one-half of the land over which the easement has been granted. Upon that theory one-half of the street would be a part of the lot itself, and a conveyance of the lot describing it simply by its platted number would convey the fee to one-half the street adjacent thereto. Rail-

road Co. v. Rodel, supra. A conveyance of property abutting on a street may be limited so as not to convey the fee in the street. An owner of a lot abutting on a street in a town or city has a distinct and separate interest from the public in the easement in such street, in that his rights and interests are legally inherent to the lot itself, affording him the free and convenient use thereof. This property right cannot be taken from him, or even impaired without compensation. *Egbert v. Railway Co.*, (Ind. App.) 33 N. E. Rep. 659; *Butterworth v. Bartlett*, 50 Ind. 537; *State v. Berdetta*, 73 Ind. 185; *Roes v. Thompson*, 78 Ind. 90; *City of Indianapolis v. Kingsbury*, 101 Ind. 200; *Town of Rensselaer v. Leopold*, 106 Ind. 29, 5 N. E. Rep. 761; *City of Lafayette v. Nagle*, 113 Ind. 425, 15 N. E. Rep. 1; *Burkam v. Railway Co.*, 122 Ind. 344, 23 N. E. Rep. 799; *Kincaid v. Gas Co.*, 124 Ind. 577, 24 N. E. Rep. 1066; *Lostutter v. City of Aurora*, 128 Ind. 436, 26 N. E. Rep. 184. If property has been adjusted to a street as laid out, buildings erected, and other improvements made with reference thereto, any change in the street, either by the city itself, or others with its consent, which would injure said property by shutting off the means of ingress and egress, subjecting it to the risk of fire, or in any manner interfering with its free use and enjoyment the same as before the change was made, would entitle the property owner to compensation. *Cummins v. City of Seymour*, 79 Ind. 491; *Town of Rensselaer v. Leopold*, supra; *Railroad Co. v. Elsert*, 127 Ind. 156, 26 N. E. Rep. 759. The existence of a permanent obstruction in a street in front of property abutting thereon is such an unlawful act as injures the rights of the owner, which are incident to the enjoyment of his property, to have the street maintained free of obstructions to its full width and extent. *State v. Berdetta*, supra; *City of Indianapolis v. Kingsbury*, supra.

The appellant is the owner of the fee of Upper Water street to the middle of the street on the side adjacent to his lot, but it does not follow that simply because there was no platted land or lots on the south side of the street, between the street and the river, he is also the owner of the fee of the other half. The fee of the south side of the street remains in the original owners and their grantees, as does the riparian rights. Counsel for appellant have cited the case of *Village of Wayzata v. Great Northern Ry. Co.*, (Minn.) 52 N. W. Rep. 913, and insist that it decides the question presented in this case. Even if we were to agree with counsel as to the extent of that decision, we should at least doubt its correctness. In that case, however, a street was platted, and the controversy was as to the boundary of the street. There the street was bounded, not by a stated line, but by the lake. The court says: "Where the southern boundary of the street runs, is a question of intention, to be ascertained by the plat itself, there not appearing to have been any monuments placed on the ground to mark such boundary. It can hardly be supposed it was the intention to make the street along that

part of it just one hundred feet wide, for the most obvious and natural means to indicate such intention was to continue the short lines we have mentioned across the water till they met. The fact that they stop at the water shows that they were not intended to indicate the boundary any further. There is nothing else to indicate it but the natural object,—the lake,—and that must be taken to have been the boundary intended." A municipal corporation has the power and a right to grant permission to a railroad company to build its tracks over and upon its streets, but such grant does not transfer any proprietary rights of the persons owning lands abutting on such streets. Such permission is simply a grant of the right to share with the general public the use of the easement. To that extent the power of the city is unlimited. Such a grant does not impair or destroy the right of an abutting landowner, owning the fee in the street, to recover damages for the additional burden imposed upon his land. If the railroad is not constructed upon that part of the street the fee of which is in the person seeking damages, he must allege and prove injuries to his property different from those sustained by the public. *Railway Co. v. Eberle*, 110 Ind. 542, 11 N. E. Rep. 467; *City of Lafayette v. Nagle*, supra. The sections of the statute under which these proceedings were instituted and prosecuted contemplate the assessment of damages only in case of an actual taking of property. The railroad is not located upon that part of the street owned by appellant, and no part of his lot has been taken; hence he is not entitled to recover in this action. Judgment affirmed.

(7 Ind. App. 655)

**EVANSVILLE SUBURBAN & N. EY. CO.  
v. LAVENDER.**

(Appellate Court of Indiana. Sept. 27, 1893.)

**REVIEW ON APPEAL—ABSENCE OF EVIDENCE  
FROM TRANSCRIPT—INSTRUCTIONS.**

Where the record on appeal does not contain all the evidence, an improper reference in an instruction is not such error as will reverse the judgment if the instructions, taken as an entirety, state the law correctly except as to the reference complained of.

On rehearing. For former opinion, see 34 N. E. Rep. 109.

DAVIS, J. It is earnestly contended by counsel for appellant that so much of the third instruction as refers to the usage by the public of the alleged highway for such length of time as has justified juries in other cases finding there was a dedication was erroneous under any conceivable state of the evidence, and, therefore, that the petition for rehearing filed by appellant should be granted. It is not insisted that the substance of the instruction is erroneous. When the instructions are considered together as an entirety, they correctly state the law, with the exception that it was not proper to say to the jury what length of time had authorized other juries in finding a dedication. The objectionable part of the instruction was a

quotation from Greenleaf on Evidence, and, as an abstract proposition, correctly states the law. If the reference to other juries had been omitted, we do not understand there would have been any objection to it. This reference, although manifestly improper, is not of such character as necessarily to constitute reversible error. In this case the record, as it comes to us, shows that it does not embrace all of the evidence, and we are not prepared to say that it embraces the complaint. Therefore such improper reference, when construed in the light of the instructions as a whole, should not, in our opinion, in view of the defective and imperfect condition of the record, for the reasons stated in the original opinion, be held to constitute such error as would require the reversal of the judgment of the court below. Petition for rehearing overruled.

(7 Ind. App. 453)

**PHILLIPS v. JOLLISANT.**

(Appellate Court of Indiana. Sept. 28, 1893.)

On rehearing. For former opinion, see 34 N. E. Rep. 653.

GAVIN, C. J. Appellant has filed a petition for rehearing, urging that the court was in error in saying that the record does not show the final estimate to have been made by the city engineer after his term had expired. Counsel, in their consideration of the record, overlooked a portion of it. On pages 17 and 18 of the record, it appears that the final estimate was reported to council by the engineer, and referred to a committee on May 6th. On the same day, the remonstrance of appellant was also referred to this committee, which, on June 3d, made report to council, concurring in the estimate. It is true that the entry of June 17th contains a statement which, if considered alone, would sustain appellant's claim. Taking the record altogether, however, we think it clear that the final estimate was reported to council before the expiration of the engineer's term. The petition for rehearing is accordingly overruled.

**ARMSTRONG v. WHITE.<sup>1</sup>**

(Appellate Court of Indiana. Sept. 28, 1893.)

**RIGHTS OF PURCHASER—FALSE REPRESENTATIONS  
—CAVEAT EMPTOR.**

A complaint in an action by a purchaser of land against his vendor, for damages for false representations, alleged that the statements as to the character and value of the land, and its productiveness, were false, to the vendor's knowledge, but that the plaintiff was ignorant thereof, being a physician, and did not visit the land, and relied on the representations. Held, that the rule "caveat emptor" applied, and plaintiff could not recover. Gavin, C. J., and Davis, J., dissenting.

Appeal from circuit court, Sullivan county; J. C. Briggs, Judge.

Action by William P. Armstrong against Samuel A. White. Judgment for plaintiff. Defendant appeals. Affirmed.

<sup>1</sup> Superseded by opinion, 37 N. E. 23.

John S. Bays, for appellant. W. S. Maple, W. C. Hults, and Beasley & Williams, for appellee.

REINHARD, J. The appellant traded to the appellee a stock of drugs, and took in exchange therefor a tract of land. The appellant brought this action in the lower court for damages on account of alleged fraud in the trade of the land. The case comes here on the ruling of the court in sustaining a demurrer to the complaint. It is shown that the appellant resides in the city of Terre Haute, and the land is situated in the adjoining county of Sullivan. The alleged misrepresentations are as to the character, condition, and value of the land, and the adaptability of the soil to productiveness, etc. The complaint charges that the representations were false, and were known to be such by the appellee, when made, but that as to the facts thus represented the appellant was ignorant, and being a physician, and having patients at home, he could not, without inconvenience to himself, have gone and examined the premises, and informed himself of the truthfulness or falsity of such representations, and that, therefore, he relied upon the same, and believed them. We are of the opinion that the court committed no error in sustaining the demurrer. It has often been decided that such allegations as these will not support an action, though the seller knew the representations to be false when he made them, as in such cases the maxim "caveat emptor" applies. The matters affirmed in the alleged misrepresentations were open to inquiry, and could, with common prudence, have been investigated. As was said by the supreme court of Massachusetts: "Assertions concerning the value of property which is the subject of a contract of sale, or in regard to its qualities and characteristics, are the usual and ordinary means adopted by sellers to obtain a high price, and are always understood as affording to buyers no ground for omitting to make inquiries for the purpose of ascertaining the real condition of the property. Affirmation concerning the value of the land, or its adaptability to a particular mode of culture, or the capacity of the soil to produce crops or support cattle, are, after all, only expressions of opinion, or estimates founded on judgment, about which honest men might well differ materially. Although they might turn out to be erroneous or false, they furnish no evidence of any fraudulent intent. They relate to matters not peculiarly within the knowledge of the vendor, and do not involve any inquiry into facts which third persons might be unwilling to disclose. They are, strictly speaking, *gratis dicta*. The vendee cannot safely place any confidence in them, and, if he does, he cannot make use of his own want of vigilance and care in omitting to ascertain whether they were true or false, as the basis of his claim for damages, in reduction of the amount which he agreed to pay for the property." *Gordon v. Parmelee*, 2 Allen, 212. See, also, *Parker v. Moulton*, 114 Mass. 99; *Brown v. Castles*, 11 Cush. 348; *Long v. Woodman*, 58 Me.

49; *Williams v. McFadden*, (Fla.) 1 South. Rep. 618. In the case last cited it was said by the supreme court of Florida: "A statement made by the vendor, which is tantamount to an estimate of opinion, such as value, condition, character, adaptability to certain uses, \* \* \* is not actionable, unless the seller resorts to some fraudulent means to prevent the purchaser from examining the property." See, also, *Shade v. Creviston*, 93 Ind. 591; *Hartman v. Flaherty*, 80 Ind. 472; *Cagney v. Cuson*, 77 Ind. 494; *Kerr, Fraud & M.* (Amer. Ed.) p. 82. The rule is, of course, otherwise, where the representations are of facts peculiarly within the knowledge of the defendant, and other than mere belief or opinion, and the truth or falsity of which could not, with usual diligence, have been ascertained by the plaintiff. *Huston v. McCloskey*, 76 Ind. 88; *Morse v. Shaw*, 124 Mass. 59. It is also different where the purchaser resides at a great distance from the location of the property which forms the subject of the negotiations, or is prevented from examining it by the fraud of the seller. *Harris v. McMurray*, 23 Ind. 9. Nothing is disclosed in the complaint from which it appears that the appellant had not a reasonable opportunity of examining the land he traded for, and, if he was imposed upon, it was the result of his own folly,—a dilemma from which the courts cannot extricate him.

Error is further claimed in striking out a portion of the first paragraph of the complaint. The part stricken out related to an alleged representation as to how much the appellee had been offered for the land. Had it remained in, it would have made the paragraph no stronger. The striking out was a harmless performance. Judgment affirmed.

DAVIS, J., (dissenting.) The facts on which the action is predicated are, in my opinion, well and strongly pleaded, and are sufficient, as I view them, to constitute a good cause of action. It is, among other things, alleged, in substance, that appellant was unacquainted with the real estate; that he resided at Terre Haute, Ind., and that the land was situate in Sullivan county, 40 or 50 miles from where he resided, and that he had no means of ascertaining anything about the real estate, except through appellee; that appellant was a practicing physician, and engaged in the practice of medicine at Terre Haute, at the time the fraudulent representations were made by appellee, and that it was impossible for him to leave said city, on account of sick patients, who were then demanding his immediate attention, and that he could not leave them, and that he did not have any person to act for him in said premises, either to care for the sick patients, or to examine said real estate; and that he was compelled to, and did, rely wholly upon the statements of appellee to the kind, character, condition, and location of said land, the quality and production of the soil, and the value thereof, etc. A part, at least, of the alleged false and fraudulent representations so made by appellee, namely, that said



real estate was well located and well adapted for farming purposes, and was of good and productive soil, and was fertile, and that 50 acres thereof was in a high state of cultivation, and was then in cultivation in corn and meadow, and that all of said tract was fine land, well and securely fenced, and well timbered with valuable timber, and was good, tillable soil, and was well improved, were as to alleged existing facts, and their truth was negatived in the complaint in clear and explicit terms. Whatever may be the rule in other states,—and I have not entered upon such an investigation,—the law, it seems to me, has been settled by our own supreme court to be that the injured party, under the circumstances disclosed in this case, is entitled to relief against the fraud, for the damages sustained. *Jones v. Hathaway*, 77 Ind. 14.

GAVIN, C. J., concurs in the opinion of DAVIS, J.

(10 Ind. App. 131)

**BLANEY et al. v. POSTAL.<sup>1</sup>**

(Appellate Court of Indiana. Sept. 29, 1893.)

**COUNTERCLAIM—WHAT CONSTITUTES—BREACH OF CONTRACT.**

In an action for a breach of a contract of employment, defendants alleged that plaintiff violated the contract by leaving their employ during a season when his services were most needed, by which defendants "were damaged in the sum of \$200." Held, that the allegations constitute a counterclaim which is good on demurrer.

Appeal from circuit court, Allen county; E. O'Rourke, Judge.

Action by John S. Postal against Milton L. Blaney and others for a breach of contract. From a judgment sustaining a demurrer to the answer, defendants appeal. Reversed.

A. A. Chapin and C. O. Broxton, for appellants. T. E. Ellison and E. V. Harris, for appellee.

ROSS, J. The appellee sued the appellants, as partners, and recovered judgment in the court below for the breach of the following contract, viz.: "Fort Wayne, Ind., August 28th, 1891. This contract witnesseth that J. S. Postal and the Fort Wayne Portrait Company, per M. L. Blaney, manager, have agreed as follows: That J. S. Postal shall work for said company at \$1,000 per year, or \$20 per week, beginning September 15, 1891. This contract to extend to at least one year, and, in the event of any change in the firm, said Postal to be continued as half partner. It is understood and agreed that the said Postal and wife shall occupy the rear room as an office, to be furnished by them without further charges to them, with gas furnished for fuel. It is understood that said Postal shall work on an average at least 4 portraits per day of sizes not greater than 16 x 20, and of grade A. [Signed] M. L. Blaney, Mgr. Fort Wayne Portrait Co. J. S. Postal. M. J. Braden. David Braden." The appellee in his complaint, after alleging the terms of the con-

tract, avers that he commenced work under said contract, and, while in the employ of appellants, performed each and every condition to be performed by him until December 19, 1891, when the appellants, without cause, discharged him, having previously misused, abused, and maltreated him; that he was ready and willing to continue in their services, but that they refused to further perform said contract on their part, to appellee's damage. To this complaint the appellants filed several answers, to the fifth paragraph of which the court sustained a demurrer. The substance of this paragraph of the answer, after admitting the making of the contract sued on, is that said contract provided that in the event of any change in appellants' firm, of which the appellant Blaney was the owner of one-half, and the other appellants of the other half, the appellee, Postal, was to be continued in the firm as a half partner; that on or about the 15th day of December, 1891, the appellants Melissa J. and David Braden notified appellee that on the 1st day of January, 1892, they would retire from said partnership, and offered to be responsible to appellee for his wages until their retirement, and that they requested him to take their interest upon their retirement, and become a half partner therein, as provided in said contract, and that appellee refused to take said interest and become a partner, and on or about the 19th day of December, 1891, voluntarily left the employ of appellants; that the most profitable time for appellants' business was from the time appellee quit their employ until the 1st of January, which fact was well known to appellee; and that, by reason of his failure to perform his part of said contract, they were damaged in the sum of \$200. While the record shows this paragraph to have been filed simply as an answer in bar, it was in fact recognized as a counterclaim, and as such we must determine its sufficiency.

A counterclaim is in the nature of a complaint, and, in order to withstand a demurrer, must contain facts sufficient to entitle the defendant to affirmative relief against the plaintiff. *Brower v. Nellis*, (Ind. App.) 88 N. E. Rep. 672; *Branham v. Johnson*, 62 Ind. 259. And it must state a cause of action without any reference to the allegations of the complaint. It is not in the nature of a defense to the original action, but is in itself an independent action, arising out of the same subject-matter declared on in the original complaint. A counterclaim can embrace only such matter as arises out of, or is connected with, the cause of action declared on in the complaint, and new matter cannot be introduced therein. *Douthitt v. Smith*, 69 Ind. 463. The pleading in question contains the necessary allegations with reference to the making of the contract sued on, and that the appellee violated the same on his part by leaving their employ during the busy season, and at a time when his services were most needed, by reason of which they were damaged, etc. While we cannot commend it as a model pleading, yet we think it stated facts sufficient to constitute an independent action. Other questions are presented

<sup>1</sup> Rehearing denied.

by the record, which arose on the trial of the cause, but, inasmuch as the issues will be changed, they may not arise on another trial; hence we refrain from considering them. Judgment reversed, with instructions to overrule the demurrer to the fifth paragraph of answer or counterclaim, and for further proceedings not inconsistent with this opinion.

(8 Ind. App. 687)

### ANDIS v. LOWE<sup>1</sup>

(Appellate Court of Indiana. Sept. 29, 1893.)

#### REMOVAL OF ADMINISTRATOR—PLEADINGS.

Rev. St. 1881, § 2229, provides that if several persons, of the same degree of kindred, are entitled to administration, letters may be granted to one or more of them, "but males shall be preferred to females." Held that, in a petition by a son of decedent for the removal of a daughter from the office of administrator, and the appointment of himself to that position, the allegation that petitioner has "the lawful right to be preferred as administrator of said estate" is insufficient, without showing that he is otherwise qualified to hold the office.

Appeal from circuit court, Hancock county; W. H. Martin, Judge.

Petition by Morgan Andis for the removal of Mary E. Lowe from the office of administrator of the estate of Isabella Andis, deceased, and for the appointment of petitioner to that office. From a judgment sustaining a demurrer to the petition, petitioner appeals. Affirmed.

B. F. Davis and Marsh & Cook, for appellant. Offutt & Black, for appellee.

REINHARD, J. This proceeding was instituted in the court below by the appellant against the appellee, for the removal of the appellee as administratrix of the estate of Isabella Andis, deceased, and for the appointment of the appellant in her stead. The petition states, in substance, that on the 27th day of March, 1892, Isabella Andis died in Hancock county, Ind., intestate, leaving an estate therein of \$600 in value, and leaving surviving her no husband, but leaving surviving her, as her only children and only heirs at law, the petitioner and Samuel Andis, John R. Andis, Margaret E. Osborn, wife of Alexander Osborn, and Mary E. Lowe, wife of Uriah Lowe; that at the time of said decedent's death the appellee was, and still is, the wife of said Uriah Lowe; that each of said decedent's children above named was at the time of her death, and still is, a resident of Hancock county, Ind.; that immediately upon the death and burial of said decedent, to wit, on the 29th day of March, 1892, and without the knowledge or consent of the petitioner, the appellee made application to the clerk of the Hancock circuit court for letters of administration upon the estate of said decedent, and also, on said day, filed the written consent of her said husband that she should be appointed as such administratrix, and that thereupon the clerk issued letters of administration upon said estate to the appellee, she executing her bond, and otherwise qualifying as such; and that she has been acting as such adminis-

tratrix ever since that time, to the exclusion of the petitioner and the brothers of the appellee and appellant, each of whom, as well as the petitioner, has the lawful right to be preferred as administrator of said estate, but that said appointment has not yet been confirmed by the court. Wherefore, the petitioner asks that said appointment be not confirmed by the court, and that said Mary E. Lowe be removed as such administratrix, and her letters revoked, and that he, as well as his said brothers, be allowed to administer upon said estate, which applicant is willing and ready to do. The petition was duly verified. The appellee appeared, and demurred to the petition. The demurrer was sustained, and an exception saved, and judgment rendered on the demurrer. An appeal was taken to the supreme court, and by that tribunal transferred to this court, under the provisions of the act conferring jurisdiction on the appellate court in such cases. Acts 1893, p. 29, § 1, subds. 8, 9.

It is agreed by the counsel on opposing sides that the petitioner and the appellee and her brothers were all the "next of kin" of the decedent, in equal degree; but it is contended on behalf of the appellant that, as the appellee was a female, the brothers had the prior right to the appointment. It is provided by statute that, at any time after the death of an intestate, the proper clerk of court, having examined the person applying for letters, and such persons as may be deemed proper to be examined, under oath, touching the time and place of the death of the intestate, whether he left a will, and concerning the qualifications of such person, and, there being no such will, shall grant letters of administration in the following order: (1) To the widow or widower; (2) to the next of kin; (3) to the largest creditor applying and residing in the state; (4) if no person thus entitled to administer shall apply within 20 days after the death of the intestate, the clerk of the court shall appoint a competent inhabitant of the county, to whom the letters shall issue. Rev. St. 1881, § 2227. In a subsequent section, it is enacted that if several persons, of the same degree of kindred, are entitled to administration, letters may be granted to one or more of them; but males shall be preferred to females, relatives of the whole blood to those of the half blood, and unmarried to married women. Rev. St. 1881, § 2229. Other things being equal, it is doubtless the policy of the law that where there is no widow or widower of the decedent, and there are brothers and sisters, the former shall have the prior right to administer upon the estate; and we may say, in passing, this provision is mandatory, and leaves the court without discretion, if the application be made within the 20 days. Henry, Prob. Law, § 12; Crossw. Ex'rs & Adm'rs, § 170; Jones v. Bittinger, 110 Ind. 478, 11 N. E. Rep. 456. If letters are issued out of the order of the statute, however, they are not void, but may be revoked on application, if the proper showing be made, when the court will appoint the person entitled thereto. Jones v. Bittin-

<sup>1</sup> Re-arising denied.

ger, *supra*. But, in order to bring the applicant for revocation and appointment within the letter and spirit of the statute, he must show in his petition the facts that give him the right of priority. In the present case, the petitioner discloses that he is a son, and the appellee a daughter, of the decedent; and, if he is otherwise qualified, he would doubtless be entitled to administer, in preference to the appellee, and the former appointment must be set aside, or confirmation thereof withheld. But has he shown himself so qualified? It will be noticed that the petition fails to allege that the petitioner and his brothers are, or that either of them is, of proper age, and possesses the necessary qualifications that entitle him to act as such administrator. Under the rule that the averments of a pleading will be most strongly construed against the pleader, we must presume that the petitioner did not possess such qualifications. It is true the petition avers that the petitioner, as well as his brothers, has each "the lawful right to be preferred as administrator of said estate," but this is not sufficient. The statement quoted is, at most, but a legal conclusion, and not a fact. But it is facts, and not conclusions, that must be pleaded, in order to make the pleading good. For aught that appears, the petitioner may be an infant, or otherwise disqualified from taking upon himself the responsible position of administering upon the estate. He should have made a clear case upon paper, showing that he was fully qualified to receive the appointment. Having failed to do this, he cannot complain of the ruling of the court in sustaining the demurrer. Judgment affirmed.

(8 Ind. App. 812)

# BALDWIN v. THRELKELD.<sup>1</sup>

(Appellate Court of Indiana. Sept. 26, 1893.)

**SALE OF FORGED NOTE—ACTION FOR DAMAGES—COMPLAINT—SALE OF HORSE—ACTION FOR VALUE—FINDINGS—SUFFICIENCY—EVIDENCE.**

1. A complaint which avers that defendant sold and assigned to plaintiff, by separate instrument, a certain promissory note, which proved to be forged and worthless, states a cause of action.

2. Findings that plaintiff sold to defendant a horse for a certain sum, and received therefor defendant's note for a specified amount, which was afterwards paid, and an assignment of a forged note, which is unpaid, support conclusions that the assignment of the note was not a payment of any part of the value of the horse, and that plaintiff is entitled to recover the balance represented by such note, without a finding that the horse was delivered to defendant.

3. An answer of payment raises an affirmative issue, which defendant is bound to prove, and a failure to find that the horse was not paid for does not defeat plaintiff's right to recover the value; since, if the facts found do not determine the issue of payment in defendant's favor, he fails in his plea.

4. In an action for damages for the assignment by defendant to plaintiff of a forged note, it is not necessary for plaintiff to show diligence in an effort to collect it to entitle him to recover, even if defendant is sued as an indorser.

5. Where such note is taken in part payment for property, plaintiff may disregard the

assignment, and sue for the value of the property.

6. Where, on appeal, counsel merely refer to the grounds of objection stated in the trial court to the admission of certain evidence, and insist that the objection should have been sustained, the question of its admissibility is not "discussed," and the court will not determine it.

7. It appeared that, when defendant assigned the note to plaintiff, an action on it by him was pending against the makers in a foreign state, in which defendants therein pleaded the forgery, and that defendant afterwards dismissed the action. Held that, though the plea in such case was no evidence of forgery, the transcript of the record of the court therein was admissible in evidence as part of the history of the transaction, and to show defendant's want of faith in the genuineness of the note.

8. It was not error to exclude evidence of the contents of certain letters referred to by defendant as a witness, after he practically admitted that he voluntarily destroyed them after he commenced the action on the forged note.

9. Where such note was signed by two persons, and defendant testified that the signature claimed to be forged was genuine, it was not error to permit an expert witness to testify that, in his opinion, both signatures were written by the same person.

10. The fact that such evidence was original, and was admitted in rebuttal, is not sufficient cause for reversal, where it does not appear that the court abused its discretion in admitting it out of its order.

Appeal from circuit court, Clinton county; T. H. Palmer, Special Judge.

Action by William C. Threlkeld against Elias J. Baldwin for damages caused by the sale and assignment to plaintiff by defendant of a forged note, and for the value of a horse sold to defendant. From a judgment for plaintiff, defendant appeals. Affirmed.

Paul & Bruner, for appellant. Ristine & Ristine, for appellee.

REINHARD, J. The appellee sued the appellant in the court below, the complaint being in two paragraphs. There was no demurrer filed to either paragraph of the complaint, but there is an assignment of error that the first paragraph fails to state facts sufficient to constitute a cause of action. The substance of the averments of this paragraph is that on the 8th day of October, 1888, the appellant sold and assigned to the appellee, by separate instrument, a certain promissory note, dated November 8, 1887, and purporting to be signed by John L. Bryan and William Bryan, payable to the order of the appellant, for the sum of \$582.05, and due one day after date; that the consideration paid for said note, and the assignment thereof, was a stallion of the value of \$700; that copies of the written assignment and the note are filed with this paragraph of complaint; that the promissory note so sold and assigned to the appellee was a forgery, and was not executed by said William Bryan; that, by reason of such forgery, the said note is absolutely worthless; and that appellee has been damaged in the sum of \$800, for which he demands judgment. The appellant's counsel have not pointed out any objection to this complaint which would

<sup>1</sup> Rehearing denied, 35 N. E. 841.

render it bad on assignment of error, and we have discovered none. Its theory is that the appellee has been damaged by reason of the sale to him of the forged and worthless note. Counsel argue that there is a wide difference between an assignment and an indorsement of a note, and we fully agree with them in their position. But there is no need for drawing any such distinction here, for the reason that this is not an action against an indorser, and is not claimed to be such. Some question is also attempted to be made as to the correct measure of damages in such a suit; but no such question is involved in the objection to the complaint. The appellee, by this paragraph, shows himself entitled to recover some damages. He would be entitled, on the facts averred, to recover the amount he paid for the note. Whether the amount he should recover would be the actual value of the horse or the price agreed upon without regard to the value is not raised by this pleading.

The second paragraph of the complaint was in the nature of an action on an account for the value of a horse sold and delivered by appellee to appellant, for the price of \$650, of which sum \$50 had been paid by the appellant. To this paragraph an answer was filed, in two paragraphs, viz.: (1) The general denial; (2) payment for the horse before the action was commenced. The appellee filed a general denial in reply to the second paragraph of answer, and the cause was submitted to the court for trial. At the request of the parties, the court made a special finding of facts and legal conclusions. The second specification of error is that the court erred in its conclusions of law from the facts found. It is insisted, in the first place, that the special finding contains only items of evidence, and not ultimate facts. The special finding is, in substance, that on the 8th day of October, 1883, the appellant commenced an action in the chancery court of Kenton county, Ky., against John L. Bryan and William Bryan, upon a promissory note of the tenor set out in the finding; that afterwards, on the same day, appellee sold to appellant a saddle horse of the value of \$500, and received from appellant his note for \$50, which was afterwards paid, and a certain written assignment of the note sued on in the Kentucky court and the proceeds thereof. The assignment is also set out in the finding. It is further found that this note was executed by John L. Bryan, but that William Bryan did not sign it; that John L. Bryan signed William's name to the note without legal authority to do so, and without the knowledge or consent of said William; that, at the time said suit was commenced in the Kenton chancery court of Kentucky, said John L. Bryan was wholly insolvent, and was a nonresident of the state of Kentucky; that William Bryan was then solvent; that in said suit the said William Bryan filed a separate answer of non est factum, duly verified; that, upon the filing of such answer, John L. Bryan dismissed said action; that the note so sued upon was given in renewal of another note before executed by John

L. and William Bryan to the appellant for a valuable consideration, the said John L. signing the name of said William Bryan to said original note, with full authority to do so from said William; that no part of said assigned note has been paid; that, at the time appellee accepted said assignment, he knew that said John L. Bryan was insolvent; and that he relied upon the genuineness of said note so assigned, and upon the solvency of said William Bryan for its payment. From these facts the court concludes (1) that the assignment of the note in question was not a payment of any part of the value of said horse so sold by appellee to appellant; (2) that appellee is entitled to recover the unpaid balance of such value, viz. \$450. We think, while these findings contain some evidentiary facts, they also contain sufficient ultimate facts to warrant the conclusions drawn by the court. It is objected that the findings fail to show that there was any delivery of the horse. It is found that the appellee sold the horse to the appellant. The execution of the \$50 note, even without the assignment of the Bryan note, made the sale a complete, and not an executory, one, and the title in the horse passed to the appellant. Possibly the appellee might have had the right to have the sale annulled for the fraud of the forged note transaction, but certainly the appellant could not treat the sale as void for that reason. The sale was not void under the statute of frauds, because the \$50 note was a part payment of the price of the horse, and entitled the appellant to possession so long as the sale was not disavowed by the appellee. The title in the horse having passed to the appellant, he could have brought replevin for him in case the appellee had refused to deliver him, and we must presume that he obtained such possession. Having thus purchased the horse, he was legally bound to pay for him. This he could not do with a forged note, and hence the finding that this note was no payment is correct. It was not essential that the finding should show a delivery.

It is further complained that the finding fails to show the ultimate fact that the horse was not paid for, the appellant insisting that there can be no recovery without the finding of such fact. If it be conceded that there is no such finding, it by no means follows that the failure to so find defeats the appellee's right to recover. The answer of payment raised an affirmative issue which the appellant was bound to prove. If the facts found do not determine this issue in his favor, the appellant fails in his plea. *Vannoy v. Duprez*, 72 Ind. 26; *Dodge v. Pope*, 93 Ind. 480; *Gray v. Taylor*, 2 Ind. App. 155, 28 N. E. Rep. 220.

It is further urged that the ultimate fact as to how much was due the appellee was not found by the court. But the facts found, when taken together, show that there was due the appellee the sum of \$450. The appellant had purchased the horse, and it was of the value of \$500. Fifty dollars of this amount had been paid. These facts warranted the inference

drawn by the court in its second conclusion, that the appellee was entitled to recover the unpaid balance of that value, to wit, \$450, without a specific statement that the amount of \$450 was still due.

Some question is made, also, that the facts found show no diligence in the collection of the note. We have already seen that the facts found amply support the second paragraph of the complaint, and the question of the assignment of the note may therefore be entirely disregarded. But, if the first paragraph of the complaint were essential to a recovery upon the facts found, still the appellant's contention cannot prevail on this point. The assumption underlying this contention is that the suit is upon an indorsement. Even if this were true, it would not be necessary to show diligence when diligence was unavailing. That it would have been unavailing was shown by the fact that as to William Bryan the note was a forgery, and that John L. was insolvent, and a nonresident of the state of Kentucky, where the appellee resided. But the first paragraph does not count upon an indorsement of the note, as we have already seen. It is an action for damages for the assignment of a forged and worthless note. The measure of damages in such case is the amount paid for the note, which, in the case at bar, was the value of the horse less the amount paid. The indorser of a note warrants the genuineness and ability of the maker to pay. *Alleman v. Wheeler*, 101 Ind. 141; *Herald v. Scott*, 2 Ind. 55. If the maker is a nonresident of the state at the time of the maturity of the note, suit need not be brought against the makers before suing the indorser. *Sayre v. McEwen*, 41 Ind. 109; *Titus v. Seward*, 68 Ind. 456. We are of the opinion, therefore, that the appellant's liability is established by the facts found, even if he was sued as an indorser of the note. But we think the appellee had a right to disregard the assignment, and sue for the value of the horse, as he did in the second paragraph of his complaint. The exceptions to the conclusions of law are not sustained.

The first assignment of error is the overruling of the appellant's motion for a new trial. It is urged that the evidence is insufficient to sustain the finding. The appellant insists that there is no evidence of the fact that the note was not genuine as to William Bryan, other than the plea of non est factum filed in the Kentucky court, and that this plea furnishes no proof whatever of the forgery alleged. In the last conclusion we quite agree with counsel, but they are in error in their assumption that no other evidence was adduced upon the point of the nongenuineness of the note. The record discloses that "plaintiff, by his counsel, with permission of the court, and consent of counsel on the other side, introduced and read in evidence the depositions of James W. Bryan and E. D. Seely. \* \* \* in words and figures following, to wit: After stating that he was a lawyer, and resided in Covington, Ky., the witness Bryan testified that the note in question was written by him at his law office in Covington, Ky.,

and that it was given in renewal of another note signed by John L. and William Bryan, which he held for collection; that John L. Bryan signed his own name and that of William Bryan in the presence of the witness, and also in the presence of the appellant; and that John L. Bryan then stated in the presence of the two that he had no written authority to sign William's name, while Baldwin stated that it made no difference, as it would be settled through Lucky Baldwin, for whom John L. Bryan was to work in California." D. A. Coulter, a banker, testified, as an expert, that, in his opinion, both names were written by the same hand. The appellant testified that William Bryan had signed his own name to the note, but the court was not compelled to accept this testimony as against that of the other two witnesses. The appellant did not proceed upon the theory that John L. Bryan had signed William's name by the latter's authority and consent, but that William himself wrote his name to the note. In view of these facts, the court had a right to accept the theory of the appellee that the name of William Bryan was signed by John L. Bryan without the consent and authority of the former. We regard the evidence as sufficient to warrant the court in its conclusion.

The next ground assigned in the motion for a new trial is that the finding of the court is contrary to law. The only discussion of this point made by appellant's counsel is a reference to their argument upon the first ground for a new trial, and, as we have already disposed of that, no further notice of the same will be necessary.

The appellant next complains of error of law occurring at the trial. This alleged error consists of the admission in evidence of the written assignment of the note described in the complaint. The only discussion of this question made by counsel in their brief is a reference to the grounds of objection stated in the trial court, and insisting that the objection there made should have been sustained. We do not think the question is "discussed," and it is therefore not presented for our determination. *Elliott, App. Proc.* § 445.

Complaint is also made of the ruling of the court in admitting in evidence a certified transcript of the Kentucky chancery court, showing the suit upon the note in question, the plea of non est factum filed in the cause, and the dismissal of the action. We agree with appellant's counsel that this transcript furnishes no sort of evidence tending to establish the forgery of the note. It does not appear that it was admitted for this purpose. We think the transcript was competent as a part of the history of the transaction. The written assignment shows that an action on this note was pending in the chancery court of Kenton county, Ky., at the time such assignment was executed. It was proper to show what had become of this action,—whether it had been prosecuted to final judgment in the appellant's name, or, if not, how it was taken out of court. The steps taken in the suit were taken by

the appellant himself, who was the plaintiff. If he dismissed his action after the plea of non est factum was filed, it was a circumstance tending to show the appellant's want of faith in the genuineness of the note. This was, of course, subject to any explanation he might desire to make concerning the dismissal, and was in no wise conclusive upon him. But we cannot say that the court had no right to consider it. Of course, the plea of non est factum could not be considered as evidence of the forgery, and there is nothing to show that it was admitted for any such purpose. There was no error in admitting the transcript in evidence.

The court sustained an objection of the appellee to proving the contents of certain letters testified to by the appellant after he had practically admitted that he voluntarily destroyed the letters after he had commenced the suit on the note against the Bryans. The court had a right to deduce from the act of destruction after the commencement of such suit the inference of a fraudulent design to do away with the letters themselves, and upon this theory the exclusion of the evidence was proper. *Bridge Co. v. Applegate*, 18 Ind. 339; *Rudolph v. Lane*, 57 Ind. 115.

A reversal is finally asked because the court permitted the appellee to examine an expert witness as to the handwriting in the signatures to the note. Appellant had testified that the signature of William Bryan had been placed there by William himself. To rebut this, the appellee sought to show that John L. Bryan had signed both names to the note. The expert witness was permitted to testify that, in his opinion, both names were written by the same hand. There was no error in this ruling. Even if the testimony was original, it was within the discretion of the court to admit it at any stage of the proceeding; and, unless a clear abuse of such discretion were shown, there would be no cause for reversal because of the introduction of the testimony out of its order. *Stewart v. Smith*, 111 Ind. 526, 18 N. E. Rep. 48.

This disposes of all the questions presented, and we find no available error. Judgment affirmed.

(9 Ind. App. 490)

#### MCWHORTER v. NORRIS.<sup>1</sup>

(Appellate Court of Indiana. Sept. 28, 1893.)

NEGOTIABLE INSTRUMENT—ASSIGNABILITY—PLEADING—RES JUDICATA—RELEASE—EFFECT.

1. There is no available error in a refusal to strike out part of a pleading.

2. An agreement to pay interest on a certain sum during the lifetime of a payee or his wife is assignable, under Rev. St. 1881, § 5501, providing that all notes or instruments in writing, signed by any person who promises to pay money, or acknowledges money to be due, shall be negotiable by indorsement.

3. An agreement providing that the maker will pay interest on \$300 during the life of the payee or his wife sufficiently shows an agreement to pay a fixed sum, though the principal is never payable.

4. In an action on an agreement in writing to pay money, plaintiff alleged in the first

paragraph of his complaint that the payee gave the same to his wife, when executed, and that on the payee's death he devised all his property to his wife, and that the court, by order, vested the payee's property in his wife, and that she then assigned and delivered the instrument to plaintiff. In a second paragraph he alleged that the payee devised all his property to his wife; that the court, by its decree, vested all the estate in her; and that she assigned the instrument in suit to plaintiff. *Held*, that the complaint showed a good title in plaintiff.

5. A dismissal of an action by a party is not an adjudication of the subject-matter, though brought about by an announcement of the court that there can be no recovery unless further evidence is introduced.

6. Where the evidence is uncontradicted that the instrument was the property of the payee's wife from July 14, 1874,—the day after its execution,—a receipt in full from the payee, dated in 1883, and a settlement with him in 1880, are no defense to the action.

Appeal from circuit court, Noble county; J. W. Adair, Judge.

Action by Marion Norris against Aaron McWhorter. Judgment for plaintiff. Defendant appeals. Affirmed.

H. G. Zimmerman, for appellant. L. W. Welker, for appellee.

ROSS, J. The judgment appealed from was rendered in an action brought by the appellee to recover upon the following written obligation: "\$100.00. Wawaka, Ind., July 18th, 1874. One year after date, I promise to pay to John McWhorter, or order, ten per cent. interest on three hundred dollars, during his and his wife's lifetime, per year, value received, without relief whatever from valuation and appraisement laws, with 10 per centum interest, and 10 per centum additional for attorney's fees, if collected by suit or legal process. Aaron McWhorter." The complaint is in two paragraphs, to each of which a demurrer for want of facts was filed and overruled. The complaint is as follows: "Plaintiff complains of defendant, and says that on the 18th day of July, 1874, said defendant, by his note, a copy of which is filed herewith, marked 'Exhibit A,' and made a part hereof, promised to pay John McWhorter ten per cent. interest on three hundred dollars, during his and his wife's lifetime, per year, payable annually, with ten per cent. interest thereon, and ten per cent. attorney's fees; that at the date of the execution of said note, said John McWhorter gave and delivered said note to Charlotte McWhorter, his wife, as her property, for whose benefit said note was given; that said John McWhorter departed this life on the 15th day of August, 1884; that, by the terms of his said will, he devised all of his property to his said wife, Charlotte, and that, by decree and order of this court, all of his said property, rights, and credits were vested in his said widow, Charlotte McWhorter, the same amounting to less than 500 dollars; that said note was by said John McWhorter transferred to said Charlotte by delivery, simply; that after said order of said court vesting said property in said Charlotte, to wit, on the — day of May, 1888, said Charlotte sold, assigned, and transferred said note to this plaintiff, for a valuable consideration, by

<sup>1</sup> Rehearing denied, 37 N. E. 21.

her written indorsement thereon; that said note is long past due, and wholly unpaid; and plaintiff further says that said Charlotte is still living. Wherefore, plaintiff demands judgment for one thousand dollars." (2) "For a second and further cause of action, plaintiff complains of defendant, and says that defendant, by his note, a copy of which is herewith filed, marked 'Exhibit A,' and made a part hereof, promised to pay John McWhorter, or order, ten per cent. interest on 300 dollars during his and his wife's natural lifetime, payable yearly, with ten per cent. interest and ten per cent. attorney's fees; that said John McWhorter departed this life on August 15, 1854; that, by the terms of his will, he gave and devised all of his property to his said wife, Charlotte. Plaintiff further avers that this court, by decree, on the — day of —, 1885, vested all of the property, rights, and credits of said John McWhorter, deceased, in his widow, Charlotte, who was the sole owner of said note, with all of the rights of said John; that said Charlotte McWhorter, by her written indorsement, assigned and transferred said note to this plaintiff. Plaintiff further says that said Charlotte is still living; that said note is due and wholly unpaid. Wherefore," etc.

The appellant, preceding the filing of the demurrer to the first paragraph, filed a motion to strike out parts thereof, which was overruled by the court. There is no available error in overruling a motion to strike out parts of a pleading. *Owens v. Tague*, 3 Ind. App. 245, 29 N. E. Rep. 784; *Walker v. Larkin*, 127 Ind. 100, 26 N. E. Rep. 694; *Lewis v. Godman*, 129 Ind. 859, 27 N. E. Rep. 563, and cases cited; *Holland v. Holland*, 131 Ind. 196, 30 N. E. Rep. 1075, and cases cited.

It is earnestly insisted that the instrument sued on is not a promissory note; hence, not negotiable. Section 5501, Rev. St. 1881, provides that "all promissory notes, bills of exchange, bonds and other instruments in writing, signed by any person who promises to pay money, or acknowledges money to be due, or for the delivery of a specific article, or to convey property, or to perform any stipulation therein mentioned shall be negotiable by endorsement thereon, so as to vest the property thereof in each endorsee successively." The obligation sued on, whether a promissory note or simply an obligation to pay money, was clearly assignable, under this section of the statute. The contention of counsel is that the obligation itself does not show an agreement to pay a fixed sum as principal, and that, without a principal, to become due and payable, there is nothing for the use of which interest is to be paid. In this contention we cannot concur. True, the obligation does not provide for the payment of a sum as principal, but the principal is designated as the sum upon which interest is to be calculated, namely, \$300.

It is contended by appellant that both paragraphs of the complaint are insufficient, in this: that they are "so ambiguous that no issue thereon can be framed which will present in an intelligent form the issues for trial, without perplexity and

confusion;" the basis of counsel's argument being that the facts alleged with reference to the ownership are not only so indefinite as to show no ownership whatever, but that there are several charges of the manner in which appellee acquired title, which allegations are inconsistent one with the other. It is often true in pleading that facts are pleaded which are inconsistent with other facts previously pleaded, and, when the pleading is insufficient without one or the other state of facts, such inconsistency will virtually eliminate all such inconsistent facts, and the pleading cannot stand. There are no such inconsistencies in the allegations of this complaint as will destroy the effect of the facts pleaded. The ownership of the obligation sued on, as alleged in the first paragraph, vested in Charlotte McWhorter, by a transfer thereof to her by her husband as contemplated by the above section of the statute. She afterwards assigned the same to the appellee. The allegations in this paragraph of the complaint with reference to the death of the assignor, John McWhorter, were necessary, because the transfer by him to said Charlotte McWhorter was not in writing. Section 276, Rev. St. 1881, provides as follows: "When any action is brought by the assignee of a claim arising out of contract, and not assigned by endorsement in writing, the assignor shall be made a defendant, to answer as to the assignment or his interest in the subject of the action. And all actions by assignees shall be without prejudice to any set-off or other defense existing at the time of or before notice of the assignment, except actions on negotiable promissory notes and bills of exchange, transferred in good faith and upon good consideration before due." The case of *Bingham v. Stage*, 123 Ind. 281, 28 N. E. Rep. 756, is not in conflict with this opinion. In that case the court held that the facts pleaded in the answer were not sufficient to sustain the theory that the deceased had made a gift of the instrument sued on to his wife, prior to his death. There were no facts pleaded in that case showing a transfer by the deceased, either by delivery or otherwise. The facts alleged in the first paragraph of the complaint show a transfer to Charlotte McWhorter, appellee's assignee, by delivery. In the second paragraph it is alleged that Charlotte McWhorter, appellee's assignee, acquired title to the obligation by devise; and it was also alleged that she was the widow and only heir at law of said John McWhorter, and that, his estate not exceeding \$500 in value, it was set off to her, as such widow, by the court. The objections urged to each paragraph, that they fail to show title in the appellee, are not well taken. There was no error in overruling the demurrer to each paragraph of the complaint.

The facts alleged in the third paragraph of appellant's answer, to which a demurrer was sustained, constitute no defense to the complaint. A party bringing an action may dismiss it at any time before the jury retires, if tried before a jury, or, when tried by the court, at any time



before the court has announced its finding. Section 353, Rev. St. 1881. And such dismissal is not an adjudication of the subject of the action against him. He may afterwards renew his action by bringing it anew, and such dismissal is no bar thereto. The contention of counsel that the facts pleaded show that the dismissal was not a voluntary one, but was brought about by an announcement of the court that, unless additional evidence was introduced, there could be no recovery, does not strengthen the answer. The uncontradicted evidence shows the obligation sued on to have been the property of Charlotte McWhorter from July 14, 1874, the next day after its execution, until she transferred it to the appellee. Hence, the receipt given to appellant by John McWhorter on the 4th day of June, 1883, is no defense to this action. Appellant contends that the court should have made a finding that the obligation sued on was satisfied, not only by the giving of the receipt above mentioned, but also by what he terms a "family settlement" had in January, 1880. We are unable to see what bearing those facts would have on appellee's right to recover in this action, under the first paragraph of the complaint, it being evident that the finding and judgment rest solely on that paragraph. John McWhorter, having no interest in the note, could neither give a receipt against it, nor include it in his settlement with appellant in January, 1880. The court below having determined the rights of the parties from the evidence, which was conflicting, this court will not review its acts by passing upon the weight of the evidence.

Counsel, with great earnestness, insist that the court below erred in the assessment of the amount of recovery, the same being too large. The contention is that the court allowed interest on interest, or, in other words, compounded the interest. The contract sued on stipulated for the payment of a certain sum at a specified time, which, if not paid when due, was to bear interest at the rate of 10 per cent. The court, in assessing the damages, allowed but 6 per cent. interest on these amounts from the time they fell due. In this we think the court erred, not in assessing the amount of recovery too high, but in assessing it too low. The appellee, if he was entitled to interest at all under the contract, was entitled to have it calculated at the rate of 10 per cent., as provided therein. The judgment of the court below is affirmed, with 5 per cent. damages.

(7 Ind. App. 503)

**SPRINGFIELD ENGINE & THRESHER CO. v. KENNEDY et al.**

(Appellate Court of Indiana. Sept. 27, 1893.)

**REVIEW OF FINDINGS—PLEADING—HARMLESS ERROR—SALE—WARRANTY—NOTICE OF DEFECTS—WAIVER—LOCAL AGENT—AUTHORITY—ACTS AFTER TERMINATION OF AGENCY—FAILURE OF CONSIDERATION—RECOUPMENT.**

1. Where the record does not contain the evidence, findings of facts not challenged by

motion for new trial will be presumed to have been in accordance with the evidence.

2. Where a pleading consists of several paragraphs, the overruling of a demurrer to a bad paragraph is not reversible error if the record affirmatively shows that the findings and judgment rest on other paragraphs that are good.

3. Under a contract of a sale of a machine, providing that continued use thereof should be evidence of fulfillment of the warranty that it should perform good work, retention and use of the machine, after notice to the seller of defects, at the instigation of the selling agent, and on his promise that the defects should be remedied, does not have this effect.

4. An answer in an action for the price of a separator, sold with a warranty that it should perform good work, which alleges that it crushed the wheat, and did not properly separate it, but carried off large quantities with the straw, sufficiently states its defects.

5. Under the provisions of the contract of sale that, if the machine did not fill the warranty that it should do good work, notice should be given the seller, and a reasonable time allowed to remedy it, and, if the seller did not make it do good work, the purchaser need not pay for it, the answer in an action for the purchase price need not allege that a sufficient test of the machine was made, as the duty of making after notice was on the seller.

6. The contract provided that, if the machine failed to fill its warranty to do good work, written notice should be given the seller at its home office, and to its local agent who sold the machine. *Held*, that oral notice having been given to the seller's general agent, and he having acted thereon, putting the notice in writing, and sending a copy thereof to the seller's home office, was waived.

7. The local agent authorized to sell machines in certain localities is, as to a sale made by him in such territory, a general agent, with authority to waive conditions in the contract of sale as to the manner of giving notice of defects in the machine sold, constituting a breach of the warranty, which, by the terms of the contract of sale, if not remedied by the seller, authorized a return of the machine.

8. Where, after a local agent sells a machine with warranty that it shall do good work, and provision that, if it is not made to do so, it may be returned, acts of his relative to a compliance with such warranty, done after termination of his agency, bind his principal, the purchaser having no knowledge of such termination.

9. Where, in an action on notes given for the balance of price of a machine warranted to do good work, breach of warranty is set up as a defense, and it is found that there was such breach, and that by reason thereof the machine was worth less than the amount paid, exclusive of the notes, the court's conclusion that defendants were entitled to judgment was correct, though the statement therein that consideration for the notes had failed was inaccurate, the breach of warranty being used by way of recoupment.

Appeal from circuit court, Howard county: L. J. Kirkpatrick, Judge.

Action by the Springfield Engine & Thresher Company against John H. Kennedy and others. Judgment for defendants. Plaintiff appeals. Affirmed.

Blacklidge, Shirley & Moon, for appellant. Bell & Purdum and D. A. Woods, for appellees.

LOTZ, J. The appellant was the plaintiff below, and began this action to recover judgment on certain notes, and to foreclose a chattel mortgage securing the

same. Pending the suit, the mortgaged property was seized and sold by the appellant under the stipulations contained in the said mortgage, so that the only controversy in this court is as to the right of appellant to a money judgment for the remainder due on the notes. The appellees answered in 11 paragraphs: (1) That the notes in suit were executed without any consideration. To the second a demurrer was sustained. (3) That the notes were paid since the institution of the suit. (4) Payment in full before suit. (5) Breach of an implied warranty in the sale of a machine for which the notes in suit were executed. (6) Breach of a verbal warranty in the sale of said machine. (7) Also breach of verbal warranty in sale of said machine. (8) Was withdrawn. (9) Breach of a written warranty alleged to be lost. (10 and 11) Breaches of written warranty coupled with averments showing that the plaintiff waived the performance of certain conditions in the contract of warranty resting upon the defendants. A demurrer was sustained to the second, and overruled as to the other paragraphs. The plaintiff replied in two paragraphs, and a demurrer was sustained to the second. There was a trial of the issues by the court. The court, at the request of appellant, made a special finding of the facts, and stated the conclusions of law thereon. The conclusion of law was that the consideration of the notes in suit had wholly failed, and that the defendants were entitled to judgment for costs. Appellant assigns as errors the overruling of the demurrers to the fifth, sixth, seventh, ninth, tenth, and eleventh paragraphs of answer, the sustaining of the demurrer to the second paragraph of reply, and that the court erred in its conclusions of law. There was no motion for a new trial, and the evidence is not in the record. A motion for a new trial calls in question the correctness of the finding of facts, but does not challenge the conclusions of law stated on the facts. An exception to the conclusions of law properly precedes the motion for a new trial, and concedes, for the purpose of securing a decision upon the facts stated in the finding, that the facts are found as the evidence requires. Elliott, App. Proc. § 798.

The facts not being challenged by a motion for a new trial, this court, in the condition of the record, will conclusively presume that the findings of facts are as the evidence requires. An examination of the record and special findings affirmatively show that the findings and judgment of the court are based upon the tenth paragraph of the answer and the answer of payment. It is a rule well established that, where the complaint or answer consists of two or more paragraphs, the overruling of a demurrer to a bad paragraph is not reversible error, if the record affirmatively shows that the findings and judgment of the court rest on other paragraphs of the pleading that are good. Blessing v. Blair, 45 Ind. 546; Keegan v. Carpenter, 47 Ind. 597; Blasingame v. Blasingame, 24 Ind. 86; Nave v. Wilson, 33 Ind. 294; Wolf v. Schofield, 33 Ind. 175; Peery v. Turnpike Co., 43 Ind.

321; Hawley v. Smith, 45 Ind. 189; MoComas v. Haas, 93 Ind. 276; State v. Julian, 93 Ind. 292; Bartlett v. Railway Co., 94 Ind. 281; Railway Co. v. Davis, 94 Ind. 601; City of Aurora v. Bitner, 100 Ind. 396; Sohn v. Cambern, 106 Ind. 302, 6 N. E. Rep. 813. Under these authorities, it is unnecessary for us to determine the sufficiency of any of the paragraphs of the answer except the tenth. The action of the court in overruling the demurrers to the other answers is not reversible error.

The tenth paragraph charges in brief that the notes declared on were given for the purchase of one steam vibrating separator, with all the necessary appliances usually furnished with such machines; that said sale was made in pursuance of a written contract entered into between plaintiff and defendants, by which contract the plaintiff warranted that said machinery, with proper use and management, would do as good work as any of its size made for the same purpose, and to be of good materials and durable, with proper care; that, if said machine should fail to fill said warranty, written notice should be given to plaintiff at Springfield, Ohio, and also to the local agent of whom the machine was purchased, stating wherein it failed to fill said warranty, and a reasonable time allowed to remedy such defect; that, if the machine could not be made to fill the warranty, it should be returned to the plaintiff, and plaintiff would cause it to perform good work, or return the money and notes given for the same. It was further stipulated that the continued use of said machinery should be evidence of the fulfillment of the warranty, and of full satisfaction on the part of the purchasers, who agreed thereafter to make no claim on the plaintiff; and, further, that if the machinery, or any part thereof, should be delivered before settlement should be made as agreed, the defendant should waive all claims under the warranty. It is further charged that said machine would not with proper usage do as good work as any of the size made for that purpose, and was not properly constructed and of good materials, and durable with proper care; that, by reason of its defective and imperfect construction, it continuously cut and crushed the wheat, rendering it of little value; that, by reason of its defective construction, it wasted the wheat, and would not properly separate it from the straw, but continually left large amounts of wheat remaining in the straw, and the same was carried away with the straw, threshed and unthreshed; that the plaintiff failed and refused to cause said machine to do good work and comply with said warranty, and failed to send a competent workman and to make said machine do good work, and failed to cancel and return said notes and mortgage, although defendants repeatedly applied for that purpose to plaintiff's agent who sold them the machine, and failed to furnish another machine; that defendants offered to return said machine, and demanded their notes. There are other averments in the paragraph which show how the defendants came to accept the machine before

the notes were executed, and why the defendants failed to give written information of the defects to the plaintiff at its home office, and of the efforts made by the plaintiff, through its agents, to make said machine do good work after notice to them, and of their failure so to do. As to this paragraph, appellant's counsel say it is defective, in that there is no averment that the defendants notified the plaintiff in writing at its home office in Springfield, Ohio. But there is an averment that its general agent was notified, and that through its agent it accepted and acted upon such notice. By such action the appellant waived the written notice. *Loan Co. v. Dunn*, 106 Ind. 110, 6 N. E. Rep. 131; *Gaar, Scott & Co. v. Rose*, 3 Ind. App. 269, 29 N. E. Rep. 616.

It is also insisted that the paragraph is bad because it shows that the defendants continued the use of the machinery, which, by the terms of the contract, should be evidence of the fulfillment of the warranty. This continued possession and use, however, is shown by the averments to have been at the instigation of the plaintiff's agent, after notice of the defects.

It is further contended that the paragraph is defective because the particular defects of the threshers are not shown, and that no sufficient test is averred. The warranty provided that the machine should do good work. The kind of work it did do under proper management is specifically alleged, and it was, under the averments, certainly far from good. Appellant has cited a number of cases to the effect that a proper test must be shown, and the defects specifically pointed out. *Booner v. Goldsborough*, 44 Ind. 490; *Machine Works v. Chandler*, 56 Ind. 575; *Harvester Co. v. Bartley*, 81 Ind. 406; *McClamrock v. Flint*, 101 Ind. 278, *Flint v. Cook*, 102 Ind. 391, 1 N. E. Rep. 633; *Conant v. Bank*, 121 Ind. 323, 22 N. E. Rep. 250; *Aultman, Miller & Co. v. Sechtling*, 126 Ind. 137, 25 N. E. Rep. 894. The answer, however, does not fall within these decisions. The rule there announced is one that applies when the obligation to make the test rests upon the party who seeks to enforce the warranty. Under this contract, after notice, the obligation of making the test, and of making the machine do good work, shifts upon the seller. We think the demurrer was correctly overruled.

The facts as found by the court are substantially as follows: The plaintiff is a corporation organized under the state of Ohio, with its principal office in Springfield, in said state; that in the year of 1887 one James B. Mitchner was the agent of the plaintiff at Kokomo, Ind., for the sale of the plaintiff's machinery; that on the 17th day of July, 1887, the defendants, through said agent, entered into a contract, in writing, for the purchase of one steam vibrating separator, with tools and necessary appliances and attachments, said contract of purchase being the same as the one set out and filed as an exhibit to the answer, which provided, among other things, that the plaintiff would warrant said machine to do good work with proper care and management;

that said machine was subsequently delivered to the defendants; that, as a part of the consideration for such purchase, the defendants delivered to plaintiff's agent one oscillator separator at and for the agreed price of \$60, and on the 21st day of July, 1887, executed their three promissory notes, payable to the order of the plaintiff,—the first for \$140, due December 1, 1888; the second for \$137, due December 1, 1889; the third for \$137, due December 1, 1890,—and to secure the payment of said notes the defendants executed a chattel mortgage on said machinery; that said machinery was in the possession and use of the defendants several days prior to the execution of said notes, but that said machinery did not do good work, as warranted prior to the execution of said notes; that defendants orally notified plaintiff's agent, James B. Mitchner, of the failure of said machine to do good work, and said Mitchner thereupon promised to remedy the same, and sent one Marshall to test said machine; that said Marshall failed to make said machine do good work, but assured and promised defendants that the plaintiff would remedy the same, and defendants, relying upon said promise, then executed the notes and mortgage in controversy; that said machine never did do good work; but wasted the wheat, and caused the wheat to pass out with the straw, and did not properly separate the wheat from the straw, and did not properly clean the wheat; that during the threshing seasons of 1887, 1888, and 1889 the defendants repeatedly notified said Mitchner that said machine would not do good work, and said Mitchner each time promised the defendants that he would go himself, or send some one else, to make it do good work, but that said Mitchner failed to go or send any other person for that purpose, except on the occasion when he sent the said Marshall; that, after the maturity of the \$140 note described in the mortgage, the defendants paid thereon the sum of \$75, and declined to pay more until said separator was made to do good work as warranted, and that the plaintiff thereupon brought suit against the defendants in the Howard circuit court for the remainder due on said note; that the defendants refused to pay because said separator would not work as warranted, and the defendants and said Mitchner compromised said suit upon these terms, to wit, the defendants agreed to pay the balance due on said note and one-half of the costs of said suit, and the said Mitchner agreed to pay the other half of the costs, and go out in the neighborhood where the defendants lived, when the threshing season of 1889 began, and make said machine do good work; that said Mitchner, in pursuance of said agreement, did pay one-half of the costs of said suit, and the defendants paid the other half and the remainder due on said note; that the attorneys of the plaintiff in said suit thereafter, on the 31st day of May, 1889, forwarded to the plaintiff, in a letter, \$77, balance due on said note, with the information contained in said letter that said Mitchner had agreed to make said machine do good

work when the threshing season opened, and that the defendants threatened and proposed to resist the payment of said note, on the ground that the separator did not give satisfaction, and that the plaintiff, with this information, received and retained said sum of \$77, and still retains the same; that the defendants retained and used said machine, relying on the promise made them by said Mitchner that he would make the same do good work as warranted; that the defendants and the said Mitchner wrote letters to the plaintiff in the month of December, 1888, which letters were received, informing the plaintiff that said machine would not do good work as warranted, after proper care and management; that about the 23d day of August, 1890, the plaintiff took and received the possession of said machine and appliances under the terms of said mortgage, and sold the same, and applied the proceeds upon the notes sued on in this action, the amount so received being \$77; that the value of said machine when so taken by plaintiff was \$75; that said machine when purchased of the plaintiff by defendants was of the value of \$200, and that, if said machine had been as warranted, its value would have been \$450; that defendants never offered to return said machine or demanded or offered to accept a new one in its place, but retained the same, relying upon the promise of said Mitchner that the same would be made to do good work as warranted; that said Mitchner was appointed the agent of the plaintiff for the selling seasons of 1886, 1887, and 1888, and was authorized to sell engines, threshers, and repairs manufactured by the plaintiff; that his said agency terminated with the season of 1888, and that he was not thereafter the agent of the plaintiff for any purpose; that the defendants, at the time of the purchase of said machine, and in the other dealings with said Mitchner, had no knowledge of any limitations upon his powers, and had no knowledge of the termination of his agency, and plaintiff gave them no notice in relation to said limitations or termination; but that defendants dealt with him in good faith, believing him to be the duly-authorized general agent of the plaintiff for all purposes in relation to all said transactions.

Appellant contends that the findings do not show that Mitchner was the general agent of the plaintiff at any time, and had no authority to waive the conditions in the contract of warranty. Mitchner was the agent of the plaintiff to make sales of its machinery, and at the time he received the notice of the defects in the separator, and made the attempt to remedy the same, the findings show that he was the authorized agent of the plaintiff. All that he did and caused to be done in relation to remedying the defects, and the promises made by him, were in the line of perfecting and completing the sale. The contract made in the first instance was not an unconditional contract for the sale of the machine. The defendants had the right to return it if unsatisfactory. It is a familiar rule that notice to an agent is notice to the principal of any matter that

is within the scope of the agency. In *Railway Co. v. Ruby*, 38 Ind. 294, it was held "that notice to an agent of a corporation relating to any matter of which he has the management and control is notice to the corporation." This rule is peculiarly applicable to foreign corporations doing business in this state. *Insurance Co. v. Hinesley*, 75 Ind. 1; *Insurance Co. v. Crutchfield*, 108 Ind. 518, 9 N. E. Rep. 458. The terms "general agent" and "special agent" are relative. An agent may have power to act for his principal in all matters. He is then strictly a general agent. He may have power to act for him in particular matters. He is then a special agent. But within the scope of such particular matters his powers may be general, and with reference thereto he is a general agent. Mitchner was authorized to make sales of plaintiff's machinery in certain localities. His powers for that purpose were general, and with reference thereto he was a general agent. As such, he received notice of the defects in said machinery, and notice to him was notice to the principal. His subsequent acts and promises were in the line of perfecting the sale. We think he had the right to waive the written notice required by the contract and of the other stipulations therein contained which were for the benefit of appellant. But it is said that many of his acts were done long after his agency had expired, and that the appellant cannot be bound by his action long after the termination of the agency. The findings, however, show that the appellees had no knowledge of the termination of the agency. "Third parties dealing bona fide with one who has been accredited to them as an agent are not affected by the revocation of his agency unless notified of such revocation." *Clirch v. McCormick*, 86 Ind. 243; *Rolling Mill Co. v. Hyland*, 94 Ind. 448. When one of two parties must suffer through the misconduct of a third person, the loss must fall on the party who has accredited and sent forth such third person.

The statements in the court's conclusion that the consideration for the notes has wholly failed, we think, is inaccurate. There was a consideration for the notes at the time of their execution,—the machinery and appliances. The machinery may have decreased in value, but the things for which the notes were given still continued to be in existence, and in the possession of the appellees. There was no failure of consideration; but there was a breach of the warranty, as shown by the findings. A breach of warranty may be treated as a matter of defense, or as a matter of counterclaim, at the option of the warrantee. The breach is used as a defense by way of recoupment. *Brower v. Nellis*, (Ind. App.) 33 N. E. Rep. 672; *Love v. Oldham*, 22 Ind. 51.

The findings show that the machine was only of the value of \$200; that, if it had been as warranted, it would have been of the value of \$450. This shows that the defendants have paid \$215 on the purchase price of said machinery. It thus appears that there is nothing owing to the appellant. We think the court did

not err in its conclusions of law. The consideration did not fail, but the defendants suffered damages by reason of the breach of warranty by which they were entitled to recoup the balance due on the notes. We find no reversible error in the record. Judgment affirmed, at costs of appellant.

(135 Ind. 143)

PENCE et al. v. WAUGH et al.

(Supreme Court of Indiana. Sept. 29, 1893.)

WILL CONTEST—MENTAL CAPACITY—EVIDENCE—  
CROSS-EXAMINATION—OBJECTIONS TO EVIDENCE—  
DEPOSITION—PRIVILEGED COMMUNICATIONS—  
IMPEACHING WITNESS.

1. The question of the alleged misconduct of a juror will not be reviewed on appeal, where the affidavit as to such misconduct is not in the record by a bill of exceptions.

2. In a will contest, a witness who testifies to certain facts, on which he bases his opinion that testator, an aged man, was of unsound mind, may be cross-examined as to whether it is not his belief that old men, as a rule, are of unsound mind, because of a failure of memory.

3. Where a contract entered into between testator and his grandson forms a part of the facts on which the witness bases his opinion as to testator's unsoundness of mind, it is proper to ask him on cross-examination whether he regarded the contract as a reasonable or an unreasonable transaction.

4. The good faith of a witness who has testified as to testator's unsoundness of mind may be tested on cross-examination by a question as to whether he considered testator of unsound mind at the time of certain business transactions between them.

5. There is no impropriety in an inquiry on cross-examination as to whether the witness understood the meaning of a question put to her on her examination in chief.

6. In a will contest on the ground of testator's unsoundness of mind, a witness was asked to state a conversation between himself and one of the devisees. *Held*, that an answer that testator was crying during such conversation is properly stricken out as irresponsible.

7. An erroneous ruling of the court that a question to a witness is proper is harmless when the question is abandoned, and no answer is given.

8. A single objection to a series of questions put to a physician, on the ground that the matters inquired about are confidential and privileged, is not sufficient to authorize a review of the testimony on appeal, where a part thereof is not subject to the objection; and in such cases there should be a distinct objection to each question.

9. The contestants of a will, who have introduced incompetent evidence of nonexpert witnesses as to testator's mental capacity, cannot complain of the subsequent introduction of similar evidence by the contestees.

10. An objection to the deposition of an attorney, that specified questions and answers are privileged communications from his client, is an objection to the competency of deponent, within the meaning of Rev. St. 1881, § 433, which permits such objections to be taken at the trial, and is not within section 439, which requires all objections to the validity of any deposition, or its admissibility in evidence, to be taken before the trial.

11. An exception to the admission of certain evidence in a deposition by reference to the questions and answers in the deposition by their numbers is sufficient without setting out the evidence in the exceptions.

12. The selection by the testator of the attorney who drew the will to act as an attest-

ing witness is a waiver of the statutory privilege as to communications between attorney and client, and on a contest of the will the attorney may testify as to conversations between himself and the testator as to the character and contents of the will then desired.

13. Where a party desires to impeach the testimony of a witness by showing that he has made out of court statements contrary to his testimony at the trial, the question put to the impeaching witness as to such statements should be identical as to time, place, and substance with the foundation question put to the witness sought to be impeached, and so framed as to admit of an affirmative or negative answer.

14. On a will contest, the giving of an instruction that the contestants must prove both unsoundness of mind and undue execution of the will before they can recover is no ground for reversal, where a subsequent instruction authorizes a recovery on proof of unsoundness of mind alone, and nothing appears in the record to show that the jury were not fully instructed as to undue execution.

Appeal from circuit court, Whitley county; J. W. Adair, Judge.

Action by James L. Pence and others against Nancy Waugh and others to contest the will of Joseph Waugh, deceased. From a judgment in defendants' favor, plaintiffs appeal. Affirmed.

Marshall & McNagny, for appellants. Collins & Adams and Zollars & Calvert, for appellees.

HACKNEY, J. This appeal is from an action by the appellants to contest the last will of Joseph Waugh. The alleged grounds of contest were the unsoundness of mind of the testator, and that the will was unduly executed. All of the questions discussed arise upon the alleged error in overruling appellants' motion for a new trial.

One of the alleged causes for a new trial was the action of a juror in not basing his verdict upon the law and the evidence, but in following the answer, real or supposed, to his prayer for proper guidance in determining the rights of the parties litigant. This element of the motion is verified by the affidavit of one of the counsel for appellants, which affidavit is not in the record by bill of exceptions. The question upon the action of the juror will therefore not be considered. *Kleespies v. State*, 104 Ind. 383, 7 N. E. Rep. 186, and cases there cited.

Joseph Pence, a witness for the appellants, had testified to certain facts upon which he gave an opinion that the testator was of unsound mind. One of the facts was the failure of memory as age advanced, and the frequent statements of the testator that his memory was failing, and he was asked on cross-examination if "a great many old men in his community say their mind is not as good as it used to be." This question, over the objection and exception of the appellants, was answered by saying: "I know some; yea." The point against this examination is that it is foreign to the case to inquire what men other than the testator said of their conditions of mind. Taken in the connection in which the question was asked, its manifest object was to ascertain if it was the opinion of the witness

that all old men were of unsound mind because of the failure of memory. The answer was that he knew some men whose memory was weakened by age. Standing alone, the inquiry would probably not be strictly proper, but we are unable to observe its injury to the cause of the appellants. If the claim of the witness had been that age makes inroads upon the memory as a rule,—and that is as much as can be said of the question and answer,—the effect upon appellants' case would rather have been beneficial than injurious.

In the course of the further cross-examination of said witness, he was asked: "Did you regard that contract as unreasonable,—unreasonably high or unreasonably low,—so as to indicate the old man wasn't right?" The contract referred to was one between the testator and his grandson, concerning the management of the former's farm, and in testing the strength of the opinion of the witness as to mental capacity it was proper to inquire whether, in his opinion, the contract, the making of which formed a part of the facts upon which his judgment of mental capacity was based, was a reasonable or unreasonable transaction. The witness, his intelligence, and the value of the facts upon which his opinion rested were upon trial by the cross-examination, and if he regarded the transaction as a reasonable one that fact took the circumstance from the support it may have appeared to give the opinion. We do not regard the inquiry as beyond the legitimate scope of a cross-examination.

Nor was it error to ask the witness if, at the time he paid the testator a sum of money, he regarded him as of unsound mind. Though the ultimate question is the condition of mind at the time the will was executed, it has never been doubted that prior or subsequent conditions are proper in determining the condition at the particular time. As before said, the good faith of the witness is upon trial under the cross-examination, and it is proper to consider whether he continued business transactions with a man he believed of unsound mind, or whether in good faith he regarded him as *compos mentis* then. *Rush v. Megee*, 86 Ind. 69. The question asked and held improper in *Staser v. Hogan*, 120 Ind. 216, 21 N. E. Rep. 911, and 22 N. E. Rep. 990, was: "Mr. Mesker, would you have taken a note from John C. Staser during the last year of his life? Did you ever hear anybody in his life question his sanity?" The opinions of others than the witness were not on investigation by the cross-examination, especially of those not under oath. Nor was it important what transactions the witness might have had with the testator, but it would have been, as it was in this case, proper to test the character of transactions actually had, and which form a part of the basis of the witness' opinion as to sanity.

Another question, on the cross-examination of Nancy Waugh, is said to have been erroneous. It was as to whether she understood, in her examination in chief, the question as to her husband having

been "afflicted with the infirmities of age," and a suggestion that it was meant to inquire if, as he grew older, he became more feeble. There is no impropriety in an inquiry as to whether a witness understood a question.

On the examination of one Wendell on behalf of the appellants it was asked that a certain conversation between the witness and the appellee David M. Waugh be stated. Over the objection of the appellees, the witness answered that "David spoke of making hay. It was wet, and the old man was crying about making hay, and he said he wished he hadn't taken the hay, and he said he would have nothing to do with the old man; that he was old and childish, and that he would not rent another \* \* \* foot of ground from him." On motion of the appellees, the answer was stricken out, and now the appellants contend that the words, "and the old man was crying about making the hay," were the statement of such an occurrence as a fact; and if the old man cried about making hay it was a proper circumstance to be proven. The answer involves in doubt whether the witness saw the old man crying, and states the circumstance as a fact independent of what David said, or whether the words are from David's statement. However, as appellants contend that it was proper as an independent fact, stated as within the knowledge of the witness, it is in no manner responsive to the question asked, and formed no proper part of David's statement, and was therefore properly stricken out. On the trial it was insisted that the conversation by David contained an admission by him that the testator was "old and childish," which admission was proper evidence against David. While appellants do not insist upon this position in this court, it may well be doubted whether, if all the words of the answer were David's, the declarations of one contestee against the validity of the will may be given in evidence. *Shorb v. Brubaker*, 94 Ind. 165; *Ryman v. Crawford*, 86 Ind. 262; *Hayes v. Burkam*, 67 Ind. 359.

The physician who attended the testator in his last illness was a witness for the appellees, and, after testifying to an extended acquaintance with him, and as to the disease of which he died, was asked how long the disease had lasted, when appellants objected to anything ascertained from the patient or observed in the sick room, on the ground that such matters were privileged. The court overruled the objection, and appellants excepted. Without pressing the question asked, or permitting an answer to it, the appellees asked another question, as to the character of the illness, instead of its duration, which question was answered without objection. The question asked and objected to having been abandoned, and no answer given to it, no harm was done by the ruling, even if the judgment of the court in supporting such ruling had been wrong.

Some time later, in the course of appellees' examination of said witness, it was asked in relation to the time of testator's

sickness, "Do you know whether he walked around?" which the witness answered: "He did; yes, sir; against my orders, though." Here counsel for appellants stated: "The court understands my objection goes to the entire testimony of the witness, so as not to keep repeating it. We desire the same objection to go to all of this,—that the relations were confidential." The witness had stated many things within his knowledge and observation not gained as a physician, and, the objection having been made to all of the testimony when part of it was not subject to such objection, it was not error to overrule the objection. *Binford v. Young*, 115 Ind. 174, 16 N. E. Rep. 142, and cases cited. Objections, in practice, are usually addressed to the questions, and it is not a favored practice to permit counsel to delay until it may be learned if answers are injurious before objecting. The character of the answer is always indicated by the question asked, and opportunity is given for objection before answer. If the answer is not what might have been anticipated from the question, then it is not properly responsive, and the rights of the adverse party are not lost by delay in objecting, for he may then move to strike out the answer. In this instance, the answer objected to, and the evidence preceding it, does not disclose whether the walking by the testator was in the sick room, and observed by the physician while present attending him, or upon the streets, or on the farm, where the witness occupied no relation of confidence to him. Counsel for appellants say in this connection that, "unfortunately, matters of fact and professional observation are so blended that it will require a reading of the whole of his evidence in order to decide this question." Sitting as a court of review, and it being our duty, where we reasonably may, to presume in favor of the action of the trial court, and the burden resting upon the appellant in this court to make his cause for reversal clear, we cannot sift out the chaff from the straw where the appellant has permitted a mixture of the two to reach this court.

It is next contended that the court erred in permitting several nonexpert witnesses for the appellees to state opinions as to the sanity of the testator, upon facts which, in whole or in part, had not been detailed to the jury, and that in some instances questions were permitted upon that subject where the opinions were asked to be based in part on the facts detailed and in part upon acquaintance, observation, and business transactions, regardless of such facts not having been stated to the jury. Appellees urge that appellants are in no position to insist upon the question here presented, even if it should appear that the rulings mentioned were erroneous, because of having, previous to such rulings, sought and obtained like evidence upon like questions. We find that appellants, while introducing their evidence in chief, asked and received answers to questions subject to the objection here made against the questions of the appellees. In *Perkins v. Hayward*, 124 Ind. 445, 24 N. E. Rep. 1033, it

was said: "It has been often decided that a party, by calling out incompetent evidence, may preclude himself from successfully objecting to evidence of like character introduced by his adversary. The rule upon this subject is that evidence, otherwise incompetent, may be practically stripped of its objectionable character by the course pursued by the party who challenges its competency. If a party opens the door for the admission of incompetent evidence, he is in no plight to complain that his adversary followed through the door thus opened;" citing numerous cases. By this rule the appellants are precluded.

On behalf of the appellees, the deposition of the attorney who prepared the will and acted as one of the attesting witnesses was offered at the trial. After so much of the deposition had been read in evidence as disclosed the relation of the attorney to the testator as one employed to write the will, counsel for appellants objected to a question for the stated reason that the relation of attorney and client was confidential, and that communications between them were privileged. The court overruled the objection, which action we deem proper, so far as the objection related to the question to which the objection was addressed, for the reason that the question did not call for any communication between the attorney and client, but asked only where the witness was employed to write the will. Immediately following the ruling of the court, counsel for appellants said: "Will the court consider the same objection as being made to each question down to question 20 of the deposition, and give us an exception in each case?" to which the court answered, "Yes, sir." Questions and answers numbered 15 and 18 introduce fully the conversations between the witness and the testator as to the character and contents of the will then desired, the number and amount of advancements made, the reasons for discriminating between his children and his grandchildren, who should be named as executors, the description of his lands, and the importance of ample provision for his widow during her lifetime. Appellants now insist that the action of the court in admitting this evidence was error. Appellees contend that the objection could not be made upon the trial, but that, under section 439, Rev. St. 1881, "all objections to the validity of any deposition, or its admissibility in evidence, shall be made before entering upon the trial; not afterwards." As to the validity of the deposition, or its admissibility as a deposition, the objection must be made before the trial, and is usually made by a motion to suppress it in whole or in part. But, as provided by Rev. St. 1881, § 438, "objections to the competency of the deponent, or the propriety of any questions proposed to him, or answers given by him, may be made \* \* \* in court." This objection is to the competency of the deponent, and does not constitute an objection to the validity of the deposition, or its admissibility as a deposition, and is therefore not required to be made before the trial, but, according



to the uniform practice in the trial courts, may be made when the evidence is offered, and as it is offered, the same as if the witness were upon the stand before the court and jury.

Further objection is made to a consideration of the alleged error in admitting this evidence that the assignment of the ruling thereon as cause for a new trial is too general, in that it only indicates the evidence admitted by reference to the questions and answers in the deposition by their numbers, and not by including the evidence. We think that the cause is sufficiently stated when by reference to the proper and authentic files then existing. While no case directly in point has been called to our attention, the following seem to support this view: *Ball v. Balfe*, 41 Ind. 221, and *Elliott v. Russell*, 92 Ind. 526. In the latter case it was held sufficient if the cause assigned refer to a bill of exceptions on file. If it may be made sufficient by reference to a bill of exceptions, we know of no reason why a deposition is not of sufficient character to support the reference. It is an authentic document, and a proper part of the files in the cause.

A more important question arises upon the insistence of the appellees that the selection of the attorney as an attesting witness was a waiver of the statutory privilege. Says Beach, in his *Law of Wills*, (page 65, § 39:) "In making it requisite to the validity of a will that there should be attesting witnesses, who shall subscribe their names to the writing, the law has a three-fold purpose: the identification of the paper, the protection of the testator from deception and fraud, and the ascertainment of his testamentary capacity." Numerous authorities are cited to support this view, and we have no doubt that the same objects were intended by the statute of this state. In *Chaplin on Wills* (page 91) it is said that "one of the very purposes of requiring witnesses at all is to provide for testimony from competent persons on the question, among others, of the testator's general capacity to make a will. Their position, too, in having been present at the execution, and having their attention called, with more or less directness, to the fact that the testator was doing some act calling for the exercise of some degree of judgment, and having themselves subscribed their names on the same paper signed by him, is such as to render their testimony of unusual importance. They may therefore testify whether, in their opinion, testator was, at the time of the execution of the will, sane or insane." *Schouler on Wills*, (section 848,) and no doubt other authors, maintain the same doctrine. In *Re Coleman*, 111 N. Y. 220, 19 N. E. Rep. 71, the question here raised was decided. There the communications were held to be confidential and privileged. The statute creating the privilege provided that it should exclude the witness, unless the privilege were expressly waived. This express waiver is required to be made, says the court, "in such a manner as to show that the testator intended to exempt the witness, in the particular in-

stance, from the prohibition imposed by the statute." Again, it is said: "He must have been aware that his object in making a will might prove to be ineffectual, unless these witnesses could be called to testify to the circumstances attending its execution, including the condition of his mental faculties at the time." And it is further said: "The law presumes knowledge on his part of its provisions, and that what he does deliberately is done with full comprehension of the legal effect of his act, and the duty which it imposes upon those who comply with his request. It would be contrary to settled rules of law to ascribe to the testator an intention, while making his will, and going through the forms required to make it a valid instrument, to leave in operation the provisions of a statute which he had power to waive, but which, if not waived, might frustrate and defeat the whole object of his action. It cannot be doubted that, if a client in his lifetime should call his attorney as a witness in a legal proceeding, to testify to transactions taking place between himself and his attorney, while occupying the relation of attorney and client, such an act would be held to constitute an express waiver of the seal of secrecy imposed by the statute; and can it be any less so when the client has left written and oral evidence [meaning by "oral evidence" the request to the witness to attest his will] of his desire that his attorney should testify to facts learned through their professional relations, upon a judicial proceeding to take place after his death? We think not. *McKinney v. Railroad Co.*, 104 N. Y. 352, 10 N. E. Rep. 544. The act of the testator in requesting his attorneys to become witnesses to his will leaves no doubt as to his intention thereby to exempt them from the operation of the statute, and leave them free to perform the duties of the office assigned them, unrestrained by any objection which he had power to remove." This case was expressly approved in *Alberti v. Railroad Co.*, 118 N. Y. 77, 23 N. E. Rep. 35.

The privilege of the statute requires no express waiver in this state, and it may be waived, not only by express waiver, but by implication. See *Lane v. Bolcourt*, 128 Ind. 420, 27 N. E. Rep. 1111. Under the statute of wills in this state (*Rev. St. 1881*, § 2576 et seq.) the witnesses must be competent, and they are required, in probating, to give evidence that the will was not only duly executed, but that the testator was competent to devise his property, and not under coercion at the time of executing the will. This statute existed concurrently with that creating the privilege, and may be said to have been within the knowledge of the testator when he selected his attorney as a witness. The testator will be presumed to have acted with a desire to support his sanity, and the validity of his will, and that in choosing a witness he intended to waive every obstacle to his competency. The privilege, if sufficient to preclude the witness in a contest of the will, would be sufficient to preclude him in the probating of the will. We cannot presume that the

testator intentionally selected one as a witness to establish the identity of the will, the genuineness of the signature, and his mental capacity, who was to be incompetent for such purposes. The law presumes sanity, and accepts the manifest intention of parties in determining the effect of their acts. Clearly it must be presumed that the testator meant that his witness should be competent to make proof for the probate of the will, and that he intended by his selection to waive the privilege of the statute in that regard, and it is no less clear that the desire and interest of the testator were as strong to support his will against contest, and that his selection for that reason was with like intention. The statute required that he should select a competent witness, and, as nothing stood in the way of the competency of the witness chosen which the testator could not remove by his waiver, it will be presumed that his choice was with such intention, and the waiver is implied.

One Davis, a witness for the appellees, testified to the soundness of the testator's mind, and on cross-examination was asked if he had not, at a given time and place, said "to Daniel Jones, who was the assessor of that township, that said Joseph Waugh was old and childish; that he always complained about his taxes being too high; that they were going to break him up, and that he would have to go to the poorhouse, and that you would rather assess all the rest of the township than said Waugh." Having failed to affirm that he had so stated, the appellant called Daniel Jones in rebuttal, and, after stating that he and Davis had conversed at the time and place indicated, he was asked the following question: "I will ask you to state what he said to you in that conversation about his assessment of Waugh." To this question the court sustained appellees' objection. We do not doubt that the witness Davis was subject to the rule as to indirect impeachments that the statements made out of court contrary to his testimony in court were admissible, but it is insisted that the question to the impeaching witness should have been substantially in the form of the question asked of Davis, and not as a simple inquiry for the details of the conversation. While we do not insist that the question to the impeaching witness should be in the exact words of the question asked of the witness sought to be impeached, we do hold that as to time, place, and substance of the conversation or statement it should be identical, and should be so framed as to admit of a negative or an affirmative answer. This has been the rule of practice in the trial courts of this state without exception, so far as we are advised, and we have no doubt that it is the safer and better practice; for, as said in *Sloan v. Railroad Co.*, 45 N. Y. 125, if it were "otherwise, hearsay evidence, not strictly contradictory, might be introduced to the injury of the parties, and in violation of legal rules." If less than the whole substance of the conver-

sation inquired of in the foundation question is stated in the impeaching question, injustice is done the witness whose credibility is in question, and the same may be said with additional force if the impeaching question includes more than the substance of the foundation question. The foundation question here asked of the witness was as to a statement that the testator was old and childish; that the testator had said "they would break him up, and that he would have to go to the poorhouse," and that the witness had said that he would rather assess all the rest of the township than said Waugh. The impeaching question did not necessarily comprehend so much. The inquiry of Jones was as to what Davis said as to his assessment of Waugh, which will at once appear to be materially less than the substance of the inquiry of Davis. It cannot be favored as a rule of practice to permit the impeaching witness to state the conversation in detail, except as the cross-examiner may call it out in testing the accuracy of the conclusion that the conversation denied and that affirmed are the same, for the reason, already given, that to do so will admit matters not included in the foundation inquiry, and often matters of mere hearsay. No case directly in line has been called to our attention, or has fallen under our observation, but we have no doubt that the ends of justice are subserved better by the practice which has always prevailed in this state. The court therefore did not err in refusing the evidence offered.

The appellants complain that the court's first charge to the jury cast the burden upon the plaintiffs of proving the material allegations of the complaint—both unsoundness of mind and undue execution—before they could recover. Such must be the construction of the charge named when standing alone, but the court instructed the jury that if the element of unsoundness of mind were established the plaintiffs might recover, thereby severing the causes of contest; and from anything appearing in the record we cannot say that the jury were not fully instructed upon the cause of undue execution. It does not appear from the record that no other charges were given than those presented by the transcript, and we must presume in favor of the action of the lower court until error is clearly shown. This presumption is so broad as to include the giving of a charge clearly defining the cause of contest mentioned as undue execution, and stating it as a separate issue, proof of which alone would require a verdict for the plaintiffs. *Reinhold v. State*, 130 Ind. 467, 30 N. E. Rep. 306; *City of New Albany v. McCulloch*, 127 Ind. 500, 26 N. E. Rep. 1074; *Lehman v. Hawks*, 121 Ind. 541, 23 N. E. Rep. 670.

Other alleged errors are discussed, but as we have in the course of this opinion considered like questions we will not add to what has already been said. Finding no error for which this cause should be reversed, the judgment of the circuit court is affirmed.

(140 Ind. 120)

## ROSS et al. v. BANTA.1

(Supreme Court of Indiana. Sept. 23, 1893.)

PLEADING—HARMLESS ERROR—APPEAL—RES JUDICATA—COLLATERAL ATTACK—INJUNCTION AGAINST JUDGMENT—EXEMPTIONS—EXECUTION SALE.

1. In an action for the possession of land, a demurrer to the complaint on the ground that it does not allege that defendants unlawfully keep "plaintiff" out of possession, as required by the statute, is properly overruled, where, by a clerical error, the word "property" was used, instead of the word "plaintiff."

2. A special finding that defendant unlawfully keeps plaintiff out of possession cures the above defect in the complaint.

3. Where, under a general denial, defendant may give in evidence every defense he has, legal or equitable, the fact that an affirmative defense pleaded by him has been held bad on demurrer is harmless error; but, where defendant asks for affirmative relief, the sustaining of a demurrer to his cross complaint cannot be considered harmless, even if the facts therein pleaded are admissible under his general denial.

4. A ruling of the trial court refusing to require plaintiff's attorney to produce and prove his authority to prosecute an action for the possession of land must be preserved by a bill of exceptions, properly authenticated, if a review thereof is desired on appeal.

5. A judgment for the recovery of land is as binding on a purchaser from the heirs of the party against whom it was rendered as if he had been himself a party.

6. It is no objection to the maintenance of an action to enjoin a judgment that it is a collateral attack on the judgment.

7. Rev. St. 1881, § 616, which authorizes the review of a judgment for error of law appearing in the proceedings and judgment within one year after its rendition, or, within three years, for material new matter discovered since the rendition thereof, extends the right of review to judgments at law as well as to decrees in equity; and hence, since the adoption of that statute, a court of equity cannot enjoin the enforcement of a judgment at law where such right of review exists. *Walker v. Heller*, 90 Ind. 198, disapproved.

8. Pending an appeal from a judgment establishing his title to land, plaintiff recovered another judgment for the possession of the land, based solely on the title established by the appealed judgment. *Held*, that the reversal of the appealed judgment within one year from the rendition of the judgment for the possession was no ground for enjoining the enforcement of the latter judgment, since defendant had an adequate remedy by a review of that judgment, under Rev. St. 1881, § 616, though prior to the enactment of such statute an injunction would have been the proper remedy.

9. A purchaser of the land from the heirs of defendant after such reversal has the same right to a review of the judgment for possession as have the heirs, under the express provision of Rev. St. 1881, § 615; and, having such right, the purchaser cannot resort to equity for an injunction against the judgment.

10. One who, with his family and part of his household goods, leaves the state for government service in one of the territories, with the intention of returning when such service shall terminate, is not a "resident household-er," within the meaning of Rev. St. 1881, § 703, exempting certain property of "resident householders" from execution sale.

11. A judgment for costs is not a debt "growing out of or founded on a contract, express or implied," within Rev. St. 1881, § 703, exempting certain property from execution sale under a judgment for such a debt.

\* Rehearing denied, 39 N. E. 732.

12. Where an execution, issued out of the supreme court to its sheriff for the enforcement of a judgment for costs, is transmitted by him to the sheriff of the county where it is to be enforced, as provided by Rev. St. 1881, § 5834, the fact that the notice of sale was signed by the county sheriff in his official capacity as such sheriff, and not as the deputy of the sheriff of the supreme court, will not invalidate the sale.

Appeal from circuit court, Cass county; E. P. Hammond, Special Judge.

Action by Henry J. Banta against George E. Ross and others to recover possession of land. From a judgment in plaintiff's favor, defendants appeal. Affirmed in part and reversed in part.

G. E. Ross, for appellants. D. P. Baldwin, for appellee.

MCCABE, C. J. Appellee sued the appellants in the court below to recover possession of lots 5 and 6, in D. D. Dykeman's First addition to Logansport, Cass county, Ind. Issue, trial by the court, special finding, conclusions of law, and judgment thereon for appellee. This was the second trial of the cause. On the first trial, the appellants recovered judgment. A new trial, as a matter of right, under the statute, was granted the appellee, resulting in a judgment, as above stated, in his favor. There are 20 assignments of error by appellants, and 9 assignments of cross error by the appellee. Many of these assignments we shall find it unnecessary to examine.

The first assignment questions the overruling of a demurrer to the complaint. The complaint is in the usual statutory form, except that instead of alleging, as the statute provides, that "the defendant unlawfully keeps him out of possession," it alleges that "the defendants are in the unlawful possession of said real estate, and wrongfully detain the same from the possession of said property." If the pleader intended to use the word "property," it would clearly make the complaint bad, because section 1054, Rev. St. 1881, imperatively requires in such a complaint the allegation "that the defendant unlawfully kept the plaintiff out of possession," or its equivalent. *Bank v. Corey*, 94 Ind. 457; *Mansur v. Streight*, 103 Ind. 358, 3 N. E. Rep. 112; *Simmons v. Lindley*, 108 Ind. 297, 9 N. E. Rep. 360. But it appears clearly enough that the pleader intended to use the word "plaintiff" in the place where he has used the word "property." The Civil Code requires us to regard the complaint as having been amended in that respect. Rev. St. 1881, §§ 396-398, 658. Besides, there was a special finding in this case, and if it supplied or found the existence of the fact missing or wanting in the complaint, or if it failed to so find, in either case the ruling on the demurrer would be harmless, because, in either event, a correct declaration of the law upon the facts found would reach the same legal result as would have been reached with a correct ruling on the demurrer, or with the defect in the complaint obviated by an amendment. We are not unmindful of the rule that forbids consideration of facts in a special finding

or verdict that are outside of the issues. Facts in a special finding or verdict may, in a case of this kind, be said to be outside of the issues only when they are outside of the scope of the issues; otherwise, there could be no such thing as a verdict curing a defective complaint. The missing fact in the complaint was within the scope of the complaint, because, the complaint being for the recovery of the possession of real estate under the statute, the allegation that the defendant unlawfully keeps the plaintiff out of possession was within the scope of the complaint, though that direct averment was not made. Where a good complaint is held bad, a different result must follow. A special finding or verdict could not either cure or render the error harmless, because the facts in such pleading, even if they found their way into the special finding or verdict, could not be considered for any purpose. Such facts, in such a case, would not only be outside of the issues, but outside of the scope of the issues. It is clear, therefore, that the overruling of the demurrer to the complaint was a harmless error, if error at all. *State v. Vogel*, 117 Ind. 188, 19 N. E. Rep. 773; *Martin v. Cauble*, 72 Ind. 67; *Douthit v. Douthit*, 32 N. E. Rep. 715, (at May term, 1892); *Reddick v. Keesling*, 129 Ind. 128, 28 N. E. Rep. 316.

There were seven paragraphs of answer setting up affirmative matter besides the general denial. There were nearly as many affirmative paragraphs of reply. Many errors and cross errors are assigned on rulings on demurrers to the affirmative answers and replies. The answer of general denial authorized every defense to be given in evidence which appellants had, either legal or equitable. In such a case a bad affirmative pleading held good is harmless, because, when its facts are found in the special finding or verdict, a correct declaration of the law arising on such facts puts the injured party in the same attitude he would have occupied had the pleading been held bad on the demurrer; and a good affirmative pleading held bad on demurrer in such a case is harmless, because its facts were still admissible under the general denial. See authorities last cited. Therefore rulings as to the sufficiency of answers or replies, even though erroneous, were harmless errors, whether committed against appellant or appellee.

The next error urged is the refusal of the court below to require the appellee's attorney to produce and prove his authority to prosecute the action, under section 970, Rev. St. 1881. This was such a motion as required a bill of exceptions to present it to this court. There is a paper copied into the transcript in the form of a bill of exceptions, purporting to set forth the motion and the action of the court thereon, but it is not signed by the judge. Therefore there is no question presented to this court as to such refusal of the court to require appellee's attorney to prove his authority to act.

There was a demurrer sustained to the cross complaint of appellant Ross, and the correctness of that ruling is the next question presented. It is insisted that, as the

same facts could have been given in evidence under the answer of the general denial, sustaining the demurrer to the cross complaint was harmless, if even it was error. It is true the facts set up in the cross complaint, if sufficient to constitute a cause of cross action, are also sufficient in this case to constitute a defense to the original action, and, so far as that defense is concerned, we have already seen that it was a harmless error to hold the cross complaint bad; but the very object in pleading the facts in the form of a cross complaint is to accomplish something more than the mere defeat of the original action; it is to secure affirmative relief, such as quieting the cross complainant's title, or that which is the same thing,—to enjoin the other party from setting up title to the premises through a certain judgment, founded on another judgment. That was asked in this case, and restitution and other relief also were asked in the cross complaint, neither of which could have been granted on a mere defeat of the ejectment suit. In an action to recover possession of real estate, as was the case here, a pleading filed by the defendant in which he claims title to the land, and asks the title to be quieted, or any other affirmative relief, constitutes a counterclaim. *Tabor v. Mackee*, 58 Ind. 290; *Wilson v. Carpenter*, 62 Ind. 495. In such a case the matter set up in the counterclaim or cross complaint, while it may defeat the original action, like a mere defense, its purpose is to go beyond a mere defense, and afford to the cross complainant affirmative relief, which is more than a mere defeat of the original action. *Harness v. Harness*, 63 Ind. 1; *Jones v. Hathaway*, 77 Ind. 14; *Branham v. Johnson*, 62 Ind. 259.

The cross complaint was, in substance, as follows: "The defendant George E. Ross, by way of cross complaint against the plaintiff Henry J. Banta, says that on the 8th day of February, 1875, and for more than five years prior thereto, one Catherine Peters was the owner of the lots in complaint mentioned, describing them. That for the years 1873 and 1874 taxes were regularly assessed against said lots in the sum of \$50, which became delinquent, for which the county treasurer sold them to one Joseph Uhl for \$53.27, to whom a proper certificate was issued by the auditor of said county, and, there having been no redemption at the proper time, a deed was duly executed to him for said property, pursuant to said sale. That Uhl remained in possession until July 4, 1881, when he sold and conveyed it to one Margaret Sheehan, who afterwards intermarried with one Andrew J. Ream. That she died in 1889, intestate, leaving surviving her, as her only heir at law, her husband, Andrew J. Ream, who conveyed said lots to cross complainant, by deed, February 27, 1890. That said Uhl had, while he held the tax title aforesaid, and on February 24, 1879, recovered judgment in the superior court of Cass county, Ind., against said Catherine and Abraham Peters, her husband, quieting his title to said property under said tax deed. That said Margaret Ream took and held posses-

sion of said property from July 4, 1881, until her death, and her husband until his conveyance to the cross complainant. That said Uhl and Ream paid \$400 taxes on said property under said tax sale, which, with interest and penalties to this date, amount to \$2,000. That said Banta claims some interest in or title to said property, as follows, viz.: That in the year 1878 Abraham Peters and Catherine Peters executed a mortgage upon said property, and also on lot 4 of the same addition, also owned by said Catherine, to one Timothy Crawley, who on December 23, 1878, recovered judgment of foreclosure thereof in the superior court of said Cass county, against said Abraham and Catherine Peters, who were the only parties defendant in said judgment. That said Crawley, on the 27th of January, 1879, assigned said judgment to one Alexander S. Guthrie. That on the — day of August, 1880, said lots 4, 5, and 6 were sold by the sheriff of said Cass county to satisfy said judgment in foreclosure, at which sale said Guthrie became the purchaser. That on the — day of —, 188—, said Guthrie conveyed lot 6, aforesaid, to said Banta, and afterwards conveyed to said Banta said lots 4 and 5. That afterwards said Guthrie and Banta jointly sued said Catherine and Abraham Peters and Margaret Sheehan in the circuit court of said county to set aside said sheriff's sale, on the ground that the sale had been made without relief, while the judgment was subject to relief from valuation and appraisement laws; asking also that the tax title of said Margaret Sheehan be set aside, and they be permitted to redeem from the same. That said suit resulted in favor of said Guthrie and Banta, setting aside said sheriff's deed, and directing a resale of said property against all said defendants under the original decree of foreclosure. That said Margaret Sheehan appealed from said latter judgment to the supreme court, where said judgment was reversed and set aside March 14, 1889. That, pending said appeal, said Guthrie and Banta caused said property to be resold on January 2, 1886, by the sheriff of said county, pursuant to said judgment ordering a resale, said Banta becoming the purchaser of said lots 5 and 6 at said resale, and afterwards received a sheriff's deed therefor. That on the 27th of January, 1887, said Banta commenced suit against said Abraham and Catherine Peters and said Margaret Ream (nee Sheehan) for possession of said lots 5 and 6, and, in his abstract of title filed with his complaint, set forth that he derived his title through said sheriff's sale and deed to said Guthrie, and also through said sheriff's sale made January 2, 1886, aforesaid. That, to this complaint and abstract of title, said Ream answered that she was the owner and in possession of said property under said tax sale aforesaid, specifically setting out said title; also that she was the owner of said property under said sale aforesaid; and that she and her grantor had been in possession of said property thereunder since 1875; and that the cause of action sued on did not accrue

within five years before the commencement of said action; and, further, that said Banta bid at said sale of January 2, 1886, \$1,645.41, for which said sheriff had sold the property to him, but that he had not paid said bid up to the commencement of said action, each of which answers was held good by the court, and sufficient to defeat said action. That to these several answers and defenses said plaintiff replied—First, by general denial; and, second, affirmatively, that the matters and things pleaded in these special answers had been passed upon and adjudicated by and in said judgment of the Cass circuit court, rendered October 19, 1885, aforesaid. That said cause was taken on change of venue to the Pulaski circuit court, where, upon the issues so formed, a trial was had, and a special verdict was returned by the jury under the issues aforesaid. That said jury, in their verdict, found the rendition of said original judgment in foreclosure, the sale thereunder to said Guthrie in August, 1880, the setting aside of said sale by the Cass circuit court in October, 1885, the resale under said last judgment in January, 1886, the issuing of the sheriff's deed on said sale in January, 1887, the commencement of said action in ejectment, and that said defendants were in possession of said property, and retained possession thereof, during the year next after said sale, and that the title and interest of Margaret Sheehan in and to said property had been tried and determined against her in said action brought by said Guthrie and Banta against her and others, and in which said judgment was rendered in October, 1885, as aforesaid. And cross complainant avers that, upon these facts so found by the jury, and which were the only facts found by said jury of title in said Banta, and the only right he had to possession of said property, said Pulaski circuit court, on the — day of May, 1887, rendered judgment in favor of said Banta for possession of said property; that upon said judgment a writ of possession was issued to the sheriff of Cass county, Ind., who, on the — day of —, 1890, executed said writ by ejecting said Abraham and Catherine from said property, and all other persons mentioned in said writ, and delivered up possession of said property to said Banta. And cross complainant avers said Banta has no title or right to the possession of said property other or different from that above specifically set out. Wherefore cross complainant asks the following relief, viz.: (1) That, as a grantee of Margaret Ream, he have restitution of said property; (2) that said Banta be forever enjoined from setting up any title to said property or right to the possession thereof under said judgment of the Pulaski circuit court rendered May, 1887; (3) that he account for the rents and profits of said property; and (4) all other proper relief." It is earnestly contended that this cross bill is not sufficient, because, Ross having purchased from Ream's heir, who inherited from her since the recovery of the judgment against her and others for the possession in the

Pulaski circuit court, he, it is claimed, is as much bound by that judgment, so far as this property is concerned, as if he had been one of the defendants in that judgment. And so we hold he is as much bound by that judgment, so far as it affects his title to this property, as if he had been one of the defendants therein. Therefore, if Margaret Ream, through whom Ross claims title, and who was a defendant in the Pulaski circuit court judgment, could maintain a bill to enjoin that judgment had she lived and retained her title, then Ross can do the same, as he is her successor in the title; and, on the other hand, if she could not maintain such a bill, then Ross cannot.

The cross complaint in this case is, in effect, a bill to enjoin the Pulaski circuit court judgment, among other things. Does it state facts sufficient to warrant that relief? Appellee contends that it does not, because it is a collateral attack upon a judgment of a court of competent jurisdiction, and cites *Pierce v. Banta*, (Ind. App.) 31 N. E. Rep. 812, in support of that proposition. That case lends some sanction to that contention, though it was not a suit to enjoin. Appellee's counsel assumes that there cannot be a collateral attack on a judgment in any case. While it is true that a judgment cannot be collaterally impeached in an action at law, yet it is equally true that a judgment may be collaterally attacked in a suit in equity, where any fact exists which clearly proves it to be against conscience to execute the judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents. 1 High, Inj. § 114; *Hogg v. Link*, 90 Ind. 346; *Walker v. Heller*, Id. 198; *Harman v. Moore*, 112 Ind. 221, 13 N. E. Rep. 718.

The cross complaint being in the nature of a suit in equity to enjoin a judgment at law, that the attack thereon is collateral is no objection to the maintenance of such suit. In *Walker v. Heller*, supra, very nearly the question here under consideration was decided by this court in favor of appellant's contention. In that case a suit on a note was tried, resulting in a finding for the defendant, which was entered of record. Afterwards the court permitted the plaintiff, over objection, to dismiss his suit before judgment on the finding from which the defendant appealed to this court, where the judgment of dismissal was reversed, with instructions to the trial court to enter judgment upon the finding in favor of the defendant, which was accordingly done on the return of the case to the trial court. Pending the appeal, and before the decision thereof, the plaintiff brought another action on the note, and recovered judgment before the reversal in the other case. After the reversal and entry of judgment for the defendant on the return of the case from the supreme court, the defendant brought suit to enjoin the judgment recovered pending the appeal, which injunction was

refused in the trial court, but this court reversed that ruling. It is there said: "It is well settled that a court of equity will restrain proceedings upon a judgment at law where its enforcement is against conscience and the same has been recovered by an unfair advantage. Wherever, by accident, mistake, fraud, or otherwise, an unfair advantage has been obtained in proceedings at law, and it is against conscience to make use of such advantage, a court of equity will restrain the party from making use of the same; and, after judgment, any facts which prove it to be against conscience to execute such judgment, and of which the injured party could not avail himself in defense of the suit, will authorize the court to interfere by injunction, and restrain the party from enforcing the judgment." The case made here for the interposition of equity is much stronger than the case from which we have quoted. There, there were two judgments on the same cause of action, one in favor of one of the parties, and the other in favor of the other; and equity interposed in favor of the party who last recovered, though he should have been the first to recover. But here is a case where a party has recovered a judgment for the possession of real estate on a title established wholly and solely by a judgment, which was the only evidence of title, which judgment has been overthrown by an unqualified reversal.

Embry, administrator, brought suit in the supreme court of the District of Columbia against Stanton and Palmer, and recovered judgment for \$9,185.18. He brought suit on that judgment in a state court in Connecticut. Thereupon they filed their petition in equity in the same court, the object and prayer of which were to obtain a perpetual injunction restraining him from prosecuting his action upon that judgment, or in any manner enforcing it against them, setting forth the reasons therefor. The judgment was enjoined in the state court, which was, on appeal to the state supreme court, affirmed, (46 Conn. 595,) and Embry appealed to the supreme court of the United States, (2 Sup. Ct. Rep. 31.) That court in that case said: "The question then arises, what causes would have been sufficient in the District of Columbia, according to the law then in force, to have authorized its courts to set aside the judgment recovered there by Embry against Stanton and Palmer? This is answered by the decision of this court upon the point, in the case of *Insurance Co. v. Hodgson*, 7 Cranch, 332. That was a bill in equity, filed in a court of the District of Columbia, perpetually to enjoin the collection of so much of a judgment at law recovered in the District as was in excess of an amount claimed to be the sum equitably due. The grounds of relief alleged were that a fraud had been practiced upon the underwriters in a valued policy of marine insurance by an overvaluation of the ship, and that the complainant had been prevented from making the defense at law. Chief Justice Marshall, delivering the opinion of the court, affirming the

decree of the court below dismissing the bill, stated the rule as follows: 'Without attempting to draw any precise line to which courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may safely be said that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery. On the other hand, it may with equal safety be laid down as a general rule that a defense cannot be set up in equity which has been fully and fairly tried at law, although it may be the opinion of that court that the defense ought to have been sustained at law.' \* \* \*

This was held to be the law prevailing in the District of Columbia, not by reason of any local peculiarity, but because it was a general principle of equity jurisprudence. It was repeated in *Hendrickson v. Hinckley*, 17 How. 443, where the rule was condensed by Mr. Justice Curtis into the following statement: 'A court of equity does not interfere with a judgment at law unless the complainant has an equitable defense, of which he could not avail himself at law, because it did not amount to a legal defense, or had a good defense at law, which he was prevented from availing himself of by fraud or accident, unmixed with negligence of himself or his agents.' *Creath's Adm'r v. Sims*, 5 How. 192; *Walker v. Robbins*, 14 How. 584; and in *Brown v. County of Buena Vista*, 95 U. S. 157. This is the doctrine recognized and applied by the supreme court of errors of Connecticut in the case of *Pearce v. Olney*, 20 Conn. 544. That was a bill in equity to restrain the collection of a judgment recovered in New York, upon the ground that the complainant had a good defense at law to the action which he was prevented from making by the fraud of the defendant. It was there said by the court: 'It is well settled that this jurisdiction will be exercised whenever a party, having a good defense to an action at law, has had no opportunity to make it, or has been prevented by the fraud or improper management of the other party from making it, and by reason thereof a judgment has been obtained which it is against conscience to enforce.'" Such is the general current of authority touching the power of a court of equity to enjoin judgments at law, being in full harmony with the principles announced by this court in *Walker v. Heller*, supra. But there was one consideration this court lost sight of in the decision of that case, and that is the effect the Civil Code, establishing the reformed system of procedure, has had on the right to maintain a suit to enjoin a judgment at law, such as the one upheld in that case.

It is a well-settled principle that the jurisdiction in equity to enjoin a judgment at law in proper cases, although well es-

tablished, is not regarded as a favorite one with courts of equity. A bill seeking relief of this nature is scrutinized with extreme jealousy, and the grounds upon which the interference will be allowed are confessedly somewhat narrow and restricted. 1 High, Inj. § 113. Another well-established principle of equity is that courts of equity will not lend their aid by injunction against judgments, or for any injunctive relief, where the party invoking such aid has a plain and adequate remedy at law. 1 High, Inj. § 173; *Thatcher v. Humble*, 67 Ind. 444; *Bishop v. Moorman*, 38 Ind. 1; *Baragree v. Cronkhite*, 33 Ind. 192; *Schwab v. City of Madison*, 49 Ind. 329; *Sims v. City of Frankfort*, 79 Ind. 446; *Allen v. Winstandy*, 34 N. E. Rep. 699, (at this term.) Did the appellant Ross have an adequate remedy at law? Margaret Ream (nee Sheehan) died, as cross complainant avers, in 1889, leaving Andrew J. Ream, her husband, as her sole heir at law, who conveyed to appellant Ross, February 27, 1890, and that the judgment for a resale of the lots, which was the sole producing cause and foundation of the Pulaski circuit court judgment, was reversed by this court on March 14, 1889. When Margaret Ream died, she had a right to maintain a complaint to review the Pulaski circuit court judgment on account of the reversal of the judgment for a resale if that reversal had taken place before her death; and that right would have descended to her heir, Andrew J. Ream, cross complainant's grantor, under the statute, as we shall hereinafter see. Whether she died before or after the 14th of March, 1889, the date of reversal, is not stated, though it is stated she died in that year. The reversal of that judgment constituted material new matter for which the statute authorizes a judgment to be reviewed and reversed. The statute authorizes the review of a judgment for error of law appearing in the proceedings and judgment within one year, or for material new matter discovered since the rendition thereof within three years. Rev. St. 1881, § 616. When the jurisdictions of law and equity were separate, and before the adoption of our reformed procedure, bills of review were maintainable only for relief against decrees in equity, and they could not be maintained to secure relief from judgments at law, such as the Pulaski circuit court judgment was. Story, Eq. Pl. 404-406. Prior to the adoption of the new system, a bill to enjoin that judgment would have been maintainable because that would have been the only remedy. The ordinances in chancery of Lord Chancellor Bacon, which have never been departed from, authorized a bill to review only decrees in chancery for error appearing on the face of the record, and for new matter discovered since the rendition of the decree. The section of the Civil Code last above cited extends that same right to all judgments, whether in the nature of a judgment at law or a decree in equity. It embodies substantially the ordinances in chancery above mentioned, and extends them to all judgments. The section, 615 of the Code above referred to, however,



limits the right to review to "a party to any judgment, or the heirs, devisees or personal representatives of a deceased party." The appellant Ross was not a party to the Pulaski circuit court judgment, but he is a purchaser of the title of Margaret Ream, who was a party, after her death, from her heir, after the cause for review of that judgment had arisen, namely, after the reversal of the judgment for a resale of said lots. His grantor, Andrew J. Ream, therefore, being an heir of one of the parties to the Pulaski circuit court judgment, and having conveyed to appellant Ross after the judgment for resale had been reversed, he, as such heir, had a right at the date of such conveyance to maintain a suit to review said Pulaski circuit court judgment for and on account of the new matter caused by such reversal; and hence, having such legal remedy, he had no right to maintain a suit to enjoin the Pulaski circuit court judgment, and by the conveyance to appellant Ross of all his rights he must be held to take such rights subject to all the equities such rights were subject to in the hands of his grantor, and one of those equities was that said grantor, Andrew J. Ream, as heir of Margaret Ream, his wife, had the right to review the Pulaski circuit judgment, and, because he had that legal remedy, had no right to maintain a suit to enjoin that judgment, and for that reason appellant Ross has no right to maintain a suit to enjoin it. We disapprove of the conclusion reached in *Walker v. Heller*, supra, because in that case the injured party was a party to the judgment sought to be enjoined, and he had a right to maintain a complaint to review that judgment for the new matter arising out of the reversal of the judgment of dismissal, and the subsequent judgment rendered pursuant to the order of this court on such reversal; and hence he had an adequate remedy at law, which ought to have precluded him from maintaining the suit to enjoin. This consideration escaped the attention of this court when that case was decided. But the principles announced in that case are correct as applied to a proper case. We therefore conclude that the court below did not err in sustaining the demurrer to the cross complaint.

The appellant Ross, in his defense under the general denial, set up another and different title in himself to said lot 6 through a sheriff's sale to himself. The court below, in its ninth finding of facts, finds that, from the judgment ordering a resale of said lots as above stated, the Peterses and Margaret Sheehan appealed to the supreme court without bond, where said judgment was in all things reversed, on the 14th of March, 1889, (*Peters v. Guthrie*, 119 Ind. 44, 20 N. E. Rep. 536;) and on the 11th day of May, 1889, said supreme court rendered a judgment in said cause in favor of said Peterses and Sheehan, and against said Alexander S. Guthrie and Henry J. Banta, in the sum of \$55.75, as costs made by said appeal in said court; that, upon said judgment for costs in the supreme court, an execution

was in due form, on July 27, 1889, issued by the clerk of said supreme court to the sheriff of the supreme court, commanding him to collect the amount of said judgment, interest, and costs out of the property of said Alexander S. Guthrie and Henry J. Banta; that said sheriff of the supreme court delivered said execution to John Donaldson, sheriff of Cass county, Ind., for collection, and said Donaldson, as such sheriff, on August 27, 1889, levied said execution upon all the right, title, and interest of said Guthrie and Banta in and to lots 5 and 6 in D. D. Dykeman's First addition to the city of Logansport, Ind.; that on July 1, 1889, said Banta received from the United States government an appointment as physician to the Marcorelo Indians, at Marcorelo, in the territory of New Mexico, and left Indiana early in July, 1889, and has remained in New Mexico ever since, being engaged in said government service. He left this state with the intention of returning thereto, and such has ever since been his intention, when his said service shall terminate. At and prior to the time of leaving Indiana, he was a resident householder of Cass county, Ind. In August, 1889, prior to the said levy, the wife of said Banta stored a part of their household goods in Logansport, Ind., and took another part and her children with her to her husband, and since that time she and her husband have been keeping house in New Mexico, and have not since that time been keeping house in the state of Indiana. Though a resident of this state, and only temporarily absent therefrom in said government service, he has not since leaving Indiana been a householder therein, but has been a householder in said territory of New Mexico. Before the day fixed for the sale of said real estate under said execution, said Donaldson, as such sheriff, caused the same to be duly appraised, the form of appraisalment of the fee simple of said lots being as follows: "We appraise the fee-simple interest, if they own it, of A. S. Guthrie and Henry J. Banta, in and to lots 5 and 6, at \$1,500, deducting the following liens and incumbrances: Mortgage to D. P. Baldwin, \$200; tax title to Margaret Sheehan, \$900,—total \$1,100. We appraise the fee-simple of A. S. Guthrie, if he owns it, in lot 5, D. D. Dykeman's 1st addition, \$400; in lot 6 in D. D. Dykeman's 1st addition, \$1,100. We appraise the fee-simple interest of H. J. Banta, if he owns it, in lot 5, D. D. Dykeman's 1st addition, \$400; in lot 6, D. D. Dykeman's 1st addition, \$1,100." The appraisers also appraised the rents and profits of each of said lots for each year for seven years, and made proper affidavit as to the correctness of their appraisalment. After the appraisalment was made, Banta's attorney produced and handed to said Donaldson, as such sheriff, Banta's schedule and affidavit for exemption, and named his appraisers to said sheriff, and demanded of said sheriff that his property be appraised and set off to him under the \$600 exemption law of Indiana. The schedule set forth his personal property and the real estate in controversy, and

attached thereto was an affidavit made by said Banta setting forth that the same was all his real estate and personal property within or without the state of Indiana, all his money on hand or on deposit within or without the state of Indiana, rights, credits, choses in action, and all personal property of every description whatever belonging to him, or in which he had any interest, on the 27th day of July, 1889, showing what he had sold since that date, the amount he had received therefor, and how he had disposed of the proceeds. The sheriff, after receiving said schedule and affidavit, without appraising the personal property, and without making any other appraisal of the real estate than that hereinbefore mentioned, did, as he states in his return to said execution, set off to Henry J. Banta, as exempt from execution, all the personal property named and described in his affidavit; also lot 5 in D. D. Dykeman's First addition to Logansport, as appraised in the valuation law inventory heretofore made. After having duly advertised said lot 6 for sale at sheriff's sale under said execution from the clerk of the supreme court, the advertisement being signed, not by the sheriff of the supreme court, but by John Donaldson, sheriff of Cass county, Ind., by M. J. Gallagher, deputy, said sheriff of Cass county, on September 28, 1889, sold at sheriff's sale all the right, title, and interest of said Guthrie and Banta in and to said lot 6 to the defendant Ross for the sum of eighty dollars, that being more than two-thirds of the appraised value of said lot over and above the incumbrances thereon. After the year for redemption had expired, and there having been no redemption from said sale, the sheriff of the supreme court, on the 24th day of October, 1890, executed, acknowledged, and delivered to said Ross a sheriff's deed for said lot 6 upon the sale thereof made as aforesaid, which deed has never been recorded.

The conclusions of law relative to the validity of the sheriff's sale and deed to appellant Ross are as follows: "(6) That defendant Ross has no title to said lot 6 by virtue of the sheriff's sale under said execution issued by the clerk of the supreme court, for the reason that the plaintiff was entitled to his exemption, and such exemption was denied him." "(7) That the plaintiff is entitled to recover possession of the real estate in controversy against all the defendants, and also to recover for the use of the premises as against the defendant Ross the sum of \$187, less \$55.75, with six per cent. thereon paid by said defendant Ross, September 28, 1889, on the purchase of said lot 6, on said execution issued by the clerk of the supreme court, leaving due the plaintiff \$106.25." We think the court below erred in these conclusions of law. The facts found show that Banta, though a resident of Indiana, in law, yet was not a householder in this state, but was a householder in New Mexico, at the time he demanded his exemption, and when the sheriff's sale to appellant Ross took place. It is only "resident householders" that are entitled to

exemption by the language of the statute. Rev. St. 1881, § 708.<sup>1</sup> Where does this language require the person to reside to entitle him to exemption? All must concede that it requires him to reside in Indiana. Where does it require him to keep house? If the language means that he is to reside in the state, then it means that he must keep house in the state to entitle him to exemption, because the two words "resident householder" stand together in the statute; and whatever qualifies one of them, and limits its application to the state, likewise limits the other.

The conclusion of law was wrong for another reason. The execution from a sale on which exemption was claimed was for the collection of a judgment for costs on the reversal of the judgment already mentioned, ordering a resale of the lots in question. Such a judgment, it has been held, is not a "debt growing out of, or founded upon, a contract, express or implied," and therefore not within the exemption statute. *State v. McIntosh*, 100 Ind. 439; *Russell v. Cleary*, 105 Ind. 502, 5 N. E. Rep. 414. The exact question under consideration was decided by the appellate court in favor of the contention of appellant Ross in *Donaldson v. Banta*, 29 N. E. Rep. 362. The appellee, Banta, sued the sheriff, Donaldson, for refusal to allow him his exemption from said execution, and recovered in the trial court, but Donaldson appealed, and the appellate court reversed the judgment, holding that Banta was not entitled to any exemption from said execution, it being for costs.

The sheriff's sale to appellant Ross is vehemently assailed by appellee's counsel for other and different reasons than those assigned for holding it invalid by the court below in its conclusions of law. As the only reason stated in those conclusions for the invalidity of the sheriff's sale to appellant Ross was that Banta was entitled to exemption which the sheriff had refused him, it might be taken as an implied conclusion of law that there was no other legal objection to said sale and deed. The conclusion against the validity of that sale is attempted to be supported by contending that the sale was invalid, because the notice thereof was signed by the sheriff of Cass county in his official capacity as such sheriff, and not as the deputy of the sheriff of the supreme court, and that, while the sale was made by the sheriff of Cass county as such, the deed was executed by the sheriff of the supreme court. The statute provides that "when any process, rule, or order shall come into the hands of such sheriff [of the supreme court] he may transmit the same by mail to the sheriff of the county where the same is to be served. The sheriff of each county shall be his deputy, but shall be liable on his own bond for all acts done by him as such deputy." Rev. St. 1881, § 5834. The

<sup>1</sup> This section provides: "An amount of property not exceeding in value \$600, owned by any resident householder, shall not be liable to sale on execution or any other final process from a court for any debt growing out of or founded upon contract, express or implied."

advertisement of the sale would naturally describe the process as an execution issued by the clerk of the supreme court to the sheriff of the supreme court, which such sheriff had delivered to the sheriff of the county. No complaint is made against the advertisement that it did not so show, but, on the contrary, the court below found that the sale "was duly advertised to take place under said execution from the clerk of the supreme court." If the sale was duly advertised, it appeared therefrom that such sale was to take place on an execution issued by the clerk of the supreme court to the sheriff of the supreme court, and by him delivered to the county sheriff. All persons are presumed to know the law, and that such an execution must be executed by the county sheriff, if executed by him at all, as the deputy of the sheriff of the supreme court. The county sheriff serves the process as the deputy of the sheriff of the supreme court. He is not deputy by appointment, but by operation of law. When he signs his name to a return of service of such process, or to publication notice of sale under such process, he is deputy to the sheriff of the supreme court by operation of law, and his character as such deputy may be as well understood by the public from his official designation of county sheriff when the process has been designated and described as if he should designate himself as deputy of the sheriff of the supreme court. This seems to be more clear when it is borne in mind that the county sheriff is liable on his own bond for all acts done by him as such deputy. *McGruder v. Russell*, 2 Blackf. 18. Besides, it has been the universal practice in all cases, so far as we know, under this statute, where a county sheriff serves process directed to the sheriff of the supreme court, to sign his name to the return as sheriff of the county, and not as deputy of the supreme court sheriff. Such is the nature of the return to the process in this case, which brought the appellee into this court on this appeal. It would be an awkward procedure to sue the county sheriff on his own bond for an act done by him as deputy of the sheriff of the supreme court if he did such act in the name of the sheriff of the supreme court, and not in his own name. When the county sheriff does an act as the deputy of the sheriff of the supreme court, he does it by virtue of his office of sheriff of the county, which office, by operation of law, makes him the deputy of the sheriff of the supreme court. Therefore, when his official character as such county sheriff and the process from the supreme court appear, his character as deputy to the sheriff of the supreme court, without any designation of himself as the deputy to the sheriff of the supreme court, also sufficiently appears. Even if the contrary were right, and the advertisement ought to have been signed by the county sheriff as deputy of the supreme court sheriff, yet that was but a slight irregularity, which cannot invalidate the sale, where no injury is shown to have resulted to the execution defendant on account thereof. *Rose v. Ingram*, 98 Ind. 276; *Lowry v. Reed*, 89 Ind. 442.

The judgment is reversed, at appellee's costs, with instructions to the court below to restate its conclusions of law relating to the sheriff's sale of lot 6 aforesaid, in accordance with this opinion, and to render judgment thereon in favor of appellant Ross. As to lot 5 the judgment is affirmed.

(135 Ind. 119)

STATE ex rel. GIBSON v. FRIEDLEY.

(Supreme Court of Indiana. Sept. 27, 1893.)

JUDGES—TERMS OF OFFICE—LEGISLATIVE POWER.

1. Under Const. art. 7, § 161, which vests the judicial power of the state in the supreme court and in the circuit courts, and section 169, which fixes the term of a circuit judge at six years, if he so long behave well, the legislature cannot, by virtue of the power to divide the state into judicial circuits vested in it by section 169, remove a circuit judge from office by attaching the entire territory constituting his circuit to another circuit, and empowering the judge of the other circuit to act as judge for the new circuit.

2. Const. art. 7, § 172, which provides that judges may be removed from office by "conviction for corruption or other high crimes," does not authorize the legislature to enact a law removing a judge from office at its will, without giving him a day in court.

3. Act March 4, 1893, which undertakes to abolish the fifth judicial circuit by attaching the territory to the fourth circuit, and which provides that the judge of the fourth circuit shall be the judge of the new circuit, is unconstitutional, because, in express terms, it is to go into effect several years before the expiration of the term of the judge of the fifth circuit; and the provision of the act changing the terms of court, and the time of holding the same, in the two counties composing the new circuit, are also ineffectual, because intended for the new circuit created by the act, and not for the separate judicial circuits theretofore existing.

Appeal from circuit court, Jefferson county; S. E. Leland, Judge.

Information in the nature of quo warranto by the state of Indiana ex rel. George H. D. Gibson against William F. Friedley to determine title to the office of circuit judge of the fourth judicial circuit. From a judgment in defendant's favor, relator appeals. Affirmed.

M. Z. Stannard, for appellant. C. E. Walker, for appellee.

DAILEY, J. On the 23th day of August, 1893, the relator filed an information in the Jefferson circuit court against the appellee, Friedley. By the information it is averred that the relator is the judge of the fourth judicial circuit of the state of Indiana, and that said appellee has usurped and intruded into said office, and detains the same from him, although he has demanded possession thereof; and judgment is prayed that the relator may be awarded the possession of said office, and all other proper relief. To this information the appellee, in the court below, filed his answer, pleading specially the authority by virtue of which he holds the possession of said office as judge, as against the said relator. To this answer the appellant filed his demurrer, which was overruled, an exception being reserved to the decision of the court. There-

upon the appellant filed his reply, to which the appellee demurred; the demurrer being sustained, and an exception reserved on the part of the appellant. The appellant standing by the reply, and declining to plead further, judgment was rendered in favor of the defendant, from which the relator prosecutes this appeal. The errors assigned in this court are as follows: First, that the answer of the appellee, William T. Friedley, in the court below, did not state facts sufficient to constitute a cause of defense; second, that the court below erred in overruling the demurrer to said appellee's answer; third, that the court below erred in sustaining the demurrer to appellant's reply.

It is not disputed that on the 4th day of March, 1893, Clark county, alone, constituted the fourth judicial circuit of the state of Indiana. Elliott's Supp. § 263. And the statute in force provided that the terms of court in said fourth judicial circuit should be held as follows: "On the first Monday in February, the third Monday in April, the first Monday in September and the third Monday in November of each year, to remain in session while the business of the court required." Acts 1891, p. 68. And at said date the county of Jefferson, alone, constituted the fifth judicial circuit of the state of Indiana, and it was provided by law that the terms of court in said fifth judicial circuit should be held as follows: "On the first Monday in January, the first Monday in April, the first Monday in September and the first Monday in November of each year;" said terms to continue in session as long as the business of the court required. On the 4th day of March, 1893, the legislature of Indiana approved an act which purports to abolish the fifth judicial circuit and annex the territory heretofore constituting the fifth judicial circuit, and change the time of holding the courts in the counties of Clark and Jefferson. The act will be found in the Acts of 1893, on page 359, and is entitled "An act defining the fourth judicial circuit of the state of Indiana, fixing the times of holding courts in said circuit, prescribing the limits of the terms thereof, providing for the judge thereof, and abolishing the fifth judicial circuit of the state of Indiana, and repealing all laws in conflict therewith." It will be observed that this title has no reference to, or mention of, courts in the fifth judicial circuit. The first section reads as follows: "Be it enacted by the general assembly of the state of Indiana, that on and after the first day of August, 1893, the fifth judicial circuit of the state of Indiana, which is now constituted of the county of Jefferson, shall be abolished." The second section provides that on and after the 1st day of August, 1893, the counties of Clark and Jefferson shall constitute the fourth judicial circuit of the state of Indiana. The third section provides for the holding of the courts in the fourth judicial circuit, as by the second section constituted of the counties of Clark and Jefferson. The fourth section provides that on and after the 1st day of August, 1893, the judge of the fourth judi-

cial circuit of the state of Indiana, as the same is now constituted, shall be the judge of the fourth judicial circuit of the state of Indiana, as thereafter constituted by this act, and until his successor is elected and qualified. This proceeding was instituted as a friendly one, with a view to testing the following questions: First. What is the legal effect of the act of March 4, 1893, in view of the fact that the act abolishes the appellee's entire circuit, the term for which he was elected and qualified not having expired? Second. If the act of March 4, 1893, is unconstitutional or inoperative, in so far as it undertakes to abolish the term for which appellee was elected, viz. from October 22, 1891, to October 22, 1897, will the same still have the effect of changing the terms of court in the counties of Clark and Jefferson?

At the time the act of 1893 was approved, the relator, George H. D. Gibson, was the sole judge of the fourth judicial circuit, and the appellee, William T. Friedley, was the sole judge of the fifth judicial circuit. The appellee, having declined to recognize the validity of the last-mentioned act of the legislature, upon the ground that the same is unconstitutional and void, or, at any rate, is inoperative, has continued in possession of said office, and in the discharge of the duties thereof, in the county of Jefferson, and has declined to surrender the same to the relator.

The first question that naturally arises is as to the alleged error of the court in overruling the demurrer to appellee's answer; but, as the questions attempted to be raised in all the assignments of error are the same, they may be disposed of together. The answer, omitting the caption and purely formal parts, reads thus: "The said defendant hereby enters his appearance to the above action, waives the issuing and service of process herein, and for answer to said information and complaint says that he, said defendant, is a bona fide resident of Jefferson county, Indiana, and has been for more than thirty years last past; that he is now fifty-eight years old, and has been a voter and elector of said county aforesaid for the last thirty years or more, and during all of said time he has been eligible to be voted for, and to be elected to the office of circuit judge of the fifth judicial circuit of the state of Indiana, and eligible to take and hold said office; that prior to the general election of November, 1894, the fifth judicial circuit was composed of the counties of Jefferson and Switzerland, and so continued until February 4, 1891, when Switzerland, Ohio, and Dearborn counties were erected into the seventh judicial circuit, and Jefferson county, alone, was erected into the fifth judicial circuit; that on the 28th day of February, 1889, the county of Clark, alone, was created the fourth judicial circuit, and the relator was elected circuit judge of said fourth judicial circuit by the electors of Clark county, alone, on the — day of November, 1892, at the general election, and was afterwards commissioned as such judge, and entered upon the discharge of the duties of said office

on the 19th day of November, 1892; that this defendant was duly and legally elected circuit judge of the fifth judicial circuit on the 4th day of November, 1884, for the term which was to commence on the 22d day of October, 1885; that he was duly commissioned for said term, qualified, and entered upon the discharge of the duties of said judge, as aforesaid, and served the full term thereof; that he was again a candidate for election to said office of circuit judge of said fifth judicial circuit at the general election held November, 1890, and had no opposition, and was the only person voted for to fill said office; that there were cast 2,894 votes in Jefferson county, and 2,100 votes in Switzerland county, for judge of the fifth judicial circuit of Indiana, at said election, and he received all of said votes so cast, and was duly elected circuit judge of said fifth judicial circuit for the term of six years from the 22d day of October, 1891; that said votes were duly canvassed, and the result properly certified to the secretary of state, and the executive of state, the governor, issued to defendant a commission as judge of said fifth judicial circuit for the term of six years, commencing October 22, 1891, and ending October 22, 1897; that said defendant accepted said office and commission, and took the oath of office, which is indorsed on his commission, and a certified copy thereof was forwarded to the secretary of state, and by him filed in his office, to wit, November —, 1890; that, at the expiration of defendant's first term, he entered upon the discharge of the duties of said office aforesaid, and has tried to discharge the duties of said trust to the best of his skill and ability; that he accepted said office in good faith, and entered into the possession of it peaceably, and as a matter of right, and has not forfeited, surrendered, nor resigned the same, but is still acting in the capacity as aforesaid. And he says that at all times he has discharged said duties of circuit judge, as aforesaid, within the bounds of Jefferson county, Ind., since it alone has been created into a circuit, and that at no time has he attempted to exercise any of the duties of the judge of the Clark circuit court (the fourth judicial circuit) since the relator has been judge as aforesaid. The defendant further avers that by an act approved March 4, 1893, the legislature attempted to abolish the fifth judicial circuit aforesaid, and consolidate Jefferson and Clark counties into the fourth judicial circuit, and provided that the judge of the fourth judicial circuit, as the circuit was then composed, (to wit, of Clark county,) should discharge the duties of circuit judge in the circuit attempted to be formed by said act, (to wit, in the counties of Jefferson and Clark,) and they further provided that said act should not go into effect until the 1st day of August, 1893. The defendant avers that said legislature utterly failed to provide by said act any circuit or county for defendant, in which he could exercise the functions of said office of circuit judge, or in which he could discharge the duties thereof, and attempted by said act to deprive him of his vested right to said office,

and its functions, in violation of the constitutional rights of the defendant, which he had by virtue of said election, commission, and acceptance of said office, and constitutional guaranties in reference thereto. The defendant says that the sole and only cause of complaint which the relator has against the defendant is that the defendant has exercised the duties of circuit judge within Jefferson county (only) since the 1st day of August, 1893, claiming that such duties in said court devolve upon him (relator) by virtue of said act of March 4, 1893, and said actions of this defendant are the same wrongful and unlawful acts of usurpation and intrusion into relator's office complained of, and none other. The defendant says that as to all other matters in said information and complaint, not controverted in this paragraph of answer, he denies. He further says that said relator is assuming that he is the proper person to discharge the duties of circuit judge within Jefferson county, Ind., and that defendant is not, and that by reason of said assumption a cloud has been cast upon the title of defendant to said office, and the functions thereof. Wherefore, he asks that the relator take nothing by this action; that said act of March 4, 1893, be declared and adjudged void; that defendant's title to said office be quieted in him; and for all other proper relief as may be equitable and just."

In order to determine the sufficiency or insufficiency of this answer, an inquiry is involved as to what is the legal effect of the aforesaid act of March 4, 1893. It is conceded by the appellant that unless the said act was a valid and legal enactment, and became operative from and after the 1st of August, 1893, the relator's claim to the office of judge, in so far as Jefferson county is concerned, is not well founded. On the contrary, it is conceded by the appellee that his title to the office of judge of said court is based upon his previous election thereto, and the claim upon his part that the act of March 4, 1893, is unconstitutional, or at least that the same is inoperative during the term for which he was elected.

The judge and prosecuting attorney are constitutional officers. They are so designated in the organic law, and are neither state nor county officers. The constitution (article 3, § 96, Rev. St. 1881) separates into three departments the powers of the state government, as follows: Legislative, executive, (including administrative,) and the judicial. Article 7 of the constitution (section 161, Rev. St. 1881) vests the whole judicial power of the state in the supreme court, in circuit courts, and in such other courts as the general assembly may establish. Section 168, Rev. St. 1881, provides that the circuit courts shall each consist of one judge. Section 169, Id., is as follows: "The state shall, from time to time, be divided into judicial circuits, and a judge for each circuit shall be elected by the voters thereof. He shall reside within his circuit, and shall hold his office for the term of six (6) years, if he so long behave well." Section 171, Id., reads: "There shall be elected, in

each judicial circuit, by the voters thereof, a prosecuting attorney, who shall hold his office for two (2) years." Section 172, *Id.*, reads: "Any judge or prosecuting attorney who shall have been convicted of corruption or other high crime, may, on information in the name of the state, be removed from office by the supreme court." Section 173 provides that the compensation of the judges of the supreme court or circuit courts shall not be diminished during their continuance in office. The first section of the act in controversy abolishes, in express terms, the fifth judicial circuit of this state, which circuit the section itself declares to be composed of the county of Jefferson alone; necessarily having a judge to preside over its courts, and a prosecuting attorney to prosecute the pleas of the state therein. The other four sections are built upon the validity of the first section. If the first section be unconstitutional and void, then all the other sections are likewise void. It seems beyond the power of the legislature to legislate a judge and prosecuting attorney out of office, and if the legislature cannot, by a direct act, deprive them of their offices, neither can it do so by the indirect mode of abolishing their circuit. Section 172, *supra*, which provides that judges and prosecuting attorneys may be removed from office by "conviction for corruption or other high crime," defines a plan which in itself involves a trial, a hearing by the accused, a day in court, and then the removal, on information in the name of the state, may be adjudged by the supreme court. This section, however, provides that a removal may be effected in such other manner as may be provided by law. But the state has thus far failed to provide any other manner than the constitutional mode. The legislature, under this latter clause, we think, has the power to provide for the removal of judges and prosecuting attorneys in some additional or other manner than that prescribed in this constitutional section. It could only do so, however, by enacting a general law applicable to all judges and all prosecuting attorneys, and, to be valid, must provide for a trial, and must give to the accused a day in court, an opportunity to be heard and make defense, or the act would be unconstitutional, for the failure to give the accused such opportunity and right. This clause does not authorize the legislature to enact a law removing the judge or prosecutor from office, at its will, without giving him a day in court. Section 169, *supra*, is the only authority that can be found on which to base the legislative right of removal. But to give the first clause of that section such construction would nullify that part of the same section which provides that the judge of a circuit, when elected, shall hold his office for a term of six years, if he so long behave well. To construe this section to mean that the legislature can, at its own will, abolish the circuit, and thus legislate the judge and prosecuting attorney out of office, in addition to being in direct conflict with the other provisions of our organic law, would also put the official life of

every judge and every prosecuting attorney of the state at the mercy of the legislature. It would subject the judiciary to the legislative power, and utterly destroy all judicial independence. Judges and prosecutors would be at the whim or caprice of the senators and representatives, in their tenure of office. The authors of our constitution well understood the long struggle for many years previous to secure the independence of the judiciary, and the tenure of office of the judges. Hence section 96, *supra*, was enacted, dividing the powers of the state government into three distinct, co-ordinate departments, carefully excluding any control of one over another. If the legislature, by a special act, may remove one judge or one prosecuting attorney, it may remove any and all such officials in the state, and hence they would be at the mercy of any legislature whose enmity or ill will they may have incurred. The office of circuit judge, as well as prosecuting attorney, is a public trust, committed by the public to an individual, the duties and functions of which he is bound to perform for the benefit of the public, and entitles him to exercise all the duties and functions of the office, and to take the fees and emoluments belonging to it. 2 Bouv. Law Dict. tit. "Office." "Officers are required to exercise the functions which belong to their respective offices. The neglect to do so may in some cases subject the offender to an indictment." Work v. Hoofnagle, 1 Yeates, 506. There can be no such thing as an office without responsive duties and functions to be performed by the officer. It is not the mere right to receive an annual compensation, without the exercise of any corresponding duties. If the general assembly can transfer bodily the entire territory which constitutes the locality in which the judge or prosecuting attorney may lawfully exercise the functions and duties of his office, and attach that territory to another circuit, then it can strip the incumbents of their respective offices as effectually as it is possible to do by any words that can be used. It is in fact as much a removal of the judge and prosecutor so deprived of all territory as would be a judgment of a supreme court removing either of them from his trust. It is not to be assumed that the framers of the constitution builded it so unwisely as to secure to a judge an office and its tenure, and the right to exercise all its prerogatives within a defined locality, for a period of six years, if he so long behave well, and by the same organic law intended that the general assembly might remove him, at its will, from the exercise of all the privileges and duties pertaining thereto, without a hearing, without a conviction for misconduct, under the guise of "from time to time dividing the state into judicial circuits." Such division may be exercised by the legislature where the act does not legislate judges and prosecutors out of their respective offices, but not otherwise. The general assembly may add to or may take from the territory constituting a circuit. It may create new circuits. It may abol-

ish a circuit, if the act be made to take effect at, and not before, the expiration of the terms of office of the judge and prosecutor of such office, as constituted, at the time of the act. This act abolishes the circuit on and after the 1st day of August, 1893, and therefore must be effectual to abolish the circuit and the offices on the day named, or not at all. As stated, the offices of judge and prosecuting attorney of the fifth judicial circuit expire on the 22d day of October, 1897, and, to abolish the circuit, it must be by law to take effect on the date last named. These positions are in line with the authorities. The judges and prosecuting attorneys are not state, county, or township officers. They are constitutional officers. *State v. Turner*, 46 Ind. 359.

The case of *State v. Noble*, 118 Ind. 350, 21 N. E. Rep. 244, fully establishes the independence of the judiciary. The legislature cannot extend or abridge the term of an office, the tenure of which is fixed by the constitution. *Howard v. State*, 10 Ind. 99. The case of *Moser v. Long*, 64 Ind. 189, holds that the office of prosecuting attorney of a circuit court is one provided for by the constitution, which fixes the term of office at two years, and the legislature can neither abolish the office, nor abridge the term thereof. In *State v. Johnston*, 101 Ind. 223, which was also an information in the nature of a quo warranto filed by the appellant's relator, Howard, against the appellee, it is decided by the court that the general assembly has the power, at its discretion, to divide a judicial circuit at any time during the terms of office of the judge and prosecuting attorney of such circuit, subject only to the restrictions that the legislature cannot, by any legislation, abridge the official terms of either of such officers, nor deprive either of them of a judicial circuit, wherein he may serve out the constitutional term for which he was elected. This ruling is upon the theory that it is declared and ordained otherwise in section 9, art. 7, of the state constitution. Section 169, supra. In *Hoke v. Henderson*, 25 Amer. Dec. 704, note 1, it is said: "It is without the power of the legislature to indirectly abolish the office by adding the circuit of the incumbent to another then existing, and this even if it be within the power of the legislature to create new or alter old circuits, for that power must be so exercised as to leave the incumbent his office." That the framers of the constitution intended that there should be no abridgment of the term of office, as fixed by fundamental law, is indicated also by section 176, Rev. St. 1881, as follows: "No person elected to any judicial office shall, during the term for which he shall have been elected, be eligible to any office of trust or profit under the state other than a judicial office." This section appears, in terms, to guaranty to a judicial officer his term as fixed by the constitution. *People v. Bull*, 46 N. Y. 57; *People v. McKinney*, 52 N. Y. 374, 378. "But, if the constitution provides for the duration of an office, the legislature has no power, even for the pur-

pose of changing the beginning of the term, to alter its duration. Where the constitution has created an office, and fixed its term, and has also declared the grounds and mode for removal of an incumbent before the expiration of his term, the legislature has no power to remove or suspend the officer for any other reason, or in any other mode." 7 Lawson, Rights, Rem. & Pr. p. 5970, par. 3797. Judges of circuit courts can only be removed from office by the ordained constitutional provisions. *Lowe v. Com.*, 3 Mete. (Ky.) 237. The constitutional provision in respect to the terms and tenure of office, (except as to duration or length of terms,) and commissions of judges, and the power of the legislature to create new judicial districts, are substantially the same in Pennsylvania as in this state. The constitutional provision in the former state was construed, in *Com. v. Gamble*, 62 Pa. St. 343. In the opinion, *People v. Dubois*, 23 Ill. 547, is cited, in which the supreme court of Illinois hold that, although the creation of new judicial districts was expressly authorized by the constitution, yet no new districts could be created, by which the judge in commission could be deprived of a right to exercise the functions of his office during the continuance of his commission. The court say: "The question is, can the legislature expel the circuit judge from his office by creating a new district taking from him the territory which constituted his district? The bare reading of the constitution must convince every one that it was intended to prohibit such a proceeding." See, also, *State v. Messmore*, 14 Wis. 163. In *Com. v. Gamble*, supra, the following propositions are established: "A judge, having been elected and commissioned, is by the constitution to continue in office ten years, if he shall behave himself well. Its duration is assured to him, subject to be determined only by death, resignation, or breach of condition. Such breach cannot be determined by the legislature, but only on trial by the senate on impeachment, or, in case the breach amounted to total disqualification, perhaps by address of two-thirds of each branch of the legislature. A legislative act which impinges on the tenure of judges is invalid. The power and jurisdiction of a judge constitute the office, are of the essence of it, and inseparable from it. The grant of power is incapable of any limitation but that attached to it. The aggregate amount of the duties of a judge in any district may be diminished by the division of his district. Constitutional grants imply a prohibition of any limitation or restriction by legislative authority." In the last-named case the reasoning is so clear and strong that we copy the following extracts therefrom: "The Pennsylvania legislature established the twenty-ninth judicial district by the act of the 23th of February, 1868, under which James Gamble was elected and commissioned president judge of the district. By an act passed March 16, 1869, the former act was repealed, and the district was abolished. \* \* \* The powers, authority, and jurisdiction of an office are inseparable."



arable from it. The legislature may diminish the aggregate amount of the duties of the judge, but must leave the authority and jurisdiction pertaining to the office intact. \* \* \* I see not how, for another reason, that the commission of a president judge could exist after the total abolition of his district. Every judge is elected in and for a district defined and fixed by law, and then he is commissioned, and is required by the constitution to reside within the district. It seems to me it would be a logical conclusion to hold that, if no district exists to which the commission could apply, and in which the judge would be bound to reside, that there could not exist a commission for any purpose. This, I think, would be the inevitable deduction from such premises, and it would therefore follow that, if the legislature could blot out a district, it could limit the duration of the commission granted to a less period than ten years, if it might so choose. That it cannot shorten the tenure of the office of a judge, as fixed by the constitution, is certain, and this ought to establish that it can pass no act to do by indirection that which may not be done directly." "Notwithstanding the constitutional provisions referred to, the legislature has not only attempted, by the act of the assembly in question, to expel Judge Gamble from his district, but in fact has appointed other judges to hold courts therein, who were neither elected nor commissioned for that purpose. The legislature has, undeniably, by this act of assembly, assumed the power of appointment and removal of the judge for the district. The act displaces Judge Gamble, as the president judge, and appoints Judge White and his law associate to hold the court therein. If such a thing can be done in one district, it can be done in all; and thus not only would the independence of the judiciary be destroyed, but the judiciary, as a co-ordinate branch of the government, be essentially annihilated." Applying this reasoning and these fundamental principles to the case under consideration, we do not see how the constitutionality of the act of March 4, 1893, can be upheld, as much as we may desire to do so; it being in the interest of economy, and retrenchment in public expenditures. But it is enough for this case to say that it was not in force to abolish the fifth judicial circuit of the state on the 1st day of August, 1893, and the fifth judicial circuit, not being abolished by the act, is not attached to, and made a part of, the fourth judicial circuit. The provisions of the act of March 4, 1893, changing the terms of court, and the times of holding the same, in the counties of Clark and Jefferson, are so interwoven with and dependent upon the other provisions therein that they do not have the effect of changing the terms of court, or the times of holding the same, as provided by law prior to March 4, 1893. In other words, the terms of court, and times of holding the same, as fixed by the act in question, were not intended for the counties of Clark and Jefferson, as constituting separate judicial circuits, but were intended for them when both these

counties constituted the fourth judicial circuit, as provided by the act. Judgment affirmed.

(135 Ind. 701)

STATE ex rel. HOWARD v. BEAR.

(Supreme Court of Indiana. Sept. 27, 1893.)

Appeal from circuit court, Jefferson county; S. E. Leland, Judge.

Information in the nature of quo warranto by the state of Indiana ex rel. Edgar A. Howard against Perry E. Bear to determine title to the office of circuit judge. From a judgment in defendant's favor, relator appeals. Affirmed.

M. Z. Stannard, for appellant. C. E. Walker, for appellee.

DAILEY, J. The legal questions presented in this case are fully considered and passed upon in the case of *State v. Friedley*, 34 N. E. Rep. 872, (just decided.) On the authority of that case, the judgment is affirmed.

(139 N. Y. 163)

THOMAS v. NEW YORK & G. L. RY. CO.  
et al.

(Court of Appeals of New York. Oct. 3, 1893.)

RAILROAD BONDS—INTEREST PAYABLE FROM INCOME.

1. Certain railroad bonds bore interest, payable half-yearly, at a certain rate, provided that no more interest should be payable than should be certified by a vote of the majority of the directors to have been earned above expenses in the preceding six months, and in default of such certificate no interest should be payable. *Held*, that a bondholder could not ask for an accounting of the earnings, as of a trust fund in the company's hands for the bondholders' benefit; the obligation being merely contractual, and not fiduciary.

2. Where bonds bear interest payable only out of the earnings above all expenses, including necessary repairs, averments, by bondholders suing for interest, that earnings have been made over and above the operating expenses properly payable out of defendant's gross earnings, and that such legitimate expenses did not exceed 70 per cent. of the gross receipts, are only expressions of opinion, and are not amended by averments that, "among other diversions," defendant has used a large part of the moneys applicable to interest in needlessly rebuilding the road, and building new railway and structures, and in leasing and operating another road at a loss specified, since these are matters within the discretion of the directors, and the loss mentioned may well have been more than made up indirectly. 19 N. Y. Supp. 766, affirmed.

Appeal from supreme court, general term, first department.

Action by G. Weld Thomas, on behalf of himself and all other income bondholders of defendant railroad, against the New York & Greenwood Lake Railway Company and others, for an accounting. From a judgment of the general term (19 N. Y. Supp. 766) affirming a judgment in favor of defendants, plaintiff appeals. Affirmed.

The other facts fully appear in the following statement by ANDREWS, C. J.:

The complaint is as follows.

The plaintiff, suing in his own behalf, as well as in behalf of all other holders and owners of income mortgage bonds

issued by the defendant the New York & Greenwood Lake Railway Company, similarly situated with himself, who shall come in as parties to, and contribute to the expenses of, this action, for an amended complaint, alleges, upon information and belief:

(1) That the defendant the New York & Greenwood Lake Railway Company is a foreign corporation, duly incorporated under the laws of the state of New Jersey, and that it owns and operates a line of railroad from a point in or near Jersey City, N. J., to or near Greenwood Lake, in said state, together with branches of its main line, and is the owner of the franchises and property described in the mortgages hereinafter particularly mentioned.

(2) That on the 30th day of November, 1878, the defendant railway company duly issued and put upon the market its bonds, known as its "First Mortgage Income Bonds," to the amount of \$900,000, par value, each of said bonds being under seal, and of the denominations of \$50, or multiples thereof, up to \$1,000, par value; and in and by each of said bonds said railway company covenanted and promised to pay to the person named therein, (being the purchaser thereof,) or his assigns, 30 years after the date thereof, the principal sum named therein, and also interest thereon at 6 per cent. per annum, half-yearly during said term, on the 1st days of April and October in each year, out of the earnings of said company, at its agency in the city of New York. Each of said bonds contained the following proviso: "Provided always, nevertheless, that no more interest shall be payable by virtue hereof than shall be certified by a vote of a majority of the board of directors for the time being to have been, by said corporation, earned, over and above all expenses, including necessary repairs, during the six months ending one month before such time fixed for such half-yearly payments, or theretofore to have accumulated during the current year, so as altogether to make enough to pay at the rate of six per cent. per annum, and in default of such certificates no interest shall be payable."

(3) That to secure said issue of bonds the defendant railway company on said 30th day of November, 1878, duly executed to the defendants Edwin F. Bedell and Charles G. Barber, as trustees for the owners and holders of said bonds, a mortgage upon all its franchises and property then owned or subsequently acquired by it, and all appurtenances thereto, which said mortgage was thereupon duly recorded in compliance with the laws of New Jersey, in all the counties in which the mortgaged property, or any of it, was located, both as a mortgage of real estate, and also as a chattel mortgage, and that said trustees thereupon duly accepted the trust reposed in them by said mortgage.

(4) That on the 30th day of November, 1878, the defendant railway company also duly issued and put upon the market its bonds, known as its "Second Mortgage Income Bonds," to the amount of \$1,800,000,

par value, said bonds being under seal, and of various denominations from \$100 to \$1,000; and in and by each of said bonds said railway company covenanted and promised to pay to the person named therein, (being the purchaser thereof,) or his assigns, bearers thereof, 20 years after its date, for value received, the principal sum named in said bond, and also interest thereon, at 6 per cent. per annum, half-yearly during said term, on the 1st days of May and November in each year, out of the earnings of said company, at its agency in the city of New York. Each of said bonds contained the following proviso: "Provided always, nevertheless, no more interest shall be payable by virtue hereof than shall be certified by a vote of a majority of the board of directors for the time being to have been by said corporation earned, over and above all expenses, during the six months ending one month before such time fixed for such half-yearly payments, or to have heretofore accumulated during the current year, so as altogether to make enough to pay interest at the rate of six per cent. per annum, and in default of such certificate no interest shall be payable. In estimating expenses in order to such certificate, there shall be included necessary repairs, and also six per cent. interest in said current year on the 'first mortgage bond.'"

(5) That to secure said issue of second mortgage income bonds the defendant railway company, on said 30th day of November, 1878, duly executed to the defendants William L. Raymond and Edson D. Hammond, as trustees for the owners and holders of said bonds, a second mortgage, subsequent and subject to the first mortgage hereinbefore described, upon all its franchises and property then owned or subsequently acquired by it, and all appurtenances thereto, which said mortgage was thereupon duly recorded, in compliance with the laws of New Jersey, in all the counties in which the mortgaged property, or any of it, was located, both as a mortgage of real estate and as a chattel mortgage, and that said trustees thereupon duly accepted the trust reposed in them by said mortgage.

(6) And the plaintiff further alleges that he is the owner and holder of a number of said first mortgage income bonds, to wit, of five bonds of the par value of \$1,000 each, and is also the owner and holder of a number of said second mortgage income bonds of the par value of \$5,000, having purchased all said bonds in the open market, and for value. And plaintiff further alleges that he represents other holders of said first and second income bonds to the aggregate amount of \$425,000 and upwards, par value thereof, all of said holders being similarly situated with this plaintiff.

(7) And the plaintiff further alleges, upon information and belief, that shortly after the 30th day of November, 1878, the defendant railway company disposed of all or the greater part of said bonds, both the first mortgage and the second mortgage income bonds, and that a large amount of them — but precisely what

amount plaintiff is unable to state—are now owned and held by bona fide purchasers thereof for value; that said owners and holders are very numerous, and it is impracticable to bring them in by name as parties to this action.

(8) That no interest has ever been paid on said first mortgage income bonds, or on said second mortgage income bonds.

(9) That the defendant railway company was organized and became a corporation under the laws of New Jersey on or about the 5th day of October, 1878, and almost immediately thereafter, and on or before December 24, 1878, an agreement was entered into by and between the defendant Hewitt, who was president of said railway company, and H. J. Jewett, the president of the New York, Lake Erie & Western Railroad Company, (hereinafter called the Erie Railroad Company,) said defendants acting in their capacity as said presidents, respectively, under which the defendant railway company was, and has ever since continued to be, and now is, operated by the Erie Railroad Company. That the defendant railway company is now, and ever since said agreement has been, practically controlled by said Erie Railroad Company. That a majority of the directors of the defendant railway company are now, and were at the time of the execution of, and ever since said agreement have been, officers or directors of the Erie Railway Company. The defendant King is president of the Erie Railroad Company, and is a director of the defendant railway company. The defendant Hewitt is now, and ever since its organization has been, president and a director of the defendant railway company. The secretary of the Erie Railroad Company is now, and ever since said agreement has also been, secretary of the defendant railway company, and has his office for the transaction of business in the offices of the Erie Railroad Company, in the city of New York. That the capital stock of the defendant railway company is \$100,000, and no more, and that the shares of said stock are almost entirely owned and held, and ever since said agreement have been owned and held, by or for the Erie Railroad Company, and by said defendant Hewitt, or the firm of Cooper & Hewitt, of which he is a member.

(10) That the defendant railway company, for many years past, and in each of said years, has, during the six months ending one month before the several times fixed for the half-yearly payment of interest on said first and second income bonds respectively, earned enough money, over and above its operating expenses, including necessary repairs, and including all expenses properly chargeable against, or payable out of, the gross earnings, before paying interest on said bonds, to pay said interest in full, at the rate of 6 per cent. per annum on both said classes of bonds, but that the defendant railway company has, nevertheless, at all times, wrongfully neglected and refused to pay said interest, or any part thereof, and the board of directors thereof have wrongfully neglected and refused to certify that said interest, or that any interest whatever, has

at any time been earned, over and above said expenses and, that the defendants Hewitt and King have at all times participated and aided in such wrongful neglect and refusal.

(11) That the necessary and legitimate operating expenses of the defendant railway company, including necessary repairs, and all other expenses properly chargeable against the gross receipts before paying the interest on said bonds according to the terms thereof as aforesaid, do not exceed, and never have exceeded, 70 per cent. of the gross receipts of said defendant railway company. But said defendant company has, through its directors, including the defendants Hewitt and King, wrongfully and improvidently incurred great and unnecessary expenses, which they have wrongfully charged against, and paid out of, the earnings of said defendant railway company, properly applicable to the payment of interest as aforesaid, and have thereby at all times since said bonds, or any of them, were issued as aforesaid, wrongfully prevented the accumulation of a fund to pay said interest. That among other diversions of the moneys properly applicable to the payment of said interest, and preventing the accumulation and application thereof for that object, the defendant railway company, with the consent and aid of the defendants Hewitt and King, improvidently and wrongfully, as against the owners and holders of said first and second income bonds, used and appropriated a large part of said moneys to rebuilding the railway of the defendant company, and to building new railway and structures. That such rebuilding and such building were not necessary for the maintenance and operation of the defendant's railway. But the defendant railway company, with the consent or by the procurement of the defendants Hewitt and King, wrongfully charged the moneys so used and appropriated as expenses against its gross earnings. That the defendant railway company, with the consent and aid of the defendants Hewitt and King, caused a further wrongful diversion of the moneys properly applicable to the payment of said interest, and preventing the accumulation and appropriation thereof for that object, by leasing and operating a railroad known as the Watchung Railroad, resulting in a loss to the defendant railway company in every year since said leasing was effected, and amounting in 1888 to \$10,474.02, and in 1889 to \$9,498.98. That, at the time of such leasing, said Watchung Railroad was insolvent, and the defendant Hewitt was the receiver thereof, and that said defendants Hewitt and King, and their associate directors of the defendant railway company, knew, or had good reason to know, that said leasing would be improvident, and would result in loss to the defendant railway company, but they nevertheless procured the lease of said Watchung Railroad to the defendant railway company to be consummated; and, although the Erie Railroad Company had undertaken to operate said defendants' railway, (including the Watchung Rail-

road, as one of the branches,) the loss resulting from operating the Watchung Railroad was, with the procurement or consent of the defendant railway company, and by the procurement or aid of the defendants Hewitt and King, thrown onto the defendant railway company, and paid out of the gross receipts of said company.

(12) That the defendant railway company has never accounted to the plaintiff and the other holders of said bonds. And the plaintiff further alleges that before bringing this action the plaintiff applied to the defendant railway company for information respecting its receipts and disbursements, but was unable to obtain any fuller or further information than is hereinbefore set forth, and is unable, after due inquiry made by him, to ascertain or state, more definitely than as before set forth, the facts as to said receipts and disbursements, and as to the diversions of moneys properly applicable to payment of interest on the income bonds issued by the defendant railway company. And the plaintiff further alleges, on information and belief, that the defendant railway company has at all times wrongfully neglected to keep such an account of its earnings and expenditures as will show the net income of each semiannual interest period applicable to the payment of the interest on its income bonds.

(13) And the plaintiff further alleges, upon information and belief, that it is provided in and by said mortgage, severally, that in case of a sale under foreclosure the bonds secured by said mortgage, respectively, may be used in payment of the purchase money at such sale, after the payment of expenses of foreclosure, and the compensation and expense of the said trustees provided for in case of default under said mortgages, respectively; that the great majority of both said first and said second mortgage income bonds are owned and controlled by the defendants Hewitt and King, or by said firm of Cooper & Hewitt, and by the said Erie Railroad Company; that it is claimed by the defendant railway company, and by the defendants Hewitt and King, that large sums of money are due and payable to said Erie Railroad Company and to said defendant Hewitt, or his said firm, and that they would be liens prior to said bonds upon any moneys resulting from any such sale; that in case of sale the defendants Hewitt and King and the said Erie Railroad Company intend and expect, by the use of the said bonds so owned and controlled by them, to buy in the mortgaged property for their own use, benefit, and advantage, and inequitably to deprive the plaintiff and minority bondholders of all benefit from such sale.

(14) And the plaintiff further alleges that before bringing this action he duly requested the defendant trustees to bring suit for the purposes stated in the prayer of the complaint, but they have neglected and declined to do so; that said defendant trustees have not, as plaintiff is informed and believes, at any time, taken any steps to protect or enforce the rights

of plaintiff and the other holders of said bonds, or to prevent the waste of the revenue of said defendant railway company. And plaintiff further alleges, upon information and belief, that said trustees are in the employ of the defendant Hewitt, or of the Erie Railroad Company, or of the said firm of Cooper & Hewitt, or are otherwise under their influence. They are made formal parties to this action, but no personal claim is made against them. Wherefore, plaintiff demands judgment that the defendants (other than the defendant trustees) account for all income and earnings of said defendant railway company, and that an account be taken and stated of the net earnings of the defendant railway company over and above operating expenses, including necessary repairs and all disbursements properly payable out of gross earnings before paying interest on said income bonds during each period of six months ending one month before the several times fixed for the payment of interest on said first and second income bonds, respectively, since said bonds were issued, and that the defendants (other than the defendant trustees) pay the amount of said net earnings into the hands of a special receiver to be appointed by the court, to be disposed of, under the direction of the court, for the benefit of the plaintiff and all other bona fide holders of the said income bonds now outstanding issued by the defendant railway company, who may come in as parties to this action, and contribute to the expense thereof, and for such further or other relief as to the court may seem equitable and proper.

Oliver P. Buel, for appellant. Cortlandt Parker, Jr., and Buchanan & Steele, for respondents.

ANDREWS, C. J., (after stating the facts.) The main proposition upon which this action is sought to be maintained is that the relation created between the New York & Greenwood Lake Railway and the holders of the income bonds, in respect to the earnings of the railroad, was fiduciary, and that the bondholders, under the general equitable rule which permits a cestui que trust to maintain an action against the trustee for an accounting in respect to the trust fund, may maintain this action without showing any misappropriation or wrongdoing by the company or its directors. This proposition, upon the facts disclosed in the complaint, fails, we think, in its primary and essential assumption,—that a trust relation between the company and the bondholders was created by the contract between the parties. The obligation of the company to pay the principal of the bonds at maturity was absolute, but it assumed to pay the interest only out of the earnings of the company. The proviso which follows the covenant in respect to the payment of interest had two general objects, viz. to limit the scope of the prior general covenant to pay interest on bonds out of the earnings to such earnings as should be made during the six months' period, or such as should have accumulated during the current year, "over and above all ex-

penses, including necessary repairs," and, next, to constitute the board of directors of the company the tribunal to determine whether there were earnings in excess of the charges first to be paid, applicable to the payment of interest. The language is as follows: "Provided always, nevertheless, that no more interest shall be payable by virtue hereof than shall be certified by the board of directors for the time being to have been, by said corporation, earned, over and above all expenses, including necessary repairs, during the six months ending one month before such time fixed for such half-yearly payments, or theretofore to have accumulated during the current year, so as altogether to make enough to pay at the rate of six per cent. per annum, and in default of said certificates no interest shall be payable." In substance, the current interest was to be paid out of the current earnings, and then so far only as the board of directors should certify that interest had been earned "over and above all expenses, including necessary repairs." The claim that the contract, by designating a fund out of which the interest was to be paid, operated as an equitable assignment of the fund so designated to the bond creditors, or created an equitable lien thereon in their favor, so that where any sum had been earned, applicable to the payment of interest, it constituted a trust fund in the hands of the company for the benefit of the bondholders, is opposed to the authorities in this state. This is not the case of the administration in a court of equity of the estate of an insolvent corporation. If that was the condition, and the question was presented, as between bond creditors and other creditors of the corporation, as to the distribution of surplus earnings specially devoted by the contract with the bond creditors to the payment of interest on the bonds, it may be that in that case the court would award to the bondholders an equitable preference by reason of the contract. But the question here is between a solvent corporation and the bondholders, and the only ground in support of the claim that a fiduciary relation was established by the contract between the corporation and the bondholders, or that the surplus earnings became a trust fund in the hands of the corporation for the benefit of the bondholders, is the promise of the corporation, implied in the contract, that, when the existence of surplus earnings was ascertained and certified by the board of directors, it would apply them to the payment of interest on the bonds. The substance of the contract between the corporation and the bondholders is that the interest should be paid out of a particular fund, which should come into existence, and be ascertained, in the manner provided in the contract. The earnings of the corporation, when received, would, of necessity, become the property of the corporation. They might be wholly absorbed in paying expenses, and repairing and operating the road. If there was a surplus beyond what was required for these purposes, ascertained as provided in the contract, the corporation obligated itself to apply it to

the payment of interest on the bonds. But until the surplus was ascertained, and applied by the corporation to the payment of interest, it remained the absolute owner of the fund, and it was subject to disposition for any corporate purpose by the board of directors. The corporation was, by its contract, obligated to apply it to the payment of interest on the bonds, and a breach of the contract would subject it to liability to the bondholders, and such remedies would be open to them as the law affords for breach of contract in other cases. But the bondholders acquired no title, legal or equitable, to the fund itself. A disregard of the contract by the corporation, or a diversion of the surplus to any other purpose, would be a flagrant breach of confidence reposed in the corporation by the bondholders. But the rights and obligations of the parties rested in contract. There was no appropriation of the fund out of which the interest was to be paid, in any sense which worked a transfer of the legal or equitable title thereto, to the bondholders, when it should come into existence, and before it had been set apart, by the action of the directors, to the payment of interest.

It is the settled doctrine in this state "that an agreement, either by parol or in writing, to pay a debt out of a designated fund, does not give an equitable lien upon the fund, or operate as an equitable assignment thereof." *Earl, J., Williams v. Ingersoll*, 89 N. Y. 508, and cases cited. In *Trist v. Child*, 21 Wall. 441, the court, referring to this subject, said: "But a mere agreement to pay out of such fund is not sufficient. Something more is necessary. There must be an application of the fund *pro tanto*, either by giving an order or by transferring it otherwise in such a manner that the holder is authorized to pay the amount directly to the creditor, without the further intervention of the debtor." The question has usually arisen where the debtor promised his creditor to pay his debt out of a claim he held, or which should accrue in his favor, against a third person, the primary liability of the debtor continuing. In this case the promise to pay the interest on the bonds out of surplus earnings, when the amount was ascertained, was made at the inception of the bonds, and was the security the bondholders had for its payment, no general liability therefor being assumed by the corporation. But these circumstances do not, we think, distinguish the case, in principle, from the cases cited. The corporation was bound to act in the utmost good faith towards the bondholders. They relied, as they had a right to rely, upon its faithful performance of the contract; and if it failed to apply the surplus when certified, or if its board of directors wrongfully refused to certify when there was a surplus applicable to the payment of interest, an action would lie against the corporation, in behalf of the bondholders, for damages, measured by the amount of interest of which they had been wrongfully deprived. This court, in *Boardman v. Railway Co.*, 84 N. Y. 157, sustained a judgment which enforced a contract between the company

and the holders of guarantied stock, to make preferential dividends out of the net earnings; but there is no intimation in the opinion that the holders of such stock acquired, by force of the contract, an equitable lien on the earnings, or that the agreement operated as an equitable assignment of the fund out of which the dividends were to be paid. The case of *Uhlman v. Insurance Co.*, 109 N. Y. 421, 17 N. E. Rep. 363, which dealt with the relation of outline policy holders to the insurance company, where the contract upon which it was claimed that a fiduciary relation was created between the company and the holders of such policies, as to the tonnage fund, was stronger in support of the claim made in that case than is the contract upon which the similar claim is made in this case, and the court rejected the claim made, and held that the relation was that of debtor and creditor only. Our conclusion upon the point now under consideration is that this action cannot be maintained on the theory that there was a fiduciary relation created by the contract between the New York & Greenwood Lake Railway Company and the bondholders, in respect of the fund out of which the interest was payable. The claim of the bondholders under the contract is legal, and not equitable; and if any right to equitable relief, in the nature of an accounting, exists, it must be found in circumstances outside of the contract relation between the parties.

It remains to consider whether the complaint discloses any breach of the contract between the defendant corporation and the bondholders. Unless facts are stated showing that the contract has been violated by the corporation, there can be no ground for either legal or equitable relief. In ascertaining the meaning of the contract, the same rules of construction apply as in other cases. The words are to be interpreted according to their natural and legal import. No strained construction is to be placed upon them to meet a supposed hardship, or to relieve either party from a situation which, if it had been foreseen, might have been provided for, but for which no provision was made. If an ambiguity exists in any of the terms of the contract, resort may be had to circumstances constituting the *res gestæ*, which tend to explain their meaning. It is manifest that as the bondholders were, by the contract, to receive interest only in case there were earnings of the corporation remaining, "over and above all expenses, including necessary repairs," any application of the earnings to any purpose other than the purposes embraced within the phrase quoted, before reserving sufficient to pay the interest on the bonds, would constitute a breach of the contract. We assent to the argument that the restriction of the right of the corporation to apply the gross earnings to certain designated purposes was an essential element of the security of the bondholders. The bonds were offered to the public, and were purchased upon the faith of the contract therein stated. The security for the payment of interest on the bonds was, at best, precarious; and, al-

though it may be assumed that the price of the bonds in the market was affected by this circumstance, it is but the dictate of obvious justice that such security as was afforded should not be permitted to be impaired by dealings of the corporation with the earnings, not justified by the fair construction of the contract with the bondholders. But the point now before us is whether the complaint discloses that the corporation has received earnings applicable under the contract to the payment of interest, which it either wrongfully retains and refuses to apply, or has applied to purposes not within the fair meaning of the words, "all expenses, including necessary repairs."

There is a question somewhat preliminary, which will first be noticed. It is claimed in behalf of the defendants that, assuming that earnings have been made applicable to the payment of interest on the bonds, it is, by the contract, a condition precedent to the right of the bondholders to maintain an action that the board of directors should certify to the fact and the amount; the language of the bonds being, "in default of such certificates, no interest shall be payable." This point is, we think, sufficiently met by the averment in the complaint that the "board of directors have wrongfully neglected and refused to certify that said interest, or any interest whatever, has at any time been earned," which follows a general averment of the receipt of earnings applicable to the payment of interest. It was necessary for the plaintiffs to show that the required certificate had been made, or had been demanded and wrongfully refused. It would be a very unreasonable construction of the contract that the bondholders are concluded by the omission of the board of directors to certify, although there were earnings in excess of the fair charges against them, applicable to the payment of interest. The wrongful withholding of a certificate, when demanded, satisfies the condition precedent, and this is especially true where the alleged condition precedent is some act of the party who is liable to pay. In such case, his wrongful inaction is no obstacle to a recovery. *Doll v. Noble*, 116 N. Y. 230, 22 N. E. Rep. 406, and cases cited. The allegation of refusal to make the certificate implies a prior demand, and, on demurrer, is equivalent to an allegation of demand and refusal. *Marle v. Garrison*, 83 N. Y. 14; *Abb. Tr. Brief*, § 220.

But we concur in the opinion of the general term that the complaint is fatally defective, in that it does not show that there were earnings applicable to the payment of interest on the bonds, which had either been retained by the corporation, or applied to other purposes. The averment in the tenth paragraph in the complaint that earnings had been made by the corporation, "over and above its operating expenses, including necessary repairs, and including all expenses properly chargeable or payable out of gross earnings," sufficient to pay the interest, and the averment in the eleventh paragraph that the "legitimate operating expenses of the corporation, including necessary repairs, and all

other expenses properly chargeable," etc., before paying interest, did not exceed 70 per cent. of the gross receipts, standing alone, are simply averments that, in the opinion of the pleader, the expenses "properly chargeable," when deducted from the gross earnings, would leave sufficient to pay the interest. If the pleader had stopped with these averments, we think the allegations would have been plainly insufficient to show that there were earnings applicable to interest. The question, what expenses were "properly chargeable," is a question of law, and the necessary facts should have been averred, so that the court could see that the company had appropriated earnings to purposes excluded by the language of the bonds. The pleader, apparently recognizing the necessity, proceeded in the latter part of the eleventh paragraph to specify the instances of misapplication, prefacing the specification with the language, "among other diversions," etc. The pleading is, we think, to be treated as if the acts specified were the grounds of the complaint of misapplication and diversion which the plaintiff charges. It is to be observed that it was not the intention of the parties to the contract to withdraw the general management of the affairs and business of the corporation from the board of directors. The power of control by the board was left unimpaired, up to the point that its exercise did not interfere with the rights of bondholders to have the earnings applied to paying the interest on the bonds after defraying "all expenses, including necessary repairs." The fullest discretion was reposed in the board of directors, consistent with the limitation for the benefit of the bondholders, and it was left to the board to ascertain and determine whether any earnings had been made, applicable to the payment of interest. The board was bound to act in good faith, but any expenditures incurred, which by fair construction came within the permitted charges, were conclusive upon the bondholders. It was for the board to determine, in the first instance, what repairs were necessary, and a mistake in judgment as to the necessity or extent of repairs directed would afford no ground of complaint by the bondholders. The court could not review this discretion, provided there was room for difference of opinion as to their wisdom or necessity. The application of earnings to rebuilding the road might in many cases constitute necessary repairs. The improvement of the roadway; the relaying of the track with new rails; the erection of new buildings, bridges, or structures; the construction of new sidings; and the general improvement of the road, to insure its safety and to accommodate a growing business,—may constitute necessary repairs, and the board of directors, acting in good faith, might so determine, and the contract does not withdraw these matters from the determination of the governing body of the corporation. There is no charge of bad faith, nor that the corporation or the board have applied any of the earnings to private uses. The allegation in the complaint that various acts enumerated were

"wrongful" or "improvident" are not allegations of fact, but of law, and are not admitted by the demurrer; and the allegation that the "rebuilding" and the "building of new railway and structures" were not necessary for the maintenance and operation of the railway, does not show that what was done did not constitute "necessary repairs," and so was within the discretion of the board of directors. The leasing of the Watchung Railroad by the defendant corporation is charged as having entailed a loss in each year, to the lessee, "amounting in 1888 to \$10,474.02, and in 1889 to \$9,493.98." It is not claimed that the lease was not authorized by the charter of the defendant corporation, nor does it appear that the direct loss was not more than made up by the advantage derived by the main line from the transaction. The general question of the relation between "income bondholders" and a railroad corporation, under a contract quite similar to the one now in question, was exhaustively considered by this court in the case of *Day v. Railroad Co.*, 107 N. Y. 129, 13 N. E. Rep. 765, and the opinion of Judge Danforth in that case is very pertinent upon the question raised by this discussion, as to what may be done by a board of directors in charging income, consistently with the rights of the bondholders. Our conclusion is that the demurrer to the complaint was well taken, and the judgment should therefore be affirmed. All concur.

(139 N. Y. 240)

PEOPLE ex rel. HAMILTON PARK CO.  
v. WEMPLE, Comptroller, et al.

(Court of Appeals of New York. Oct. 3, 1893.)

TAXATION — CANCELING SALE — APPLICATION BY OWNER — PROCEEDINGS BEFORE COMPTROLLER.

Laws 1855, c. 427, §§ 83, 85, providing that if the comptroller shall discover, prior to conveyance of land sold for taxes, that the sale was invalid, he shall cancel the sale and return the purchase money, and, if the invalidity is discovered after conveyance made, it shall be the comptroller's duty, on receiving evidence thereof, to cancel the sale and refund the money, (as construed in *People ex rel. Wright v. Chapin*, 5 N. E. Rep. 64, 11 N. E. Rep. 383, and 104 N. Y. 369,) is merely for the benefit of the purchaser, and does not authorize an application by the owner of land to cancel a tax sale, or allow the comptroller to entertain such application by the owner. *Held*, that Laws 1891, c. 217, which amends the act of 1855 by providing that all applications to the comptroller for cancellation of tax sales "by any person interested in the event thereof" shall be heard and determined by him, and his determination shall be subject to review by certiorari or otherwise, does not extend the act of 1855 so as to include an application by the owner of the land, but merely makes it imperative on the comptroller to entertain an application by the purchaser, who is interested in the return of the purchase money, and expressly gives him a right to review by certiorari and otherwise. *Earl and Maynard, JJ.*, dissenting. 22 N. Y. Supp. 497, reversed.

Appeal from supreme court, general term, third department.

Certiorari on the relation of the Hamilton Park Company to review the decision of Edward Wemple, late comptroller of



the state of New York, canceling certain tax sales. The writ was directed to Wemple and to Frank Campbell, his successor in office. From a judgment of the general term (22 N. Y. Supp. 497) quashing the writ, relator appeals. Reversed.

The other facts fully appear in the following statement by ANDREWS, C. J.:

This is an appeal in a proceeding instituted by writ of certiorari, brought for the purpose of reviewing the decision of Edward Wemple, late comptroller of the state of New York, made December 30, 1891, canceling three several tax sales made by the state in the years 1877, 1881, and 1885, of lands in the town of Long Lake, Hamilton county, for taxes. The sale of 1877 was for taxes assessed in the years 1867 to 1870, inclusive; the sale of 1881 was for taxes assessed in the years 1871 to 1876, inclusive; and the sale of 1885 for taxes assessed in the years 1877 to 1882, inclusive. The comptroller, on the 29th day of January, 1884, executed to the purchasers in the tax sales of 1877 and 1881 conveyances of the lands sold, which were recorded December 10, 1888, and made a similar conveyance April 9, 1889, of the lands sold at the tax sale of 1885, which was recorded December 22, 1889. The relator, the Hamilton Park Company, is the grantee of the purchasers at the three tax sales mentioned, by deed dated May 1, 1889. On the 9th day of December, 1885, the Adirondack Railway Company, a railroad corporation organized July 7, 1882, presented its petition, duly verified, to the comptroller for the cancellation of the three tax sales of 1877, 1881, and 1885, of two parcels of land, aggregating 3,000 acres, in township 36, in Totten and Crossfield's purchase, in the town of Long Lake, on the ground that it was the owner of the land as successor of the Adirondack Company, a railroad corporation organized under chapter 236 of the Laws of 1863, and that the lands were, by virtue of that act and subsequent amendatory acts, exempt from taxation during the years 1867 to 1882, inclusive. This application was denied by the comptroller June 23, 1888, on the ground that the owner of the lands sold for taxes was not authorized under the statute to apply to the comptroller for the cancellation of tax sales, and that the purchaser was the only party entitled to make such application. Subsequently, on the 19th day of November, 1891, the Adirondack Railway Company, on a new verified petition, applied to the comptroller for a rehearing and reconsideration of its previous application, setting forth as in the first petition the grounds upon which application for cancellation was made, which were in substance the same as were stated in the petition of December 9, 1885. Other parties, claiming as owners or mortgagees of lands affected by the tax sales, were allowed to intervene. A hearing was had before the comptroller of the application of November 17, 1891, at which the petitioners and the relator were present. The petitioner, in support of its application for cancellation, introduced papers purporting to be an abstract of title, showing the ownership

of the lands by the Adirondack Company during the years in which the taxes were assessed, accompanied by written statements as to the performance of the conditions of exemption imposed by the act of 1863 and subsequent amendatory acts. Affidavits were also introduced tending to show that the taxes on the lands and for which they were sold were not extended by the board of supervisors of Hamilton county when the tax rolls were delivered by the board to the supervisor of the town, and that the board never acted upon any extension or had any cognizance of the rolls after they were delivered to the supervisor. On the 30th day of December, 1891, the comptroller made his decision in writing, granting the application for cancellation, on the grounds (1) that the lands were exempt from taxation under chapter 236 of the Laws of 1863, and amendatory and subsequent acts; (2) that the taxes were void by reason of the nonextension of the taxes by the board of supervisors on the tax rolls. The return shows that the relator appeared on the hearing before the comptroller, and opposed both the applications of 1885 and 1889, and by counsel submitted briefs in opposition. The relator gave no evidence on the hearing, nor does it appear that it interposed any objection to the evidence offered by the petitioners as to its form or otherwise. The certiorari is taken by the relator to review the decision of the comptroller canceling the tax sales. The decision recites that it was made "in accordance with the requirements of chapter 217, Laws 1891." The general term affirmed the decision of the comptroller, and from the order of affirmance this appeal is taken by the relator.

Esek Cowen, for appellant. Stedman, Thompson & Andrews, (Arthur L. Andrews, of counsel,) for respondent Campbell. I. & J. M. Lawson, for respondents Durant and others.

ANDREWS, C. J., (after stating the facts.) The point urged by the relator that the owner of land sold for taxes is not entitled under the statute to apply to the comptroller for the cancellation of a tax sale, or that the comptroller has no jurisdiction to entertain and act upon an application by the owner for such cancellation, is, if well taken, decisive of the case, and requires a reversal of the proceedings. The decision of the comptroller now under review, which canceled tax sales of 1871, 1881, and 1885 of lands in Hamilton county, was rendered on the application of the Adirondack Railway Company, made November 17, 1891, as owners of the lands, by grant from the Adirondack Company. The application was made on the ground that the lands in question were, during the years in which the taxes were assessed, upon which the lands were sold, exempt from taxation under chapter 236 of the Laws of 1863, and subsequent statutes. The comptroller entertained the petition of the Adirondack Railway Company, and, against the protest and objection of the relator, the Hamilton Park Company, the grantee of the purchasers on the tax

sales, rendered his decision December 30, 1891, canceling the several sales in the years mentioned on the ground stated in the petition, and on the additional ground, embraced in the general claims of the petition, that the board of supervisors of Hamilton county had omitted to extend on the tax rolls of the town of Long Lake the taxes for which the several tax sales were made, before delivering the rolls to the supervisor of the town. The action of the comptroller was taken, therefore, upon the application of the owner of the lands at the time of these several tax sales, or his grantees, and the right of the owner of lands sold for taxes to institute the proceedings for cancellation, and of the comptroller to adjudicate on his application the respective rights of the owner and of a purchaser, on a tax sale, is distinctly presented, and must be determined. The question is not wholly new in this court. In the case of *People ex rel. Wright v. Chapin*, 104 N. Y. 869, 5 N. E. Rep. 64, and 11 N. E. Rep. 383, the question was presented, and was elaborately considered by the court, whether the owner of lands sold for taxes was entitled, under chapter 127 of the Laws of 1855, to the remedy provided for by that act for the cancellation of tax sales on application to the comptroller. The act of 1855 consolidated the previous legislation on the subject of tax sales, and regulated the proceedings on the sale by the state of lands for unpaid taxes, and by the eighty-third and eighty-fifth sections power was conferred on the comptroller to cancel invalid tax sales, and upon such cancellation he was required to refund to the purchaser, out of the state treasury, the purchase money and interest thereon. It is unnecessary to quote the sections here. They are quoted in the opinion in the case cited. The court, on the first argument, and afterwards on a motion for reargument, unanimously decided that the object and intent of sections 83 and 85 was to relieve a purchaser who had purchased land at a tax sale which was invalid from his purchase, and to provide for a prompt restitution of the money paid by the purchaser. It was therefore held that the owner of land who had applied to the comptroller for the cancellation of a sale of his land for taxes, and where application had been denied, could not maintain an appeal from the decision of the comptroller. Danforth, J., in his opinion, after referring to sections 83 and 85 of the Laws of 1855, said: "The evident object of these provisions was to enable the state to relieve the purchaser from the consequences of a defective tax title, and at the same time replenish the treasury by a speedy collection of the tax withheld from it. The owner is not a party to the proceeding, nor is he permitted in this way to test the validity of the sale or tax. In such a controversy the purchaser would have an interest, and a right to the protection of the court by the usual course of legal proceedings. The statute contains no intimation of a legislative purpose to deprive him of this right. It gives no process to bring him in; confers no power to compel witnesses. In short, it creates no court;

provides for a single transaction, to which the comptroller and the purchaser are the only parties." In reviewing the grounds of this decision, we are fully satisfied that it accords with a sound construction of the act of 1855. If the statute was intended to make the comptroller a tribunal to decide controversies between the owner and the purchaser as to the validity of a tax title, it is singularly deficient in provisions for securing the due consideration and hearing of the controversy, and in providing the safeguards which ordinarily surround and attend judicial investigations affecting questions of title to land, arising between conflicting claimants.

The validity of a tax title frequently is a question of great difficulty, and involves important and valuable interests, not only of the owner whose title is claimed to have been divested, but of a purchaser who, in reliance upon the validity of his title, may have made valuable improvements on the property. The comptroller may be a person not familiar with legal questions or investigations. The act of 1855, as Judge Danforth points out, makes no provision for bringing the claimants before the comptroller, provides for no notice to the adverse party, prescribes no rules for the examination and cross-examination of witnesses; and, as we held in *People ex rel. Ostrander v. Chapin*, 105 N. Y. 309, 11 N. E. Rep. 510, the comptroller may accept affidavits in place of common-law proof of any facts relevant to the application. There is no provision for an appeal from the comptroller's decision, and if his decision might, prior to the amendment of 1891, have been reviewed on certiorari, it would be subject to the rules governing a review under that act. It is difficult to suppose that the act of 1855 intended to constitute the comptroller a court to decide controversies between the owner of lands sold for taxes and the purchaser as to the validity of a tax title. On the other hand, if the provisions in the act of 1855, as to cancellation of tax sales, were intended merely to afford a remedy to the purchaser to recover back the money paid on an invalid sale, the act established a consistent system, easily understood, and productive of no injustice. The purchaser by his application consents to a cancellation of the tax sale. The state, by its officers, considers and passes upon the application, and is the only party, other than the purchaser, interested. The owner of the land cannot complain if the sale is vacated, and, if the application is denied, his position is not changed. The county, which may be required to replevy the amount refunded, is one of the municipal divisions of the state, and is represented in the transaction by the state officers. If the comptroller acts under section 83 on his own motion, and vacates the sale before the conveyance is made, the purchaser gets back his money, and he cannot complain because he purchased subject to the right of the comptroller to exercise this power. The construction of the act of 1855 established by the decision in *People ex rel. Wright v. Chapin*, supra, was reasserted in the case of *People ex*

rel. *Ostrander v. Chapin*, supra, in which Rapallo, J., said: "The intent was to protect the title of the purchaser in case the sale was found to be ineffectual to give him title." In the subsequent case of *People v. Turner*, 117 N. Y. 227, 22 N. E. Rep. 1022, which was an action to recover penalties for cutting timber on lands in Franklin county, title to which was claimed by the state under a tax sale made in 1877, the defendant, without connecting himself with title to the land in any way, sought to defeat the action on the ground that the plaintiff's title was defective, for the reason that the assessors, in assessing the taxes on which the land was sold, had omitted to give notice of a review of the assessments, as required by law. The court, in its opinion, after giving several conclusive reasons in answer to this defense, assigned as an additional reason that the owner whose lands were assessed had a remedy, under the act of 1855, to apply to the comptroller for the cancellation of the tax. No reference was made to the decision in 104 N. Y., 5 N. E. Rep., and 11 N. E. Rep., and the suggested construction of the act of 1855, in hostility to that decision, was a mere inadvertence. Unless, therefore, the right of an owner whose lands have been sold for taxes to apply to the comptroller of the state has been given by some statute subsequent to 1855, no such right exists. The comptroller, as authority for exercising this jurisdiction, relied upon chapter 217 of the Laws of 1891, which amended section 2 of chapter 448 of the Laws of 1885, which itself was an amendment of the law of 1855. The act of 1885 enacted a rule of evidence by making certificates of tax sales and conveyance thereunder in certain cases, and, after a certain time, conclusive evidence of the validity of the sale and of the prior proceedings, whereas, by the act of 1855, a conveyance by the comptroller was made presumptive evidence only. In the opinion in *People ex rel. Wright v. Chapin*, supra, given on the motion for reargument, the judge delivering the opinion, referring to the statute of 1885, stated, in substance, that it did not extend the power of the comptroller in respect to cancellation beyond that given by the act of 1855. Section 1 of the act of 1885 amends section 65 of the act of 1855, the main purpose of the amendment being, as has been stated, to create a conclusive presumption of regularity in the cases mentioned. It confers no new power upon the comptroller in express language. The section is very obscure, and it may afford ground for an argument that the legislature, by the concluding clause in the section, intended to give the owner a remedy to apply to the comptroller for cancellation where the taxes had been paid before the sale, or where the land taxed was not taxable.

On the other hand, the intention may have been not to preclude the purchaser from applying for cancellation in these cases, the objections being fundamental, and which, it might be claimed, would not be reached by a curative statute, or by a statute enacting a conclusive rule of evidence, in support of the purchaser's title.

Section 2 of the statute of 1885 was the one amended by the statute of 1891, and the original section in the act of 1885 contained nothing bearing upon the point we are now considering. The act of 1891 added to the original section this clause, which is the one relied upon to sustain the action of the comptroller in this case: "All applications heretofore or hereafter made to the comptroller for the cancellation of any tax sale by any person interested in the event thereof shall be heard and determined by him, and his determination shall be subject to review by certiorari or otherwise." It will be observed that there is no express grant of power in this clause to the comptroller to entertain and adjudicate upon the validity of tax sales on the application of the owner of lands affected thereby. The act of 1891 was passed several years after our decision in *People ex rel. Wright v. Chapin*, and may be presumed to have been known by the legislature. It is quite significant that, if the legislature intended to confer the additional power upon the comptroller to cancel tax sales upon the application of the owner, it was not expressed in unequivocal terms. The clause quoted from the act of 1891 contains two new affirmative provisions. It makes it imperative upon the comptroller to hear and determine applications for cancellation, which, prior to our decision in *People ex rel. Ostrander v. Chapin*, was regarded by him as discretionary; and next, it gave in express terms a remedy by certiorari to review his decision. The position of the purchaser, if the right of cancellation is still confined as in the act of 1855, gained these advantages, and his rights were relieved from the obscurity which before attended them. It is, however, upon the language of the act of 1891, directing the comptroller to hear an application for cancellation "by any person interested in the event thereof," upon which the defendants rely as extending the power of the comptroller so as to embrace application by the owners of the property sold for taxes, as well as purchasers. Looking to the policy of the act of 1855, in conferring power on the comptroller to cancel tax sales, which was to encourage bidding, and to provide a speedy and summary remedy in favor of purchasers to recover back the purchase money, where the purchaser could acquire no title by reason of the invalidity of the proceedings, the words "interested in the event thereof," in the act of 1891, would most naturally refer to persons interested in the refunding of the money paid, which was the primary object of applications for cancellation under the act of 1855. The cancellation of the tax sale and the refunding of the money paid thereon were to be simultaneous acts, and an owner whose land had been illegally sold for taxes, although he might have an interest in having the cloud upon his title removed, did not need the remedy by cancellation to preserve his rights, and he was not interested in the refunding to the purchaser of the money paid on the sale, and so not in the event of the application for cancellation in its main purpose. We are of

opinion that the statute of 1891 has not changed the prior rule, and that now, as before, the owner is not entitled to the remedy by cancellation. The construction of the obscure legislation is not free from difficulty. If the legislature should deem it wise to extend the scope of the powers of the comptroller to the determination of controversies between the owner and purchaser of land sold for taxes, new and additional legislation should be enacted containing provisions which shall insure a deliberate hearing upon competent evidence, with the usual safeguards which attend ordinary judicial trials. These views lead to a reversal of the proceeding below, and costs should be awarded to the relator in all costs. All concur, except EARL and MAYNARD, JJ., dissenting. Order and judgment reversed.

(129 N. Y. 19)

WHITE et al. v. MANHATTAN RY. CO.  
et al.

(Court of Appeals of New York. Oct. 3, 1893.)

ELEVATED RAILWAY—CONSENT OF PROPERTY OWNERS TO CONSTRUCTION—REVOCATION—CONSENT BY ONE MEMBER OF FIRM—EFFECT—STIPULATION OF COUNSEL—CONSTRUCTION.

1. By a written instrument, not under seal, owners of land bounded on certain streets, to which they had no title, gave unconditional "consent to the construction and operation of an elevated railroad over and through and along such streets," by a designated company, which, with others, afterwards built and operated the road. *Held*, that such consent, after being acted on by the company, operated as an abandonment by such owners of their easement in the streets so far as was reasonably necessary for the construction and operation of such road, and that they or their successors in title could not revoke such consent, and recover damages already sustained, and enjoin the further operation of such road. 18 N. Y. Supp. 396, reversed.

2. Where a landowner gives his unconditional consent in writing to a railroad company to build its road in streets on which his land abuts, he is not, after the road is constructed, entitled to damages against the company, under Const. art. 3, § 18, which provides that no railroad can be built in the public streets without the consent of the owners of one-half in value of the property in the street, or, in lieu thereof, the determination of three commissioners appointed by the general term, after a hearing of all parties interested, and confirmed by the court.

3. Where the land belonged to a copartnership, and the firm name was signed to the consent by one member of the firm, the rights of the other members and their successors in title are not affected thereby, in the absence of evidence of authority to sign it by such other members, or of circumstances from which an inference of authority might fairly be drawn.

4. In an action by the owners of the land against such railroad company for damages, and to enjoin the operation of the road, counsel stipulated that in case of the failure to produce certain exhibits used on the trial, on the argument at general term or in the court of appeals, such failure, together with the other evidence in the case, should be taken to establish the genuineness of the firm's signature on such instrument. *Held* that, on the failure to produce the exhibits in such courts, such stipulation should not be construed as an admission that the partner who signed the firm's name was authorized by the other members thereof to do so.

Appeal from supreme court, general term, first department.

Action by Anna B. White and Anna B. Haulenbeck against the Manhattan Railway Company and another to enjoin defendants from maintaining and operating its elevated railroad in the streets in front of plaintiffs' premises, and for damages. From a judgment of the general term (18 N. Y. Supp. 396) affirming a judgment for plaintiffs, defendants appeal. Reversed.

Davies & Rapallo and Brainard Tolles, for appellants. Leo C. Dessar, (Joseph B. Reilly, of counsel,) for respondents.

PECKHAM, J. On the 28th day of July, 1897, the plaintiffs became owners of certain land, with the buildings thereon, situated on Chatham square, in the city of New York. They are respectively the widow and daughter of one James H. White, who died on the above date in the possession and ownership of the premises, and who devised the same to the plaintiffs. The railroad of the defendants was at that time in operation in Chatham square, and on the 30th day of July, 1888, the plaintiffs commenced this action for the purpose of recovering damages which they alleged had been already sustained by them from the operation by defendants of the railroad in front of the plaintiffs' premises without having obtained the right to do so from the owners thereof, and also for the purpose of enjoining the defendants from the further operation of the road unless they paid the damage which such operation of it would thereafter occasion to the plaintiffs as the owners of the premises in question. They recovered judgment for both kinds of relief. Upon the trial the defendants proved that in 1875 the premises were owned by the firm of W. M. Seymour & Co., hardware merchants, and the firm was then composed of William M. Seymour, James H. White, and Jonathan E. Brush. In February, 1877, Brush conveyed his interest in the premises to his partners, Seymour and White, and in March, 1882, the executor of Seymour, under due authority in the will of the testator, conveyed the interest in the premises of which testator died seized to James H. White, the plaintiffs' testator. The defendants further proved that in October, 1875, while the premises were owned by and in the possession of the firm, one of the members thereof (Jonathan E. Brush) signed a paper which reads as follows: "We, the undersigned, owners of land bounded on Chatham street, east side, between Roosevelt and East Broadway, hereby respectively consent to the construction and operation of an elevated railway over, through, and along said street; the said railway to be constructed and operated by either the New York Elevated Railroad Company, or a company to be organized under chapter 606 of the Laws of 1875. Dated New York, October, 1875. Street number, 4; ward number, 781; street front, 34.4; owners, Seymour & Co.; residence, —; valuation, \$20,000; signature, W. M. Seymour & Co." The railroad was constructed subsequent to the execution of this

paper, and has been operated as alleged in the complaint. The court was requested to find the fact as to the execution of this paper, and the subsequent construction of the railroad in accordance with the proof, which was uncontradicted, but the request was refused, and an exception duly taken. The principal question in the case arises upon the materiality of this exception.

The plaintiffs insist that the paper was of no more effect than a parol license to do work on the land of the licensor would have been, and that it was revocable at the pleasure of the licensor, and that a revocation was effected by the conveyance of the land, and by the commencement of this action by the devisees of the former owner, James H. White. There is no finding or proof that the plaintiffs have any title to any portion of the street or square upon which their building fronts, but there is a finding that they acquired with their title to the premises the right to have Chatham square kept open as a public street, "and to have a free and unobstructed right of way, access, and passage to and from said premises, and over and upon said street, together with all the use and benefit of the light and air coming in and upon said lot and premises through and from said street, free and unobstructed." I think the proof shows, without contradiction, that all the rights in the street they had were what has been termed property rights in the nature of easements of light, air, and access. *Story's Case*, 90 N. Y. 122; *Kane's Case*, 125 N. Y. 164, 26 N. E. Rep. 278, and cases cited. The defendants therefore insist that, as the plaintiffs or their predecessors had no title to any portion of the street, the consent of their predecessors, while in the possession and ownership of the abutting land, that the defendants might construct and operate the railroad in the square in front of their land, was more than a mere license to do an act on the land of the licensor, and that it amounted in law and in fact to an abandonment of their rights or easements in the street, so far as was necessary for the construction and operation of the railroad, and that, the consent to such construction having been acted on, and large amounts of money expended on the faith thereof, the plaintiffs, as the successors of those who gave the consent, are themselves estopped from making any claim for damages arising from such construction and operation. It has been the law in this state for a number of years that an easement to do some act of a permanent nature on the land of another can be created only by a deed or conveyance in writing, operating as a grant, and that a consent in writing on the part of the landowner is no more valid than if it were by parol. Thus a parol agreement by the owner of the land that a person may abut and erect a dam on such land, not for a temporary purpose, but for a permanent use, such as the creation of a water power for the use of mills, is void, and the agreement, being a mere license, may be revoked even after it has been acted upon by the other party. Also a permanent easement to drain through the land

of another is not created by a license so to do, even when in writing, and made upon a good consideration. *Mumford v. Whitney*, 15 Wend. 381; *Wiseman v. Lucksinger*, 94 N. Y. 31; *Cronkhite v. Cronkhite*, 94 N. Y. 323; *Babcock v. Utter*, 1 Abb. Dec. 27, and cases cited; *Eckerson v. Crippen*, 110 N. Y. 585, 18 N. E. Rep. 443.

The question of the establishment of an easement by adverse user, which may authorize the presumption of a grant, is not involved, nor is the ability to thus prove its existence denied. *Hammond v. Zehner*, 21 N. Y. 118. It is, however, held (what would otherwise seem to be plain enough) that there can be no adverse user where the right to use exists and is exercised under a license. *Wiseman v. Lucksinger*, supra. The reasoning upon which these decisions as to the insufficiency of a license are based is that the right which is claimed under a license amounts to an interest in land, and that such interest cannot be created, and cannot pass to another, without a proper conveyance or grant of such interest in writing and under seal, as required by our statute. It is said that a license is a mere authority to enter upon the land, and is a sufficient protection to the licensee while it lasts, but that it may be revoked at any time, and after its revocation it cannot be used as a protection for any future acts. It is held there can be no equitable estoppel which will operate to prevent the revocation of the license, grounded upon the fact that the licensee has entered upon the land of the licensor, and expended thereon labor and money upon the faith of the license, because it must be held that the licensee knew that the license gave him no interest in the land, and that he must rely only upon the indulgence of the licensor, and, if that be withdrawn, he must himself withdraw from the land. Otherwise, it is said, the statute in regard to the creation and conveyance of interests in land would be in great part abrogated. The easements of abutting owners in New York city, who are without title to any portion of the streets upon which their lands abut, differ somewhat in their origin from ordinary easements. They have not been created by grant or covenant, but it is said of them that it is easier to realize their existence than to trace their origin; that they arise from the situation, the course of legislation, the trust created by statute, the acting upon the faith of public pledges and upon a contract between the public and the property owner, implied from all the circumstances, that the street shall be kept open as a public street, and shall not be devoted to other and inconsistent uses. *Kane's Case*, supra. Whatever the means by which the easements were created, they are in their nature the same as if they had been created by grant. The owners thereof cannot be divested of them without their consent, unless they are compensated therefor. Although it may generally be said, under the authority of the cases already cited, that an easement in the nature of an interest in the land of another can only be created by a grant, yet after it has been created, and while it is in existence, it may be aban-

done, and thus extinguished, by acts showing an intention to abandon and extinguish the same. This has been many times decided, and by many different courts. A cesser to use, accompanied by an act clearly indicating an intention to abandon the right, would have the same effect as a release without reference to time. *Snell v. Levitt*, 110 N. Y. 595, 18 N. E. Rep. 370, and cases cited in opinion of Earl, J., at page 603, 110 N. Y., and page 372, 18 N. E. Rep. The intention to abandon is the material question, and it may be proved by an infinite variety of acts. If a third party interested in the servient estate has acted upon such abandonment, and in regard to whom it would operate unjustly if the exercise of the easement should be resumed in favor of the dominant estate, added force is given to the claim of abandonment. *Id.* The railroad company having procured the consent of the authorities of the city to the construction of the railroad in the street or square in question upon the terms agreed upon, such company obtained an interest in, and to a certain extent a title to, the street, for the purpose of the construction and operation of its railroad, which was in the nature of property, and which was sufficient to enable it to treat with abutting property owners in the character of one who had an interest in the servient estate. *People v. O'Brien*, 111 N. Y. 1, 18 N. E. Rep. 692.

The case before us is therefore different from those cases where an easement has been claimed to have been created in the land of a third person, by reason of his mere license to enter upon his land and do some act of a permanent nature which would amount, if the right should continue, to an interest in the land of such person. This interest in land, the cases hold, requires a grant. In this case the owners of the abutting land had no title to the street. They had an easement in it only, and their consent purported to carry no title to land. There can be no question that they had the right to release, abandon, or otherwise extinguish that easement, and upon such terms as they should think fit. The question before us is whether they have done so, and to what extent, by the execution of the paper proved upon the trial. Assuming that it was executed by each of the parties who owned an interest in the abutting land at that time, what was its effect? The parties were under no obligation of a legal or moral nature to give this consent. There was nothing in the law, nor, so far as appears, in the circumstances surrounding the parties, which called upon the owners to give their consent upon any condition other than that which operates in all strictly and purely business transactions,—the consideration of benefit to themselves. These owners occupied no public position with regard to their property; they were in no sense trustees, either for the public or for any human being. They represented only themselves and their own interests, and in deciding whether to consent to the building of the road or not they had legally or morally no possible reason for

consulting any but their own interests, as they thought they might be affected by the construction and operation of the road. Under such circumstances, when an abutting landowner is confronted with the question whether he will or will not consent to such construction and operation, and he gives in writing a full, unconditional, and absolute consent thereto, where is the reason for saying he did not mean it, but only meant to consent to its construction upon payment of the damages which he might sustain by reason of such construction and operation? That is clearly in direct contradiction of the language used in the instrument here proved. If such had been the intention, it may be asked why it was not so stated. If not so stated, and in the absence of any evidence that such was the understanding of the parties, and that there was a mutual mistake, it seems to me quite plain that effect must be given to the language which was actually used, and that such effect is to create a full and unconditional consent to the building and running of the road, without any claim for damages consequent therefrom.

It is urged that the provisions of the constitution<sup>1</sup> that no railroad can be built in the public streets without the consent of the owners of one-half in value of the property in the street, or, in lieu thereof, the determination of three commissioners appointed by the general term, after a hearing of all parties interested, and confirmed by the court, that the road might be built, has and should have a most material effect upon this written instrument. It is said that the consent is nothing but a kind of public act designed to give the necessary legality to the acts of the company in commencing to construct the road, and that it cannot be held to mean that the owner consents thereto without the right to claim the damage which he may prove as the result of the very acts which he has consented to. I can see no sound foundation for any such construction. The provisions of the constitution are a protection to the abutting landowner so far as they go. They are not absolutely a condition precedent to the construction of the road. If the requisite consents are not given, the company may have recourse to the alternative of a commission appointed by the general term. But, in giving the consent, the owner has no public function to perform. It is, as I have already said, an entirely private consideration for himself. Will I, or will I not, be benefited by the construction and operation of the road? is the only question that he is called upon to decide, and there is nothing in the nature of that question which calls for its decision on any but purely private and individual grounds. If he think he will, on the whole, be benefited, he will in all probability consent, and, if he think the contrary, he will be quite as likely to refuse. If he consent, and subsequently find that he has been mistaken as to the probable benefits, no cause or ground for the recovery of damages from the company

<sup>1</sup>Article 3, § 18.

arises as the result of his error. When, therefore, an abutting owner consents in writing to the construction and operation of an elevated railroad in the street fronting his property, what other possible meaning can be placed upon such act than that he voluntarily abandons his easement of light, etc., in the street, to the extent to which it will necessarily be affected by the building of the road? The act is capable of but one construction, as it seems to me. He might have consented conditionally, as, for instance, that a majority should also execute such consent, or upon payment of a certain sum, or upon condition of the payment of such damages as he might prove he would sustain from the existence of the road.

In this case, however, there is absolutely no condition stated or claimed. There is the unconditional consent to the building of the road, and, upon the assumption that it was signed by all the owners or duly authorized by them, it must be regarded as an abandonment *pro tanto* of the easement in that street as already described, especially after the consent has been acted upon by the company, with the possible limitation hereinafter to be mentioned. Perhaps the consenting party might withdraw his consent if he had given it without any valuable consideration, and if the other party had done nothing under it, so that its position would not be unfavorably affected by such withdrawal. This is not such a case, because the company have proceeded to build their road, and they would be unfavorably affected by just the amount they must pay if the consent be regarded as withdrawn. The case here shows that the consent in question was not signed by all the owners of the land. The land was owned by these persons as tenants in common, and they were also partners in business. The evidence shows that the name of the firm was signed to the consent by Mr. Brush, and the stipulation of counsel was that in case of the failure to produce certain exhibits used on the trial, upon the argument at general term or in this court, such failure, together with the other evidence in the case, should be taken to establish the genuineness of the signature of the firm upon the consent in question. The exhibits were not produced, and the defendants' counsel claims not only that the genuineness of the signature of the firm to the paper is thus admitted, but he also claims that the proper construction of the stipulation is that the partner who signed the firm name was authorized by the other members thereof so to do. I do not think so. The defendants were endeavoring to prove that the signature of the firm name to the paper was placed there by Mr. Brush, one of the partners, and witnesses were called who knew his handwriting, and had seen him write the signature of the firm to other papers, to show by them that in their opinion he had written the signature in question. The exhibits in question were the books of different banks where the firm kept their accounts, in which the firm name had been written by each of the partners, and also

their individual names, as aids to enable the bank officers thereafter to identify the firm signature when signed by the different members. All that the stipulation effected was to concede (in the absence of these exhibits) that the firm signature was genuine,—that is, was placed there by one of the members of the firm, (Mr. Brush,) as defendants were endeavoring to prove. I can see no reason for giving a greater weight to the absence of these exhibits than could possibly be given to them and the other evidence by their presence. If present, all that could have been inferred therefrom was that the defendants, upon the whole evidence, had proved that Mr. Brush, one of the partners, had signed the firm name. We do not think that the defendants have proved that it was signed by the authority of the rest of the firm. It was not a firm matter in regard to which each partner would in his action represent himself and the rest of the firm, but actual authority would have to be shown or inferred from acts and circumstances in proof. In the absence of evidence of authority, or of circumstances from which an inference of authority might fairly be drawn, we think the owners of the land, other than the one who signed it and his grantees with knowledge, or implied knowledge, would be wholly unaffected by the execution of this paper. We leave this question open for proof upon another trial as to authority.

It is also claimed that the actual occupation of this square by the defendants for their railroad is much greater and more exclusive than any fair construction of the consent would permit. It is said to be unreasonable and excessive under cover of such a license to in fact completely cover the whole street, and to render the latter much less valuable for purposes of light, etc., than could reasonably have been in the contemplation of the parties. Possibly this may be true. We do not now pass upon that question. The courts below, however, have denied all validity to the written consent, and have not confined themselves to a refusal to give effect to it beyond a reasonable extent. We think the consent should have a reasonable construction, and we ought not to hold that such a paper would authorize the building of a solid structure as high as the top of the buildings fronting on the street, and completely covering the same from building to building. This would certainly be regarded by all as not within the contemplation of the parties to the paper. We will not now, and in advance, decide whether the use actually made of the street is or is not unreasonable with reference to this consent. Further evidence may be given upon another trial on this point, from which the question may be more readily determined. We think the courts below, in refusing all possible effect to the consent in question as an abandonment to any extent of the owners' easement in the street, committed an error which requires a reversal of the judgment and a new trial. All concur except MAYNARD, J., not voting.



(129 N. Y. 153)

## TOWNSHEND v. THOMPSON et al.

(Court of Appeals of New York. Oct. 3, 1893.)

## RIGHTS OF MORTGAGEE IN POSSESSION.

1. A purchaser at a mortgage foreclosure sale, which is invalid, as against the owner of the equity of redemption, because he was not made a party to the foreclosure action, becomes assignee of the mortgage; and, if he lawfully enters into possession of the premises, he becomes a mortgagee in possession, and hence ejectment will not lie against him by the owner of the equity of redemption. 18 N. Y. Supp. 870, affirmed.

2. A mortgagee in possession of uninclosed land, who has used it for gardening purposes in the summer time, and has paid the taxes for many years, is not ousted by the mere facts that, without his knowledge or consent, the owner of the equity of redemption built a fence around the lot, and at one time made some slight repairs about it.

3. A mortgagee in possession, who has been wrongfully deprived of the possession by the owner of the equity of redemption, may again peaceably enter into possession, and thus be restored to his rightful position as mortgagee in possession.

Appeal from superior court of New York city, general term.

Action by Mary N. Townshend against Ellen L. Thompson and others to recover possession of land. From a judgment of the general term (18 N. Y. Supp. 870) affirming a judgment dismissing the complaint on a trial by a jury, plaintiff appeals. Affirmed.

John Townshend, for appellant. Foster & Thomson, (James Thomson, of counsel,) for respondents.

EARL, J. This is an action of ejectment to recover a lot of land situate at the southwest corner of Eighth avenue and 117th street, New York city. The plaintiff's title does not appear to be very meritorious, and the court ought not to be very astute to uphold it. Both parties trace their title back to Edward Price, who took a conveyance of the lot in 1827. The plaintiff claims title under him as follows: In 1835 he conveyed the lot to John Scudder, and took back a purchase-money mortgage. In 1836 Scudder conveyed the lot to Ebenezer L. Williams, subject to the mortgage. February 4, 1843, Williams was adjudged a bankrupt, upon his own petition, under the bankrupt act of 1841, and William C. H. Waddell, the official assignee in bankruptcy, became his assignee, and all his estate at once vested in him; and on the 27th day of May, 1843, Williams received his discharge from his debts. On March 1, 1869, the assignee, by order of the court, sold and conveyed this lot, with five other adjoining lots, to George Law, for the consideration of \$2,150; and on the 10th day of January, 1873, Law, for the consideration of \$500, conveyed the same lots to the plaintiff. During all these years—more than 26—before the sale to Law, there is no pretense that the assignee had any actual possession of the lots, or that he ever exercised any acts of control or ownership over them, except as follows: February 8, 1845, he filed a report in which he stated that these six lots, among other assets, were subject to two mortgages,

and were of uncertain value, and ought to be disposed of at public sale without incurring further expense or delay. It does not appear that any formal order was then made for the sale of these lots. They were marked "Worthless" in an inventory of the assets made by the assignee. He being dead at the time of the trial of this action, his account book, found in the possession of the plaintiff's attorney, was put in evidence, in which appeared an entry showing that he had sold the lots on the 23d day of March, 1846, for 13 cents. In February, 1867, the assignee presented a further report to the court, in which he stated that an application had been made to him to procure all the interest which the bankrupt had, and which became vested in him as assignee, in the six lots, and that Price had foreclosed his mortgage on the lots without serving any notice on the assignee, and had obtained possession of them, and that the application was to procure his interest in the lots for "a nominal consideration, and the costs of the assignee and his counsel therein, the title hereby sought being of no pecuniary value to his estate." Upon this report an order was made for the sale of the property at private sale. In January, 1869, the assignee made another report, in which he stated again that application had been made to him for the purchase of the lots for a nominal consideration, and the costs of the assignee and his counsel therein, the title sought being of no pecuniary value to the estate. Upon this report an order was made, authorizing the sale of the lots at public auction, and, as above stated, they were sold and conveyed to Law. It is clearly inferable that John Townshend, the plaintiff's husband, and her attorney in this action, instigated these proceedings of the assignee in the years 1867 and 1869, and that he was his friendly counsel therein. The fact that the lots were not sold for a nominal consideration must have been a disappointment to some one. It is not probable that the man who paid \$2,150 for the lots was the person who was seeking to procure them for a nominal consideration. But Law, as an obstacle, was soon disposed of. On the 5th day of February, 1870, John Townshend, without an atom of record title, and, so far as this record discloses, without any title whatever, conveyed the lots to his daughter, for the consideration of one dollar, by a deed containing full covenants, in which was the statement that the lots were then in the occupation of his tenant, John H. Bischoff. Law's title being thus menaced, he conveyed the lots to the plaintiff at a loss of \$1,650, besides interest. But the final scene in this interesting drama is still to come. Of the purchase money paid by Law, \$2,000 was paid to the clerk of the court. Steps were immediately taken by Townshend, as attorney for Wesley S. Yard, receiver of the Trust Fire Insurance Company, to reach this money. The insurance company had obtained against Williams a deficiency judgment in a foreclosure sale for upwards of \$2,000 in October, 1842, and that judgment was specified as a liability of the

bankrupt in the schedules annexed to his petition to be declared a bankrupt in 1843. Although about 27 years had elapsed since he was declared a bankrupt, this debt had not been proved, and in fact no debt had been proved. Now, Townshend, appearing as attorney for the receiver, caused the debt to be proved; and such proceedings were taken by him (no other debt having been proved) that the whole \$2,000, less costs,—about \$75,—was paid to the receiver in September, 1870. The result of all these proceedings in bankruptcy was that Mrs. Townshend had a conveyance of these lots, and some one had the proceeds of the sale by the assignee; and the only loser seems to have been Law, who unwittingly bid off the lots at the assignee's auction sale. The plaintiff did not seem to be in haste to take possession of these lots, and indeed it does not appear that she ever took possession of them. In 1875 Mr. Townshend first appeared at the lots, and, as he testified, finding them unoccupied he then caused a fence to be put around them, which remained there a few months, and then disappeared. Before the fence was built, according to the testimony of one of the plaintiff's witnesses, the lots were occupied by a gardener, and the fence was built to keep him out. It does not appear whether, in building the fence, Mr. Townshend acted for himself, or for his daughter, or for his wife. He testified that in 1878 he received a notice from the commissioner of public works to repair the curb and gutter stones in front of the lots, and that in compliance with the notice he made the repairs, as the agent of his wife. Frederick S. Wleck, one of the plaintiff's witnesses, testified that he took from Mr. Townshend a lease of the lots in 1883, and occupied them for about four years, and that he was in possession of the lots now in question before he took the lease. It does not appear that, in making this lease, Mr. Townshend acted for the plaintiff. These are all the acts of ownership exercised over these lots by Mr. or Mrs. Townshend at any time, and neither of them ever paid any taxes upon the lot, or assumed any of the burdens of ownership, except the slight repairs to the gutters in front of the lots. These are the facts and incidents attending the plaintiff's title to this lot. The chain of title is apparently complete, and we may assume that it must prevail, unless it has been subverted by the facts yet to be stated.

As before stated, Price took back a purchase-money mortgage from Scudder, and that mortgage he foreclosed in chancery. The bill was filed November 21, 1845, and the decree of foreclosure was entered June 11, 1846. Price bid off the property, and the master's deed to him was executed September 8, 1846; and then he went into possession of the property, and remained in possession until January 28, 1855, when he died intestate, leaving several children, his only heirs at law. Scudder and various junior incumbrancers were made defendants in the foreclosure suit. But Waddell was not made a party, and hence, as to him, the foreclosure was ineffectual, and his title remained unaffected thereby.

In February, 1858, an action was commenced by one of Price's heirs against the others for a partition of the real estate left by him, including the six lots, and judgment of partition was entered, and the property was sold; but no conveyance of this lot was made, probably on account of the defective foreclosure of the mortgage. Thereafter, in December, 1858, for the purpose of perfecting the record title by foreclosing the rights of Waddell as assignee, an action was commenced by Price's administrator to foreclose the mortgage against him. He was named in the action individually, and not as assignee. He appeared in the action, and on the consent of his attorney a judgment of foreclosure was entered; and in pursuance of that judgment the property was again sold, and conveyed to Mrs. Coulter, one of the heirs, January 28, 1859. This foreclosure was still ineffectual to cut off the rights of the assignee, because he was not made a party in his representative capacity. The foreclosure was, however, believed to be effectual until, in 1889, we held in the case of Landon v. Townshend, reported in 112 N. Y. 93, 19 N. E. Rep. 424, that it was ineffectual, on the ground stated. The other heirs of Price conveyed their interests in the lots to Mrs. Coulter at various times between the last foreclosure sale and March 25, 1863. The subsequent conveyances of the lot were as follows. Mrs. Coulter to Donovan, April 10, 1863; Donovan to Adams, May 8, 1863; Adams to Whitbeck, March 25, 1864; Whitbeck to Andrew, April 1, 1867; and Andrew to William Thompson, March 9, 1868. Thompson died January 13, 1872, leaving all his right and title to the lot to these defendants, his widow and children. It thus appears that the defendants' chain of title is complete, but for the defective foreclosure of the Scudder mortgage; and we will assume, without passing upon other grounds of defense presented for our consideration, that the defendants must rely for their defense upon that mortgage, and the possession of the lot by them and their predecessors.

A purchaser at a mortgage foreclosure sale, defective and void, as against the owner of the equity of redemption, because he was not made a party to the foreclosure action, becomes assignee of the mortgage, and, if he lawfully enters into possession of the real estate purchased, he becomes a mortgagee in possession. *Robinson v. Ryan*, 25 N. Y. 320; *Winslow v. Clark*, 47 N. Y. 261; *Miner v. Beekman*, 50 N. Y. 337; *Thom. Mortg.* (2d Ed.) c. 8. Therefore, when Price purchased at the defective foreclosure sale, in 1846, he became assignee of the mortgage, and when his administrator again foreclosed the mortgage, in 1859, and Mrs. Coulter became the purchaser, she became the assignee of the mortgage; and the mortgage passed to the subsequent grantees of the real estate, and to these defendants upon the death of the last grantee. It is undisputed that Price, under his purchase at the foreclosure sale, entered into possession of this lot, and continued to possess it until his death, in 1855. His entry was lawful, under color of right, and was ac-

quiesced in by Waddell, the assignee. After his death his children, including Mrs. Coulter, were in the possession of the lot, through their tenants, and that possession, with some interruptions, has been continued by these defendants and their predecessors to this day. This lot was generally uninclosed, and was used as a garden by market gardeners. In the winter it was necessarily unoccupied, and in the summers it was cultivated and possessed in that way. Price, having taken lawful possession, never surrendered his possession. His children took possession from him, and neither they nor any of their successors in the title voluntarily surrendered the possession, or ever intended to abandon the possession. They always paid the taxes upon the lot, and always claimed title to the same. Their position as mortgagees in possession, having been once acquired, continued, unless they in some way surrendered or abandoned it. It was not destroyed by the unlawful interference of Townshend, or any other person. It does not appear that they ever acquiesced in, or ever knew of, his pretended possession or interference with the lot. A mortgagee who has lawfully taken possession of the mortgaged premises cannot be ousted or deprived of his rights as such by the mere intrusion of the owner of the equity of redemption against his will, or without his knowledge. There must be some act or omission on his part indicating a change in his position. The mortgagee who has taken lawful possession of the land pledged for his debt is not obliged to stand upon the land with a club, to keep off intruders, nor need his continued possession be of such a character as is required by the statute to create a title by adverse possession. If the land be uninclosed, he is not bound to inclose it or to cultivate it. Having taken possession lawfully, with the assent of the mortgagor or his successor, his relation to the land is not changed until, by some act or omission of his, he intentionally changes it. He may abandon or surrender the possession, or, what is the same thing, he may acquiesce in the possession of the mortgagor or his successors, thereby indicating his surrender of the pledge. Here there is not an atom of evidence tending to show that any of the parties holding under the mortgage ever intended to surrender the land, or that they knew of any possession by the plaintiff or her pretended agent, or by any act under a lease from him or her.

So, too, a mortgagee once lawfully in possession of the land, who has been wrongfully deprived of the possession by the mortgagor or any other intruder, may resume his possession, if he can, and again hold the pledge in possession. Never having voluntarily surrendered or abandoned the possession, he has not lost his right to the possession, and he may again peaceably enter into possession, and thus be restored to his rightful position as mortgagee in possession. Here it is undisputed that these defendants were in possession of the lot at the time of the commencement of this action, and for some years prior thereto. Our conclusion,

therefore, is that they are at least entitled to the position of mortgagees in possession, and that hence this action cannot be maintained against them. As this conclusion is sufficient for the affirmance of this judgment, we do not deem it important to inquire whether the defendants have any other grounds of defense to the action. The judgment should be affirmed, with costs. All concur.

(139 N. Y. 201)

CASSIDY et al. v. McFARLAND et al.

(Court of Appeals of New York. Oct. 3, 1893.)

REFERENCE—LONG ACCOUNT—COSTS.

1. In an action to foreclose a mechanic's lien, an allegation in the complaint that plaintiffs furnished material valued at \$4,382, which was used in the construction of three buildings by defendants, and a denial by defendants of sufficient knowledge or information to form a belief as to the truth of these allegations, do not show with reasonable certainty that the hearing of the case will require the examination of a long account, so as to justify the court in ordering a compulsory reference. 20 N. Y. Supp. 875, reversed.

2. The examination of a long account, which will warrant a compulsory reference, imports an actual contest as to the correctness of the different charges, or at least of several of them, a prolonged examination of witnesses on the issue, and a judicial inquiry and determination as to each one of numerous litigated items; and the necessity of making mere formal proof of the details of a claim is not sufficient to warrant such a reference.

3. If there is conflicting evidence as to whether the examination of a long account will be involved, the decision of the lower court will not be reviewed by the court of appeals; but where there is an entire failure of proof the question is purely one of law, which may be reviewed.

4. The experience of judges that proof, in mechanic's lien cases, of work done and material furnished, will generally require the examination of a long account, will not dispense with the necessity of proof of this fact; nor can the courts, from their experience, take judicial notice that the proof of such issues involves the examination of a long account.

5. An affirmance by the general term of an order of reference, "with costs," does not authorize the clerk, under Code Civil Proc. § 3251, which allows as the costs of a motion or a reference a sum not exceeding \$10, and the necessary printing disbursements, to tax any disbursements, except printing disbursements. 21 N. Y. Supp. 585, reversed.

Appeal from common pleas of New York city and county, general term.

Action by Patrick Cassidy and others against Joseph McFarland, Frederick Wood, and others to foreclose a mechanic's lien. An order of the general term (20 N. Y. Supp. 875) affirming an order of reference was affirmed on the appeal of defendants McFarland and Wood, (33 N. E. Rep. 744, mem.,) and afterwards a reargument was granted, (33 N. E. Rep. 1063, mem.) Defendant Wood also appeals from an order of the general term (21 N. Y. Supp. 585) affirming an order denying his motion for the relaxation of costs. The cause now comes on to be heard on the reargument, and on the appeal from the order denying the motion to relax costs. Reversed.

George A. Stearns, for appellants.  
Thomas C. Ennever, for respondents.

**MAYNARD, J.** This action was brought to foreclose a mechanic's lien for plumbing and gas-fitting materials furnished the defendants Gorman & Sylvander, who were subcontractors to do the plumbing in the course of the erection of three buildings in New York city for the defendant Frederick Wood, who was the contractor for the erection of the buildings for the defendant Joseph McFarland, the owner of the premises. McFarland was to pay Wood \$67,158 for the erection and completion of the three buildings, and Wood was to pay Gorman & Sylvander \$6,195 for the plumbing. The complaint alleges that the amount and value of the materials furnished by the plaintiffs is \$4,382, no part of which has been paid, except \$375; that there is more than \$4,007 due and unpaid on the contract between McFarland and Wood, and more than that sum due and unpaid on the contract between Wood and Gorman & Sylvander. Gorman & Sylvander did not plead. Two of the other defendants, Orlofski and Cornet, filed liens, and sought to foreclose them in the action, both against Wood, the contractor,—one for painting work and material to the amount of \$710, and the other for sand furnished to the amount of \$900. All of the defendants, separately answering, deny that they have any knowledge or information sufficient to form a belief as to whether the plaintiffs furnished the materials, and whether they were of the amount and value alleged. McFarland denies that there is anything due Wood on his contract, and Wood denies that he owes Gorman & Sylvander any sum on their contract. There are various other defenses, but they are not material to be considered here. The plaintiffs did not notice the cause for trial, but it was noticed by the defendants McFarland and Wood, and placed upon the calendar, and then referred by the court, upon its own motion, against the objection of the defendants, upon the ground that it appears from the pleadings that the trial of the action would involve the examination of a long account, and that no difficult questions of law were involved. The general term affirmed the order of reference, and the defendant has brought this appeal.

The order cannot be affirmed, we think, without disregarding repeated decisions of this court. In *Kain v. Delano*, 11 Abb. Pr. (N. S.) 29, it was held that a compulsory reference could not be ordered unless it affirmatively appeared that the examination of a long account was necessarily involved upon the trial. In *Thayer v. McNaughton*, 117 N. Y. 111, 22 N. E. Rep. 562, it was held that it is not enough to justify a compulsory reference that the case may, by possibility, involve the examination of a long account; that enough must be alleged or shown to justify the inference that such will be the course of the trial; and that the same rule applies to equitable as to legal actions. In *Spence v. Simis*, 137 N. Y. 616, 33 N. E. Rep. 554, it was held that a compulsory reference could not be ordered unless it appeared

with reasonable certainty that the hearing of the case will require the examination of a long account. It is not necessary that this proof shall be made by affidavit. It is sufficient if the fact clearly appears from the verified pleadings that the examination of a long account will be involved in the trial of the issues. The referable quality of the action must also be determined from the complaint. *Welsh v. Darragh*, 52 N. Y. 590; *Untermeyer v. Behnauer*, 105 N. Y. 521, 11 N. E. Rep. 847. The general term sustained the order because the plaintiff's lien was for plumbing material furnished for the equipment of three buildings, and, as they would be required to make proof of the quantity and value, the conclusion could be drawn that a long account was necessarily involved. We do not think that such an inference is permissible. For aught that appears, the materials were all furnished at one time, and constituted but one bill. Chief Justice Bronson denied a reference in *Swift v. Wells*, 2 How. Pr. 79, on the ground that one bill of goods, containing 50 different items, delivered at the same time, was but one item; and this court, in the recent case of *Spence v. Simis*, supra, held that a bill for coal and wood furnished upon 15 different occasions during a period of three years did not necessarily make a long account, within the meaning of the statute. The utmost that could properly be inferred is that there might be a separate bill for each building, and thus that there might be three items of plaintiffs' claim. But the plaintiffs allege that the defendants Gorman & Sylvander agreed to pay for the materials furnished a specified sum in gross; and if this allegation is sustained by the proof, as it may be, no investigation would be necessary in regard to the value of the several items, however numerous. It is also apparent from the condition of the pleadings that it is not probable that there will be any actual controversy as to the materials furnished, or their value. The defendants Gorman & Sylvander, who purchased them, make no defense, and so admit the averments of the complaint, for the purposes of this action. They are, presumably, the only parties, other than the plaintiffs, who have any personal knowledge upon the subject. The other defendants do not deny that the materials were furnished, and that they were of the value alleged, or that Gorman & Sylvander agreed to pay the price specified, or that they were used in the construction of the buildings. They are content to allege that they have no knowledge or information sufficient to form a belief as to the truth of these allegations. It must therefore be presumed that there is no witness, or other source of proof known to them, by means of which the falsity of the plaintiffs' demand can be established, or they could not have truthfully made this statement on oath. It is true that by this form of denial the plaintiffs may be required to make proof of the details of their claim. But the examination of a long account, which the Code contemplates, is something more than mere formal proof of its existence. It imports an actual contest as to the cor-

rectness of the different charges, or at least of several of them, a prolonged examination of witnesses upon the issue, conflicting proof, and a judicial inquiry and determination as to each one of numerous litigated items. Although, under a denial of this kind, the plaintiffs may be compelled to prove the sale and delivery of each article, yet if this proof is not controverted, so as to bring directly in issue each item or several items, with respect to their delivery or their value, it is plain that there will not be such an investigation of a long account, within the meaning of the statute, as to authorize a compulsory reference.

It is insisted that under the pleadings the plaintiffs must prove performance by Gorman & Sylvander of their contract with Wood, and the amount due from Wood, and also performance by Wood of his contract with McFarland, and the amount due from McFarland; but it does not follow that the examination of a long account would be necessarily involved in such proof. The amount to be paid the contractor in each case was a lump sum, and payments made thereon would not ordinarily be deemed an account, in the legal sense. Whether the work had been done as agreed would require a reference to the contract, plans, and specifications, and it may be an examination of the work in detail; but it cannot be presumed or inferred that the solution of such a question will, of necessity, impose upon the court the labor of determining the correctness of a disputed or complicated account. Trial by a referee is an exceptional mode of judicial procedure, and, when it is sought to coerce a suitor into a submission to it, the burden is upon the party applying for a reference to show by satisfactory proof that the case is within the excepted class. The rule is not different where the court, upon its own motion, undertakes to compel a reference. If there is conflicting evidence as to whether the examination of a long account will be involved, the decision of the court below will not be reviewed here, (*Welsh v. Darragh*, 52 N. Y. 590;) but where there is an entire failure of proof upon the point, as we think there is in this case, it becomes purely a question of law for our consideration.

The claim is made that experience has fully proved that "the proof of work done and materials furnished in mechanic's lien cases, under allegations such as are contained in the pleadings before us, always involves the examination of a long account," and that judicial notice might be taken of the knowledge which the court has thus acquired by experience in this class of cases. While a court may take judicial notice of what ought to be generally known, within the limits of its jurisdiction, the experience of judges in the trial of causes, however valuable it may be as an aid in the administration of justice, cannot be substituted for proof of an essential fact upon a judicial hearing. The results of the experience might vary with the different judges selected as the subjects of it. If we were to decide from the records which come here, we would be

compelled to say that it has not infrequently happened, in this class of cases, that there was no real contest over any matter of account, but the questions actually litigated have involved the relative liabilities of owners, contractors, and subcontractors, and the conflicting rights of lienors, and other controversies not in any wise involving the examination of a long account. As it is conceded that a trial of this cause has been had before the referee, we have been reluctant to reach a conclusion which will require a reversal of the order; but it cannot be avoided, we think, without overturning well-established principles which affect the substantial rights of litigants.

There is also an appeal here from an order of the general term affirming an order of the special term denying a motion for a retaxation of costs. Upon the appeal from the order of reference, the general term made an order affirming the same, "with costs," and not allowing any disbursements. The respondents procured the clerk to tax \$10 costs, and \$9.06 disbursements for affidavits and acknowledgments, certified copies of orders, sheriff's fees on execution, and printing points. The appellants objected to the taxation on the ground that the clerk had no authority to tax costs or disbursements; that the order of the general term did not fix the amount of costs; and that no disbursements could be allowed on the motion, except printing,—and moved at special term for a retaxation, which was denied. We think the motion should have been granted, and the taxation set aside. Costs are the creature of the statute, and cannot be imposed except in the cases authorized by its provisions. The clerk has no authority to tax costs, except such as may be conferred upon him by the statute, or by the order of the court. The hearing of the appeal at general term is to be regarded as a motion, for the purpose of costs, and the same sums might have been allowed as on the decision of a motion,—\$10 and printing disbursements. Section 3251, Code Civil Proc. If this provision does not apply, then there is no authority for the allowance of costs upon such an appeal. Section 3256 has no application. It refers only to costs awarded in an action. Under section 3251, the costs must be fixed by the court at a sum not exceeding \$10. This was admitted in the present case. As the customary allowance is the full sum of \$10, the decision of the court that the respondent have costs might properly be deemed a direction that he have the full amount, and the prevailing party might have caused that sum to be inserted in the order of affirmance, when entered, and, omitting to do so, the court might have amended the order upon motion. The order did not allow any disbursements. The utmost which could have been granted, under section 3251, were those for printing. The court is not required to fix the amount of these disbursements, but might direct in the order that they be taxed by the clerk. Without such a direction, the clerk would have no authority to fix their amount. When so ordered, he may adjust them, and note

his adjustment on the foot of the order, which will then show the exact amount of costs and disbursements allowed, and for the collection of which a precept can be issued. The order of reference must be reversed, but, as it was not made upon the respondents' motion, the reversal should be without costs in any court. The order denying the motion for a retaxation must be reversed, and an order entered setting aside the taxation, with costs. All concur.

(139 N. Y. 128)

**SPRUCK v. McROBERTS et al.**

(Court of Appeals of New York. Oct. 3, 1893.)

**MECHANICS' LIENS—CONSENT OF OWNER.**

Where a contractor agrees to construct a building for persons wrongfully in possession of land, with full knowledge that their title is disputed, the mere silence of the true owner, or his omission to forbid the contractor from proceeding with the building, is not an implied consent by him to its erection, so as to subject the land to a lien in favor of the contractor, after the owner, who has at all times and in all reasonable ways repudiated the wrongdoers' possession, has finally recovered the land in ejectment. 19 N. Y. Supp. 128, reversed.

Appeal from supreme court, general term, second department.

Action by Henry Spruck against Hugh McRoberts and others to foreclose a mechanic's lien. From a judgment of the general term (19 N. Y. Supp. 128) affirming a judgment in plaintiff's favor, entered on the report of a referee, defendant McRoberts appeals. Reversed.

William M. Mullen, for appellant. Oscar Frisbie, for respondent.

O'BRIEN, J. The plaintiff recovered a judgment directing the sale of certain lands of the defendant McRoberts to satisfy a mechanic's lien, which it was claimed the plaintiff had under the provisions of chapter 342 of the Laws of 1885. The notice of the lien was filed in the proper county on the 11th day of April, 1889, against one George Tarter and his wife, as the owners of the land, and the defendant McRoberts is not referred to therein as owner or otherwise. The plaintiff entered into a contract on the 18th of November, 1888, with Tarter and his wife, for the erection of an hotel building on the lands, at a cost of over \$6,000, and was paid by them from time to time, during the progress of the work, and in pursuance of the contract, about \$5,000. The defendant is in fact the owner of the land, and was when the contract was made and the building erected; but some time before the contract was made, the Tarters went into the actual possession, under title hostile and adverse to the defendant, and kept their possession and assumed to be the owners, in hostility to the defendant, until the 2d day of January, 1890, when they were compelled to surrender the premises to the defendant, under a judgment and execution in an action of ejectment. This action was commenced against the Tarters, their grantors and

others, on the 27th day of March, 1889, by the service of a summons and complaint, and the filing thereof, with a notice of the pendency of the action in the county clerk's office of the proper county. The plaintiff by his contract was to complete the building on or before May 1, 1889, and it was completed substantially according to the contract, a considerable part of the work having been done after the defendant had brought the action to recover the land upon which the structure was being erected. There can be no doubt upon the finding that the plaintiff entered into the contract and erected the building upon the faith of the title and responsibility of the Tarters, and trusted to them and their title for payment of his compensation. The referee has found substantially that the plaintiff, before entering into the contract, was notified by different persons that the land belonged to the defendant, and to have nothing to do with the erection of the building, to which he replied, in substance, that he was willing to take his chances; but the force of these facts was evidently much impaired in the mind of the learned referee by the circumstance, which he finds, that this notice was not given in pursuance of any authority or request from the defendant himself. One of the persons who thus warned the plaintiff of the danger of making any expenditure upon the land on the strength of Tarter's title was the attorney of record for the defendant in this action, and it is a fair inference from the whole record that he acted for the defendant, or at least obtained the information from him. But, however that may be, the important fact cannot be ignored that the plaintiff, before he made any contract to build, and before he incurred any expense, was fully informed, not only of these statements, but, by his own inquiries and investigations, as to the condition of the title; and that, with full knowledge of all the facts, he deliberately elected to enter upon and perform the contract for the construction of the building upon the faith of a title which proved to be utterly invalid, and also in reliance upon the pecuniary responsibility of parties who failed to pay the contract price in full. The record does not disclose the slightest ground for supposing that the plaintiff's conduct in this respect was influenced in any degree by any word, act, or omission of the defendant, and, so far as the plaintiff seeks to sustain the judgment upon general principles of equity these considerations are important.

The statute which gives to a contractor, mechanic, or material man a lien upon the lands of another created a remedy in such cases which was unknown to the common law, and, while it must receive a liberal construction to secure the beneficial purposes which the legislature had in view, it cannot be extended to a state of facts not fairly within its general scope and purview. *Spencer v. Barnett*, 35 N. Y. 94; *Tiley v. Hotel Co.*, 9 Hun, 424. The statutory incumbrance is imposed upon real estate in such cases only when the work is performed or materials furnished in pursuance of some contract with the

owner, who is sought to be charged, or whose interest is to be affected, or when his consent is in some way established. It is not claimed that the defendant ever made any contract with any one that connects him in any way with the work or material that the plaintiff put upon the land. The judgment proceeded, and has thus far been upheld, upon the sole ground that the building was erected with his consent. It is not and obviously cannot be urged that any express consent is shown. The most that can be claimed is that the defendant knew what was being done by the plaintiff, and failed to forbid or prevent him. There is not the slightest reason to believe that anything the defendant could have said to the plaintiff would have influenced his action or changed his resolution to take the chances upon his contract with Tarter. The latter agreed to pay him \$8,860, and actually did pay \$5,000, and no doubt the plaintiff would have been successful in collecting the whole sum from the parties who agreed to pay had the judgment in ejectment been delayed or given against the defendant. The result of that suit was a contingency which evidently did not enter into the plaintiff's calculations at the time he entered upon the performance of the contract to build, though the information in his possession or within his reach might very well have foreshadowed the risk involved. If the defendant had consented to the expenditure made by Tarter upon this land, that fact might have been a very serious obstacle in the way of his action to recover it; or even if, with knowledge of all the facts, he looked on and allowed an innocent party, believing that he had the title, to make valuable improvements upon it without objection, equity might hold him estopped from afterwards calling in question the title of a party who had acted upon the faith of his silence. But these principles have no application to this case, for the plain reason that it does not appear that the defendant failed in any duty that the law imposed upon him, or that the plaintiff acted otherwise than upon his own judgment, having knowledge of all the facts.

The defendant had been ousted from the possession of his land by parties claiming title, but who were in fact mere trespassers; and while thus out of possession, and wrongfully deprived of any control or dominion over it, the plaintiff contracted with the wrongdoers to erect a building on the land. His security for the payment of the contract price of the building under these circumstances was the personal responsibility of his employees, and their interest, whatever it might turn out to be, in the land. In the absence of proof connecting the defendant with the contract, or showing that he consented to the work, neither he nor his title is bound by what was done. When a contractor, mechanic, or material man proposes to erect a building, or to expend labor or material upon land, under a contract with a person in possession, it is incumbent upon him to inquire and to assure himself of the fact that the person with whom he contemplates making the contract, or for whose

benefit he is about to employ labor or materials, has in fact such an estate or interest in the land as will enable him to assert a statutory lien. If he fails to do this, or is mistaken in his calculations and contracts with a person without title, the statute does not impress a lien upon the estate of the true owner, unless he is in some way connected with the contract, or has given his consent to the expenditure in such manner as to bind him within recognized principles of equity. The cases relied upon by the learned counsel for the plaintiff to support the judgment are clearly distinguishable from this, as in all of them the actual owner had in some way authorized the improvement, or was related to the contract, or had given his consent, or, having the control or possession of the property, his consent was found as a fact from circumstances, and such finding was a just and reasonable inference from his conduct. *Schmalz v. Mead*, 125 N. Y. 188, 26 N. E. Rep. 251; *Otis v. Dodd*, 90 N. Y. 338; *Husted v. Mathes*, 77 N. Y. 388; *Burkitt v. Harper*, 79 N. Y. 273; *Cowen v. Paddock*, 137 N. Y. 188, 33 N. E. Rep. 154. The record in this case discloses no such element of consent. The defendant's position was that the possession of Tarter and his wife was wrongful from the beginning, and that they were trespassers upon his property. He not only refused to sanction any act of ownership or dominion on their part over the property, but actually brought an action to eject them therefrom a very short time after the plaintiff entered into the contract with them, and before it was performed, and there can be little doubt from the record that the plaintiff had full information as to his attitude. At all times, and in all reasonable ways, the defendant resisted and repudiated the Tarters' possession and claim to the property, and the plaintiff, having acted under their authority solely, cannot, under the circumstances, be awarded any greater or different measure of relief than they could assert themselves.

The defendant having been deprived of the possession and control of the property, and his rightful relation to it having been usurped by a trespasser, his mere silence, if it be assumed, or his omission to forbid the plaintiff from proceeding under his contract, cannot be construed into consent on his part to anything that was done by the parties in possession, or by the plaintiff acting under their authority. The true owner was not bound to seek out the plaintiff, or any one else acting under a hostile claim, and inform him of his rights at the peril of subjecting his property, which at all times he was seeking to recover, to the burden of a lien based upon acts manifestly wrongful, and against which he in every proper way protested. *Cowen v. Paddock*, supra. The situation is not changed by the fact, if it be so, that the defendant's property has been enhanced in value by the plaintiff. A learned authority on the law of damages, in discussing the rule applicable to cases quite analogous, remarked that "the improvements may be very valuable, but they may be quite unsuited to the use which



the plaintiff intends to make of his land. Even if they are such as he would wish to make, they may also be such as he could not have afforded to make. To compel him to pay for them or to allow for them in damages, which is all the same, is quite as unjust as it would be to lay out money in any other investment for a man, and then compel him to adopt it *volens volens*." *Mayne Dam. 255; Woodhull v. Rosenthal, 61 N. Y. 397*. One cannot make improvements upon the land of another without his consent, and charge him with their value; and, as the defendant's consent to the erection of the building cannot be implied from the facts in this case, the recovery cannot be sustained upon any just or fair construction of the statute in regard to mechanics' liens, nor upon any principle of equity. The judgment should therefore be reversed, and a new trial granted, costs to abide the event. All concur.

(139 N. Y. 237)

**EQUITY GASLIGHT CO. OF EASTERN DISTRICT OF CITY OF BROOKLYN v. McKEIGE.**

(Court of Appeals of New York. Oct. 3, 1893.)  
CORPORATIONS—CANCELLATION OF STOCK—RIGHTS AGAINST DEPOSITOR.

Plaintiff issued 30,000 shares of its stock to its president, and deposited the certificate thereof with defendant, to be delivered to W., P., and M. on completion of certain work they had contracted to do for plaintiff. The work was never commenced, and W., who had been principal actor in the transaction for the three, executed a release to plaintiff, signing thereto the names of P. and M. The genuineness of the written authority from M. to sign was disputed, but not disproved. *Held*, that defendant was properly directed to deliver up the stock. 19 N. Y. Supp. 914, affirmed.

Appeal from supreme court, general term, second department.

Action by the Equity Gaslight Company of the Eastern District of the City of Brooklyn against Ferdinand McKeige to compel defendant to surrender for cancellation certain shares of stock deposited with him to be delivered on condition to third persons. From a judgment of the general term (19 N. Y. Supp. 914) affirming a judgment in favor of plaintiff, defendant appeals. Affirmed.

On the 27th of August, 1889, plaintiff issued to its president a certificate for 30,000 shares of its stock. The plaintiff had just before that made a construction agreement with George F. Work, Louis E. Pfeiffer, and John Macfarlane. The certificate was to be deposited with the defendant until the agreement was fulfilled by the contractors. The work was never commenced by the contractors. The defendant was the treasurer of the plaintiff, and knew of the agreement, and the same is specified in the receipt which he gave to the contractors for the stock. On the 21st of November, 1890, the contractors authorized the cancellation of the stock certificate. This authorization was not signed by Macfarlane personally, but was signed by Work in his name. Work had been a principal actor for all the firm of contractors, and had given an order on

the defendant in October, 1890, to deliver up the stock to the plaintiff's president. It was proven that Pfeiffer had given authority to Work to sign this order for him. On the 27th of November, 1890, the contractors gave a general release to the plaintiff. Work signed this paper for Macfarlane. The material dispute in the case was as to the authority of Work to act for Macfarlane. In the early part of 1890, Work gave to the plaintiff's president a paper purporting to have been signed by Macfarlane, stating that any agreement made between the plaintiff and Work and Pfeiffer would be satisfactory to him.

Gratz Nathan, for appellant. Horace Graves, for respondent.

ANDREWS, C. J. The contract upon which the certificate of stock was placed in the hands of the defendant as bailee was never performed by Work, Pfeiffer, and Macfarlane, and upon the facts found the plaintiff was entitled to a return of the certificate. The only defense which the defendant urges in answer to the claim of the plaintiff for the surrender of the certificate is that a judgment against him in this action will not conclude Work, Pfeiffer, and Macfarlane in any suit they may hereafter bring against him as bailee. The fact that a party may possibly be subjected to a double recovery in the same matter in suits by adverse claimants is not a reason for denying relief to a party who comes into court alleging and proving his right to the thing demanded. The defendant may ordinarily protect himself by bringing a suit in the nature of a bill of interpleader, making the different claimants parties. *Ball v. Liney, 48 N. Y. 6*. Upon the evidence and findings the plaintiff established its right to a return of the certificate. The consent of Work and Pfeiffer that it should be returned was made known to the defendant before the action was commenced. Macfarlane had also consented, provided Work was authorized to sign his name to the order drawn on the defendant. This question was litigated on the trial, and found in favor of the authority upon sufficient evidence. There seems to be no merit in the effort of the defendant to prevent the company from regaining possession of the certificate. The judgment should be affirmed. All concur.

(139 N. Y. 185)

**PEOPLE v. BINGHAMTON TRUST CO.**  
(Court of Appeals of New York. Oct. 3, 1893.)  
SAVINGS BANKS—UNLAWFUL SOLICITING OF BUSINESS.

Laws 1882, c. 409, § 283, making it unlawful "to advertise or put forth a sign as a savings bank, or in any way to solicit or receive deposits as a savings bank," does not forbid the carrying on of a business substantially as that of a savings bank, but it only forbids the conducting of such business under a claim or pretense of being a savings bank. 20 N. Y. Supp. 179, affirmed.

Appeal from supreme court, general term, fourth department.

Controversy submitted without action between the people as plaintiff and the

Binghamton Trust Company as defendant for the recovery of a penalty for unlawfully soliciting business as a savings bank, and for an injunction. There was a judgment in favor of defendant, (20 N. Y. Supp. 179,) and plaintiff appeals. Affirmed.

Simon W. Rosendale, Atty. Gen., and W. D. Painter, Dist. Atty., for the People. W. J. Welsh, for respondent.

GRAY, J. In this action the people of the state, by their attorney general, seek to recover a judgment in their favor, which shall decree that the defendant is exercising franchises not conferred upon it by law, and which shall adjudge in their favor and against the defendant for the amount of the penalty prescribed for carrying on business in violation of section 283 of chapter 409 of the Laws of 1882, known as the "Banking Law." By that section it is made unlawful for any corporation, association, or person "to advertise or put forth a sign as a savings bank, or in any way to solicit or receive deposits as a savings bank;" and for every offense against these provisions the offender "shall forfeit and pay \* \* \* the sum of \$100 \* \* \* to be sued for and recovered in the name of the people of the state, by the district attorneys of the several counties, for the use of the poor, chargeable to said county in which said offense shall be committed." The district attorney did not bring this action, but he has joined in its submission. Inasmuch as no objection has been raised to the form of the action, and in view of the public interest in a determination of the issue raised, we shall pass over any question of that kind, and we shall assume that a recovery might be had in such an action if, upon the facts established, a violation as alleged is made out.

The facts were agreed to by the parties. It appears that the defendant's mode of doing business is to issue a pass book to customers upon the receipt of deposits, containing sundry so-called "rules governing deposits;" that it issued and distributed a circular descriptive of the nature of the corporate business, and pointing out the advantages to the public in dealing with the company; and that it also published in the papers a certain advertisement descriptive of its business. With respect to the pass books issued by this defendant, it was argued that, as they were exactly similar to those issued by savings banks, in the feature of a set of interest rules, a violation of the banking law is evidenced. Whether it is true that the pass books are alike in the feature alleged we cannot say, inasmuch as the fact is neither admitted nor shown by the record. But, assuming that such likeness exists, are we then to say that there has been a violation of the law? If those rules are such as savings banks have adopted in their relations and dealings with depositors, I see nothing in them but a regulation of the manner of doing business, which has nothing in its nature to make it so peculiarly appropriate to the savings bank business, as, in the view of the law, or of the ordinary mind, to constitute any test of

the organic business, or that the rules are other than would be appropriate for adoption for the regulation of any business in which deposits of money are received and held upon an obligation to pay interest. I do not see that the rules which are given in the circular as governing the "interest department," and which are printed in the pass book, are such as should be confined in their use to a savings bank business. They are eight in number. The first states the hours for business; the second, that entries of deposits and withdrawals of moneys are made through a pass book; the third, that to draw out moneys there must be a written order or check, and that the right to withdraw is subject to a condition, to be imposed at the option of the company, requiring a certain notice to be given, varying with the amount proposed to be drawn; the fourth fixes the rate of interest which will be paid on deposits left for three months, and states how it will be compounded and computed; the fifth reserves a right to the company to close and refuse accounts; the sixth states that moneys may be deposited for minors under written directions; the seventh provides for the case of a loss of the pass book; and the eighth states that the acceptance of the pass book, with its entries, shall be the evidence of an agreement by company and depositors, to be governed by these rules. The trust company has the power, under the fourth section of the act under which it exists, "to receive deposits of trust moneys, securities, and other personal property from any person or corporation, and to loan money on real or personal securities." With this rather broad privilege, and having the power, by its first section, "to make contracts," there can be no question as to its right to agree with its depositors with respect to their relative duties and obligations. That agreement is embodied in the eight rules, and in no one can we find any such innovation upon commercial practices, or such a novelty in idea, as to characterize it as especially applicable to any peculiar institution. These rules are, evidently enough, the product of a consideration of the nature of the obligation which the trust company assumes towards the depositor, and of certain prudential requirements, which have been suggested by a business sense and by the experience of men, founded upon commercial transactions and crises. The company's power, by the eleventh section of the act, over the deposits, extends to a use of them in making loans, and in a pretty wide range of investments. Its relations with a depositor are, obviously, those of debtor and creditor. The moneys belong to the company when deposited, and through their use, in the permitted ways, are gained the moneys from which to make the interest payments agreed to. Without being a banking corporation, as such is legally understood, it is a moneyed corporation, and possesses many of the powers of a banking corporation, as may be inferred from the eleventh section, in prohibiting a construction which would authorize the issuance of bills to circulate as money. These cl.

cumstances sufficiently show that in the formulation of rules to govern deposits the company but compels the adoption of a reasonable and prudential agreement as the basis of its relations with a depositor. The statute has not prescribed a set of rules or of regulations for doing business with depositors, for the adoption by the one or the other class of corporations; nor has it done anything more than to define and limit their powers, duties, and privileges. I know of no principle of law which, as to commercial transactions within their chartered powers, and involving the receipt or borrowing of, and the obligation to repay, moneys, denies the entire freedom to regulate them by such a contract as the parties are willing to enter into.

The learned attorney general, conceding that trust companies may receive deposits of moneys, and may pay interest upon them, argues that they may not transact or regulate their business upon the general plan, or in the manner usually adopted by savings banks. Why may they not? Can there be such a thing as an exclusive appropriation of a system of conducting commercial transactions, and thereby to symbolize it to the world? I do not think that savings banks, however closely in the public interest they should be guarded, should be accorded a monopoly of any set of business rules. The vice of the position taken for the people in this controversy seems to be found in attaching a wrong sense to the language of the section. The prohibition is that a corporation shall not "solicit or receive deposits as a savings bank." It would not be correct to interpret that language as though its literal reading were "to solicit or receive deposits as a savings bank solicits or receives deposits." That would, in my opinion, impute to the legislature an unnecessary intention. I think it plain that it embodies the legislative intention that a corporation shall not, in soliciting and receiving deposits, represent or hold itself out as a savings bank, so as to deceive the public. Unless it can be established that in the acts of issuing the circular and of publishing the advertisement in question there is either a soliciting of deposits from the public in the character or under the pretense of being a savings bank, or an advertising of the corporate business in such manner as to deceive persons into believing it to be that of a savings bank, we could not say that any violation of the law has been made out. It ought to be plain to the ordinary mind, in reading the circular, that the features described to the public as being valuable and attractive mark the company at once as being other than a savings bank, and as possessing several attributes and capacities very different from those of banks for savings. It sets out by announcing to the public its corporate title, and its readiness to receive deposits of money, and to transact such other business as its charter permits. It describes the advantages which trust companies offer by reason of having a capital, and being subjected to certain legal restrictions, and their greater safety as deposi-

taries which people may trust with their savings. It sets forth the amount of its paid-in capital, mentions the liability and solvency of its stockholders as an added security to the depositor, describes its investments, narrates the powers conferred by the charter, and under the heading of "An Interest Department" gives a set of rules which are the same as printed in the pass book, and which have been described. It explicitly says that it "differs from a savings bank in that it has a large capital invested that is pledged as security to its depositors." The whole circular is the company's prospectus, setting forth the advantages and superiority of trust companies in general as depositaries of the people's moneys, and of this company in particular; not because of any special legal attributes, but because possessing, in connection with its organization and management, certain solid and attractive features. There is nothing in the paper which should lead minds of the plain order to suppose that the corporate business was that of a savings bank; and the only feature of corporate resemblance is in the soliciting of deposits in the manner in which they would be received and held. That, however, is not a business distinctively and exclusively of a savings bank. Nor is the published advertisement of the defendant subject to any other legal criticism than is the circular. The advertisement is not that the defendant could or would do business as a savings bank; and, no more than the circular, does it hold the company out as a savings bank.

In discussing whether acts were in violation of law, I have, of course, had in mind the statutory prohibition or provision in the section of the banking law referred to. I have not had reference to the statute under which the defendant is incorporated. We are not concerned with the question of whether it has violated any provision of its charter. That question is not here. If there has been any such violation, or an exercise of powers or privileges not conferred by law, that question can only be raised and tried out in another form of action provided to be brought by the attorney general. That with which we are alone concerned is whether the inhibition in the banking law is met by the facts of this case, so as to render the defendant amenable to the penalty prescribed for a violation. I think it clearly is not. The provision is only aimed at preventing a deception from being practiced upon the public by sign or representation. It is intended to act as a safeguard to what, under the legislation in the state, exists with respect to corporations which are created to become safe depositaries of the people's moneys, and which are designed solely for the public advantage, and not for the promotion of any private interests of the organizers or members. If we were called upon to discuss the relative advantages of the two classes of institutions in the feature of security offered to the depositor, it might be said that the trust company is the safer in the added resource of a capital stock. Each is placed under a supervision by the state government, and the difference in the powers or in the restric-

tions imposed upon the use or investment of moneys rests upon the difference in the purposes for which incorporated. The trust company is incorporated for the purpose of gain to the members of the corporation, while the savings bank is in the nature of a charitable institution, the sole corporate purpose of which is to securely protect moneys deposited up to a certain fixed amount by individuals, and, by investing them in such limited and prudent ways as the legislature has prescribed, to secure a safe and moderate return by way of interest upon the moneys held. What ever tends to the protection of a bank for savings is in the public interest, and it is in the line of that protection that any appearance or external sign or representations should be prohibited which would deceive and cause the public to suppose that a business institution, really organized for the gain of its members, was a savings bank. But the line ends with securing that general protection against public deception, and does not project itself into the mere methods by which transactions with depositors or dealers are conducted. There can be no exclusive appropriation of business laws or business methods. Where commercial transactions are alike in their character, the parties to them are entitled to make use of the same business rules, and to contract in the same manner respecting them. I think, for these reasons, that the judgment of the general term was right, and should be affirmed by us, with costs. All concur, except MAYNARD, J., not voting.

(139 N. Y. 389)

## KAARE v. TROY STEEL &amp; IRON CO.

(Court of Appeals of New York. Oct. 3, 1893.)

## REVIEW ON APPEAL — WEIGHT OF EVIDENCE — INJURY TO EMPLOYE — NEGLIGENCE OF MASTER — ASSUMPTION OF RISK.

1. Where there is a vast preponderance of evidence in favor of defendant, whose witnesses are apparently entitled to credit, while plaintiff's case stands on his own evidence but slightly supported, the refusal to defendant of a new trial is subject to review by the general term. 19 N. Y. Supp. 789, reversed.

2. An employe who uses a platform for two weeks without objection, and who is fully able to appreciate the risk arising from its deficiency in width, assumes such risk, and cannot recover for injuries resulting therefrom.

3. The existence, in a platform used for wheeling barrows, of a depression, caused by use, a quarter of an inch in depth, so small as to escape the attention of many persons using the platform, is not evidence of such negligence as to make the employer liable to a workman injured thereby.

4. An employer who furnishes to night workmen enough torches to light the platform where they are working is not responsible for an injury to one of the workmen arising from their failure to light more than a part of the torches.

O'Brien and Maynard, JJ., dissenting.

Appeal from supreme court, general term, third department.

Action by Jens Kaare against the Troy Steel & Iron Company for personal injuries. From a judgment of the general

term (19 N. Y. Supp. 789) affirming a judgment for plaintiff, defendant appeals. Reversed.

R. A. Parmenter, for appellant. G. B. Wellington, for respondent.

EARL, J. In the night of June 13, 1887, the plaintiff was in the employment of the defendant as a laborer, and while engaged in wheeling a load of slabs over an elevated platform into its boiler house on Breaker Island he fell from the platform, and was seriously injured, and this action was commenced by him on the 3d day of December, 1889, to recover for his injuries. The account he gives in his evidence of the accident which befell him is as follows: He had been at work for the defendant on the island about two months, and for about two weeks had wheeled coal over the platform into the boiler room. One of those weeks he worked in the daytime and one in the nighttime, and he had commenced his night work in the third week. He had wheeled coal all day on Sunday, June 12th, and between 1 and 2 o'clock on Monday morning the supply of coal was exhausted, and he, Sullivan, Keeler, and other workmen, were ordered by Mr. Stevenson, the night boss, to wheel slabs to the boiler room for fuel; and he and the others asked Stevenson to wait until daylight, as the platform was dangerous to work on when they could not see. He nevertheless ordered them to proceed with the work of wheeling the slabs upon wheelbarrows. The plaintiff loaded the slabs, which were about two yards long, crosswise upon his barrow. The platform was made of two planks, each one foot wide, and ascended, so that it was 15 feet high where he fell. There were no guards on the sides of the platform, and no lights so that he could see ahead at the place where he fell. There was a hole in the platform which he could not see on account of the darkness, and when the barrow struck that as he was wheeling the first load of slabs, it tipped over, the slabs struck against the door of the boiler room, and he was thereby thrown off from the platform. It was the hole in the platform which tipped over the barrow, and caused the accident. The hole had been there about two weeks, and he had frequently seen it, and had several times called the attention of Mr. Cooper, whom he styled the "head boss," to it, saying to him that it was dangerous in rainy weather, and slippery. Other workmen had also called his attention to it, and he said he would see about it. He gave no particular description of the hole when he was first examined. But the plain inference is that it was not there when the platform was built; it was not through the platform; it was a mere imperfection or depression, caused by the use of the platform. Keeler had preceded him with a load of wood in safety. This is the story of the plaintiff as to the cause and manner of the accident. He called no witnesses whatever to confirm it in any respect. As to the width of the platform, and its height, and as to the lights and

the hole, he is his only witness. There must have been numerous persons who knew the condition of the platform. If he told the truth about it, and yet he did not call one of them.

The defendant called several witnesses as to the condition and use of the platform, as follows: Martin Fay, who had been in the employ of the defendant for many years, a millwright and carpenter, built the platform, in the early part of May, 1887, of oak, spruce, and pine, seven feet wide, of seven planks. There was no defect in any of the planks, and the platform was built wide enough so that two men with barrows could use it at the same time, one going up and the other down, and there was plenty of room for them to pass each other. The door of the boiler room into which the men wheeled the slabs was four feet and six inches wide. The height of the platform at the lower end was six feet and six inches, and at the upper end at the boiler room seven feet above the filling under it. He saw the platform, and passed over it every day after it was built, and it was in good condition, and there was no hole in it. There were pieces of scantling spiked on the sides of the platform to hang torches on. He saw the platform as late as 8 o'clock in the evening before the accident, and it was well lighted, so that one could see all around on both sides of it. The workmen had had no difficulty in working on this platform before. Hugh Munroe, a foreman in the employ of the defendant, gave evidence in all essential respects confirming that of Fay. He assisted in building the platform, and said he knew there were seven planks, three inches thick, and that it was seven feet wide. The morning after the accident, he and others examined the platform, and there was no defect or hole in any of the planks. The platform, at the time of the trial, was seven feet wide, and in that respect had never been changed since it was built. Mr. T'ouceda, a civil engineer and chemist in the employ of the defendant, testified that the length of the platform was eighty feet, and that it was eight feet high at the highest point, and that the boiler room door was four feet six inches wide. Mr. Keeler, at the time of the accident one of the defendant's workmen, testified, in substance, that at that time he was working with the plaintiff, wheeling wood over the platform; and when the plaintiff fell he was wheeling a load of wood about six feet behind him. They had been wheeling wood about an hour before the accident occurred. The slabs were four feet long. He loaded the slabs on his barrow lengthwise of the barrow, and wheeling until 6 o'clock in the morning he had no trouble on the platform, which consisted of seven planks, each ten or twelve inches wide. There were a good many men engaged in wheeling the wood, and they wheeled the loaded barrows up on one side of the platform, and came down with empty barrows on the other side. There were lights hung on both sides of the platform, and there was plenty of light, so that the whole of the

platform could be seen. The plaintiff was close by the boiler-room door when he fell, and the slabs were piled on his barrow crosswise. Either the wheels of the barrow or the slabs struck the side of the doorway, and thus caused the accident. He never discovered any hole in the plank, and there was none, and he never made any complaint of the hole or of the platform, or heard any one else make any. At the time he gave his evidence he was not in defendant's employ, and had not been for two years. Mr. Trowbridge worked for the defendant in 1887, and was night timekeeper. He was well acquainted with the platform, examined it, and went back and forth upon it every night. There were seven planks, side by side, on the platform, which was seven feet wide; and, in wheeling, men with loaded barrows would go up on one side, while men with empty barrows came down on the other side. From the time the platform was built to the time of the accident he saw it every night, and there was no change in its width, and it was safe and strong. John Sullivan testified that he was working for the defendant at the time of the accident; that he was wheeling coal and wood that night over the platform; that the platform was six or seven feet wide; that he made no complaint, and heard no complaint by any one of the platform; that there was a depression worn by the barrows in one of the planks, of about one-quarter of an inch, which did not amount to anything, and did not cause any difficulty in the use of the platform; that the platform was about two feet wider than the door of the boiler room; that the platform was well lighted with torches, and that he could see plainly. Thomas Stevenson, who was at the time in the employ of the defendant, and had charge of the men working at the time of the accident, testified that he was standing right by the boiler-room door when the plaintiff fell; that the wood on the barrow hit the side of the door, and caused him to fall; that his attention was never called to any defect in any plank, and he never discovered any; that no one made any objection to wheeling wood on any ground; that he is positive that the plaintiff had wheeled wood over the platform that night, before the trip upon which he fell; that he told the men to pile the wood on the barrows lengthwise of the barrows, and not crosswise; that the wood struck the side of the door because it was piled crosswise; that the platform remained just as it was originally built; that it was well lighted with torches which threw their light across the platform,—perfectly light; that 30 torches were furnished, and the men lighted as many as they wanted,—not all of them; that he had not been in the employ of the defendant for the past three years. Samuel Hurlburt testified that he knew the platform was built in the forepart of May, 1887, and that there never was any other platform there.

After the defendant had rested its case, the plaintiff was recalled, and he described what he called the hole in the plank as

follows: "It was a kind of split that was taken out of the plank,—worn like. It was worn down in the plank. It was worn down like,—a split. There was a kind of hole. It was worn down like a split that had gone out. The hole did not go through the plank. It was about three feet from the boiler room." and he reiterated his statement that there were but two planks, about a foot wide each, in the platform, and that there never were any torches lighted on the side of the platform.

There was no proof or claim that any accident had before happened upon this platform, although it had been used night and day for more than a month. At the close of the evidence the defendant moved that the plaintiff be nonsuited, on the grounds that there was not sufficient evidence of its negligence, and that he had not shown affirmatively his freedom from negligence; and the judge denied the motion. The judge submitted the case to the jury for them to determine whether the defendant was chargeable with negligence on account of the alleged defect in the plank and the alleged absence of lights upon the platform, and the jury found for the plaintiff a verdict of \$1,000. The defendant moved for a new trial upon the judge's minutes, and that motion was denied, and judgment having been entered, it appealed from the judgment, and also from the order denying the new trial to the general term.

The learned judge writing the opinion at the general term, among other things, said: "The plaintiff is his only witness as to the facts showing negligence on the part of the defendant, and is contradicted by a number of witnesses, and on examining the evidence I have entertained doubts whether the court ought not, under the circumstances, to have granted defendant's motion for a new trial on the ground that the verdict was against the weight of evidence. But the learned judge who presided at the trial of the case, who heard all the witnesses sworn, and who saw them when they gave their testimony, was of opinion that the evidence given justified the submission of the case on the question of negligence to the jury, and that such evidence was sufficient to sustain the verdict, and his view as to the evidence bearing on the questions of fact involved in the case is entitled to great respect. It is only in exceptional cases that the decision of the judge presiding at the trial of an issue of fact in a case where there is conflicting evidence, on a motion for a new trial, will be disturbed by the court on appeal."

\* \* \* As above stated, the cases are unusual where the general term, on an appeal, there being a conflict of evidence, and the case having been fairly tried and submitted to the jury, and a motion for a new trial having been denied by the trial judge, will grant a new trial because the number of witnesses on the part of the appellant on a question of fact exceeded the number of witnesses sworn on the part of the respondent." If these views give what should be the correct practice in the general term upon appeals from orders denying new trials, the right of appeal

secured by the Code in such cases is of very little value. Here the plaintiff, testifying under the influence of self-interest, was the sole witness on his own behalf as to all the essential facts relating to the accident. He was confronted by numerous witnesses contradicting in the most positive manner all the material facts stated by him. There does not appear to be any possible chance of mistake. Either he or they testified falsely. They were disinterested, and were in no way responsible for the accident, and the evidence that they gave is in no way improbable. Indeed, their version seems to be more probable than that given by the plaintiff. The plaintiff waited more than two years and a half before he commenced his action, and then did not allege in his complaint the defect in the plank, now the main ground of complaint against the defendant. The plaintiff testified through an interpreter, and hence his manner of testifying and his appearance could not have been of much aid to the judge in weighing his evidence. If, under such circumstances, the general term will refuse to grant a new trial, on the ground that the verdict is against the weight of evidence, it is difficult to conceive of any case where it ought to do so, and an appeal to it in such cases will be entirely useless. It is quite true that in some cases some deference may properly be paid to the views of the trial judge who heard the witnesses testify, and those cases are where there is a fair conflict in the evidence; and while there is some, yet there is no great or marked preponderance in the evidence either way. But where there is a vast preponderance in the evidence in favor of the defendant, and the defense is supported by numerous witnesses apparently entitled to credit, and the plaintiff's case stands upon his own evidence, either unsupported or slightly supported, the general term should exercise an independent judgment, and give the defendant appealing to it the full benefit which the law, by the right of appeal, intends he should have. But where the court below refuses a new trial, in the exercise of its discretion, we have no jurisdiction to give relief, and if there be no error of law the defeated party is without remedy for any injustice he may suffer.

A careful scrutiny of this record satisfies us that the plaintiff, as matter of law, upon the undisputed evidence, ought not to have recovered, and should have been nonsuited.

1. If we assume that this platform was only two feet wide, the plaintiff knew it. He had used the platform for two weeks, night and day, and wheeled his barrow up and down it many times. If it was dangerous for use on that account, he knew it as well as any one, probably better than any of the defendant's officers. He did not ask that it should be made wider, nor did he complain of the manner of its construction to any one. Knowing exactly the condition of the platform, and the risk of its use, and fully able to appreciate that risk, he voluntarily took the risk upon himself, and exposed himself to the danger, and he cannot, therefore, maintain his recovery on the ground that

the platform was not wide enough. *De Forest v. Jewett*, 88 N. Y. 284; *Powers v. Railroad Co.*, 98 N. Y. 274; *White v. Lithographic Co.*, 131 N. Y. 631, 30 N. E. Rep. 236.

2. There was not such an imperfection in the plank as to sustain a charge of negligence against the defendant. Only two witnesses saw the defect in the plank. The plaintiff described it as above. According to his evidence it certainly was not a defect which would indicate to one of ordinary prudence the appearance of danger. It was simply a depression in the plank, caused by its use; and judging, as we must, by the description he gave of it, it was not a dangerous defect. The witness Sullivan, the only witness who gave the depth of the depression, says it was only one-quarter of an inch, and of no moment. The depression was so small that it escaped the attention of the numerous other persons who used the platform, some of whom specially examined it. It is impossible to say upon this evidence that there was the want of that ordinary care on the part of the defendant in the maintenance of the platform which can impose liability for the accident upon it, and a verdict based upon this imperfection should not be permitted to stand. It is altogether improbable that this imperfection played any part in the accident. It is a fair inference from the plaintiff's evidence that it was caused, as one of the defendant's witnesses testified, by the collision of the slabs, laid crosswise upon the barrow, with the side of the doorway. The only other ground of alleged negligence is the absence of lights at the platform. All the witnesses but the plaintiff testified that it was amply lighted. He had wheeled all the night until 2 o'clock A. M. without any difficulty. But the answer to this ground of negligence is that plenty of torches were furnished to the workmen for use in lighting the platform, and if they did not use them, and thus the platform was not sufficiently light, it was their own fault. The defendant discharged its duty by furnishing sufficient torches, and if they were not used, or if they were not properly placed, the fault cannot be charged to it. We are therefore of opinion that a new trial should be granted, costs to abide event. All concur, except O'BRIEN and MAYNARD, JJ., dissenting; ANDREWS, C. J., not voting. Judgment reversed.

(139 N. Y. 364)

TAENDSTICKSFABRIKS AKTIEBOLAGET VULCAN v. MYERS et al.

(Court of Appeals of New York. Oct. 3, 1893.)

TRADE-MARKS—INFRINGEMENT—INJUNCTION TO RESTRAIN.

1. Plaintiff corporation manufactured matches under a trade-mark to which it was exclusively entitled, consisting of a label affixed to the match box, on which was stamped in red "The Vulcan," over a globe, with representations of certain medals awarded plaintiff, and the words "Damp Proof," "Trade-Mark," and "Paraffin Matches." Defendants imported matches in boxes of like size and general appearance, and bearing a label stamped in red, with the same words except that

"The Vulture" was substituted for "The Vulcan," with a facsimile of the same medals, and also a picture of a vulture. The words and characters on the bottom and one of the sides of the two boxes were widely dissimilar. *Held*, that the resemblance between the boxes was such as to tend to create confusion, and deceive intending purchasers of plaintiff's goods, and that plaintiff was entitled to an injunction to restrain further sales by defendants.

2. The owner of a trade-mark is entitled to an injunction to prevent a threatened infringement, though as yet he has suffered no actual loss therefrom.

3. To obtain an injunction restraining the infringement of a trade-mark it is not necessary to establish a guilty knowledge or fraudulent intent on defendants' part.

Appeal from supreme court, general term, first department.

Action by the Taendsticksfabriks Aktiebolaget Vulcan against Elijah Myers and I. Harby Moses to restrain the infringement of a trade-mark. From a judgment of the general term (19 N. Y. Supp. 1000) affirming a judgment for plaintiff, defendants appeal. Affirmed.

Billings & Cardozo, (Michael H. Cardozo, of counsel,) for appellants. H. Appleton, for respondent.

MAYNARD, J. The plaintiff is a Swedish corporation engaged in the manufacture of matches, and is entitled to the exclusive use of a trade-mark consisting of a label affixed to a small, rectangular box containing the matches, and having printed or stamped upon it in red colors the words, "The Vulcan," over a globe, upon each side of which are the representations of three medals awarded to the plaintiff at the Swedish exhibition at Gothenburg in 1871, at the Russian exhibition at Moscow in 1872, and at the Austrian exhibition at Vienna in 1873, the obverse and reverse surfaces of the medals being both exhibited. There is also printed underneath the name, and over the globe, the words "Damp Proof," and beneath the globe the words "Trade-Mark," and at the bottom of the label the words "Paraffin Matches." This trade-mark was adopted by the plaintiff in 1883, and has been used by it continuously ever since, and it derives large profits from the sale of its matches under it. The defendants are dealers in matches, and imported from Holland, in 1889, matches put up in boxes identical in size and general appearance with those used by the plaintiff, and bearing upon them a label also printed or stamped in red ink, and with letters of the same style as those upon the plaintiff's boxes, and upon which appear the words "The Vulture," and the picture of a vulture with outspread wings, and a facsimile of the medals awarded to the plaintiff, and the words "Damp Proof," "Trade-Mark," and "Paraffin Matches," arranged in the same way as upon plaintiff's boxes. The trial court has found that this use of the defendants' label is an imitation of the plaintiff's trade-mark, and so closely resembling it that when used upon boxes containing matches it has a tendency to create confusion in the market, and mislead and deceive the public. From an examination of the speci-



mens submitted to us, we think that this finding is fully supported by the proofs. The similarity between the names employed and the devices used, the identity of the medals represented, and the correspondence of size, color, and general appearance, when combined upon the wrapper of a box, are so close and striking that an intending purchaser of the plaintiff's goods would be likely to be imposed upon if the matches sold by defendants in these packages should be offered. While competition is essential to the life of commerce, and is the consumer's main defense against extortion, it should be fair and honest; and the manufacturer who produces an article of recognized excellence in the market, and stamps it with the insignia of his industry, integrity, and skill, makes his trade-mark a part of his capital in business, and thus acquires a property right in it, which a court of equity will protect against all forms of commercial piracy. It is true that the principal points of resemblance between the wrappers occur on the top of the box, and that the words and characters on the bottom and one of the sides are widely dissimilar, both in general appearance and in the details of their arrangement; but it is the top which is usually exposed to the eye of the buyer, and from which the impression would be produced as to the brand of the article offered for sale. The resemblance of the wrappers in this respect is so marked as to leave no room for doubt what the trade effect would be. No evidence was given or offered to show that any person had actually been deceived by the imitation of the plaintiff's trade-mark, and we think that none was necessary for the maintenance of the action. It is the liability to deception which the remedy may be invoked to prevent. It is sufficient if injury to the plaintiff's business is threatened or imminent to authorize the court to intervene to prevent its occurrence. The owner is not required to wait until the wrongful use of his trade-mark has been continued for such a length of time as to cause some substantial pecuniary loss. *Manufacturing Co. v. Fraiser*, 101 U. S. 51. The trial court has not found, and the proof does not indicate, any intention on the part of the defendants to infringe upon the plaintiff's trade-mark. They are importers of the goods, and it is not shown that they have any interest in or control over their manufacture. On the contrary, their conduct has been such since the commencement of the action as to acquit them of the charge of any wrongful or fraudulent intent. But this question does not arise where nothing but preventive relief is granted. It might be material if damages were sought or claimed. As was said by Judge Allen in *Colman v. Crump*, 70 N. Y. 573, it is not necessary, to sustain an action of this kind, "either to establish a guilty knowledge or fraudulent intent on the part of the wrongdoer. It is sufficient that the proprietary right of the party and its actual infringement are shown." The cases are numerous where this principle has been asserted and applied. We discover no error in the record, and the

judgment and order must be affirmed, with costs. All concur. Judgment accordingly.

(139 N. Y. 332)

NEWTON v. LEE et al.

(Court of Appeals of New York. Oct. 3, 1893.)

ACTION FOR PRICE—PLEADING—SET-OFF.

1. In an action for goods sold and delivered, defendants pleaded a general denial, and for a further defense that the goods were sold to a third party, and that defendants were guarantors of the debt, and that plaintiff had failed to fulfill his contract, to the damage of said third party, which defendants "are entitled to recoup and set-off." *Held*, that the second defense is demurrable, in that it has no relation to the cause of action set up in the complaint, and because defendants could show under the general denial that they were not purchasers. 23 N. Y. Supp. 536, reversed.

2. Defendants, if guarantors of the debt due plaintiff, could not set off damages sustained by their principals in the absence of an assignment of the claim, or an allegation of insolvency, or other ground for equitable jurisdiction.

Appeal from supreme court, general term, second department.

Action by Franklin D. Newton against Gertrude E. Lee and others. A judgment of the special term overruling a demurrer was affirmed on appeal by the general term. 23 N. Y. Supp. 536. Plaintiff appeals. Reversed.

Nelson S. Spencer, for appellant. Knevals & Perry, (James W. Perry, of counsel,) for respondents.

ANDREWS, C. J. The demurrer to the second answer or defense was, we think, well taken. The complaint was in the ordinary form for goods manufactured for and sold and delivered to the defendants at their request by the plaintiff's assignor, the Naugatuck Malleable Iron Company, for an agreed price, with averments of the assignment of the claim to the plaintiff, and that the debt was due and unpaid. The answer, in the first instance, contained a denial of the allegations of the complaint, and then, "for a further and separate answer and defense," the defendants alleged that the transactions set forth in the complaint as being made with the defendants were had with the American Bit-Brace Company, a New York corporation, and not with the defendants, or either of them, and that that corporation should be a party defendant. The answer then alleges, "in that behalf," that, at a date stated, a written contract was entered into between the American Bit-Brace Company, and the Naugatuck Malleable Iron Company, by which the latter company agreed to furnish to the American Bit-Brace Company castings from patterns it should furnish, on monthly orders; that the Naugatuck Company failed to perform its contract to furnish the castings upon monthly orders made by the bit-brace company in time, as it was bound to do, by reason of which default the bit-brace company was compelled to shut down its works for 10 days, and thereby it sustained damages in the sum of \$5,000, which "these defendants are entitled to re-

coup and set off as a counterclaim against the pretended cause of action set forth in the complaint." It is further alleged that the defendants "became privy to the contract" by guarantying the payment of all accounts owing by the bit-brace company to the Naugatuck Iron Company, and were only sureties, and that this is the only basis of the claims set forth in the complaint, and that the defendants are entitled to avail themselves of the "defense and counterclaim existing in behalf of the American Bit-Brace Company, to the extent of any demand made against them by the plaintiff herein." The answer concludes by a demand for judgment in the alternative dismissing the complaint, or that the bit-brace company should be made a party defendant, and judgment be awarded in its favor, "as such party defendant, for \$5,000," or that the defendants be allowed to recoup and set off so much of said sum, "as a counterclaim in their own right," as shall extinguish the plaintiff's demand. The second defense, assuming the facts therein stated to be true, has no relation to the cause of action set forth in the complaint. The complaint is upon a contract of sale and delivery to the defendants. The plaintiff would be bound to prove this cause of action in order to entitle him to recover. The action would not be supported by proof that the goods were sold to the American Bit-Brace Company, and that the defendants were guarantors of its liability. A cause of action against them as guarantors is a different cause of action from the one alleged in the complaint. The defendants are not sued as sureties or guarantors, but as purchasers of the goods.

Assuming that the defendants, if they had been sued as guarantors or sureties, might avail themselves of a breach of the contract by the Naugatuck Iron Company, and recoup any damages suffered by their principals therefrom, in the actual situation no defense was relevant, except one based upon a denial that they ordered or purchased the goods, or upon a discharge or satisfaction in whole or pro tanto of their liability as purchasers, or growing out of a set-off or counterclaim existing in their favor against the plaintiff or the Naugatuck Company. The defense set up in the second answer is to a cause of action not alleged by the plaintiff, and which could not be shown on the trial. It is an attempt to defend a cause of action not sued upon, and such a defense is demurrable because it does not answer the complaint, and is "insufficient in law." Code Civil Proc. § 494. The defendants may doubtless prove on the trial any facts tending to show they were not the purchasers of the goods, and, as bearing upon this issue, that they were mere guarantors or sureties. This they would be permitted to do under their denial in their answer preceding the second alleged defense. But they would not be entitled to prove this fact as a basis for the further claim that the bit-brace company were the real purchasers, and as such had a claim for damages for a breach of the contract against the Naugatuck Iron Company. If the defendants were the purchasers, there was

no contract with the Naugatuck Company for the breach of which any damages could accrue to the bit-brace company. If the bit-brace company were the purchasers, and the defendants were guarantors only of the liability of that company, then the action is misconceived; and, even if the defendants had been sued as guarantors or sureties upon the collateral undertaking, they could not avail themselves in exoneration of their liability of a cause of action for damages for a breach of the contract existing in favor of their principals. *Gillespie v. Torrance*, 26 N. Y. 306; *Davis v. Toulmin*, 77 N. Y. 280. The answer alleges no assignment of the claim for damages to the defendants, nor is there any allegation of insolvency or other ground of equitable jurisdiction.

The second defense, treating it as a whole, is clearly bad. But the claim is made, based upon the preliminary allegations therein, that the contract for the sale of the castings was with the bit-brace company, and not with the defendants; that the demurrer is too broad, since these allegations, in substance, deny the contract alleged, and therefore alone constitute a good answer to the complaint, and that the other parts of the answer may be disregarded or rejected. But this is too technical a view of the subject. The allegations referred to are introductory, merely, to the substantial matter intended to be set up by the answer, viz. the counterclaim existing in favor of the bit-brace company. The answer is to be judged as a whole. The averment that the goods were sold to the bit-brace company and not to the defendants was essential to explain the construction alleged in the answer. We do not perceive the force of the claim that the second answer is not "new matter," within section 494 of the Code. The matter stated therein is pleaded as a counterclaim to defeat a recovery. New matter pleaded as a defense is properly preceded by a confession of the cause of action. There is no confession, in the answer demurred to, of the original liability of the defendants. This could not have been done without defeating the purpose of the answer. The vice of the defense, based upon a cause of action in a third party, is exposed by the necessity imposed upon the defendants of averring that they were not the purchasers of the goods. A defendant cannot claim that a defense does not consist of "new matter," for the reason that his pleading is defective in form, if it sets up a counterclaim which upon the facts averred is not available to the party pleading it. This view leads to a reversal of the judgments of the general and special term, and judgment should therefore be entered sustaining the demurrer, with costs in all courts. All concur. Judgment accordingly.

(129 N. Y. 206)

#### PRESTON v. HAWLEY.

(Court of Appeals of New York. Oct. 3, 1893.)

#### USE AND OCCUPATION—SUFFICIENCY OF EVIDENCE

In an action for use and occupation it appeared that plaintiff bought the premises of

defendant, who on the day of the sale requested permission to leave his goods in the building until they were disposed of. While the goods remained there, defendant occupied the entire building, and kept the keys, and employed a watchman. Plaintiff, both during and after such occupancy, demanded rent, and defendant never disputed his liability, but objected to the amount. *Held*, that the questions as to whether defendant occupied the premises as tenant, and under circumstances from which the law would imply an agreement to pay for the use, and, if so, the value of such use, should have been submitted to the jury.

Appeal from supreme court, general term, third department.

Action by George C. Preston against Samuel R. Hawley for use and occupation of certain real estate which plaintiff had purchased of defendant, but which defendant continued to occupy after the sale. From a judgment of the general term (19 N. Y. Supp. 764) affirming a judgment for defendant, plaintiff appeals. Reversed.

Preston & Chipp, (Howard Chipp, Jr., of counsel,) for appellant. George Wilcox, for respondent.

MAYNARD, J. This action is brought under the provision of the Revised Statutes which declares that "any landlord may recover in an action on the case a reasonable satisfaction for the use and occupation of any lands or tenements, by any person under any agreement not made by deed." 4 Rev. St. (8th Ed.) p. 2459, § 26. The plaintiff cannot, therefore, recover without establishing the conventional relation of landlord and tenant. He succeeded to the title by purchase from the defendant, who remained in possession after the sale, during the period for which rent is claimed. But the bare proof of use and occupation by the vendor after conveyance of the premises granted is not sufficient to support an action for compensation under the statute. The purchaser's remedy, in such cases, is trespass or ejectment, and for the recovery of mesne profits. Woodf. Landl. & Ten. (11th Ed.) § 510; *Boston v. Binney*, 11 Pick. 1; *Greenup v. Vernor*, 16 Ill. 26; *Tew v. Jones*, 13 Mees. & W. 12. There can be no inference that the retention of the possession is pursuant to the agreement of the parties, for the presumption is that, if such were the agreement, it would have been so expressed in the conveyance of the property. Upon the first trial of this action, which was reviewed by this court on appeal, (101 N. Y. 589, 5 N. E. Rep. 770,) the plaintiff did not succeed, because there was a substantial failure of proof that the defendant had gone into possession with the permission of the plaintiff, and under circumstances indicating the creation of a tenancy. He there rested upon the proof of use and occupation, and mainly relied upon the presumption of a tenancy which the law has never recognised, but has always disfavoured in such cases. There was no further evidence, except that the plaintiff testified that he wrote to the defendant to send him a check, and received no reply. He then drew upon the defendant, and he did not honor the draft; and when plaintiff saw him he said that he thought the rent was excessive; that he should pay

for storage, but not for the regular full rent of the factory; and this occurred about a month before the defendant ceased to occupy the property. The record now here is materially different in this respect from that presented by the former appeal. The plaintiff's testimony, if entitled to credit, legitimately tended to the conclusion that the defendant's possession, after the sale, was that of a tenant, and not of a trespasser, and that an action of ejectment or of trespass would not lie. He testified that upon the day of the sale, and after it had taken place, the parties had a talk with reference to the occupation of the property, in which the defendant requested permission to leave his goods in the factory until they were disposed of or worked up there. The premises had been used as a wool hat factory, and the personal property there belonging to the defendant consisted of raw material and wool hats in all stages and conditions of manufacture, together with findings and hat bodies, and was distributed throughout the building in every room. Some of the stock was upon the cards, and the unfinished hats were in the formers. This property remained there for two months and a half, and during this time plaintiff had no possession or use of the premises, but paid the taxes and insurance. The defendant, by his agent and servants, occupied the entire building, and had the keys of the factory, and all the indicia of possession and control of it. He employed a watchman, who slept in the building; had his safe and books and papers in the office rooms; and used the office as his headquarters, for the purpose of not only looking after the goods which he had in that factory, and also conducted from it the operations of a straw hat factory in the same city. The agent made his daily reports to the defendant of the business of the straw hat factory from this office, and employed there at one time six or eight assistants, to make a catalogue of the goods previous to the auction sale, which, it is to be inferred, was also held there on August 22d, when the defendant removed from the premises. He thus had their use for the full term stipulated, which was until the goods could be disposed of or worked up. The plaintiff repeatedly demanded rent of the defendant, both while he was occupying the factory and subsequently, and the defendant never disputed his liability to pay, and admitted that he ought to pay something, and that he expected to pay when he continued in possession, but contended that the plaintiff's charge was excessive. He disputed the amount, but not the existence of the liability. Upon this evidence it is apparent that the plaintiff was never dispossessed, and that he could not have pursued the defendant as a wrongdoer. The silence of the parties upon the subject of compensation at the time the permission to occupy was given does not necessarily preclude a recovery by the plaintiff. It is the settled law of the state that an agreement to pay for the use of real property, where leave to enter upon and enjoy it is given, may be implied, and it is for this class of cases

that the statute we have referred to was enacted. *Osgood v. Dewey*, 13 Johns. 240; *Colt v. Planer*, 4 Abb. Pr. (N. S.) 140; *Despard v. Walbridge*, 15 N. Y. 374; *Collyer v. Collyer*, 113 N. Y. 448, 21 N. E. Rep. 114.

At common law an action of assumpsit would not lie for rent, except on an express promise made at the time of the demise, and hence the necessity for the statutory enactment, which was taken from 11 Geo. II. c. 19, § 14. The rule, we think, which controls in cases like the present, is stated by Judge Earl in *Collyer v. Collyer*, at page 448, 113 N. Y., and page 114, 21 N. E. Rep. "It is true that the possession and beneficial enjoyment of real property with the permission of the owner is ordinarily sufficient to sustain an action upon an implied agreement for use and occupation. But where the use and occupation of real estate is under such circumstances as to show that there was no expectation of rent by either party, a contract to pay rent will not be implied." In the present case the plaintiff's evidence leads directly to the conclusion that both parties expected that some rent would be paid. The amount only was left to be the subject of future adjustment. In *Despard v. Walbridge* the plaintiff was the assignee of the landlord's estate, and gave notice to a subtenant, whose term then expired, that if he continued in possession he would regard him as a tenant at an annual specified rent, payable quarterly, to which the defendant made no reply, but continued in occupation of the premises, and it was held that this was a virtual assent to the terms prescribed in the notice, and was a sufficient foundation for an implied contract. Here the plaintiff twice wrote to the defendant, demanding rent, and to one of the communications the defendant made no reply, and to the other he replied with the single objection of the excessiveness of the charge, which might be regarded as a recognition by him of an existing tenancy. The evidence in regard to the correspondence between the parties and the admissions of the defendant did not appear in this record as they were presented upon the former trial. They were there accompanied by a disclaimer by the defendant of his liability to pay rent, which is not contained in the case under review, and which rebutted the inferences which may now be drawn.

In order to explain the occupation of the premises, the defendant seeks to establish the relation of bailor and bailee, and to restrict his liability to a charge for the storage of his property. But we think the evidence is quite as consistent with the existence of a contract of tenancy as of bailment, and that it was the province of the jury to determine what inferences should be drawn from it. We express no opinion in regard to the weight to be given to the evidence. Whether he continued in possession during the term for which rent is claimed, as tenant of the plaintiff, and under circumstances from which the law would import an agreement to pay for the use of the property, and, if so, what was the reasonable value of such use, considering the kind and the extent of the de-

fendant's occupation, were questions which, we think, should have been submitted to the jury, and left for their determination under proper instructions from the court. The judgment must be reversed, and a new trial granted, with costs to abide the event. All concur.

(139 N. Y. 307)

# CASCO NAT. BANK OF PORTLAND v. CLARK et al.

(Court of Appeals of New York. Oct. 3, 1893.)

## PROMISSORY NOTES—NOTICE OF EQUITIES—INDIVIDUAL LIABILITY.

1. The fact that a director in a bank discounting a note is also a director in a corporation, payee of the note, is not sufficient to charge the bank with knowledge of equities between the parties. 18 N. Y. Supp. 887, affirmed.

2. A note in form as follows, "We promise to pay," etc., and signed "C., Treas.," and "O., Prest.," and with the words "Ridgewood Ice Company" printed across the end, is the personal and individual obligation of the signers. 18 N. Y. Supp. 887, affirmed.

Appeal from supreme court, general term, second department.

Action by the Casco National Bank of Portland against John Clark and E. H. Close. From a judgment of the general term (18 N. Y. Supp. 887) affirming a judgment in favor of plaintiff, defendants appeal. Affirmed.

Henry Dally, Jr., for appellants. Edward B. Merrill, for respondent.

GRAY, J. The action is upon a promissory note, in the following form, viz.:

Brooklyn, N. Y., Aug. 2, 1890.  
\$7,500. Three months after date we promise to pay to the order of Clark & Chaplin Ice Company seventy-five hundred dollars at Mechanics' Bank; value received.  
John Clark, Prest.  
E. H. Close, Treas.

It was delivered in payment for ice sold by the payee company to the Ridgewood Ice Company under a contract between those companies, and was discounted by the plaintiff for the payee before its maturity. The appellants Clark and Close appearing as makers upon the note, the one describing himself as "Prest." and the other as "Treas.," were made individually defendants. They defended on the ground that they had made the note as officers of the Ridgewood Ice Company, and did not become personally liable thereby for the debt represented. Where a negotiable promissory note has been given for the payment of a debt contracted by a corporation, and the language of the promise does not disclose the corporate obligation, and the signatures to the paper are in the names of individuals, a holder taking bona fide and without notice of the circumstances of its making is entitled to hold the note as the personal undertaking of its signers, notwithstanding they affix to their names the title of an office. Such an affix will be regarded as descriptive of the persons, and not of the character of the liability.

Ridgewood Ice Co.

Unless the promise purports to be by the corporation, it is that of the persons who subscribe to it; and the fact of adding to their names an abbreviation of some official title has no legal significance as qualifying their obligation, and imposes no obligation upon the corporation whose officers they may be. This must be regarded as the long and well settled rule. *Byles, Bills*, §§ 36, 37, 71; *Pentz v. Stanton*, 10 Wend. 271; *Taft v. Brewster*, 9 Johns. 334; *Hills v. Bannister*, 8 Cow. 81; *Moss v. Livingston*, 4 N. Y. 208; *De Witt v. Walton*, 9 N. Y. 571; *Bottomley v. Fisher*, 1 Hurl. & C. 211. It is founded in the general principle that in a contract every material thing must be definitely expressed, and not left to conjecture. Unless the language creates, or fairly implies, the undertaking of the corporation, if the purpose is equivocal, the obligation is that of its apparent makers.

It was said in *Briggs v. Partridge*, 64 N. Y. 357, 363, that persons taking negotiable instruments are presumed to take them on the credit of the parties whose names appear upon them, and a person not a party cannot be charged upon proof that the ostensible party signed or indorsed as his agent. It may be perfectly true, if there is proof that the holder of negotiable paper was aware, when he received it, of the facts and circumstances connected with its making, and knew that it was intended and delivered as a corporate obligation only, that the persons signing it in this manner could not be held individually liable. Such knowledge might be imputable from the language of the paper, in connection with other circumstances, as in the case of *Mott v. Hicks*, 1 Cow. 513, where the note read, "the president and directors promise to pay," and was subscribed by the defendant as "president." The court held that that was sufficient to distinguish the case from *Taft v. Brewster*, *supra*, and made it evident that no personal engagement was entered into or intended. Much stress was placed in that case upon the proof that the plaintiff was intimately acquainted with the transaction out of which arose the giving of the corporate obligation. In the case of *Bank of Genesee v. Patchin Bank*, 19 N. Y. 812, referred to by the appellants' counsel, the action was against the defendant to hold it as the indorser of a bill of exchange drawn to the order of "S. B. Stokes, Cas.," and indorsed in the same words. The plaintiff bank was advised, at the time of discounting the bill by the president of the Patchin Bank, that Stokes was its cashier, and that he had been directed to send it in for discount, and Stokes forwarded it in an official way to the plaintiff. It was held that the Patchin Bank was liable, because the agency of the cashier in the matter was communicated to the knowledge of the plaintiff, as well as apparent. Incidentally it was said that the same strictness is not required in the execution of commercial paper as between banks; that is, in other respects, between individuals.

In the absence of competent evidence showing or charging knowledge in the holder of negotiable paper as to the char-

acter of the obligation, the established and safe rule must be regarded to be that it is the agreement of its ostensible maker, and not of some other party, neither disclosed by the language nor in the manner of execution. In this case the language is "we promise to pay," and the signatures by the defendants Clark and Close are perfectly consistent with an assumption by them of the company's debt. The appearance upon the margin of the paper of the printed name "Ridgewood Ice Company" was not a fact carrying any presumption that the note was, or was intended to be, one by that company. It was competent for its officers to obligate themselves personally, for any reason satisfactory to themselves; and, apparently to the world, they did so by the language of the note, which the mere use of a blank form of note having upon its margin the name of their company was insufficient to negative.

In order to obviate the effect of the rule we have discussed, the appellants proved that Winslow, a director of the payee company, was also a director in the plaintiff bank at the time when the note was discounted, and it was argued that the knowledge chargeable to him, as director of the former company, was imputable to the plaintiff. But that fact is insufficient to charge the plaintiff with knowledge of the character of the obligation. He in no sense represented or acted for the bank in the transaction, and, whatever his knowledge respecting the note, it will not be imputable to the bank. *Bank v. Norton*, 1 Hill, 572, 573; *Mayor, etc., v. Tenth Nat. Bank*, 111 N. Y. 446, 457, 18 N. E. Rep. 618; *Bank v. Payne*, 25 Conn. 444. He was but one of the plaintiff's directors, who could only act as a board. *Bank v. Norton*, *supra*. If he knew the fact that these were not individual, but corporate, notes, we cannot presume that he communicated that knowledge to the board. An officer's knowledge, derived as an individual, and not while acting officially for the bank, cannot operate to the prejudice of the latter. *Bank v. Davis*, 2 Hill, 451. The knowledge with which the bank as his principal would be deemed chargeable, so as to affect it, would be where, as one of the board of directors, and participating in the discount of the paper, he had acted affirmatively or fraudulently with respect to it, as in the case of *Bank v. Davis*, *supra*, by a fraudulent perversion of the bills from the object for which drawn, or as in *Holden v. Bank*, 72 N. Y. 286, where the president of the bank, who represented it in all the transactions, was engaged in a fraudulent scheme of conversion. It was said in the latter case that the knowledge of the president as an individual or as an executor was not imputable to the bank merely because he was the president, but because, when it acted through him as president, in any transaction where that knowledge was material and applicable, it acted through an agent. The rule may be stated, generally, to be that where a director or an officer has knowledge of material facts respecting a proposed transaction, which his relations to it, as representing the bank, have given him,

then, as it becomes his official duty to communicate that knowledge to the bank, he will be presumed to have done so, and his knowledge will then be imputed to the bank. But no such duty can be deemed to have existed in this case, where the appellants have made and delivered a promissory note, purporting to be their individual promise. If one of the plaintiff's officers did have knowledge—whether individually or as a director of the Clark & Chaplin Company is not material—that the paper was made and intended as a corporate note, his failure to so state to the bank could not prejudice it. It was in no sense incumbent upon him, assuming that he actually participated in the discount, (a fact not shown,) to explain that the note was the obligation of the Ridgewood Company, and not of the persons who appeared as its makers. He was under no duty to these persons to explain their acts, and the law would not imply any. At most it would be merely a case of knowledge, acquired by a director, of facts not material to the transaction of discount by the plaintiff, and which he was under no obligation to communicate. No other questions require discussion, and the judgment rendered below should be affirmed, with costs. All concur.

(139 N. Y. 314)

**MERCHANTS' NAT. BANK OF GARDNER v. CLARK et al.**

(Court of Appeals of New York. Oct. 3, 1893.)

**PROMISSORY NOTES—NOTICE OF EQUITIES—BANK OFFICERS.**

1. To charge a bank discounting a note with the knowledge of the president of equities between the parties it is necessary that the knowledge should have come to him in his official capacity, and because of a necessity for him to inquire and know the facts in behalf of the bank.

2. Admissions of directors of the bank, subsequent to the discounting of the note, as to their knowledge of equities between the parties, are inadmissible to bind the bank.

Appeal from supreme court, general term, second department.

Action by the Merchants' National Bank of Gardner, Me., against John Clark and E. H. Close. From a judgment of the general term (19 N. Y. Supp. 138) affirming a judgment for plaintiff, defendants appeal. Affirmed.

Henry Dally, Jr., for appellants. Edward B. Merrill, for respondent.

GRAY, J. The promissory notes sued upon in this case were in the same form as was the note in the case of the Casco National Bank against the same defendants, decided at this term. 34 N. E. Rep. 908. The reasons given for the affirmance of the judgment in that case apply to the present. These appellants, however, claim that there was error committed by the trial court in the exclusion of evidence offered for the purpose of showing that the plaintiff knew, at the time it discounted the notes, that they were the notes of the Ridgewood Ice Company, and not the notes of these defendants. It appears

that at that time Dennis, who was a director of the Clark & Chaplin Ice Company, the payee in the notes, and which procured them to be discounted, was also the president of the plaintiff. The notes were handed to him in the company's office. He was not examined, and it was not shown that he was conversant with the transaction out of which the note arose, or how it was made; but, assuming that he was, his knowledge was not attributable to the plaintiff. When it is sought to prove that the plaintiff took the note, knowing it to be the promise of the Ridgewood Company, and not that of the appellants, it is essential that the knowledge to be attributed to the plaintiff should have been acquired by its officer, not casually, and through his individual relations to the other parties, but in an official capacity, and because of a necessity for him to inquire and to know the facts in behalf of the bank. That was not this case. Dennis, receiving these notes from the company of which he was a director, to be offered for discount by the board of his bank, was under no obligation to state to the board what his opinion was as to the liability of the parties appearing as maker upon the notes. The questions which were put for the purpose of showing a knowledge by plaintiff that these were the notes of the Ridgewood Company were addressed to the defendant Close, and related to conversations had with Dennis, or with any other officer of the plaintiff, before the commencement of the suit, with regard to the notes. The inquiry was whether, in any of these conversations, the witness had been told that at the time the plaintiff received the notes it knew they were the notes of the Ridgewood Company. The exclusion of such evidence was perfectly proper. A party to a promissory note should not be permitted to invalidate his written agreement by any testimony of that hearsay nature. If the statements sought to be elicited in the testimony had been made to Close, they would have been quite incompetent to prejudice the rights of the bank. While evidence to show what took place at the time when the notes were offered and received for discount, in order to prove knowledge by the bank of the facts, might be proper, subsequent admissions and declarations by individual directors or other officers would be of no effect to bind the bank. What they may have said, not being under oath, cannot be evidence against the bank; and upon that principle, as because the statements were not made in strict relation to any agency for the bank, such evidence is inadmissible. The principle of the exclusion is the same as obtains in the ordinary relation of principal and agent. The statements of the latter are inadmissible to affect the former, unless in respect to a transaction in which he is authorized to appear for the principal; and he has no authority to bind his principal by any statements as to bygone transactions. Hearsay evidence of this character is only permissible when it relates to statements by the agent, which he was authorized by his principal to make, or to statements by

him which constitute part of the transaction which is at issue between the parties. 1 Mor. Priv. Corp. § 540a. The judgment should be affirmed, with costs. All concur.

(139 N. Y. 379)

**CRANE v. POWELL.**

(Court of Appeals of New York. Oct. 8, 1893.)

**STATUTE OF FRAUDS—PLEADING.**

Unless the complaint shows that the case is within the statute of frauds, such defense must be specifically pleaded. *Earl and Peckham, JJ.*, dissenting. 19 N. Y. Supp. 220, affirmed.

Appeal from common pleas of New York city and county, general term.

Action by Julia M. Crane against Seneca D. Powell. From a judgment of the general term (19 N. Y. Supp. 220) modifying and affirming a judgment for plaintiff, defendant appeals. Affirmed.

Henry Major, for appellant. John W. Weed, for respondent.

**O'BRIEN, J.** The plaintiff recovered damages for the breach of an agreement, which, on the trial, appeared to be oral. The complaint alleges that the plaintiff, in the month of October, 1887, was in the possession under a lease of a house in the city of New York, and that she entered into an agreement with the defendant whereby the defendant leased from her, for the term of one year from the 1st day of November, 1887, the two front rooms on the second floor, and the back parlor and extension room, with the use of the front parlor on the first floor, with board and attendance to be furnished during the time by the plaintiff for the defendant and his assistant or associate in business, for the sum of \$3,250, payable in equal monthly payments of \$270.83 in advance. The defendant was a practicing physician, and the rooms were intended, in part, at least, to serve the purpose of an office, in which the defendant was to carry on his business. The defendant, in pursuance of this agreement, entered into and took possession of the rooms, and used them for the purpose intended, and he and his associate were furnished with board and attendance until the month of June, 1888, when, without the consent of the plaintiff, he abandoned the premises, and refused to further perform the agreement on his part, though the plaintiff was at all times ready and willing to perform on her part. It was also stipulated, as a part of said agreement, that the defendant, for the purpose of his business, should have the privilege of affixing in a suitable place on the front of the house his business sign, and that in pursuance of that right, conferred by the agreement, he did affix, upon taking possession on the 1st of November, at the side of the front door, a metallic sign with his name and professional business upon it, and also words and figures indicating when he could be found by patients and callers at his rooms in the house. The judgment appealed from was recovered by the plaintiff as damages for a breach of this agreement.

It appears that he paid the stipulated monthly payments only up to June 1, 1888, and the plaintiff claims that on or about July 1st thereafter, in consequence of the defendant's refusal to further perform his agreement, her home and business were broken up, and she was obliged to surrender her lease, which then had about two years to run, to her landlord. The jury allowed the plaintiff for the month of June the whole of the monthly payment, but the general term modified the damages for that month by deducting what it would actually cost the plaintiff to furnish board for two persons during that time, and for the four remaining months of the time the plaintiff recovered only the profits which she would have made had the defendant performed. The defendant's answer admits that during the time he was engaged in business as a physician, and that the plaintiff, at the time of the alleged agreement, was the lessee of and in possession of the house, and all the other allegations of the complaint were denied, but no other defense was pleaded. At the trial it appeared that the contract sued upon was not in writing, but the defendant made no objection to oral proof to establish it, and the plaintiff was permitted, without objection, to testify to a verbal agreement to sustain the allegations of the complaint. When the plaintiff rested, however, and again at the close of the case, the defendant moved to dismiss the complaint, on the ground, among others, that as the agreement was not in writing, and as it was not to be performed within one year from the making thereof, it was void by the statute of frauds. The court refused to rule in accordance with this request, and the defendant excepted. The defendant, in his own behalf, testified that there was no time specified for the duration of the agreement, and there was a sharp conflict in the evidence between him and the plaintiff, who claimed that it was to last for one year. The plaintiff's version of the transaction was sustained in some degree by circumstances and by proof of admissions claimed to have been made by the defendant. That question was submitted to the jury by the learned trial judge, with proper instructions, and the verdict must be taken as a conclusive determination of the issue. But the learned judge distinctly ruled and charged the jury that the defendant was in no position to urge the invalidity of the contract under the statute of frauds, by reason of his omission to plead that defense, and to the ruling and the charge to the same effect there was an exception. The result in the courts below thus turned upon the omission of the defendant to plead the statute, and the first and perhaps only question presented by the appeal is one of pleading. Preliminary to that question it should be observed that contracts that by their terms are not to be performed within one year were valid at common law, though not in writing, but the statute enacted that thereafter such agreements should be void unless reduced to writing, and therefore a new defense was created with respect to such



agreements as were within the statute. The statute of frauds does not prohibit the making of any agreement in any way that the parties may see fit, nor render them illegal or immoral, if not made in some particular way. It simply requires that certain agreements must be proved by a writing. It introduced a new rule of evidence in certain cases without condemning as illegal any contract that was legal before. The vital fact that was in issue in this case was whether the agreement set forth in the complaint was made. The jury found that it was, and it might be a question whether this court can review that finding upon the record as it stands. The motion to dismiss the complaint presents the question whether there was any evidence of the contract, and nothing else. If there was any proof to establish the agreement sued upon, or tending to establish it, (within the rules sanctioned by this court,) then the finding is beyond the power of review, and is conclusive. A material fact may sometimes be found by a jury upon other than strictly legal evidence. When proof is offered to establish it that is not of the quality or character required by law, and it is not objected to, the other party is deemed to assent to another mode of proof of an inferior or secondary nature; and when such proof is in the case the error, if any, is not reached by a motion to dismiss the complaint. Now, the plaintiff in this case gave proof of an oral agreement which showed that the minds of the parties met, and that there was mutual assent with reference to the subject-matter, and this is ordinarily the very essence of a contract. It tended to sustain the complaint, as the defendant did not elect to insist upon the statutory form of proof, but virtually assented to the mode of proof that had always been sanctioned by the rules of the common law. Under these circumstances, it seems to me that we cannot say that the finding of the jury is without any evidence to sustain it, or that the defendant's exception to the refusal of the trial judge to dismiss the complaint is good.

In *Flora v. Carbean*, 38 N. Y. 111, it was held that where testimony tending to establish a material fact, although incompetent in its nature, is received without objection, the party has a right to insist upon the facts shown thereby or based thereon. *Sharpe v. Freeman*, 45 N. Y. 808; *In re Yates*, 99 N. Y. 101, 1 N. E. Rep. 248. So it was held in *Howard v. Sexton*, 4 N. Y. 157, that a witness might be convicted of perjury in falsely swearing to a parol promise within the statute of frauds, although that mode of proof would have been incompetent if objected to. Judge Gardiner, in the opinion of the court, remarked: "The evidence was material, for it proved the promise. It was not, perhaps, competent, if the objection had been taken in season. All secondary evidence becomes incompetent if objected to. But if the parties choose to rely upon it, a witness is not thereby absolved in conscience or law from his obligation to speak the truth." The defendant's contention upon this appeal cannot be sustained, un-

less we hold that the plaintiff's testimony, showing an agreement by parol, amounted to nothing, and must now be treated as if not given. The experience of any one familiar with trials in the first instance is that nothing is more common than to give proof of facts, which is not strictly competent, but which, if not objected to, may be the basis for findings which are beyond the power of this court to review. The defendant's exception to the refusal to dismiss the complaint raises no question here except the presence in the record of any evidence whatever for the consideration of the jury upon the issue raised by the answer as to whether the agreement alleged in the complaint was made or not. There were, according to some of the cases, two methods in which the defendant could have raised the question that he is now seeking to review, namely, by objection to the proof given, or by specifically pleading the statute of frauds as a defense. But he has omitted to avail himself of either the one or the other. When the statute is set up as a defense, the objection to any other mode of proof than that required by the statute is to be deemed as made in advance, and the defendant may raise the question at any time before the case is submitted to the jury. If the defendant neither pleads the statute nor objects to what may be called the common-law proof of the agreement, it ought to be held, I think, even upon the authority of the earlier cases, that he has waived the objection.

These views are confirmed and illustrated by the application of a principle which is settled beyond debate. When the complaint alleges a verbal agreement within the statute, and the defendant, by his answer, admits it without pleading the statute as a defense, he is deemed to have waived its benefits. *Cosine v. Graham*, 2 Paige, 177; *Vaupell v. Woodward*, 2 Sandf. Ch. 143; *Harris v. Knickerhacker*, 5 Wend. 638; *Browne, Frauds*, §§ 135, 508; *Duffy v. O'Donovan*, 46 N. Y. 228; *Marston v. Swett*, 66 N. Y. 206. Now, all that the defendant admits in such a case is the existence of a verbal agreement, void by the statute. But, nevertheless, the law treats it as valid and binding, since the defendant, by omitting to raise the question at the proper time and in the proper way, is deemed to have waived the necessity of proof such as the statute requires. If this constitutes a waiver, why not hold that any other course equivalent to it is a waiver also? What real difference can there be in principle between such a case and the one at bar, where the defendant, failing to plead the statute, allowed verbal proof to be given of the agreement alleged in the complaint at the trial without objection? It is difficult to show that there is any satisfactory distinction in reason between the two cases. But the important question in the case, and upon which we prefer to let the decision rest, is whether, in the light of the adjudged cases, it is not necessary for a defendant who intends to avail himself of the benefit of the statute, as a defense to an action for damages for breach of a verbal agreement, within the statute, to specifically

plead it. It is safe enough to premise that the authorities are not all in harmony on this question, any more than they are upon many other questions with respect to the constitution and application of the statute itself. In England, under the rules framed in pursuance of the judiciary act, and in some of our sister states, it is necessary to plead the statute. 8 Amer. & Eng. Enc. Law, p. 747, note 2; *Graham v. Pierce*, 143 Mass. 386, 9 N. E. Rep. 819; *Lawrence v. Chase*, 54 Me. 196; *Farwell v. Tillson*, 78 Me. 227; *Bird v. Munroe*, 66 Me. 346; *Duck Co. v. Dewey*, 6 Gray, 446. In this state cases may be found where the opinion is expressed that the defendant may avail himself at the trial of the benefit of the statute, under the general issue, by objection to verbal proof of the contract. Some of these cases, and perhaps the principal ones, have already been cited to show when and how the defendant is deemed to have waived the benefit of the statute by admitting the allegations of the complaint. It is proper, I think, to observe that they are cases where the complaint was admitted in some way, or the decision was before the Code, or founded upon authority antecedent to it. The recent cases in this court sustain the view that it is necessary to plead the statute. In *Porter v. Wormser*, 94 N. Y. 450, Judge Andrews said: "The general rule is that the defense of the statute of frauds must be pleaded." \* \* \* It cannot be doubted that if the defendants had brought an action to recover a balance claimed to be due on the contract for the purchase of the bonds, without disclosing whether the contract was oral or written, the plaintiff would have been bound to plead the statute to avail himself of its protection." In that case the plaintiff had recognized the existence of the contract by bringing an action upon it, and it was held that he was not in a position to question the validity of it under the statute. In *Hamer v. Sidway*, 124 N. Y. 538, 27 N. E. Rep. 256, the action was against the executors of a deceased person upon a verbal promise to his nephew that he would give him a large sum of money at 21, if, in the mean time, he would abstain from the use of liquor, cigars, billiards, etc. The promise was confirmed by a letter from the uncle after the boy became of age. It was insisted that the promise was within the statute. After stating that the deceased had waived the defense by his letter and statements subsequent to the time of performance, the court, Parker, J., delivering the opinion, said: "Were it otherwise, the statute could not now be invoked in aid of the defendant. It does not appear on the face of the complaint that the agreement is one prohibited by the statute of frauds, and therefore such defense cannot be made available unless set up in the answer." In *Wells v. Monihan*, 129 N. Y. 161, 29 N. E. Rep. 232, the action was upon a written promise to pay the debt of another without expressing any consideration, and it was urged upon the argument here that it was void under the statute.

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Passing upon that point, Judge Finch said: "So far as the defense in this case rests upon the statute of frauds it must fail, for two reasons: No such defense has been pleaded, and it is not raised by the averments of the complaint; and without one or the other of these conditions the defense, if existing, cannot be made available."

Without referring to other cases in which the precise point does not seem to have been discussed or noticed, sufficient appears to show the tendency of late decisions in this court. They announce a rule well settled and familiar in analogous cases. The statute of frauds is a shield which a party may use or not for his protection, just as he may use the statute of limitations, the statute against usury, that against betting and gaming, and others that might be mentioned. I take it to be a general rule of universal application that the statutes last mentioned are not available to a party unless specifically pleaded, and there is no reason for making the statute of frauds an exception to the rule. The present system of procedure is founded upon the idea that litigants should, when possible, know in advance the precise questions they must meet at the trial. When a contract is set out in the complaint as the cause of action, and the defendant intends to assail it on some special or statutory ground, the general spirit of the system is not complied with unless notice is given of this intention to the opposing party by the pleadings.

In the solution of this question the provisions of the Code should not be overlooked. The statute may be used as a defense to actions on certain agreements. A defense must now be presented either by demurrer or answer. Code, § 487. When the defect in the plaintiff's cause of action appears on the face of the complaint, the defense must be interposed by demurrer. Section 488. When the complaint does not, as in this case, disclose an invalid agreement upon its face, but it is, in fact, invalid for some reason, the defendant must take the objection by answer, (section 498;) and if the objection is not taken in either way the defendant is deemed to have waived it, (section 499.) The conclusion is thus reached that the defendant waived the benefit of the statute in this case by omitting to plead it.

It is claimed by the learned counsel for the plaintiff that the agreement, as pleaded and proven, was not within the statute, since it amounted to a renting of apartments in a city house for business purposes, with board and lodging added, and was, therefore, good as a verbal lease for one year. *Blumenthal v. Bloomingdale*, 100 N. Y. 558, 3 N. E. Rep. 292; *Laughran v. Smith*, 75 N. Y. 209; *Reeder v. Sayre*, 70 N. Y. 184; *Oliver v. Moore*, 53 Hun, 472, 6 N. Y. Supp. 413; affirmed 131 N. Y. 589, 30 N. E. Rep. 35. It is unnecessary to consider this question, as the conclusion reached with reference to the question of pleading is fatal to the appeal. The judgment should be affirmed. All concur, except EARL and PECKHAM, JJ., dissenting.

(139 N. Y. 228)

## VOGEL v. LEHRITTER et al.

(Court of Appeals of New York. Oct. 3, 1893.)

## WILLS—VALIDITY—EXECUTION.

A person owning real property in New York, while in a foreign country, executed an instrument, disposing of all her property, which she entitled her "last will," and which she signed only in the presence of a notary, and inclosed in an envelope, which she sealed. By an indorsement on the envelope, the notary and two witnesses, whom he then called in, certified that the envelope contained the last will of the testatrix, "according to her oral declaration." A separate instrument was then executed, repeating the statement contained on the envelope, and was signed by the testatrix and the witnesses, and by the notary, and was sealed with his notarial seal. All the papers were deposited by the testatrix with the notary. *Held*, that this was not a valid will under the laws of New York, requiring that a will be subscribed at the end by the testator in the presence of two attesting witnesses, or acknowledged by the testator to each of the witnesses to have been so subscribed, and that the witnesses see the signature, and sign at the end of the will at the testator's request. 18 N. Y. Supp. 923, affirmed.

Appeal from supreme court, general term, first department.

Action by Maria Anna Vogel against Maria Lucia Lehritter, Charles Lehritter, and others for partition. From a judgment of the general term (18 N. Y. Supp. 923) affirming an interlocutory judgment entered on the report of a referee, defendant Charles Lehritter appeals. Affirmed. The other facts fully appear in the following statement by PECKHAM, J.:

This action was brought for the purpose of obtaining a partition of two lots on West Thirty-Eighth street in the city of New York, which formerly belonged to one Maria Anna Lehritter, who died in Germany, January 29, 1890. The complaint alleged that the plaintiff, among others, was an heir at law of the former owner, Mrs. Lehritter, and that she had died intestate, and that a document which had been presented as her last will and testament had not been duly executed and published as required by the statute of New York, and in consequence thereof the real estate of which she died seized had descended to her heirs at law. The defendant Charles Lehritter denied that the deceased had died intestate, and he alleged that she had duly executed and published her will in the city of Wuerzburg, Bavaria, Germany, on or about the 13th day of October, 1882. The whole controversy arises over the question whether the facts show a due execution and publication of a will by Mrs. Lehritter in Germany at the time and place stated. The action was referred to a referee, who found that the paper was not duly executed and published, and that Mrs. Lehritter had died intestate, and judgment for partition, etc., was therefore ordered. If the paper writing were a duly executed and published will, then the defendant Charles Lehritter would take as devisee the real property which was described in the complaint; otherwise, he would take nothing. He therefore appealed to the general term of the supreme court in the first department from the judgment for a parti-

tion entered upon the report of the referee. The supreme court affirmed that judgment, and he then appealed to this court. The evidence upon which the case was decided is undisputed, and, so far as material to this question, it consists of facts agreed upon by the parties. By this statement of facts it appears that Mrs. Lehritter was a citizen of New York at the time of her death, and was then domiciled in Germany, and was the owner of the real estate mentioned in the complaint. She left certain heirs at law who were descendants of her sisters and brother. The defendant Charles Lehritter was not one of such heirs, and his only claim depended upon proving the will set up in the pleadings. The statement in the third and following paragraphs then proceeds to give in detail all the facts relating to the drawing, execution, and publication of the alleged will, as follows:

"Third. On the 13th day of October, 1882, at Wuerzburg, Bavaria, Ulrich Huth, royal Bavarian notary, a public official, at the request of the said Maria Anna Lehritter, she being then domiciled in Bavaria, formulated, in the German language, a paper writing, which having been read to and understood by her, she thereupon subscribed her signature thereto, at the end of the said paper writing, in the presence of the said Ulrich Huth only, royal notary as aforesaid.

"Fourth. The following is a correct translation into the English language of the said paper writing: 'My Last Will. I. Considering my circumstances as to property, I possess here a house and lot with appurtenances in Sanderglaciis, Number 154, of the approximate value of (30,000 M.) thirty thousand marks, and personal property of the approximate value of (6,000 M.) six thousand marks. Furthermore, I possess in New York two houses and lots with appurtenances, Nos. 307 and 309 West Thirty-Eighth street, between Eighth and Ninth avenues; in addition to which, the lots are also my property, of the approximate value of (\$12,000) twelve thousand dollars. Furthermore, I have mortgages in America, loaned upon different pieces of property, of the total approximate value of nineteen thousand seven hundred dollars, (\$19,700.) II. I appoint as my sole and universal heir and legatee of what will hereafter be my estate Maria Anna Lehritter, daughter of the tailor, Nikolaus Lehritter, my brother-in-law, and of my niece, his wife, Maria Lucia Lehritter. She was born in New York on the sixth day of January, 1861. She was adopted and educated by myself and my late husband, Johann Adam Lehritter, as our only child, and also resides at the present time with me. She, my principal legatee, shall, however, be bound to pay the following legacies: The following persons shall receive as follows: (1) Karl Lehritter, born Edelmann, dealer in wines in New York, the two houses and lots in New York, as more particularly described above. (2) Johann Lehritter, born Edelmann, brother of Karl Lehritter, (\$2,000.) two thousand dollars. His present place of residence is unknown to me. (3) My brother-in-law, Nikolaus

Lehritter, tailor in New York, (\$1,000.) one thousand dollars. (4) My niece, the wife of the former, Maria Lucia, also (\$1,000) one thousand dollars. (5) Their three children, at this time infants, to wit, (a) Dory, (b) Willy, (c) Karry, (Lehritter,) each of these (\$1,000) one thousand dollars. This legacy of three thousand dollars shall be separate property of the legatees, and their parents shall have the usufruct thereof until the end of the twenty-first year of the life of these children, up to which time these legacies shall also be mutually inheritable among the children. (6) Peter Lehritter, painter, my brother-in-law, (\$2,000.) two thousand dollars. (7) To the three sons of Dorothea Wels, wife of a carpenter in Bobstadt, District of Boxberg, in Baden, viz. Karl, Frederick, and William (Wels,) each (1,000 M.) one thousand marks. (8) Margaretha Heer, born Boetzel, my niece, in Laudenbach, District Mergentheim, (1,000 M.) one thousand marks. This is my free, well-considered last will, which I have myself read and signed in execution. Wuerzburg, the thirteenth day of October, one thousand eight hundred and eighty-two. Maria Anna Lehritter.' That the real property described in the foregoing paper writing as '307 and 309 West Thirty-Eighth street, between Eighth and Ninth avenues,' in the city of New York, is the same as that described in the first subdivision hereof.

"Fifth. That the said paper writing described in subdivision fourth hereof never had upon any part of it the signature of any person or persons whatsoever except the signature of Maria Anna Lehritter, as aforesaid, and that such signature was subscribed at the end of such paper writing.

"Sixth. That immediately thereafter, and in the presence of the said Huth, the said paper writing described in subdivision fourth hereof was, without any alteration whatever, placed in an envelope by the said Maria Anna Lehritter, deceased, which said envelope was thereupon immediately sealed up by her with her seal, which bore the letters 'M. A. L., New York.' That said envelope never contained inclosed in it anything other than the paper writing described in subdivision fourth hereof. That, immediately after such sealing had been completed, there were written by the said Huth on the outside of said envelope the following words: 'Testament of Mrs. Maria Anna Lehritter, widow of a private citizen here. The undersigned royal notary hereby certifies by his signature, and that of the two witnesses who were called in, with the addition of his official seal, that, according to the oral declaration of Mrs. Maria Anna Lehritter, there is contained in this envelope her last will. Wuerzburg, the 13th of October, 1882,'—which words were thereafter, and before signature, read aloud to the said Maria Anna Lehritter and the witnesses hereinafter named.

"Seventh. Immediately thereafter, and in the presence and hearing of Johann Georg Gutbrod and Franz Jaeger, two competent witnesses, the said Maria Anna Lehritter handed the said envelope con-

taining the aforesaid paper writing, and inscribed and sealed up as aforesaid, to the said Huth, and at the same time made the following declaration orally: 'In the envelope which I have just handed you there is contained my last will. In case this should not be legal as a last will and testament, I wish to have it carried into effect as a codicil, gift causa mortis, or in any legal way possible, and it is the result of my free will. At the same time I revoke all former testamentary documents and directions, especially the testament which was made before the present notary on the fourteenth of August, one thousand eight hundred and seventy-five, and declare the same to be revoked and null and void.'

"Eighth. Immediately thereafter, and at the request of the testatrix, and in her presence, and in the presence of each other, the said Huth, Gutbrod, and Jaeger did sign their names as witnesses on the said envelope at the end of the statement set forth in subdivision sixth, and the said Huth did also add his official seal to his signature. The said envelope contained no other inscription, signature, or writing than those hereinbefore mentioned.

"Ninth. Immediately thereafter, and in the presence of all the persons before named, the said notary drew the following instrument: 'To-day, on the thirteenth day of October, one thousand eight hundred and eighty-two, (13 October, 1882,) there appeared before me, Ulrich Huth, royal Bavarian notary, with an office at Wuerzburg, in my office at this place, Mrs. Maria Anna Lehritter, born Boetzel, known to me with respect to her name, position, and residence, and requested me to receive upon deposit her last will. After I had then procured two documentary witnesses in the persons of the two men known to me with respect to their names, position, and residence, (1) Johann Georg Gutbrod, grinder, (2) Franz Jaeger, blacksmith, both of this place, against whom there were, according to their own statements, no objections which made them incapable of being witnesses, and had also convinced myself by a suitable conversation with Mrs. Maria Anna Lehritter of her intellectual capacity to dispose of her property, Mrs. Maria Anna Lehritter handed to me an envelope with the superscription, "Testament of Mrs. Maria Anna Lehritter, widow of a private citizen here," sealed once with a private seal, which bore the letters, "M. A. L., New York," and thereupon declared orally: "In the envelope which I have just handed you there is contained my last will. In case this should not be legal, I wish to have it carried into effect as a codicil, gift causa mortis, or in any legal way possible, and it is the result of my free will. At the same time I revoke all former testamentary documents and directions, especially the testament which was made before the present notary on the fourteenth day of August, one thousand eight hundred and seventy-five, and declare the same to be revoked and null and void." Thereupon, I, the notary, through my signature with the above, the witnesses, and with the addition of

my official seal upon the envelope, did certify that, according to the oral declaration of Maria Anna Lehritter, in this envelope there is contained her last will, and here received it among my official documents. About these proceedings, I, the notary, have drawn this present document, read it to Mrs. Maria Anna Lehritter and both the witnesses, in the uninterrupted presence of all of whom, with me, the notary, all these proceedings had taken place, and have signed it in company with all. In testimony thereof. Maria Anna Lehritter. Joh. Georg Gutbrod. Frans Jaeger. [L. S.] [Signed] Huth, Royal Notary.'

"Tenth. That the statements in the said notarial instrument of what said notary and the said Maria Anna Lehritter, deceased, and the said Gutbrod and Jaeger, severally did or said, are true, and that the paper writing which the said Maria Anna Lehritter, deceased, then requested the said notary to receive on deposit as her last will, is the same writing, without any addition or change, then or at any other time, which is described in subdivision fourth hereof, and which was contained in the aforesaid envelope, which was at that time sealed up, written upon, and indorsed as aforesaid.

"Eleventh. That the said instrument described in subdivision ninth hereof was subscribed by the said Maria Anna Lehritter, Gutbrod, Jaeger, and Huth at the end thereof, in the presence of each other, and all the statements therein set forth as having been made by the said Maria Anna Lehritter were made to and in the presence and hearing of the said Huth, Jaeger, and Gutbrod; and that immediately thereafter, and in the presence of the said Maria Anna Lehritter, Gutbrod, and Jaeger, the said Huth placed the said envelope, while sealed up and inclosing the paper writing described in subdivision fourth herein, loosely between the leaves of the said instrument, the said instrument being a separate sheet of paper folded in the middle; and that immediately thereupon, and in the presence of the persons aforesaid, the said notary took the said instrument with the said envelope and contents placed between its leaves as aforesaid, and deposited the same among his official documents in a place in the office of the said notary kept for that purpose, where all the said papers remained undisturbed until after the death of the testatrix. That after the death of the testatrix all the said papers were so found by the said notary, the said envelope being found sealed up, with its contents and superscriptions intact, and still lying separately and loosely between the leaves of the said instrument. That after the death of the testatrix the said Huth took the said envelope containing the said paper writing from and between the leaves of the said instrument, and made a certified copy of the said instrument, and personally deposited with the royal district court number 1 in Wuerzburg, Bavaria, the said envelope, sealed up as aforesaid, and containing the said paper writing, together with a copy of the said instrument certified by himself as notary as aforesaid,

and that he kept in his possession the original of said instrument.

"Twelfth. The said paper writing first aforesaid, as signed under the circumstances hereinbefore stated, with the inclosing and sealing thereof in an envelope, and the making of the indorsement on such envelope with the accompanying circumstances, and the making and signing of the instrument set forth in subdivision ninth hereof, as hereinbefore stated, constituted the making a valid will for the passing of the title to real estate situated in Bavaria. It has therebeen admitted to probate. None of said writings can be removed from Bavaria, where they now remain, and none of the originals can be produced, such production being contrary to the laws of Bavaria. All the transactions hereinbefore stated took place at one meeting of the persons herein named, said meeting being held solely for the purpose described. The said Huth was a public officer of Bavaria, and as such authorized by the laws thereof to perform all the acts hereinbefore stated to have been by him performed, and such performance having been in compliance with the laws of Bavaria in relation to the execution, custody, authentication, and proof of wills and papers relating thereto.

"Thirteenth. Nothing else took place, and nothing else was done at any time, by or on the part of any person herein mentioned, germane to the issues in this action other than is recited in this stipulation. All statements herein contained are to be taken as relating only to questions of fact, and not as being conclusions of law.

"Fourteenth. At the date of all the transactions hereinbefore set forth, the said Maria Anna Lehritter was of sound mind and of full testamentary capacity.

"Fifteenth. The person described as 'Karl Lehritter, born Edelmann, dealer in wines in New York,' in the paper writing first described, is the defendant Charles Lehritter in this action. Maria Anna Lehritter, who is described herein, is the same person who is called by that name in the complaint in this action; the person described in the paper writing in subdivision fourth hereof as 'Maria Anna Lehritter, daughter of the tailor, Nickolaus Lehritter,' is the plaintiff herein, Maria Anna Vogel; the defendant Sebastian Heer is the husband of the defendant Margaretha Heer; and the defendant Otto A. Vogel is the husband of the said Maria Anna Vogel; and the plaintiff and all of the defendants are over the age of twenty-one years, and are of sound mind.

"Dated New York, November 23, 1891."

Deyo, Duer & Bauerdorf, (Robert E. Deyo, of counsel,) for appellant. Frederick W. Holls, for respondent Maria Anna Vogel. Richard M. Bruno, for respondents Heer. Emile Schultze, Jr., for respondents M. L. Lehritter and O. A. Vogel.

PECKHAM, J., (after stating the facts.) We are entirely satisfied with the opinion of the referee in this case, and think it unnecessary to ourselves add anything further than to notice very briefly one or two

criticisms that were made upon it by counsel for the appellant in the course of the argument here. It is said the vital point in the case is whether the final writing (contained in the foregoing ninth subdivision of the statement of facts) was executed as a will or codicil, and this point the counsel for the appellant says was wholly ignored by the referee. On the contrary, we think he not only did not ignore it, but that he decided it in a way which was opposed to the claim that the final writing ever was executed either as a will or codicil. He distinctly said that the final writing certifies to the formalities which attended the identification of the will which was in the envelope, after its execution and its deposit in a public office, and to nothing more; and we are of opinion that in this respect the learned referee was clearly right. There is no occasion to here specify and minutely examine how the final writing was executed, for it is plainly stated, as is also the purpose thereof, in the writing itself. There is nothing in that paper that shows that it was executed as a will or as a codicil, or that it was in fact any part or parcel of the paper wrapped in the envelope and declared by the testatrix to be her will. I think the evidence here shows beyond all controversy that the testatrix supposed she had executed her will, and that it was wrapped up in an envelope, and that everything done subsequently was done in the course of an attempt to formally, and, so to speak, officially, identify such paper, and to deposit it in the hands of the public notary, as the will of the testatrix. I am unable to see how any other construction can be placed upon the plain language of the ninth subdivision of the statement alluded to. The counsel for the appellant admits that, if this final writing were not executed as a will or codicil, then Mrs. Lehritter died intestate, and the judgment must be affirmed.

Even though the statute does not prescribe what shall be the terms in which a publication of a will shall be made, or what shall be the terms of a request made to the witnesses to become such, yet there must be an acknowledgment or publication, and there must be a request; and where the only evidence of either is contained in written papers submitted to the court, if those papers do not show a publication or request, the evidence is insufficient to prove the alleged will. Regarding the paper in the envelope as a separate document, and confessedly there is not a particle of evidence of a proper subscription before witnesses. On the contrary, the evidence shows a noncompliance with the requisites of the statute in such case. Viewing the papers outside the document in the envelope, and it is plain they cannot be regarded as a will, or as a part thereof, because they conclusively appear to be something else. It may be assumed that the testatrix appeared before the notary for the purpose of making her will and depositing it with him. The written evidence submitted to the court shows without contradiction that she signed a paper as her will, and deposited it in the envelope, and everything done thereafter by

her or the notary, so far as the writing shows, was done for the purpose of identification alone. It is said that an unattested instrument of the character of a testamentary disposition may be so identified by a subsequent will or codicil as to be regarded as incorporated with and forming a part of the will or codicil. *Brown v. Clark*, 77 N. Y. 369, 378. Hence the claim that the paper in the envelope is thus incorporated with and does form a part of the final writing, and all the papers are to be construed as forming the will of the testatrix. The claim might be well founded if the final writing had been executed as a will. In the case of *Brown v. Clark*, supra, the testatrix, while an unmarried woman, had duly made her will. She subsequently married, and thereby revoked it. After that time she duly executed a codicil to such will, in which she referred to it, and in the body of the codicil she declared her intention to thereby republish, reaffirm, and adopt the will, as modified by the codicil, as her present will, in the same manner as if then executed by her, and then followed this clause: "Which codicil, in connection with and amendment of my will, I now publish and declare together as constituting my last will and testament." The codicil was duly executed with all the requirements of the law. This court held that the execution of the codicil was a republication of the will, and it and the codicil were to be considered together as the will of the testatrix. The evidence in that case left no room for doubt (the court said) that the main purpose of the testatrix in making the codicil was to re-establish the will which had been revoked by her marriage. No such fact appears here, and, on the contrary, it does appear that there was an absence of any testamentary intent as to the final paper when the signatures were placed upon it.

It may be here admitted, as claimed by appellant's counsel, that an invalid subscription is equivalent to no subscription, and the paper in the envelope described as a will may therefore be regarded as unsigned, and still we cannot see that the final writing can ever become a part of the will, or that the signature of Mrs. Lehritter to the final writing can ever be regarded as her signature at the end of her will. Nor can we find any evidence of a request on her part to any witness to become such. It is perfectly evident, from its contents, that the final writing is not, and was not intended to be, any part of her will or codicil, and her signature was not placed at the end of the writing for the purpose or with the intent of thereby subscribing such an instrument. In the final writing the testatrix declares orally that she has just handed the notary her last will, and, if it should not be legal, she wishes to have it carried into effect as a codicil, gift causa mortis, or in any legal way possible. This does not make the final writing a will or codicil. It is but one of the formalities observed by the parties in the course of identifying the document contained in the envelope as the will of the testatrix, and to call the final writing itself a codicil and a republication of

the will would be to make of the means for identifying another paper that very paper itself. In any view that we can take of the subject, we think the order of the general term was right, and that it should be affirmed, with costs. All concur.

(139 N. Y. 303)

BAILEY v. ROME, W. & O. R. CO.

(Court of Appeals of New York. Oct. 3, 1893.)

**INJURY TO SERVANT—DEFECTIVE APPLIANCES.**

1. In an action by a brakeman against a railroad company for personal injuries, there was evidence that at a certain station, while plaintiff was in the act of setting a brake on a flat car, the brake rod came out, because of the absence of the pin in the lower end, and caused him to fall; that the brake had not before been used after the train was made up, and the absence of the pin could not be seen by a person setting the brake, but could by inspection under the car. There was no indication that the pin was displaced by the effort to set the brake, and there were indications that it could not have fallen out as the result of the car's motion. *Held*, that it was error not to submit to the jury the question as to whether or not defendant used reasonable care in the inspection of the brake.

2. It was error, in such case, to exclude evidence that the brakes on other flat cars put in the train where it was made up were defective and useless.

Appeal from supreme court, general term, fourth department.

Action by William D. Bailey against the Rome, Watertown & Ogdensburg Railroad Company for personal injuries caused by defendant's negligence. From a judgment of the general term (14 N. Y. Supp. 944, mem.) affirming a judgment of nonsuit, plaintiff appeals. Reversed.

William E. Scripture and Oswald P. Backus, for appellant. Beardsley & Beardsley, (Arthur M. Beardsley, of counsel,) for respondent.

ANDREWS, C. J. The failure of the defendant to perform its duty to use reasonable care in the inspection of the brake, the defect in which caused the injury to the plaintiff, is the gravamen of the action. The plaintiff was nonsuited, on the ground that there was no evidence of negligence on the part of the defendant. We think the case should have been submitted to the jury. The evidence shows that the plaintiff was employed as brakeman on a freight train of the defendant running from Norwood to Rome. On the day of the accident, after the train had been made up at Norwood, ready to start, 5 flat cars loaded with railroad iron were placed in the train next to the engine, and the train, consisting of 30 cars, then proceeded to De Kalb Junction. The train, having been stopped at that station, was started again, with a view of placing it on a side track, moving upon a down grade. The plaintiff, in the performance of his duty, attempted to set the brake on the fourth flat car from the engine, and swayed upon the wheel in the usual manner, when the brake rod came out, and he was thrown from the car, and injured by the moving train. On exam-

ination after the injury it was found that the pin in the bottom of the brake rod, designed to hold the rod in place, was gone. There was no evidence how long this defective condition of the brake had existed. The plaintiff testified that the rod came out easily when he swayed upon it. The absence of the pin could not have been seen by one working the brake, but an inspection of the brake under the car would have disclosed its absence. It is claimed in behalf of the plaintiff that the evidence would have justified the jury in finding that the pin was out when the train left Norwood, and that the company sent out the car from that place in a defective condition, without inspection. Rule 99 of the company provides that conductors "will be personally responsible for examining the cars in their train at every convenient point, and especially at water stations, and, with the help of the men, must know that all cars are in safe condition, and no wheels or brakes broken." The duty of a railroad company to use reasonable care to protect their employes from injury while engaged upon its trains embraces the obligation to use reasonable care in furnishing suitable machinery in the first instance, and to keep it in repair, so that the lives of its employes may not be exposed to unnecessary peril. The duty of proper inspection for the purpose of discovering defects which may arise from use is a part of the duty owing by the company to its servants. Where an employe is injured from defective machinery, the fact that he was so injured does not alone raise a presumption of negligence on the part of the company. "The knowledge of the defect must be brought home to the master, or proof given that he was ignorant of the same through his own negligence or want of proper care." *Allen, J., Wright v. Railroad Co., 25 N. Y. 566.* In this case the company had provided for a proper inspection, which, if it had been made, would have led to the discovery of the defective condition of the brake at Norwood, assuming that the pin was not in the rod when the train started from that place. The rule required an inspection at that point, and, if due inspection was omitted there, and the injury resulted from a defect then existing, a case was made for the jury, because the master is never exonerated by the negligent omission of subordinates to perform duties which are imposed upon him in his character as master, resulting in injury to other employes. We think there was enough shown from which the jury might infer that the pin was not in the rod when the train left Norwood, and that the failure to discover the defect there was in consequence of the omission to properly inspect the car at that point. It appeared that no attempt had been made to use the brake between Norwood and De Kalb Junction, and the pin could not, therefore, have been broken or displaced by any use of the brake between these points. The method of fastening the pin after passing it through the rod, as explained, indicates that it could not have fallen out as the result of the mere motion of the car. There



was no indication that the pin was displaced by the effort to set the brake, since neither the pin nor any broken parts seem to have been found at the place of the accident.

The trial court rejected an offer on the part of the plaintiff to prove that the other brakes on the flat cars taken in at Norwood were in a defective condition, which rendered them useless. This evidence was, we think, competent as bearing upon the point whether the flat cars were inspected at Norwood, and whether there was any inspection there of this brake used by the plaintiff. The evidence of the negligence of the defendant is not direct or positive, but this is an infirmity which attends the investigation of facts in courts of justice in very many cases. But while a verdict founded upon inferences having no just basis in the proven facts ought not to stand, and where the grade of proof is such that the inference therefrom of an essential fact is a mere speculation, it is the duty of the court to withdraw the case from the jury. We are unwilling to say in this case that there was no evidence from which a just inference might not be drawn by the jury that the defective condition of the brake existed when the car left Norwood, and that there was a negligent failure to discover it at that point. The judgment should be reversed, and a new trial ordered. All concur.

(139 N. Y. 342)

**KELLY v. BLOOMINGDALE et al.**

(Court of Appeals of New York. Oct. 3, 1893.)

**MECHANIC'S LIEN—ABANDONMENT OF CONTRACT—  
MATERIAL MEN—NOTICE OF LIEN.**

1. A building contract provided for payment to the contractors "every thirty days, in such sum as shall be certified by the architect, but twenty per cent. shall be retained until the final completion of the contract." The contractors abandoned the work, and it was completed by the owners. *Held*, that the 20 per cent. retained by the owners never became due the contractor, and there was nothing to which a material man's lien filed after the abandonment by the contractors could attach.

2. A payment by an owner to a contractor, made with full knowledge of a claim by a material man against the contractor, after notice of lien has been filed within 10 days thereafter, but before a copy of the notice has been served, does not protect the owner against the lien, though the statute (Laws 1885, c. 342, § 4) provides that the lien claimant shall serve a copy of the notice on the owner within ten days after filing, "and after such service such owner or the person in interest shall not be protected in any payment made to subcontractor or other claimant," as the lien attaches on the filing of the notice. 19 N. Y. Supp. 126, affirmed.

Appeal from supreme court, general term, second department.

Action by Charles H. Kelly against Joseph B. Bloomingdale, Lyman G. Bloomingdale, and others to foreclose mechanics' liens. Defendants William F. Lawrence and James V. Lawrence, prior lien claimants, assert their liens. From a judgment of the general term (19 N. Y. Supp. 126) affirming a judgment for de-

fendants Lawrence, plaintiff and defendants Bloomingdale appeal. Affirmed.

Matthew L. Harney, for appellant Kelly. Horwitz & Hersfield, (Otto Horwitz, of counsel,) for appellants Bloomingdale and others. James M. Hunt, for respondents.

O'BRIEN, J. The plaintiff is the assignee of the claim and lien of a mechanic who performed work and furnished material, under an agreement with a general contractor, in plumbing and furnishing the gas fixtures in two houses which the contractor agreed to build and complete for the owners, the two Bloomingdales, respectively. The owners and other mechanics or material men, who had also filed liens, were made defendants, and answered, setting up defenses against the plaintiff's lien which he sought to foreclose in the action. The referee dismissed the complaint, and reported with respect to the other liens, sustaining them against the plaintiff and the owners. The judgment entered upon the report having been affirmed at the general term, the plaintiff and the owners, the Bloomingdales, appeal to this court. The latter owned land as tenants in common, and on the 18th of March, 1890, the contractor agreed with each of them separately to build two houses on the land. The contract price with Joseph B. Bloomingdale was \$11,460, and with his brother Lyman G. \$13,700. The houses were to be built and completed on or before October 1st thereafter, but the contractor failed to perform, and abandoned the work about August 6, 1890, and the owners were compelled to complete them themselves, at a cost greater than the price stipulated in the contract. It was stipulated between the owners and contractors that payments should become due and payable "every thirty days in such sum as shall be certified by the architect, but twenty per cent. shall be retained until the final completion of the contract;" also, that in all matters relating to the contract the architect should be deemed to be the agent of the owners. The plaintiff's assignor performed work and furnished materials on one of the houses amounting to \$710.79, and on the other to the amount of \$907.04. He filed a notice of lien for these amounts on the 8th of August, 1890. The plaintiff's appeal raises the question whether, at that date, there was anything due to the contractor under the contract, not absorbed by prior liens, to which his lien could attach. The main contention on the part of the plaintiff, and the only one necessary to notice, is that, when his lien was filed, 20 per cent. of the cost or value of the work done and materials furnished, up to that time, remained unpaid by the owners, and that, as they have had the benefit of this work and material, a lien was impressed upon that sum, amounting to about \$14,000, in favor of the plaintiff. This proposition cannot be sustained. The 20 per cent. was, by the contract which the owners made, to be retained by them till the final completion of the con-

tract. It never was completed, and hence this part of the price never became due to the contractor, and his subcontractors have no other or different claim to it than he would have. It was retained in order to secure the owners from loss by the contractor's default, and the right to demand it by any one depended upon the substantial performance of the contract, a condition which was never fulfilled. Even with this sum retained, the owners still were at a loss on account of the default, as they paid in all a sum greater than the price agreed upon. Under such circumstances, there is nothing in the statute or any rule of equity that will compel the owners to pay the plaintiff's claim. This is the only question presented by the plaintiff's appeal that requires discussion, and as, at the time the notice was filed, there was nothing due to the contractor upon the contract, and nothing became due or payable to him subsequently, no lien was acquired. *Larkin v. McMullin*, 120 N. Y. 206, 24 N. E. Rep. 447; *Van Clef v. Van Vechten*, 130 N. Y. 571, 29 N. E. Rep. 1017; *Lauer v. Dunn*, 115 N. Y. 405, 22 N. E. Rep. 270.

The other question in the case arises between the defendants, and is presented by the owners' appeal from that part of the decision which upholds the lien and claim of the defendants Lawrence, who furnished the lumber used by the contractor before he abandoned the work. The facts out of which this part of the controversy arises are these: On July 16, 1890, there was due to the Lawrences about \$1,900 for lumber ordered by the contractor, and notice of lien therefor was filed July 19th. About \$500 more lumber was subsequently furnished, for which liens were filed July 27th. On the 21st of July the owners paid to the contractor \$2,600 upon the certificates of the architect, in pursuance of the contract, showing that such sums were due, bearing date July 18th, and stating upon their face that a notice of the Lawrence claim for lumber had been filed. The architect, who, by the terms of the contract, was the agent of the owners, had been shown copies of the notices of lien before he made the certificates, though they were not actually filed until the next day. The owners also had actual personal knowledge of the claim before they made the payment. Under a provision of the contract the owners were not bound to make any payment to the contractor until he satisfied them, if required, that material men and subcontractors had been paid. We will not stop to inquire what equities arose upon these facts between the material men and the owners independent of any statute. The question is whether the payment by the owner to the contractor with full knowledge of the claim, and after notice of lien therefor had been filed, is operative under the statute against the lien of the material man. The owners claim that it is, and this contention rests solely upon the words of the last clause of section 4 of the act.<sup>1</sup> After providing for service of a

copy of the notice upon the owner within 10 days after filing, the section concludes in these words: "And after such service, such owner or the person in interest shall not be protected in any payment made to subcontractor or other claimant." The notice was served upon the owners within 10 days after filing, but not until after the payment to the contractor. Notwithstanding this language, it is apparent from the whole statute that the lien attaches, and the rights of the claimant as against the owner and the property become fixed, upon filing the notice, and so it has been held by this court. *McCorkle v. Herrman*, 117 N. Y. 303, 22 N. E. Rep. 948; *Kenney v. Appar*, 93 N. Y. 541; *Hall v. Sheehan*, 69 N. Y. 618. We are required to give to this statute a liberal construction, but to hold that, after the notice is actually filed, the owner is still at liberty to make payments the same as before, in disregard of it, because he had not been actually served with the copy provided for, would be to defeat, in many cases, its beneficial purposes. Whatever may have been intended by the language quoted, it is certain that it does not in words, or by any fair implication, protect the owner who pays before the notice is served, and after it is filed. The meaning of the statute is to be ascertained, not from a single expression, but from all of its provisions, as well as the general scope and purpose in view. Moreover, it should be noted that, although the copy of the notice had not been served when the payment was made, yet the owners had in another way not only constructive notice of the lien, but actual notice of the claim, and the fact that the notice was to be immediately filed. There was, we think, no error in the disposition made of the case below, and the judgment should be affirmed, with costs in this court to the owners against the plaintiff, and to the defendants Lawrence against the owners.

All concur.

(139 N. Y. 358)

## PEOPLE v. JOHNSON.

(Court of Appeals of New York. Oct. 3, 1893.)

### MURDER—EVIDENCE—SELF-DEFENSE.

1. Defendant, a convict, had a fight with a fellow convict, in which he was the aggressor. While the keepers were removing him from the room he broke away and drew a knife. He then turned on another convict, who had drawn the keeper's attention to the knife, and was by him struck with a stick on the head. He then turned on deceased and stabbed him. Deceased struck him with a broom handle and retreated, when defendant followed him up, and stabbed him to the heart, killing him. *Held*, that sufficient premeditation was shown to justify conviction of murder in the first degree.

2. Evidence that in the affray that followed defendant killed another convict and wounded others was admissible as part of the *res gestae*.

3. It was for the jury to determine whether there was any motive for the crime, and a request for an instruction that there was no evidence of motive was properly denied.

4. An instruction that if, when defendant broke away from the officers, he believed that the only way to defend himself was by the use

<sup>1</sup> Laws 1885, c. 842.

of his knife, he was justified in so doing, and was not called upon to attempt to escape, was properly refused.

Appeal from court of oyer and terminer, Jayuga county.

John Johnson was convicted of murder, and appeals. Affirmed.

Amasa J. Parker, for appellant. Adelbert P. Rich, for the People.

EARL, J. The defendant was indicted for murdering Charles Peck on the 17th day of April last. He was tried upon the indictment, and found guilty of murder in the first degree on the 17th day of May, and sentenced to suffer death during the week commencing July 3d. He appealed to this court, and his counsel alleges various errors for which he contends that his client should have a new trial. His main contention is that there was not sufficient evidence of premeditation and deliberation to authorize the conviction. The defendant and Peck were both convicts in the Auburn state prison. On the morning of April 17th the defendant had a fight with a fellow convict, in which he was the aggressor, in a room in which many convicts were at work. The fight was interrupted by one of the keepers of the prison, and two of the keepers took the defendant, and were removing him from the room. They reached a stairway with him, leading down into one of the rooms, and there he resisted by taking hold of the banisters. Then he broke away from the keepers, and stepped back into the room, drew an open knife from an inside pocket of his coat or vest, flourishing it, and making a threatening remark. At this time, we think, the evidence satisfactorily shows that no assault was being made upon him or threatened by any one. After he had drawn the knife, and was holding it in his hand in a threatening manner, a convict by the name of McDonald, being near the place, made the remark to the keepers, in substance, that "he has got a knife; he will kill some one, shoot him." The defendant then went towards him in a threatening attitude, and he took a stick and hit him on the head, and, retreating, fell down. The defendant then advanced about 15 feet upon Peck, and stabbed him with the knife. Peck then struck him with a broom handle and retreated, and the defendant followed him up, and, thrusting the knife into his heart, caused his instant death. Then, and not until then, the other convicts, in self-defense, and for the purpose of subduing him, surrounded him, and commenced to assault him, and in the affray he killed another convict and wounded others.

There does not seem to have been any particular motive prompting the defendant to kill Peck. He was evidently a reckless, brutal, passionate man, hating, as he testified, convicts, and determined on that account to kill any one who came in his way. But it is not necessary to look for a motive where the crime is plainly proved. He had concealed on his person the open knife, which we must assume he had no right under the prison discipline

to have. Knowing it was a dangerous weapon, he rushed upon his victim, and dealt the fatal blow. The jury were abundantly justified in finding that he intended the consequences of his act. He drew the knife without provocation, being then in no danger, and threatened with no assault. He was in the hands of keepers who would protect him, and whose duty it was to protect him. He first tried to assault McDonald with the knife, and then advanced upon Peck, stabbed him once, and then, as Peck attempted to defend himself, and was retreating from him, he dealt him another and fatal stroke. While all this occupied but a few moments, there was time, although very brief, for deliberation and premeditation, and thus there was sufficient evidence for the jury of all the elements answering the statutory definition of murder in the first degree. *People v. Clark*, 7 N. Y. 386; *Donohue v. People*, 56 N. Y. 208; *Leighton v. People*, 88 N. Y. 117; *People v. Majone*, 91 N. Y. 211; *People v. Hawkins*, 109 N. Y. 408, 17 N. E. Rep. 371.

The pretense of self-defense has not a shadow of satisfactory evidence to rest on. The defendant could have gone down the stairs instead of rushing back into the room, and he would have been out of the way of the other convicts, and out of danger from any one. He knew that the keepers were competent and willing to protect him. He must have known that the only danger of any assault upon him came from the drawing and flourishing of the knife, and that his trouble with his fellow convicts would end with the dropping of the murderous weapon. The homicide was without provocation, and wholly without justification.

The defendant complains that the trial judge erred in allowing evidence of his murderous acts immediately after the killing of Peck. The evidence was competent as parts of the same transaction, and as bearing upon motive, intent, and other ingredients of the crime charged. The charge of the judge was full and fair, and the jury were properly instructed in the principles of law applicable to the case. No part of it was open to exception, and to no portion of it do we see any ground of complaint. Defendant's counsel requested the judge to charge that there was no evidence of motive. All the circumstances were proved, and it was for the jury to determine, if they could, whether there was any motive prompting the commission of the crime. The request embraced no rule or proposition of law. The prosecution is never bound to prove a motive for the commission of a crime. Motive furnishes corroboration in a case depending upon circumstantial evidence. But where there is no dispute about the killing, and the other ingredients of the crime are established, motive is unimportant, and a conviction may be proper, although no motive for the crime can be shown or discerned. It is one of the facts tending to the identification of the criminal, or characterizing the criminal act, but is never, as matter of law, essential. *People v. Fish*, 125 N. Y. 136, 26 N. E. Rep. 819; *People v. Trezza*, 125 N. Y. 740, 26 N.

**E. Rep. 933.** The defendant's counsel asked the judge to charge "that, if Johnson believed that the only way for him to defend himself when he broke away from the officers there at the head of the stairs was to use his knife, he was justified in doing so, and that he was not called upon to attempt escape;" and the request was denied, the judge referring to his charge as made, and refusing to alter it. He had properly and fully charged the jury as to the law of self-defense and justifiable homicide. We know of no authority which lays down the doctrine of self-defense as embraced in this request. It leaves out of consideration the rule that he was bound to retreat and flee from the threatened danger if he could. Even if he believed that the knife was the only means to defend himself, he had no right to resort to it, and no occasion to make that defense until he had attempted the easy and ready mode of escape from any danger which was available. Besides, before one can justify the taking of life in self-defense, he must show that there was reasonable grounds for believing that he was in great peril, and that the killing was necessary for his escape from the peril, and that no other safe means of escape was open to him. *Pen. Code, § 205; Shorter v. People, 2 N. Y. 195; People v. Sullivan, 7 N. Y. 396; People v. Carlton, 115 N. Y. 618, 22 N. E. Rep. 257.* The judge was also requested to charge "that, if the jury believed that after the defendant was struck by McDonald upon the head with a club he was dazed or crazed, or his mind became in such a condition that he did not realize what he did after that, that he is not responsible for his acts, and that they must acquit him." The judge replied to this: "Yes, gentlemen, if you reach the conclusion that the blow which McDonald struck affected his mind so that he did not know right from wrong, and did not know the nature of the act that he was doing, then he would not be guilty, and could not be convicted; but you must be satisfied, gentlemen, from all the evidence in the case, that that was the condition of his mind; that he did not know the nature of the act which he was doing." The defendant's counsel then excepted to the qualification of his request, and asked the judge to charge that, "if he was in such a dazed condition that he did not know what he was doing, or did not realize what he was doing, that he is not guilty." To this the judge replied: "If it affected his mind so that he did not know the nature of the act, I charge that proposition." The request was a proper one as an abstract proposition of law, with but little, if any, support in the evidence. But the judge, in substance, charged it, and it cannot be doubted that the defendant received from the language used by the judge the full benefit of it.

No other exceptions or phases of this case require particular attention. The defendant had a fair trial, and was ably defended. We see no reason for granting him a new trial, and his conviction must be affirmed. All concur, except GRAY, J., not voting. Judgment affirmed.

(120 N. Y. 349)

**LAKE v. McELFATRICK et al.**

(Court of Appeals of New York. Oct. 3, 1893.)

**CONTRACTS—ACTION FOR BREACH—DIRECTING VERDICT.**

In an action against an architect, the complaint alleged that in consequence of defendant's failure to furnish good and sufficient plans and specifications for a theater, according to his contract with plaintiff's assignor, the proscenium arch fell in, causing the damage complained of, and that said assignor substantially complied with such plans and specifications in constructing the arch. *Held*, that where it appeared that brick skewbacks, instead of stone, were used in the construction of the arch, the plans and specifications calling for stone skewbacks, and that a large number of architects examined as experts testified that stone skewbacks were essential to the proper construction of such an arch, and that the use of brick skewbacks would materially weaken it, the court erred in not directing a verdict for defendant. 19 N. Y. Supp. 494, reversed.

Appeal from supreme court, general term, fifth department.

Action by James H. Lake against John B. McElfatrick and others to recover damages caused by defendants' alleged breach of contract to furnish proper plans and specifications for the theater of plaintiff's assignor. From a judgment of the general term (19 N. Y. Supp. 494) affirming a judgment entered on a verdict in favor of plaintiff, defendants appeal. Reversed.

Van Dusen & Martin, (George W. Cottrill, of counsel,) for appellants. C. D. Murray, for respondent.

**MAYNARD, J.** The compass of our inquiry in this case is restricted within narrow bounds by the form of the pleadings and the admissions contained in them and made upon the trial. The plaintiff alleges that his assignor, April 1, 1887, was about to construct an opera house at Titusville, Pa., and desired the services of a competent architect for such purpose; that the defendants were copartners doing business in New York city, and that they held themselves out to be, and represented and warranted themselves to be, competent, skilled architects, and particularly skilled in the art and science of making plans, specifications, drawings, and detailed statements of all that was necessary in and about the construction of theaters and opera houses, so that, if their plans, details, and specifications were followed, the building would be constructed in a good, accurate, and substantial manner: that plaintiff's assignor relied upon such representations and warranty, and employed the defendants to make the plans, drawings, specifications, and detailed statements of all that was necessary to be done in and about the construction of a theater or opera house for him, and agreed to pay them for their services \$350; that, in consideration thereof, the defendants agreed to make such plans, specifications, drawings, and detailed statements, and that they should in all things be accurate, sufficient, and correct, and that, if they were followed in the construction of the building, the plain-

plaintiff's assignor should have a fine, well-constructed opera house or theater, complete in all its parts, and without injury or damage to him by reason of any defect in the plans, or any failure or neglect on the part of the defendants in making the plans, drawings, specifications, and detailed statements. These averments were admitted by the defendants, and were not litigated on the trial. The complaint further alleges the furnishing of the plans by the defendants, and the payment of the agreed price, and that the plaintiff's assignor constructed the building according to the plans, specifications, drawings, and detailed statements furnished, and followed the directions given therein; and that they were faulty to such an extent as to cause damage to the plaintiff's assignor to the amount of \$2,261, for which plaintiff has recovered judgment. The defendants put in issue the truth of these allegations by a general denial. To succeed, the plaintiff was, therefore, required to affirmatively establish two material facts: (1) That his assignor had followed the plans, specifications, and drawings in the construction of the building in all essential matters; and (2) that the plans were defective; and unless there was sufficient evidence to go to the jury upon both of these issues, the judgment which he has recovered cannot stand.

The sole defect complained of was in the plan of the proscenium arch. This opening was in the form of a "segmental arch," as it is called in architecture, 36 feet long, with a rise of 8 feet. It was built of brick, and, when the cradle which supported it was removed, it fell in, and had to be reconstructed, and the cost of rebuilding it, and of repairing the injury done to other parts of the structure by its fall, constituted the amount of the plaintiff's recovery. The particular fault which the plaintiff alleged in his complaint was the omission by the defendants in the plans and drawings of what is known as a "blind arch" over the segmental arch, and that by reason of this omission no such blind arch was constructed, and in consequence thereof the wall fell. The plaintiff was permitted to give evidence upon the trial, against objection, tending to show that the fall of the arch might have been occasioned because it was too flat; that a rise of eight feet in an arch of that width was insufficient to give it the necessary spring for self-support, and that the arch was so planned and constructed that the thrust of the arch did not fall within the abutments upon which it rested, but outside of them, and that this may have been the cause of its ruin; and also that its destruction might have been due to the use of lime mortar instead of cement, but this latter evidence was not objected to, as the defendants claim that the specifications require cement, and that therefore the failure to use it would defeat the plaintiff's cause of action. We need not review the exceptions to the admissibility of evidence, or those based upon a variance between the pleadings and proof, for we think the plaintiff's complaint should have been dismissed upon the ground of a

failure to prove that the arch was built in substantial compliance with the plans and specifications furnished by the defendants. The plan of the arch was separate from the plans of the other parts of the building, and required that stone skewbacks should be put in at each heel for it to rest upon at the points where the arch meets the abutments. These were designed to be each of solid stone the thickness of the wall, and 17 inches in width, and 26 inches the other way, and weighing 700 or 800 pounds, and their office was to furnish a firm foundation for the arch, and distribute its thrust over a larger area of the abutments. The senior member of the defendants' firm was an architect of 45 years' experience, and it was shown that he had made a specialty of the preparation of plans for theaters and opera houses; that he had drawn such plans for many of the principal theaters in all of the large cities of the country, from 75 to 100 of them; that in more than 20 of them he had put in segmental arches having no greater rise than this one, without difficulty; that a ratio of the height to the length of an arch of 1 to 6 was regarded as safe, while in this case the ratio was 1 to  $4\frac{1}{2}$ ; that he always provided in every such plan for stone skewbacks; that he considered them of vital importance for the strength and stability of the structure. The utility and necessity of these supports cannot be questioned, for they sufficiently appear from the evidence of plaintiff's witnesses. His superintendent and builder, who was responsible for the omission to put them in, testified that the whole weight of the arch rested upon the skewbacks; that the thrust of the arch in this case equaled 122,000 pounds; that its direction was in a line right through the center of the skewbacks, and that this weight must be counteracted by the abutments, or the arch would fall; that the burden of the mass of masonry composing the arch is distributed upon the two skewbacks, substantially. Another witness for the plaintiff, a skilled architect, says that he has always used a stone skewback where he constructed such work with quicklime; that it gives it more of an even bearing, and throws the thrust of the arch more upon a larger space of brick around it, and that he would not build such an arch with quicklime without a stone skewback. Another architect, called by the plaintiff, stated that he preferred stone skewbacks; that he would not feel safe in building without them; that he would not do it if he could get them; that it distributed the strength of the arch upon the abutments, and that is the purpose of putting them in, and that they produced a material effect and caused more local strength and greater stability; and that brick could not be made as effectual as stone for that purpose. Nine architects and builders were examined on the part of the defendants, who were unanimously of the opinion that skewbacks of stone were necessary to the proper construction of the arch. One of them says that in his own practice he should regard them as having an essential function to perform in the abutment to sustain the arch. If

made of stone, the surface would be perfectly true, smooth, and uniform, and of equal tenacity. Brick that has been burned and then cut has not, and never can have, these properties. If made of brick, it is only called a "skewback" by courtesy, and is made by cutting off, or breaking off, the brick irregularly with a trowel, or by sawing them off. It will not be as strong as though made in one piece, and a perfect surface is obtained from stone which can never be got by cutting brick. This perfect surface is essential, because, if this surface yields, it results in the dropping of the arch in the center. A yielding of the skewback amounts to a yielding of the arch, and he would regard the failure to put in a stone skewback of vital importance in the building of this arch, and it would have a tendency to drop the arch by the compression of the smaller pieces of brick, which would result in weakening or cracking the wall above, and it would be more liable to fall. Another witness, who had drawn the plans for twenty different theaters, and at least two of which had segmental arches as flat as this one, testified that he always put in stone skewbacks in order to distribute the thrust upon the abutments, and that the ratio of strength is one to four, that is, that they will support four times as much as a brick formation for that purpose. Another witness testified that it was a very important feature for an arch that a skewback should be of stone; that if of brick it would weaken it very materially, because every joint would be an element to induce compression at the most vital point of the arch, and a very slight compression at the skewback would be multiplied a great many times in weakening the arch at its haunches and crown. Another witness states that if the skewbacks were of brick there would be danger of their compressing or shifting, because the strain of each individual rowlock or section of the principal arch would be brought independently to bear upon an independent section of the skewback. One section might give, and that would relieve the supporting tendency of that portion of the arch, and would gradually force the piers apart, and the arch must necessarily fall. Other testimony might be cited to the same effect, but these references to the record are sufficient to show the importance of this detail of the plan of the arch. Expert knowledge is scarcely required to establish so plain a proposition in the operation of physical laws.

There is also much proof in the record tending to show that the omission of the stone skewbacks was the primary cause of the falling of the arch. The first sign of weakness was a fracture in the brick work near the skewback on the south side. The plaintiff's assignor, in a letter to defendants, August 24, 1887, informed them that, the week before, his attention was called by the boss carpenter to an opening horizontally of the perpendicular joints in the brick near the skewback; that the next day the opening was larger, and he put stay rods of one and a half inch steel through from outside to out-

side; that the breaks are all in the perpendicular joints, and no evidence of crushing or other disturbances of the horizontal joints; and he adds: "There has evidently been a disturbance at or near the skewback of the arch, as the frame which supported the arch while building is crushed down at point 'B' fully an inch." It is apparent that he had not then concluded that there was any inherent weakness in the arch resulting from its form, or because it was too flat, for he further states that while the bricklayer insists that the arch is too flat, causing more outward pressure than the walls would support, his superintendent and builder was non-committal, but said, if he were planning the building, he would undoubtedly have put in just such an arch. When the arch fell, one of the stay rods was broken off close to the skewback, indicating that this might be the point of greatest strain, and there was a crack in the abutment running from the skewback on each side. One of plaintiff's witnesses testified that the cracks, as described to him, indicated a change in the direction towards the skewback, where the weight of the brick was bearing upon the arch. Another witness testified that the cracks might be attributed to one of several causes, and among them the crushing of the skewback, and the separating of the distances between the skewbacks. Another witness states that a compression in the joints of the skewback which would vary its position would bring the weakest points of the arch between three to six feet from the skewback. The break would naturally take place at that point, and a piece of the arch might still be attached to the skewback, although the fault had been originally in the movement of the skewback itself. It appears from the plaintiff's evidence that the point here described is the precise point where the break occurred. The defendant testified that one cause of the cracking of the arch might have been the compression of the skewback, and in such case the weakest point of the arch would be five or six feet from the skewback where it first broke, and that a stone skewback would have protected it. The trial judge held that there was sufficient evidence to support a finding that the arch fell on account of the omission of the stone skewbacks, and he submitted that question to the jury, with the instruction that, if they so found, the plaintiff should not recover. But we think it was error to submit this question to the decision of the jury. When it was conceded that the plaintiff's assignor had not followed the plans in this respect, and it appeared that the failure to put in the stone skewbacks may have caused the loss, which the plaintiff is seeking to impose upon the defendants, they were entitled to a ruling, as a matter of law, that the plaintiff could not recover, and the complaint should have been dismissed. He had failed to establish a performance of the condition precedent, which was essential to the support of his cause of action. One of the principal allegations of the complaint had been left unproven. The action is *ex contractu*, and the de-

defendants cannot be made liable upon a contract which they never assented to. There is no principle upon which a case of this kind can be excepted from the rule, so firmly established, that every stipulation which the parties have inserted in a contract by way of conditions to be performed is to be deemed material. *Dauchey v. Drake*, 85 N. Y. 407; *Hill v. Blake*, 97 N. Y. 216; *Tobias v. Lissberger*, 105 N. Y. 404, 12 N. E. Rep. 13; *Bank v. Recknagel*, 109 N. Y. 482, 17 N. E. Rep. 217; *Clark v. Fey*, 121 N. Y. 470, 24 N. E. Rep. 703; *Norrington v. Wright*, 115 U. S. 188, 6 Sup. Ct. Rep. 12; *Glaholm v. Hays*, 2 Man. & G. 265. The plaintiff's assignor was contracting for the exercise of the technical knowledge and skill of the defendants, and it was upon the infallibility of their own judgment that the defendants relied when they made their guaranty that, if the arch was constructed in accordance with their directions, it would stand. They regarded a stone skewback of vital importance for its security and stability, and their promise to make good any loss which might occur if it fell was upon condition that this method of construction was adopted, and we are not permitted to say that they would have entered into the agreement had they known that these essential supports were to be omitted. It is not necessary to hold that a literal performance of the condition was required. A variance, confessedly immaterial, or a departure from the plans in a separate and independent part of the building, having no structural relation to the defective member, would present a different case for our consideration. But where the variance is not disputed, and involves the integrity of the mode of construction of the affected part, and is so far material that it may have been the direct cause of the injury for which the owner seeks to hold the architect responsible, it must be held, we think, that the plaintiff has failed to establish the cause of action upon which he relies. The judgment must be reversed, and a new trial granted, with costs to abide the event. All concur.

(139 N. Y. 449)

JOHNSON et al. v. ATLANTIC AVE. R. CO. OF BROOKLYN.

(Court of Appeals of New York. Oct. 10, 1893.)

REFERENCE—WHEN PROPER—ACTION FOR BREACH OF CONTRACT.

In an action to recover unliquidated damages for breach of contract, the complaint alleged that, to enable plaintiffs to perform, it was necessary to expend large sums in the purchase of real estate, machinery, cars, horses, the hiring of employees, etc., and that such expenditures became useless by reason of defendant's violation of the contract, to plaintiffs' damage in the sum of \$300,000. *Held*, that a reference could not be compelled in such case. 21 N. Y. Supp. 1056, reversed.

Appeal from supreme court, general term, second department.

Action by Tom L. Johnson and another against the Atlantic Avenue Railroad Company of Brooklyn for breach of contract.

From a judgment (21 N. Y. Supp. 1056) reversing an order denying a reference, plaintiffs appeal. Reversed.

James C. Church, for appellants. Tracy, Boardman & Platt, (B. F. Tracy, of counsel,) for respondent.

PECKHAM, J. The order of the general term in this case is, as we think, clearly wrong. The complaint shows that the action is one where a reference cannot be compelled. It is an action to recover from defendant unliquidated damages for its violation of the contract entered into by the parties thereto. The complaint alleges that in order to enable plaintiffs to fulfill their contract it was necessary for them to expend large sums of money in the purchase of real estate, machinery, cars, horses, hiring employees, and other expenses of construction for said railroad, and that by reason of defendant's breach of the agreement, and its failure to obtain the consents spoken of in the contract, the enterprise contemplated by the agreement became abortive, to the plaintiffs' damage in the sum of \$300,000. There is no statement in the complaint that these expenditures were made by them as the agents of the defendant, nor is there anything therein from which it can be inferred that they were so made, or that the claim for damages is based upon the difference between the expenditures made by plaintiffs as agents of the defendant, and the amounts received by them as such agents, upon the sale of any of the property thus purchased. The complaint states, in substance, that these expenditures were made by the plaintiffs in preparation and as a means for the fulfillment of their obligations to build the road, and that such expenditures became useless by the violation of the contract by the defendant. Whether these various amounts so expended are valid claims, and furnish the true rule of damages to be applied in this case against the defendant on account of its violation of the contract, need not now be decided or discussed. In no event are they anything more than different items of alleged damage, to be recovered from defendant by reason of its violation of the contract, and they do not make the action one involving the examination of a long account, as that expression is used in the statute as to references. Within that statute no case for a reference is made out. *Camp v. Ingersoll*, 86 N. Y. 433; *Untermeyer v. Behauer*, 105 N. Y. 521, 11 N. E. Rep. 847. The order of the general term must be reversed, and that of the special term affirmed, with costs to the plaintiffs in all courts. All concur.

(139 N. Y. 210)

MELLEN v. MELLEN et al.

(Court of Appeals of New York. Oct. 3, 1893.)

CONSTRUCTION OF WILL—JURISDICTION OF COURT—DEVISE SUBJECT TO POWER OF SALE—ELECTION TO TAKE LAND.

1. Code Civil Proc. § 1866, allowing an action to determine the validity, construction, or effect of a testamentary disposition of real property, does not enable one whose title comes



merely through a devise to a former owner to institute an action for the construction of the will containing such devise, nor is the validity of a power of sale given therein to the executor a question of the validity of a "testamentary disposition," within the purview of the act.

2. There is no repugnancy between a devise in fee and a subsequent power of sale given to the executor for the benefit of the devisees.

3. In an action to restrain the exercise of a power of sale in a will on the ground that the devisees, who were the legal owners, had elected to take the land, it appeared that on testator's death they took possession of the land, and continued therein; that they exercised control over the respective shares, and collected for their own use the rents and profits; that they had renewed a lease of the land; that plaintiff had asked for a partition, which was resisted by the other devisees; and that less than three years had elapsed between testator's death and the attempted exercise of the power. *Held*, that there was no election on the part of the devisees to take the land.

Appeal from supreme court, general term, first department.

Action by Sarah E. Mellen against Gordon McKay Mellen and others. From a judgment of the general term (19 N. Y. Supp. 1001) affirming a judgment dismissing her complaint, plaintiff appeals. Affirmed.

The other facts fully appear in the following statement by ANDREWS, C. J.:

The plaintiff is the widow of Abner Mellen, Jr., deceased, who died on the 6th day of March, 1890. Abner Mellen, Jr., was the son of Abner Mellen, who died on the 27th day of May, 1887, leaving him surviving, his widow, Helen L. Mellen, one son, Abner Mellen, Jr., and two daughters, and Abner M. Wilcox, son of a deceased daughter. By his will he devised all his real estate to his wife and his three children, "share and share alike, to them, their heirs and assigns, forever." His real estate consisted of several pieces of property in the city of New York, on Broadway, Seventeenth street, and Mulberry street. He appointed his wife, his son, Abner, and his son-in-law, William C. Banning, executors of his will. The testator directed that his debts and funeral expenses should be paid out of his estate, and he gave a legacy to his grandson, Abner M. Wilcox, and his personal property to his wife and children. The debts and legacies were paid prior to the commencement of this action, except a mortgage debt of \$50,000 on the Broadway property, the payment of which had not been required by the holder. By the eighth item of the will the testator gave "full power and authority" to his executors, or the successor of them, "for the purpose of a division or distribution, or for any other purpose that they in their best judgment may think proper, to grant, alien, sell, and convey, either at public or private sale, all or any real estate" owned by him at his decease, "and to apply the proceeds of such sale or sales in conformity to the provisions of the will." The widow of the testator died on the 28th day of September, 1888, intestate. Her share in the real estate descended to the three children of the testator, and the grandchild, Abner M. Wilcox. On the 5th

day of November, 1888, Abner Mellen, Jr., conveyed his undivided interest in the real estate left by the testator, devised to him, and descended to him from his mother, to his wife, the plaintiff, in payment of a debt owing to her by the firm of Mellen & Co., of which he was a member. On the 30th day of November, 1888, the plaintiff, as the owner of five-sixteenths of the real estate, brought an action for partition, making the other tenants in common, together with William C. Banning, the husband of Helen J. Banning, one of the devisees under the will of Abner Mellen, Winnifred M. Wilcox, the wife of Abner M. Wilcox, and her husband, Abner Mellen, Jr., defendants. The defendants in the partition action, other than Abner Mellen, Jr., answered, challenging the validity of the conveyance under which the plaintiff claimed title, and the case was set down for trial on the first Tuesday of April, 1890, but no trial has been had, and the action, so far as appears, is still pending. Abner Mellen, Jr., died on the 6th day of March, 1890, leaving three infant children, who were joined as defendants in the present action, and who demurred to the complaint therein. On the 26th of March, 1890, the defendant William C. Banning, the sole surviving executor of the will of Abner Mellen, and the husband of his daughter Helen J. Banning, advertised the real estate of the testator for sale at public auction, under the power of sale contained in the will. This action was thereupon brought by the plaintiff against the executor, William C. Banning, joining therein, as defendants with said executor, the two daughters of Abner Mellen, Abner M. Wilcox and his wife, and the then infant children of the plaintiff. This complaint sets out the facts hereinbefore stated, and also other facts, and alleges, among other things, that on the death of the testator, Abner Mellen, his widow and his three children, by themselves, their agents or lessees, entered into the use, occupation, and possession of the lands devised, as owners thereof, and continued in such possession until the death of Mrs. Mellen, September 28, 1888, and that during all this time they "exercised control, dominion, and ownership over their respective parts or shares in said lands and premises, and collected and received for, and applied to their own use and benefit, the rents, issues, and profits of said real estate." The complaint further alleges that, from the death of the widow, the sons and the two daughters, and the grandson, Abner M. Wilcox, were in the possession, use, and occupation of the lands, exercising sole control, dominion, and ownership, and receiving the rents and profits, until the conveyance by Abner Mellen, Jr., of his share of the real estate to the plaintiff, on the 5th day of November, 1888, when she entered into possession with the other cotenants, and they together have ever since controlled and received the rents and profits. It is alleged that prior to the death of Abner Mellen, Jr., the power of sale had not been exercised by the executors, but that they "had acquiesced and assented to the ownership, occupation, and use of

aid lands and premises by the said widow, children, and grandson of said testator as aforesaid." It is alleged that the plaintiff and the other tenants in common, in March, 1890, united in extending a lease of the premises on Seventeenth street and Worth street, by writing, for one year from May 1, 1890. It is alleged that all debts, charges, and legacies under the will have been paid out of the personal estate of the testator, and that "no necessity had arisen, or now exists, for the sale of the lands or premises, or any portion thereof, to pay any of the debts which were owed by said testator at the time of his death, or to pay said legacies or other expenses, or for any other purpose." It is alleged that the power of sale was void, and the last paragraph of the complaint preceding the demand for relief is as follows: "Twenty-Fourth. That by reason of the premises the said Helen L. Mellen, widow of said testator, and the said Abner Mellen, Junior, Helen J. Banning, Maria L. Kendall and Abner M. Wilcox, even if said so-called power of sale ever had any validity, decided and elected to take their respective parts or shares in said lands and premises instead of the proceeds from a sale thereof under said so-called power of sale contained in said will." The plaintiff, in her demand for relief, asks for a construction of the will, adjudging (1) that under the will the widow and children of the testator each took title in fee simple absolute in possession of one-fourth part of the lands and premises devised, and could sell and dispose of their respective shares; (2) that the power of sale given by the will was inoperative, null, and void, and never had any validity, and that the executors, or the successors of them, never had any power or authority under the will to sell the land, or any part thereof; (3) that the widow and children of the testator and Abner M. Wilcox, "by reason of the premises," had decided and elected to take their respective shares instead of the proceeds of sale under the power; and (4) that an injunction issue, enjoining and restraining the surviving executor from selling under the power, etc.

Henry Daily, Jr., for appellant. Alfred F. Ackert, George Hill, and William C. Frull, for respondents.

ANDREWS, C. J., (after stating the facts.) The action is not maintainable as an action for the construction of the will of Abner Mellen. The validity of the power of sale given to the executors, even if any doubt could be entertained in respect to it, is a question for a court of law, as distinguished from a court of equity. It is a question primarily of legal, and not of equitable, cognizance. There is no inherent power vested in courts of equity in the construction of devises, as a distinct and independent branch of jurisdiction, but it exercises this jurisdiction only as incident to its jurisdiction over trusts. *Bowers v. Smith*, 10 Paige, 193; *Monarque v. Monarque*, 80 N. Y. 321; *Wager v. Wager*, 89 N. Y. 168. The validity of devises and limitations in wills, or

of a power conferred thereby, depends upon, and is determinable by, legal rules, and their determination must ordinarily await an occasion when, in a legal action or proceeding, a right under the devise or limitation, or the execution of the power, is asserted by one party, or denied by the other. The will in question in this case created legal estates only in the land devised, unaccompanied by any trust. The power of sale given to the executor, while it was in a sense a trust power, did not create any trust in the land devised, and while it might warrant the executor, upon a question arising, to apply to the court for instructions, the mere fact of the existence of the power did not make a case for invoking in behalf of a devisee, or the grantee of a devisee, the equitable jurisdiction of the court in the construction of wills, within the principles established in this state. The power of the court over actions for the construction of wills has been extended by statute, and they may be brought in many cases in which, before the statute, the court would have declined jurisdiction. The statute now in force is found in the Code of Civil Procedure, (section 1866,) which has been considered in two cases in this court. *Horton v. Cantwell*, 108 N. Y. 255, 15 N. E. Rep. 546; *Anderson v. Anderson*, 112 N. Y. 104, 19 N. E. Rep. 427. The plaintiff cannot maintain the action under this statute for the reason that she is neither heir at law nor devisee of the testator, and holds her title, not immediately under the will, but as a purchaser from the grantee of her husband. The plaintiff is in the possession of the land under this title, and it would, we think, be both an unreasonable and inconvenient construction of the statute which should enable one whose title comes through a devise to a former owner to institute an action for the construction of a will which formed one of the links in the chain of title. Moreover, the language of the statute is confined to actions to determine the "validity, construction, or effect of a testamentary disposition." The question whether the power of sale given to the executor by the will of Abner Mellen is valid does not affect the "testamentary disposition" made by the testator of his lands. It is collateral to the gift, and, whether exercised or not, does not change the substantial interest of the devisees under the will. The statute should be construed liberally in aid of the remedy intended, but it would be unwise to so interpret it as to draw into the supreme court every controversy, however trivial, which could be suggested by a doubt as to the construction of some provision of a will not affecting some substantial interest thereunder.

The claim made in behalf of the plaintiff, that the power of sale given to the executor is repugnant to the prior absolute devise to the widow and children of the testator, and creates a cloud upon the title, and that the action is maintainable in this view, is not tenable. If the power is invalid, its invalidity appears on the face of the will, and it is well settled that, where the rights of parties depend upon the legal construction of a written instru-

ment, an action to correct the instrument, or to declare it invalid, under the jurisdiction of courts of equity to remove clouds upon title, cannot be maintained. In such cases there is no cloud, in a legal sense. Unless the lien, charge, or incumbrance is apparently legal and valid, there is no ground for invoking this jurisdiction. The court does not entertain such an action to remove a doubt which might be created in the minds of persons dealing with the title, provided the means of forming a correct legal judgment are patent on the face of the instrument or proceeding by which the existence or nonexistence of the right in question must be determined. *Bailey v. Briggs*, 56 N. Y. 407; *Townsend v. Mayor*, etc., 77 N. Y. 542, and cases cited. But there can be no doubt of the validity of the power of sale. There is no repugnancy between a devise in fee and a subsequent power of sale given to the executor for the benefit of the devisees. This is a common incident of testamentary dispositions. The title to the lands vested in the widow and children of Abner Mellen under the devise, and was a fee, subject to the power of sale given to the executor. In case of a sale under the power, the title of the devisees in the land would be divested, and an interest in the proceeds substituted. *Crittendon v. Fairchild*, 41 N. Y. 289.

The most serious question in the case arises upon the claim that the complaint states that the power of sale in the executor had been extinguished before he advertised to sell the lands under the power, by an election made by the devisees and parties interested in the lands, to hold them, freed from the power of sale. It is a principle now well settled that where, by a will, money is directed to be laid out in the purchase of land for designated beneficiaries, or land is directed to be sold and the proceeds distributed, it is competent for the parties beneficially interested, provided they are competent and of full age, and the gift is immediate and not in trust, before the conversion has actually taken place, to elect to take the money in the one case and the land in the other, and when they have so elected, and the election has been made known, the power of the trustee for conversion ceases and becomes extinguished, and he cannot thereafter lawfully proceed to execute the power. This doctrine is founded upon the presumption that such a power is given by the testator for the benefit and convenience of the devisees and legatees, and, unless made so in terms, was not intended to be imperative, so as to prevent the beneficiaries from taking his bounty, except in the precise form in which the property would exist after the conversion. The doctrine referred to has been considered and applied by this court in several cases. *Hetzel v. Barber*, 69 N. Y. 1; *Prentice v. Janssen*, 79 N. Y. 478. *Jarman* says (1 *Jarm. Wills*, p. 599) that the expressions or acts declaratory of an intention to make an election, though it is said they may be slight, must be unequivocal, and in *Prentice v. Janssen* the rule stated in *Leigh & Dazell on Equitable Conversions*, "that a slight expression of intention will

be considered sufficient," is quoted with approval. The devisees of the land in the present case were in a situation to make an election. All the debts and legacies of the testator had been paid. The devisees were of full age, and were the only persons interested in the land or its proceeds. If in fact they had elected to take the land as land, free from the power of sale, prior to the advertisement of the land for sale by the executor under the power, I am of opinion that an action would lie in behalf of the parties interested, to enjoin the executor from selling under the power. It is not necessary to consider what would be the right of a purchaser in good faith, without notice, on a sale by the executor in assumed execution of the power, after the former had been terminated by an election. A sale under such circumstances would at least create a cloud on the title, and an action to enjoin the sale would be an available and proper remedy. See *Butler v. Johnson*, 111 N. Y. 204, 18 N. E. Rep. 643.

But we are of opinion that the complaint is insufficient to sustain this cause of action for the reason that it is neither directly alleged that the plaintiff and the other persons interested and deriving title as original devisees of Abner Mellen, or under them, had elected to take the land in its unconverted state, free from the power of sale, nor are any facts averred from which an election can be legally inferred. The allegation that the devisees took possession of and occupied and controlled the land devised as owners, and appropriated the rents and profits, is not inconsistent with an outstanding power of sale in the executor. The devisees had the legal title to the land as tenants in common, and as such had the right to the possession and to the rents and profits. They may, nevertheless, have desired that the power of sale should continue in the executor, for convenience in passing the title upon a sale, or for other reasons. The commencement of the partition action by the plaintiff naturally signified her election, and, if all the other parties interested had joined in asking a partition, this would, I think, have amounted to an election that the power of sale in the executor should not be exercised. It would show an intention by all the parties interested to sever the tenancy in common, and take their respective shares of the land in severalty. But the other parties interested resisted the partition, and an election by one of the parties, without the concurrence of the others, would not defeat the power. A long lapse of time, during which a power of sale remained unexecuted, where there was no obstacle to its execution, might alone, or with other circumstances, affect the presumption of an election. In *Kirkman v. Miles*, 13 Ves. 338, Sir William Grant was of opinion that two years was too short a time to presume an election, (see, also, *Brown v. Brown*, 33 Beav. 399,) and *Jarman* says, (1 *Jarm. Wills*, p. 600:) "But possession for two or three years by tenants in common (without more) has been held insufficient." In the present case less than three years had elapsed between the death of

the testator and the advertisement of sale by the executor. The renewal of the lease of some of the property, in March, 1890, by the parties owning the land, for the period of a year, would be a significant, and probably a decisive, fact showing an election, if the act was inconsistent with the continued existence of the power of sale. Great weight was given by Lord Hardwicke in *Crabtree v. Bramble*, 3 Atk. 680, to the circumstance that the parties beneficially entitled under a will had executed a lease of the premises for a term, upon the point of an election. But in that case the trustee for sale took, under the English law, title to the estate as trustee, and the lease was in hostility to his right, and the lessors had bound themselves to make good the lease. The act was inconsistent with the continuation of the power of sale, and was significant of an intention on the part of the lessors to take the land and not the proceeds. The lease in the present case bound the land, and was made by the legal owners, and was not in hostility to the power of sale. A purchaser under the power would take subject to the lease. We fail to find any evidence in the facts alleged in the complaint, certainly no "unequivocal" evidence, of an election subverting the power of sale, and no allegation that such an election had been made. The concluding allegation in the complaint, that "by reason of the premises" there was an election, etc., simply refers back to the preceding allegations as ground for this conclusion, and they furnish no sufficient evidence thereof. We think the demurrer was properly sustained, and the judgment should therefore be affirmed. All concur.

(139 N. Y. 323)

RUMSEY et al. v. BRIGGS et al.

(Court of Appeals of New York. Oct. 3, 1893.)

PARTNERSHIP—POWER OF ONE PARTNER TO BIND FIRM—RATIFICATION.

1. B. and M. were partners under an agreement providing for certain operations upon partnership lands, and upon any other tract "which shall be purchased by said copartners, as hereinafter provided." The firm lands having become exhausted, the partners consulted about buying more land, but no conclusion was reached. During M.'s absence in Europe a short time after the consultation, B., who had been permitted by M. to transact the partnership business in his individual name, purchased other land, giving a note therefor executed in the firm name. *Held*, that the partnership was liable on the note; the purchase of the land and the execution of the note being within the scope of B.'s authority as agent for the partnership. 17 N. Y. Supp. 562, reversed.

2. On M.'s return, B. informed him of the conditions of the purchase, and that the title was still in a third party, and M. consented to his proposal that they become the owners of the land as partners, and operate it under the existing partnership agreement. The title was then transferred to B., who, by arrangement with M., mortgaged it to raise a certain sum, a part of which was used to pay the balance of the purchase price, a part to pay a firm debt, and the balance credited to B. in the firm account. *Held*, to constitute a ratification of the

purchase of the land, and of the giving of the note in payment therefor. 17 N. Y. Supp. 562, reversed.

Appeal from supreme court, general term, fifth department.

Action by Bronson C. Rumsey and others against George D. Briggs and another to recover on a note. From a judgment of the general term (17 N. Y. Supp. 562) affirming a judgment entered on the report of a referee dismissing the complaint, plaintiffs appeal. Reversed.

Allen, Movius & Wilcox, (Ausley Wilcox, of counsel,) for appellants. Clinton, Clark & Ingram, (George Clinton, of counsel,) for respondents.

O'BRIEN, J. This action was upon a promissory note of \$5,000 against the defendants as partners. The appeal is from a judgment of the general term affirming a judgment on the report of a referee dismissing the complaint as to the defendant Marshall, and is based upon the judgment roll alone, there being no dispute as to the facts. The question is whether, upon the facts found by the referee, a defense was established. The following is a copy of the note: "\$5,000. Buffalo, Oct. 22, 1888. One month after date I promise to pay to the order of A. Rumsey & Co. five thousand dollars at Manufacturers' and Traders' Bank, value received. G. D. Briggs." This note was one of several renewals of another of the same tenor and amount, dated March 5, 1888, which the plaintiffs, constituting the firm of A. Rumsey & Co., indorsed, as they claim, for the defendants. The note in suit was discounted at the bank, and, not having been paid when it became due, was protested, and the plaintiffs made liable thereon to the holder as indorsers. They subsequently paid the note, and in this action seek to collect from the makers. It is found, and there was no dispute as to that fact, that at the time the original note was made, and all the renewals, including that in suit, the defendants were partners. The partnership agreement was in writing, and the firm business was manufacturing and selling lumber, bark, railroad ties, and all other business relating thereto, under the firm name of George D. Briggs & Co., upon a tract of land in Pennsylvania known as "Fair Run," and "also upon any other tract of land which shall be purchased by said copartners, as hereinafter provided." The defendant Marshall was a practicing lawyer, and took no active part in the management of the business. Briggs was the financial and business manager, giving to the business in all its details his personal attention. The firm name of G. D. Briggs was adopted with the consent of both partners in making notes and procuring them to be discounted for the transaction of the partnership business, and in that name, with like consent, firm property was sold, checks drawn on the funds of the firm in banks, and deposits made. Prior to the month of January, 1888, the Fair Run tract, from which the firm had obtained the lumber and timber, became substantially exhausted of its bark and

timber. About that date the defendants had a consultation looking to the purchase of another tract of about 2,000 acres, known as the "Rock Run Tract," situated near their sawmill on the old tract, but no conclusion was reached. On the 3d of March, 1888, and while the defendant Marshall was in Europe, Briggs made a written contract with one Bouton, by which the latter was to purchase the Rock Run property, and convey it to the former, and this agreement was executed by a conveyance by the owners to Bouton, and subsequently by him to Briggs. The property cost about \$30,000, and Briggs paid, upon taking the title, about \$22,000. This sum was all substantially raised upon notes, one of which was the original of the note in suit, leaving about \$8,000 still due. In the mean time, and about May 1, 1888, the defendant Marshall returned from Europe, was informed by Briggs of the purchase and the amount still due, and was asked to take a half interest in the property at the price paid, to which he consented. Both partners then engaged to borrow of a third party \$20,000, to be secured by mortgage on the land. Briggs, having procured the title, executed the mortgage, and then conveyed an undivided half to his partner. From the money raised on the mortgage, the balance of the purchase price was paid, and, by consent of both partners, about \$9,000 of it was used to pay off and discharge another mortgage on the Fair Run property, which they owned as partners. The balance of the loan was credited to Briggs, and thereafter they carried on their partnership business by using the land and taking the timber therefrom. Otherwise than thus described, Marshall never paid or advanced anything individually upon the land, Briggs becoming personally liable for the payment of the loan, while his partner did not. Mr. Marshall was notified by Briggs of the purchase, about the time it was made, by letter addressed to him at Paris, which was received, but no reply made thereto. The referee found that the signature to the note was that of the partnership. The plaintiff's firm was engaged in the business of manufacturing leather, and used large quantities of bark in their business, a portion of which they had purchased prior to the transaction in question from the defendants, through Briggs. One of the members of the firm, at least, knew that defendants were partners, and he was the person who indorsed the note in the name of the firm. On the 5th of March, 1888, Briggs, desiring to raise money or procure credit to purchase the land, applied to this member of the plaintiffs' firm to advance the money, or to indorse a note upon which money could be raised, to be used in the business of the defendants' firm. Briggs stated to the plaintiffs that he had an opportunity to purchase the land, and desired to do so for his firm; that Mr. Marshall was absent, but had authorized the purchase, and, as he could not communicate with him in time, he desired then to close up the transaction, as it was necessary to proceed at once with

their business, and, if he could complete the purchase, he would make a large contract with the plaintiffs for the bark. Believing and relying upon these statements, and without knowledge as to the actual name of defendants' firm, the plaintiffs indorsed the note upon the credit and responsibility of the defendants. In November, 1888, Briggs failed, being insolvent, and it is found that Mr. Marshall had, in fact, no knowledge of the giving of the original note or renewals till that time. Other facts are found, and there are various requests for findings by both sides in the record, but it is believed that it is not necessary to refer to them in greater detail, as sufficient now appears to give a clear view of the legal question, upon the disposition of which the case depends. The learned referee held as matter of law that neither the original notes nor any of the renewals were firm obligations, and were not within the actual or apparent scope of the business of defendants' firm, and, developing this idea still further, held that the purchase of the tract of land by Briggs was not within the actual or apparent scope of the business of his firm, and that the defendant Marshall was not bound by any of the representations made to the plaintiffs in relation to the purposes for which the note was given, and dismissed the complaint.

We think that this conclusion could not legally or properly follow from the facts found, and was therefore erroneous. *Rochester Lantern Co. v. Stiles & Parker Press Co.*, 135 N. Y. 209, 31 N. E. Rep. 1018. The general authority and agency of Briggs, as a partner, coupled with the other fact that, with the knowledge and consent of his copartner, he was accustomed to transact the firm business in his own name, to make and discount firm notes and draw upon their proceeds in the same way, for partnership purposes, conferred power upon him to make obligations and contracts binding upon the firm in his individual name, and it is conceded that the promise sued upon is, at least in form, that of the partnership. The plaintiffs have been defeated upon the ground that, though it is a firm note, it was not given in the firm business, or within the actual or apparent scope of the agent's authority, because the purchase of an additional tract of land was not a partnership act, but that of Briggs individually. The partnership agreement provides for operations on a designated tract of land, and "upon any other tracts of land which shall hereafter be purchased by said copartners, as hereinafter provided." Therefore, the purchase of more land, when necessary, was contemplated as a part of the business, and as a partnership act. In the absence of a finding we cannot, upon an appeal on the judgment record alone, assume that the general powers to be implied from this provision of the agreement were regulated, limited, or restricted by some subsequent provision in the same instrument, or otherwise. *Rochester Lantern Co. v. Stiles & Parker Press Co.*, supra. Considering the circumstances that appear in

this case, the fact that the timber on the old tract was exhausted, that the purchase of more land was the subject of consultation between both partners before one of them went to Europe, that Briggs had been permitted by the other partner to transact the business in his individual name, we think that the purchase of the land when the other partner could not be communicated with was a partnership act fairly within the actual and apparent scope of the agency. It seems quite clear, upon the facts, that the absent partner could have claimed the benefit of the transaction, and could have compelled Briggs to account to the firm for the property, or its proceeds or profits. Briggs was the general manager, with full charge of the business, as well as a partner. His individual name was made by usage and consent to represent the firm. The purchase of more land was within the general purpose and object of the partnership when necessary, and of that he was to be the judge. The making of the note, and procuring the plaintiffs to indorse it upon the faith and credit of the firm, in order to raise money to pay the purchase price, was a necessary and usual step in the acquisition of the property. The power of Briggs to bind the firm by the note in suit, under the circumstances disclosed, is but a fair deduction from the general principles of law applicable to the powers of individual partners and the cases on the subject. *Lindl. Partn.* pp. 128-131, 144, 146, 167, 168; *Partn.* 94, 95, 170-172, 197, 198; *Chester v. Dickerson*, 54 N. Y. 1; *Johnston v. Trask*, 116 N. Y. 136, 22 N. E. Rep. 377; *Bank v. Underhill*, 102 N. Y. 336, 7 N. E. Rep. 293; *Dowling v. Bank*, 145 U. S. 512, 12 Sup. Ct. Rep. 928.

When the purchase of a piece of real estate is within the scope of the partnership business, which one of the partners is permitted by the other to manage and transact in his own name, and the latter borrows money or procures indorsements from third parties in order to pay for the real estate on the credit of the firm, it will be bound by his act, though he takes the title in his own name. But if the power to bind the firm by the transaction in which the note originated is considered in any degree doubtful, then it was competent for the other partner to ratify what had been done in the name of the firm, and in that way to make the note binding upon both partners, and such, we think, is the legal result from the facts found. Marshall, on being informed of the purchase on his return from abroad, in effect, consented to treat the land as partnership property, the same as the old tract, and took a conveyance of an undivided half interest. The finding is that Briggs informed Marshall of the conditions of the contract and the sale of the title, which was still in a third party, and proposed that they become the owners of the land as partners, and operate the same under their existing partnership agreement, to which Marshall consented. Then the title was transferred to Briggs, who, by arrangement with his copartner, mortgaged it in order to raise \$20,000, \$8,000 of which was used to pay the balance of the pur-

chase price, about \$9,000 more to pay a partnership debt, namely, a mortgage on the old tract, and the balance credited to Briggs in the firm account. Thus property of the value of \$30,000, or at least which was purchased at that price, was transferred by Briggs to the firm, subject to an incumbrance of \$20,000. If it had been an individual, and not a partnership, transaction, he would have been entitled to the difference of \$10,000 and the fruits of the loan made upon its security, less the balance of the purchase price; but upon the supposition that it was a partnership affair, the disposition made of these funds was in harmony with the object and purpose of the parties. The finding of the referee that, after all this, Marshall was not aware of the giving of the note, of which the one in suit is a renewal, is quite immaterial. Knowledge of all the details was not necessary, but it must be assumed that he knew Briggs had raised money in some way to pay \$22,000, and he certainly knew that his practice had been to raise money on notes, in precisely the same form, for the use of the firm. Under these circumstances, his adoption of the transaction, and, acceptance of the fruits of it, bound him and the firm. Where a principal adopts and ratifies the acts of his agent by receiving the fruits of it or otherwise, he assumes responsibility for the instrumentalities which the agent has employed in his behalf to effect the contract. *Bennett v. Judson*, 21 N. Y. 238; *Elwell v. Chamberlain*, 31 N. Y. 611; *Leslie v. Wiley*, 47 N. Y. 648; *Garnery v. Mangam*, 93 N. Y. 642. For these reasons the judgment should be reversed, and a new trial granted, costs to abide the event. All concur, except ANDREWS, C. J., and FINCH, J., not voting.

(139 N. Y. 446)

In re MANNING, Mayor.

(Court of Appeals of New York. Oct. 10, 1893.)

APPEAL—WHEN ENTERTAINED—PRACTICAL EFFECT.

An appeal from an order denying a writ of mandamus to a mayor to cause a list of inspectors of election and poll clerks to be published as required by Laws 1892, c. 171, § 15, will not be considered where the election for which they were appointed has been held, as inspectors and poll clerks are required to be appointed for each election, and their power to perform official duties expires after the election, and therefore a decision of the appeal could have no practical effect.

Appeal from supreme court, general term, third department.

Application of Charles H. Armatage for mandamus to James H. Mannlug, mayor of the city of Albany. From an order of the general term (24 N. Y. Supp. 1039) reversing an order of the special term granting a writ, petitioner appeals. Appeal dismissed.

Edwin Countryman and Andrew Hamilton, for appellant. John A. Delehanty, for respondent.

O'BRIEN, J. In this proceeding the special term made an order on the 6th of March, 1893, granting a peremptory writ of mandamus commanding James H. Manning, mayor of Albany, forthwith to cause to be published, as required by section 15 of chapter 171 of the Laws of 1892, in the official city papers, the lists of Democratic inspectors of election and poll clerks appointed by the board of election commissioners of the city upon the resolution of Charles H. Armatage, the petitioner, and chairman of the board, to act at a local election to be held in said city April 11, 1893, and for which registration of voters was to be made March 11, 1893. The mayor appealed from the order granting the writ, and the general term reversed it in September, 1893, and the petitioner has appealed to this court.

The statute requires that inspectors and poll clerks shall be appointed at each election. Their power to perform any official duties expires after the election for which the appointment is made has been held. Any decision, therefore, which we can make on this appeal, can have no practical effect. If, for instance, we should reverse the order of the general term and affirm that of the special term, as we are asked to do by the appellant, the latter order could not be enforced, as the election has been held, and the time and occasion for the inspectors to act has long since passed. The appeal does not now present an actual litigation, but an abstract question. The practice of this court has been to refuse to entertain appeals when it is plain that nothing can be accomplished by the decision. The inspectors and clerks selected for the election of April last cannot be appointed. There is no office to fill, and there are no duties for them to perform. To require now that their names be published would be to do a vain thing, and this court has uniformly dismissed the appeal when, from lapse of time, no decision could be made that would have any practical effect upon the controversy or the parties. It is said that the same question must arise in the appointment of inspectors and clerks to serve at the general election to be held in the state in November next. We have no judicial knowledge that the peculiar conditions which produced this controversy still exist, and, even if we had, it would scarcely be proper to construe the statute for the appointment of these officers in advance of any action of the appointing power. If the spirit of the statute was not carried out, either in the selection of the inspectors or the publication of their names in the present case, we cannot assume that the same course will be pursued by both parties again. The demands of actual, practical litigation are too pressing to permit the examination or discussion of academic questions, such as this case in its present situation presents. *People v. Phillips*, 67 N. Y. 582; *People v. Walter*, 68 N. Y. 408; *People v. Common Council*, 82 N. Y. 575; *Bryant v. Thompson*, 124 N. Y. 426, 28 N. E. Rep. 522; *Merrill*, Mand. §§ 75, 77, 78. The appeal should therefore be dismissed. All concur.

(146 Ill. 472)

FOWLER et al. v. LAMSON et al.<sup>1</sup>(Supreme Court of Illinois. June 19, 1893.)<sup>2</sup>

CONSTITUTIONAL LAW—CONSTRUCTION—CORPORATIONS—INDIVIDUAL LIABILITY OF STOCKHOLDERS—JURISDICTION.

1. In construing the provisions of the constitution of another state, the decisions of the supreme court of that state are controlling. Following *Patterson v. Lynde*, 112 Ill. 207.

2. Under the provision of the Kansas constitution that "dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder and such other means as shall be provided by law," stockholders of corporations organized under the laws of Kansas are individually liable to corporate creditors to an amount equal to their stock, the constitutional provision being self-executory. Following *Hentig v. James*, 22 Kan. 326, 44 Ill. App. 186, affirmed.

3. Special remedies for the enforcement of such liability being created by the laws of Kansas, such liability cannot be enforced by proceedings of a different character.

4. Nor can such liability be enforced by the courts of another state. 44 Ill. App. 186, affirmed.

Appeal from appellate court, first district.

Bill by George A. Fowler and others against S. Warren Lamson and others. Complainants obtained a decree, which was reversed by the appellate court. Complainants appeal. Affirmed.

E. F. Thompson, for appellants. D. M. Kirton, for appellees.

WILKIN, J. This is an appeal from the appellate court of the first district, reversing a decree of the superior court of Cook county in favor of appellants against appellees. The bill upon which the decree was rendered was filed by said George W. Fowler, and alleged that at the October term, 1890, of said superior court he recovered a judgment against the Cherokee Brilliant Coal & Mining Company for \$3,321.40 and costs of suit; that a writ of  *fieri facias*  issued thereon, directed to the sheriff of Cook county, who "demanded payment thereof, or property upon which to levy the same, from S. Warren Lamson, president of said corporation, which being refused, said writ was returned unsatisfied, and said judgment remains wholly unpaid." That said company was incorporated in September, 1882, under the laws of the state of Kansas, and for a number of years thereafter carried on business. That at the date of its incorporation it was, and ever since has been, a part of the constitution of Kansas that "dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder and such other means as shall be provided by law," and that at said time and since it has been, and now is, a part of the laws of said state, that "if any execution shall have been issued against the property or effects of the cor-

<sup>1</sup> Reported by Louis Boisoit, Jr., Esq., of the Chicago bar.

<sup>2</sup> Rehearing denied October term, 1893.



poration except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution then execution may be issued against any of the stockholders to an extent equal in amount to the amount of the stock by him or her owned, together with any amount unpaid thereon, but no execution shall issue against stockholders except upon an order of the court in which the action, suit, or other proceeding shall have been brought or instituted made upon motion of the court, after reasonable notice in writing to the person or persons sought to be charged. And upon such motion such court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment." Comp. Laws Kan. c. 23, § 32. That said Cherokee Brilliant Coal & Mining Company was not a "railway, religious, or charitable corporation." That the defendants became the owners of 521 shares of the capital stock of said company, of the par value of \$100 each, and are chargeable with liability to the creditors of said corporation equal in amount to the amount of stock so held by them. That said company became insolvent, and made an assignment of all of its property, on or about June 17, 1886. That by the laws of said state of Kansas it is further provided that "if any corporation, created under this or any general statute of this state, except railway or charitable or religious corporations, be dissolved, leaving debts unpaid, suits may be brought against any person or persons who were stockholders at the time of such dissolution without joining the corporation in such suit, and if judgment be rendered and execution satisfied, the defendant or defendants may sue all who were stockholders at the time of dissolution for the recovery of the portion of such debt for which they were liable, and the execution upon the judgment shall direct the collection to be made from the property of each stockholder, respectively, and if any number of stockholders (defendants in the case) shall not have property enough to satisfy his or their portion of the execution, then the amount of deficiency shall be divided equally among all the remaining stockholders and collection made accordingly, deducting from the amount a sum in proportion to the amount of stock owned by the plaintiff at the time the company dissolved." Id. § 44. That at the time of issuing said fieri facias said corporation had for more than a year suspended business, and was thereby dissolved. It was stipulated between the parties that the defendants were the owners of the shares of stock alleged in the bill, but the same had been fully paid for. The appellant Earle filed an intervening petition, setting up a judgment in his favor against said corporation for \$1,163.50, rendered at the December term, 1890, the return of execution unsatisfied, etc., and joining in the general allegations of the bill. The prayer of the bill is that the defendants be decreed to pay said judgments. For the purposes of this opinion, the answer of defendants,

except the stipulation above mentioned, may be treated as a general denial of the allegations of the bill, and expressly denying the jurisdiction of the court. The cause having been referred to a master, he reported that all the material allegations of the bill were sustained by the proofs, and that the prayer thereof should be granted. Exceptions to this report were overruled, and a decree entered accordingly. That decree having been reversed by the appellate court, (44 Ill. App. 186,) this appeal is prosecuted.

The first question presented for our decision is whether, under the laws of the state of Kansas where said corporation was organized and is domiciled, appellees are individually liable to its creditors to an amount equal to the stock thereof owned by them. The decision of this question depends upon whether the constitutional provision of that state, above quoted, is to be treated as self-executing; it being admitted that no direct legislation has been had, carrying it into effect. Whether or not such constitutional provisions can be availed of by creditors to charge stockholders, individually, with the debts of a corporation, in the absence of legislative action in aid thereof, depends, generally, upon the language of the provision, and hence cases are to be found holding both ways on the question. See note to *Thompson v. Bank*, 8 Amer. St. Rep. 836, 837, 7 Pac. Rep. 68. In this case, however, the question being as to the effect of a provision of the constitution of a sister state, the decisions of the supreme court of that state must be first looked to; and, if it is found that it has ruled upon such provision, we will adopt that ruling. *Patterson v. Lynde*, 112 Ill. 207. Thus, the supreme court of the United States said in *Fairfield v. County of Gallatin*, 100 U. S. 50: "It is the peculiar province of the supreme court of a state to interpret its organic laws, as well as its statutes, and it is the duty, as well as the pleasure, of this court to follow and adopt that court's interpretation. While it is perhaps true that the supreme court of Kansas has not decided, in terms, that said constitutional provision is self-executing, it has fully recognized, and, in effect, held, that stockholders of corporations organized under the constitution and foregoing statute of that state are individually liable to creditors of such corporation to an additional amount equal to the stock owned by each of them. *Hentig v. James*, 22 Kan. 826; *Valley Bank v. Ladies' Congregational Sewing Soc.*, 28 Kan. 423; *Howell v. Munglesdorf*, 33 Kan. 194, 5 Pac. Rep. 759; *Abbey v. Dry-Goods Co.*, 44 Kan. 415, 24 Pac. Rep. 426. It will be seen, however, by reference to the foregoing allegations of the bill, that two special modes are provided by the laws of Kansas by which creditors of corporations like the one in question may enforce the liability of stockholders: (1) By having judgment against the corporation, and execution issued against its property or effects returned *nulla bona*, he may have execution against the stockholders, etc. Section 32, *supra*. (2) "If the corporation be dissolved leaving debts un-

paid, suit may be brought against any person or persons who were stockholders at the time of such dissolution without joining the corporation in such suit,"—in which case the statute gives the stockholder sued a special remedy against other stockholders by judgment and execution. He "may sue all who were stockholders at the time of dissolution for the recovery of the portion of such debt for which they were liable, and the execution upon the judgment shall direct the collection to be made from the property of each stockholder, respectively, and if any number of stockholders (defendants in the case) shall not have property enough to satisfy his or their portion of the execution, then the amount of deficiency shall be divided equally among all the remaining stockholders and collection made accordingly, deducting from the amount a sum in proportion to the amount of stock owned by the plaintiff at the time the company dissolved." It is well settled that, these special remedies having been provided for the enforcement of the individual liability of stockholders created by the laws of Kansas, they alone can be pursued to enforce that liability. *Bank v. Francklyn*, 120 U. S. 147, 7 Sup. Ct. Rep. 757, and other cases cited in note to *Thompson v. Bank*, 3 Amer. St. Rep. 854, 7 Pac. Rep. 68; *Thomp. Liab. Stockh.* § 56; *Cook, Stock, Stockh. & Corp. Law*, § 219. The reason of this rule is manifest. The liability only exists by force of some constitutional or statutory provision, and the person incurring that liability is presumed to do so subject to its enforcement by the special provision made for that purpose, and no other. *Lowry v. Inman*, 46 N. Y. 129, and authorities cited.

The amended bill in this case proceeds upon the allegation that the corporation has been dissolved, but attempts to enforce the individual liability of the defendants by a proceeding entirely different from that prescribed by the statute of Kansas, and thus deprive the defendants of the speedy and adequate remedy given them by that statute against other stockholders, if they should be held liable.

There is also the further insuperable objection to this proceeding that it is an attempt to enforce the individual liability of the defendants in a jurisdiction other than that in which the corporation exists; the rule being that, when a special remedy is given creditors of a corporation against its stockholders, the liability cannot be enforced in another state. *Lowry v. Inman*, 46 N. Y. 119; *Christensen v. Eno*, 106 N. Y. 97, 12 N. E. Rep. 648; *Nimick v. Iron-Works Co.*, 25 W. Va. 184. The reason for this rule is forcibly illustrated by the above quoted statute of Kansas, providing a remedy in case of the dissolution of a corporation, which remedy, it must be conceded, could only be enforced in the state of Kansas, where presumably the stockholders of the corporation, generally, reside. For the reasons here given, it is clear that the bill could not be maintained in this state. *Young v. Farwell*, 139 Ill. 326, 28 N. E. Rep. 845, citing numerous authorities; also, sustaining the position that this bill cannot be maintained in

this state. See, also, *Bank v. Rindge*, (Mass.) 27 N. E. Rep. 1015. The judgment of the appellate court will be affirmed.

(146 Ill. 450)

### GAINES v. WILLIAMS.<sup>1</sup>

(Supreme Court of Illinois. May 9, 1893.)<sup>2</sup>

CONSTITUTIONAL LAW—TITLE OF ACT—CHATTEL MORTGAGE—APPEAL—PRACTICE—REHEARING.

1. Act June 5, 1889, entitled "An act to regulate the foreclosure of chattel mortgages on household goods, wearing apparel and mechanic's tools," provides in section 1 that such mortgages can only be foreclosed by suit in a court of record, and, in section 2, that no chattel mortgage executed by a married man on household goods shall be valid unless joined in by his wife. *Held*, that the second section, being germane to the subject expressed in the title, was not obnoxious to Const. art. 4, § 13, providing that no act shall embrace more than one subject, which shall be expressed in its title.

2. Where counsel for both parties admit in their briefs that an appeal presents only one point for the determination of the court, and a decision is rendered on that point, a rehearing will not be granted for the purpose of allowing the defeated party to present other points for decision.

Appeal from circuit court, Cook county; O. H. Horton, Judge.

Suit by George J. Williams against Thomas Gaines to foreclose a chattel mortgage. Decree for complainant. Defendant appeals. Reversed.

Cratty Bros. & Jarvis, for appellant. F. H. Trude and Slusser & Johnson, for appellee.

BAILEY, J. This was a bill in chancery, brought by George J. Williams against Thomas Gaines, to foreclose a chattel mortgage, in pursuance of the provisions of "An act to regulate the foreclosure of chattel mortgages on household goods, wearing apparel and mechanic's tools," approved June 5, 1889. The cause was heard on bill, answer, replication, and a stipulation of the parties as to the facts; and upon such hearing a decree was rendered, foreclosing the mortgage, and ordering a sale of the mortgaged property to satisfy the amount due on the indebtedness thereby secured. The circuit court, in reaching this result, seems to have held the second section of the act in pursuance of which the bill was filed to be unconstitutional and void; and, the validity of a statute being thus involved in the case, the record has been brought by appeal directly from that court to this. Counsel on both sides expressly admit that the only question presented by the appeal is the constitutionality of this section of the statute. The counsel for the appellant, in their brief, in stating the appellee's position, say that the appellee admits that if the second section of the act is valid the mortgage is valid, and not subject to foreclosure, but claims that the section is repugnant to section 13, art. 4, of the constitution, and therefore invalid; and, in response to this statement, the counsel for the

<sup>1</sup> Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

<sup>2</sup> Rehearing pending.

appellee commence their brief by saying: "As stated by the appellant, the only question involved in the case is the constitutionality of the second section of the chattel mortgage act of 1889." Under these circumstances, there is no other question for us to consider, and if, in our opinion, that section is constitutional and valid, the decree of the court below must be reversed.

The statute in question, the title of which is given above, consists of two sections, and is as follows: "Section 1. That no chattel mortgage on the necessary household goods, wearing apparel or mechanic's tools, of any person or family shall be foreclosed except in a court of record. No household goods, wearing apparel or mechanic's tools covered by a chattel mortgage shall be seized or taken out of the possession of the mortgagor before foreclosure, except by a sheriff, and then only after the mortgagee or his agent shall present an affidavit to a judge of any court of record, setting forth that the mortgage is due, or that he is in danger of losing his security, giving the facts upon which he relies, and shall obtain an order from such judge directing such sheriff, to seize such household goods, wearing apparel or mechanic's tools, and hold them subject to the order of the court: provided, that nothing herein shall apply to the sale of furniture by regular dealers on the so-called installment plan: provided, this act shall not apply to the foreclosure of chattel mortgages executed prior to the time this act shall take effect. Sec. 2. No chattel mortgage executed by a married man or married woman on household goods shall be valid, unless joined in by the husband or wife, as the case may be." Section 13, art. 4, of the constitution, provides as follows: "No act hereafter passed shall embrace more than one subject, and that shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed." The contention is that the second section of the act relates to the execution of chattel mortgages upon the several species of personal property mentioned in the title, and is not, therefore, germane to the subject expressed in the title, which is, "the foreclosure of chattel mortgages on household goods, wearing apparel and mechanic's tools."

The rule is too well established to need discussion that every presumption is in favor of the validity of a statute, and that every reasonable doubt must be resolved in its favor, and that where such doubt exists the statute must be sustained. The right of the judiciary to declare a statute void, and arrest its execution, is one which, in the opinion of all courts, is coupled with responsibilities so grave that it is never to be exercised, except in very clear cases. The party who wishes to pronounce a law unconstitutional takes upon himself the burden of proving, beyond a reasonable doubt, that it is so. *People v. Nelson*, 133 Ill. 565, 27 N. E. Rep. 217. As said by Chief Justice Shaw in *Wellington*, *Petitioner*, 16 Pick. 87: "When

called upon to pronounce the invalidity of an act of legislation, passed with all the forms and solemnities requisite to give it the force of law, courts will approach the question with great caution, examine it in every possible aspect, and ponder upon it as long as deliberation and patient attention can throw any new light on the subject, and never declare a statute void unless the nullity and invalidity of the act are placed, in their judgment, beyond reasonable doubt." To similar effect, see *Railroad Co. v. Smith*, 62 Ill. 263; *Hawthorn v. People*, 109 Ill. 302; *People v. Hazelwood*, 116 Ill. 319, 6 N. E. Rep. 490; *Wulff v. Aldrich*, 124 Ill. 691, 16 N. E. Rep. 886; *McGurn v. Board*, 133 Ill. 122, 24 N. E. Rep. 529; *Field v. People*, 2 Scam. 79; *Lane v. Dorman*, 3 Scam. 238; *People v. Marshall*, 1 Gilman, 672; *People v. Reynolds*, 5 Gilman, 1. In *McGurn v. Board*, *supra*, in discussing the constitutional provision now sought to be invoked, we said: "The constitutional provision above quoted has always received a liberal construction, and it has accordingly been held that there may be included in an act any means which are reasonably adapted to secure the object indicated by the title." And in *People v. Nelson*, *supra*, in considering the same provision, we said: "Whenever an act of the legislature can be so construed and applied as to avoid a conflict with the constitution, and give it the force of law, such construction will be adopted."

The question presented by the case before us, then, is whether there is any view, which can reasonably be taken of the statute under consideration, which will make section 2 germane to the subject expressed in the title to the act. That subject, as has already been said, is the regulation of the foreclosure of chattel mortgages upon certain specified classes of personal property. It is plain that in all cases of foreclosure under the provisions of section 1 the question must necessarily arise whether the mortgage sought to be foreclosed is a valid mortgage, or belongs to the class of mortgages intended to be comprehended within the provisions of the act. Whatever goes to the solution of these questions can scarcely be said to be foreign to the subject expressed in the title. Section 1, by its terms, applies to all chattel mortgages upon household goods, wearing apparel or mechanic's tools, except those included in the two provisos contained in that section. Section 2 declares that chattel mortgages on household goods, executed by a married man, his wife not joining, shall be void, and, as a necessary result, not subject to foreclosure. This may be regarded as imposing, in effect, a further limitation upon the generality of the terms of section 1, and as excepting from its operation mortgages of that character. If, instead of section 2 as it now stands, a further proviso had been inserted in section 1, in these terms: "Provided, that no chattel mortgage on household goods executed by a married man, his wife not joining in its execution, shall be deemed to be valid and subject to foreclosure,"—it could scarcely be doubted that the subject of such pro-

viso would be germane to that expressed in the title. But section 2 is susceptible, without any violence to its language, of a construction which will make it substantially identical, in legal effect, to a proviso expressed in those terms. A very similar question arose in *Bouorden v. Kriz*, 13 Neb. 121, 12 N. W. Rep. 831. There an act entitled "An act to exempt homestead from judicial sale," contained, as section 3, the following: "A conveyance or incumbrance by the owner is of no validity, unless the husband and wife, if the owner is married, concur in and sign the same joint instrument." The suit was to foreclose a mortgage on the homestead, executed by the husband alone, and it was contended by the plaintiff that section 3 of the act was void, as being in contravention of the constitutional provision that "no bill shall contain more than one subject, which shall be clearly expressed in the title." The court, in holding the provision constitutional, said: "Under the title to exempt homestead, the legislature may make any provision in relation to protecting such homestead that it sees fit; and so long as such legislation is confined to exempting the homestead from forced sale, whether by execution, or upon a mortgage declared to be void by the statute, it can make no difference. It certainly is just as important that the wife should be protected from a mortgage executed by the husband alone, as that she should be permitted to claim exemption in case of failure of her husband to do so. The law proceeds upon the theory that both husband and wife are entitled to the benefit of the homestead act, and this right cannot be waived except by the consent of both. The law therefore requires the assent of both to a conveyance or incumbrance of the homestead." In *Duncan v. Taylor*, 63 Tex. 645, an act entitled "An act in relation to assignments for the benefit of creditors, and to regulate the same and the proceedings thereunder," contained a section invalidating all liens on stocks of goods exposed for sale in the usual course of trade. In a suit to enforce a chattel mortgage on a stock of goods thus situated, it was held that such provision was germane to the subject of the act, and was therefore valid. In *O'Leary v. Cook Co.*, 28 Ill. 534, the question was as to the validity of a provision in "An act to amend 'An act to incorporate the North-Western University,'" which prohibited the sale of intoxicating liquors within four miles of the university. Such prohibition was held to be germane to the title of the act, and not in contravention of the provision of the constitution of 1848, which declared that "no private or local law shall embrace more than one subject, and that shall be expressed in the title." In discussing the point thus decided, it was said: "The object of the charter was to create an institution for the education of young men, and it was competent for the legislature to embrace within it everything which was designed to facilitate that object. Every provision which was intended to promote the well-being of the institution, or its students, was within the proper subject-matter of

that law. We cannot doubt that such was the single design of this law. Its purpose was to keep far away from the members of the institution the temptation to intemperance, and its attendant vices. Although this provision might incidentally tend to protect others, residing in the vicinity, from the corrupting and demoralizing influences of the groshop, yet it was not the primary object of the law, but its sole purpose was to protect the students and faculty from such influence." In the case of *People v. Blue Mountain Joe*, 129 Ill. 370, 21 N. E. Rep. 923, the title of the act involved was "An act to regulate the practice of medicine in the state of Illinois." The provision of the act in relation to which the question arose was one which imposed a fine upon any itinerant vendor of any drug, nostrum, ointment, or other appliance, of any kind, intended for the treatment of disease or injury, who should vend or sell the same without being licensed to do so. In holding this provision valid, we said: "If, therefore, the subject-matter of the section under consideration is germane to the general subject expressed in the title, or forms a subordinate branch or part of such general subject, it must be held as embraced within the title to the act. \* \* \* To regulate is to adjust by rule, to subject to governing principles, or to restrict within certain rules and limitations. Within the regulation of the practice of medicine must necessarily fall the right to determine, or to provide means for the determination of, who may lawfully exercise the right to practice medicine, and to establish such rules as shall determine what shall and what shall not be regarded as legitimate practice of the profession."

The object of the statute under consideration in the case at bar, manifestly, is to remedy certain abuses and oppressions heretofore existing in the enforcement of chattel mortgages upon household goods and other kindred property. Prior to its enactment, chattel mortgages on those as well as other species of chattels might be foreclosed by the mortgagee by taking possession and selling without legal process or judicial decree, and great hardship often resulted, especially to families of small means, whose household goods or wearing apparel were mortgaged. They were liable to be stripped of even the bare necessities of life, at the mere will of the mortgagor, without the opportunity of being heard or of making defense. To prevent oppressions in the foreclosure of mortgages of this character, the statute forbids foreclosure except by bill in chancery, and restrains the mortgagor from taking possession, and permits him to have the goods seized only by legal process, to be executed by the sheriff; such process to be issued only upon the order of a judge of a court of record, made upon due proof of the mortgagee's right to enforce his mortgage; and during the foreclosure proceedings the goods are to be held by the sheriff, subject to the order of the court. It seems clear to us, that the provision of section 2 of the act, declaring mortgages upon household goods to be

void, so as not to be susceptible of foreclosure by bill or otherwise, when executed by a married man without his wife joining with him in its execution, is germane to the general purpose of the act, as well as to the subject expressed in the title, viz. the regulation of the foreclosure of mortgages on household goods, etc. We are of the opinion that section 2 of the act is not obnoxious to the constitutional provision above quoted, and that it is valid. It follows, as the parties have expressly conceded, that the mortgage sought to be foreclosed is void, and that the mortgagee is not entitled to enforce it by foreclosure or otherwise. The decree of the circuit court must therefore be held to be erroneous, and it will accordingly be reversed, and the cause will be remanded to the circuit court, with directions to dismiss the bill.

#### On Rehearing.

(Oct. 9, 1893.)

PER CURIAM. Since the filing of the foregoing opinion, the appellee has presented his petition for a rehearing, in which he admits the only matter controverted by him at the hearing, viz. the validity of the second section of the statute in question, but seeks to sustain his mortgage on other grounds, which were not relied upon, or even adverted to, in his former brief and argument. We are not disposed to consider the points thus made, it being sufficient to say that the practice of this court will not permit a party who has once submitted his case for decision, and been defeated, to then shift his position, and obtain a reconsideration upon new and distinct grounds. Especially is this so where, as in this case, it has been expressly admitted that the point originally urged is the only ground of controversy in the case. The appellee, having admitted that the constitutionality of section 2 of the statute was the only question to be decided, must abide by that admission, and the decision of that point against him must be regarded as a final disposition of the controversy. We are not disposed to decide cases by piecemeal, and we therefore can entertain petitions for rehearings only for the purpose of correcting errors into which the court may have inadvertently fallen in deciding the case as originally presented. It follows that the petition for a rehearing in this case must be denied.

(146 Ill. 263)

#### VAIL v. ARKELL et al.<sup>1</sup>

(Supreme Court of Illinois. March 31, 1893.)<sup>2</sup>

##### FORECLOSURE—DECREE—COLLATERAL ATTACK.

1. A decree of foreclosure gave the mortgagor 30 days in which to pay the mortgage debt, in default of which the mortgaged property should be sold. Afterwards the decree was amended on stipulation of the parties by inserting a clause permitting judgment creditors to redeem, such clause having been omitted from the original decree by clerical error.

Held, that the 30 days ran from the rendition of the original decree, since the amendment did not change its form, force, or effect. 43 Ill. App. 466, affirmed.

2. The fact that the circuit court, upon the cause being remanded to it by the appellate court, departed from the mandate of that court in rendering a decree, does not render the decree void on collateral attack, especially after a lapse of eight years, where it is not shown that the aggrieved party was under any disability, or was in ignorance of the alleged error. 43 Ill. App. 466, affirmed.

#### Appeal from appellate court, first district.

Bill by Annie M. Miller against William J. Arkell, Lucy W. Drexel, and Ellen P. Vail. A cross bill was filed by Ellen P. Vail, which was dismissed on demurrer. This decree was affirmed by the appellate court, and the cross complainant appeals. Affirmed.

The following statement by the appellate court sufficiently presents the questions involved: One Annie M. Miller filed in the circuit court her bill for an injunction restraining William J. Arkell and Lucy W. Drexel from interfering with her possession of certain premises, she claiming an interest therein by virtue of an alleged lease by Joseph W. Drexel to her of certain premises described as block 5 in certain subdivisions of the N.  $\frac{1}{2}$  of section 19, township 38, range 14. Ellen P. Vail was made a party defendant, the only allegation as to her being that she claimed some interest in the premises. No relief against her was asked. The defendants Arkell and Drexel answered the bill, denying that complainant had any such lease or any interest, equitable or otherwise, in the said premises, and filed a cross bill alleging that the said Annie M. Miller and Alexander Miller, being unlawfully in possession of lots in said block 5, exercise acts of ownership over the whole block, of which they allege they are the owners, and trespass upon the rights of complainants in said cross bill; and that said Annie and Alexander Miller threaten and intimidate the tenants of orators on said premises, and threaten to commit further trespasses, and to drive off with force orators' tenants, and prevent orators from taking possession of said premises by tenants. The cross bill asked for an injunction against the said Annie and Alexander Miller, restraining them, etc. Ellen P. Vail was made a party defendant to this cross bill, but the bill set up no title in her, and asked for no relief as against her. Ellen P. Vail answered the bill of Annie M. Miller, the cross bill of Drexel and Arkell, and filed her cross bill, alleging that on the 14th day of July, 1883, she was the owner of an equal undivided half part of the lots and lands in said bill and cross bill described, and of the N.  $\frac{1}{2}$  of section 19, in the town of Lake, in the county of Cook, and state of Illinois, subject to the payment of certain purchase money to one Joseph W. Drexel; that in March, 1875, Joseph W. Drexel filed his bill to foreclose the agreement of purchase, under which she, said Ellen P. Vail, claimed title, making her and other parties defendants thereto; that a decree was entered decreeing the payment of the money found due on

<sup>1</sup> Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

<sup>2</sup> Rehearing denied October term, 1893.

such contract within 60 days; that she sued out a writ of error to reverse said decree, and it was reversed by the appellate court, and ordered to be set aside, and wholly for nothing esteemed; that said cause was redocketed in the circuit court, and the bill, against the protest of her, the said Ellen P. Vail, amended, but that the amendments did not materially alter the allegations of the bill as passed upon by the appellate court; that said bill was without equity; that the only order the circuit court was authorized to make was an order dismissing the bill, but, notwithstanding this, the circuit court entered a pretended decree inconsistent with the opinion and decree of the appellate court; that by said decree the defendants thereto were ordered to pay the sum of \$135,842.45, with interest and costs; and thereupon the complainant, Joseph W. Drexel, was to execute and deliver a warranty deed of said premises. The cross bill further sets forth that said decree was in direct violation of the order of the appellate court and of the law of the case as determined by the appellate court. That, notwithstanding the order of the appellate court, said decree ordered that in default of such payment the said land should be sold by the master, and that out of the proceeds the master should pay to said Drexel the amount found due as aforesaid, with interest, etc. Alleges that said decree was illegal and void, because it contained no provision for redemption. That said decree was amended October 9, 1883. Further alleges that the master gave public notice for three weeks that he would sell said premises. Alleges that no valid notice could be given until the expiration of 30 days from the date of said amendment to said decree. That the date of the first publication of notice was October 13, 1883, and of the last, October 27, 1883. Alleges that said notice was premature, illegal, unauthorized, and void. That said decree was placed upon the record of said circuit court at the September term, 1883, of said court. Alleges that complainant and her codefendants were entitled to 30 days from and after the expiration of said September term of said circuit court in which to pay said sum so found due as aforesaid. That on the 5th day of November said master pretended to offer said premises for sale. That there was no bidder save said Drexel, and that he became the purchaser. Alleges that, while said decree and sale are void, yet complainant offers to pay the amount of said decree, together with interest and costs. That the master has not made to said Drexel any valid conveyance of the said premises, or any part thereof, and that no valid conveyance can be made; and that she and her codefendants have the right to redeem said premises. Waives answer under oath, and prays for a discovery as to all sales of any portion of said premises, an accounting, and, after payment by her of the amount so found due as aforesaid, with interest and costs, a conveyance of said premises by the defendants to complainant and her codefendants. A demurrer to this cross bill by the executors of Joseph W. Drexel and

Lucy Drexel was sustained, and the cross bill dismissed. On appeal to the appellate court from such order the decree was affirmed.

Robert Rae and James W. Beach, for appellant. Hutchinson & Luff, for appellees.

SHOPE, J. It is not true, as seems to be supposed, that the cross bill of Arkell and Drexel had the effect of opening up the litigation which was brought to a final determination July 14, 1883. It was then found that the interest of Mrs. Vail, appellant, and those under whom she claims, in the property there in dispute, and of which the lot mentioned in the original bill in this cause formed a part, was as mortgagor only, and a foreclosure thereof decreed, and a sale was ordered and made to satisfy the amount found to be owing. The sale under said decree was made November 5, 1883, and, no redemption having been made, a conveyance of the property was made to the purchaser, Joseph W. Drexel. The decree of sale, and deed made thereunder, if valid, had the effect of extinguishing the right and interest of appellant in and to the property. It is alleged, however, that the master never made a valid conveyance. This is a mere conclusion of the pleader. That a deed was made is not questioned, and, as no defects are alleged, or the deed set out, so that the court can determine its validity, it must be presumed to have been in conformity with the decree authorizing the same.

It is also urged that the allegations of the bill that the master sold without having given proper notice gave the court jurisdiction to entertain the bill to set aside the sale. The matter complained of is, as alleged, that the master commenced the publication of notice of the sale prior to the expiration of the time fixed for payment by the decree. The decree was entered July 14, 1883, and the first publication of notice was October 13, 1883. The time fixed for the payment was 30 days from the rendition of the decree. It is, however, contended that the decree was amended October 9, 1883, and, although the amendment was made by stipulation of the parties, and was purely formal, that the 30 days began to run from that time. An examination of the record shows that the amendment consisted merely of a correction of a clerical error, and the insertion of a clause permitting judgment creditors to redeem. The amendment in no wise changed the form, force, or effect of the decree. It was a final decree, July 14, 1883, and remained in force authorizing the publication made. *Black, Judgm. 154; Coughran v. Gutcheus, 18 Ill. 390; Smith v. Wilson, 26 Ill. 186.*

It is said that error intervened in rendering said decree, because the court departed from the mandate of the appellate court, upon appeal to that court, from a former decree rendered in said cause. If this was conceded, (which it cannot be,) the decree would be erroneous, but not necessarily void; and appellant had ample remedy by writ of error or appeal, had

she prosecuted the same. It is not alleged that appellant was under any disability, or that all the matters of which she now complains were not within her knowledge; nor is it pretended that any thing has occurred since the rendition of the decree of July 14, 1888, that would in any manner change the rights of the parties. Practically eight years had elapsed prior to the filing of her cross bill, in which appellant has slept upon her rights, if any she had, and the familiar doctrine that courts of equity will not lend their aid in enforcing stale claims must apply. *Hamilton v. Lubnke*, 51 Ill. 415; *Dempster v. West*, 69 Ill. 613; *Munn v. Burges*, 70 Ill. 604; *Hay v. Baugh*, 77 Ill. 500; *Hoyt v. Institution*, 110 Ill. 890. It is insisted, however, that because, in the litigation with Miller, appellees Arkell and Drexel by their cross bill claimed title to the property in controversy in said Joseph W. Drexel and his heirs, and sought to set aside the leasehold estate claimed by Miller, appellant may on cross bill relitigate the matters that were adjudicated in the former proceeding. Her cross bill is neither in its frame or prayer a bill of review, nor a bill in the nature of a bill of review, nor does it seek to set aside the decree for fraud. As before seen, the right and interest of appellant in the property in question was adjudicated and settled by the decree in the former case, rendered July 14, 1888, and until reversed, annulled, or impeached, it is conclusive. We are of opinion that upon both of the grounds stated the demurrer to the cross bill of appellant was properly sustained. It will not be necessary to discuss the further points made. The judgment of the appellate court affirming the decree dismissing the cross bill will be affirmed.

(146 Ill. 570)

BENTON v. BROTHERHOOD OF RAILROAD BRAKEMEN.<sup>1</sup>(Supreme Court of Illinois. March 31, 1893.)<sup>2</sup>

## MUTUAL BENEFIT INSURANCE—DESIGNATION OF BENEFICIARY.

An association amended its constitution, providing a mode by which members might designate their beneficiaries, and declaring that "where marriage is contracted after issuance of policy, and said policy becomes payable through death, it shall be paid to the widow, or, in event of her death, to their joint issue, if any, unless otherwise ordered." *Held*, that where a member had, before adoption of such amendment, designated his mother as his beneficiary, in the manner then provided by the constitution, the policy was payable to his mother, although he left a widow, whom he had married after issuance of the policy, since the amendment does not require the designation of another beneficiary than the widow to be made after its adoption. 45 Ill. App. 112, reversed.

Error to appellate court, second district.

Bill by Mrs. S. S. Benton, alias Atlanta Benton, against the Brotherhood of Railroad Brakemen. Defendant obtained a decree, which was affirmed by the appel-

late court. Complainant brings error. Reversed.

The other facts fully appear in the following statement by BAILEY, C. J.:

This was a bill in chancery, brought by Mrs. S. S. Benton against the Brotherhood of Railroad Brakemen, to recover the sum of \$1,000 and interest, claimed to be due her upon a certain instrument, in the nature of a policy of insurance, issued by the defendant to Fletcher D. Benton, the complainant's son, and by his indorsement thereon made payable to her. The instrument or policy in question was dated May 8, 1888, and the material portions of it were as follows: "This policy of insurance witnesseth, that the Brotherhood of Railroad Brakemen, in consideration of the grand dues to them duly paid, in accordance with the provisions of the constitution of said brotherhood, by Fletcher D. Benton, and of the annual payment of such grand dues every year during the continuance of this policy, do insure the life of said member, Fletcher D. Benton. And the said brotherhood do hereby promise and agree to pay the amount of insurance that may, at the time of the death of said insured, be justly due and owing, according to the provisions of said constitution, as well as the like sum in case of disability of said assured, in accordance with the terms and conditions further provided in said constitution; the said sum or sums to be paid as stipulated therein, to and for the sole use of such person or persons to whom this policy shall be made assignable by said assured, and if such person or persons shall, at the death of such assured, be not living, then to the nearest heir or heirs on receiving proof of the death of said assured, and the identity and proof of right in claimant to inherit the same, according to the requirements of said constitution, any indebtedness to the brotherhood on account of this policy being first deducted therefrom. In every case when this policy shall cease and terminate, or shall be null and void, by reason of immoral or other misconduct, and the assured shall forfeit his membership in this lodge, according to the provisions of the constitution of this brotherhood, then all payments thereon shall be forfeited to the brotherhood, and this policy shall be canceled." On the back of the instrument appears the following indorsement, which was placed there by Fletcher D. Benton on the day the instrument was executed: "Payable to Mrs. S. S. Benton. Relationship, mother. Residence, Dalton, N. Y. I hereby direct the payment of the within policy to the above-named person. F. D. Benton." The case was heard in the circuit court on pleadings and proofs, the facts all appearing by stipulation of the parties, and being, in substance, as follows: Fletcher D. Benton joined the Brotherhood of Railroad Brakemen May 8, 1888, and remained in good standing as a member of Mt. Kilbourne Lodge until his death, which occurred November 27, 1888. He took out a certificate on May 8, 1888, the material portions of which are given above, and which was duly countersigned and delivered and became binding May 11, 1888.

<sup>1</sup> Reported by Louis Boisot, Jr., Esq., of the Chicago bar.<sup>2</sup> Rehearing denied October term, 1893.



On receiving his certificate, he designated Mrs. S. S. Benton, his mother, the complainant herein, as his beneficiary, in case of his death, by a proper indorsement then and there made, the foregoing being a copy of such indorsement. On the 5th day of October, 1888, he married Minnie A. Osgood, who survives him as his widow. The Brotherhood of Railroad Brakemen, at a convention, the sessions of which extended from October 17 to October 27, 1887, adopted a constitution and by-laws for the government of the order, which constitution and by-laws were in full force at the date of Benton's certificate of membership. On the 17th day of October, 1888, the brotherhood again assembled in convention, the sessions of that convention extending to and including the 26th day of that month, and at that convention the brotherhood adopted an amended constitution and by-laws. Copies of the constitution and by-laws both of 1887 and 1888 are exhibited in evidence. By both constitutions, the amount payable on the death or disability of a member was fixed at \$1,000. The most material change in the organic law of the brotherhood, made by the revised constitution of 1888, resulted from the adoption as a part of that constitution of the following section: "Any brother desiring to make a transfer of his benefit policy can do so, in writing, on the back of his policy, and in the form prescribed for that purpose, to be attested to by the secretary of the lodge under the lodge seal. Should a second transfer be desired, a duplicate policy shall be issued by the grand secretary and treasurer, upon the return of the old policy. Where marriage is contracted after the issuance of policy, and said policy becomes payable through death, it shall be paid to the widow, or, in the event of her death, to their joint issue, if any, unless otherwise ordered. All transfers of benefit policies shall be recorded in the membership and policy register of the subordinate lodge and in the grand lodge." Proof of the death of Fletcher D. Benton was made and served January 1, 1889, and Mrs. S. S. Benton demanded of the brotherhood payment to her, such demand being made March 1, 1889. On the 1st day of May, 1889, the brotherhood, having learned that the deceased member left a widow surviving him, paid the amount of the policy to her. It is admitted that payment was due either to the complainant or to the widow. On the foregoing facts, the court found that the equities were with the defendant, and entered a decree dismissing the bill, at the complainant's costs, for want of equity. On appeal by the complainant to the appellate court, the decree was affirmed, (45 Ill. App. 112.) and the present appeal is from the judgment of affirmance.

James McKenzie and Pepper & Scott, for plaintiff in error. Williams, Lawrence & Bancroft and M. J. Dougherty, for defendant in error.

BAILEY, C. J., (after stating the facts.) It being admitted that the amount payable upon the membership certificate of Fletcher D. Benton is due from the Broth-

erhood of Railroad Brakemen, and should be paid either to Benton's widow or to the complainant, the only question presented by this appeal is which of these parties is legally entitled to such payment. The decision of this question must depend upon the construction and legal effect to be given to the amendment to the constitution of the brotherhood adopted in October, 1888. It cannot be doubted that the indorsement made by Benton upon his membership certificate at the time it was issued was a sufficient designation of his mother as his beneficiary, under the then existing laws of the brotherhood. In fact, this was expressly admitted at the hearing. And it is not pretended that any change was afterwards made by him in that indorsement, the fair conclusion from the facts admitted being that it remained precisely as he wrote it, down to the time of his death. Nor is it claimed that he, by any affirmative act, except by his marriage, ever attempted to designate any other beneficiary. It is undoubtedly true that the complainant, during Benton's lifetime, acquired, by virtue of the indorsement, no vested interest in the certificate, or in the money that might become payable thereunder. Her title to the position and rights of beneficiary became vested, if at all, at Benton's death, and must depend upon the facts as they then existed. *Martin v. Stubbings*, 126 Ill. 387, 18 N. E. Rep. 657. It may also be conceded, perhaps, that by the terms of the constitution adopted in 1887 the brotherhood had reserved to itself the power to so amend its rules as to modify its legal relations to its members, and even to set aside the designation of a beneficiary already made by the member, and designate another beneficiary instead. The question is whether, upon a proper construction of the amended constitution, it must be deemed to have attempted to exercise that power in the present instance. The amended section upon which reliance is placed provides a mode in which members may designate their beneficiaries, or may make a second designation, and then provides as follows: "Where marriage is contracted after the issuance of a policy, and said policy becomes payable through death, it shall be paid to the widow, or, in the event of her death, to their joint issue, if any, unless otherwise ordered." It is a recognized rule in the construction of statutes that they should be so construed as to give them a prospective operation, only, and they should be allowed to operate retrospectively only where the intention to give them such operation is clear and undoubted. We see no reason why substantially the same canon of construction should not be applied to the rules or statutes which a mutual benefit society sees fit to adopt for the government of its members. Such rules should not be so construed as to apply to and set aside acts already done under the sanction of former rules, unless it clearly and unmistakably appears that such result was intended by the authority adopting them. There is nothing in the language of the section of the amended constitution under

consideration evidencing an intention to give it a retrospective operation. It does not attempt, either in terms or by necessary implication, to abrogate or set aside designations of beneficiaries already made in conformity with existing rules, but it merely provides that, "unless otherwise ordered,"—that is, in the absence of any other designation,—the widow, if there is one, shall be the beneficiary. We see no reason why the words, "unless otherwise ordered," should be so construed as to require a new designation of a beneficiary after the adoption of the amendment, so long as a valid designation was already in existence. The words apply just as readily to a designation already made as to one thereafter to be made. If the convention which adopted the amended constitution intended to make the widow the beneficiary unless another designation should be thereafter made, it would have been easy to employ language which would clearly express that intention. But the words used being such as apply just as readily to a past as to a future designation, the provision should not be so construed as to set aside valid designations already in existence, but to simply mean that, if a member, after obtaining his certificate, marries, and the certificate becomes payable by reason of his death, his widow shall become his beneficiary, unless he has otherwise ordered; that is, unless there is in existence a valid designation of another beneficiary. Here the member had designated his mother as his beneficiary, and that designation remained in full force and unrevoked at the time of his death. This clearly constituted an order to pay the money to his mother, within the meaning of the amended constitution, and it follows that the money was payable to her, and not to the widow. The judgment of the appellate court and the decree of the circuit court will be reversed, and the cause will be remanded to the circuit court, with directions to enter a decree in favor of the complainant for the amount, principal and interest, it shall find to be payable under the certificate of membership in question, according to the prayer of the bill.

(146 Ill. 394)

WRIGHT v. GRIFFEY.<sup>1</sup>(Supreme Court of Illinois. March 31, 1893.)<sup>2</sup>

## REVIEW ON APPEAL—PRESUMPTION—RECORD—BILL OF EXCEPTIONS.

1. Where a judgment by default is set aside at the term at which it is entered, and the showing on which the judgment is set aside is not preserved in the record, it will be presumed, on appeal, that the judgment was set aside for good cause shown. 44 Ill. App. 115, affirmed.

2. The question whether instructions are misleading cannot be raised on appeal, where the evidence is not preserved by bill of exceptions. 44 Ill. App. 115, affirmed.

3. The bill of exceptions stated that the depositions of four named witnesses were read in evidence, but did not set out the depositions.

<sup>1</sup> Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

<sup>2</sup> Rehearing denied October term, 1893.

Afterwards leave was granted to amend the bill of exceptions. No amendment was in fact made, but the clerk copied the depositions into the transcript of the record, reciting that they were opened and filed in his office. *Held*, that the depositions were not thereby made part of the record, they not being authenticated by the judge's signature, as required in bills of exceptions. 44 Ill. App. 115, affirmed.

Appeal from appellate court, first district.

Assumpsit by Albert S. Wright against G. W. Griffey. Defendant obtained judgment, which was affirmed by the appellate court. Plaintiff appeals. Affirmed.

G. W. & J. T. Kretzinger, (Fred L. Brooks, of counsel,) for appellant. Runnells & Burry, for appellee.

WILKIN, J. To the March term, 1891, of the superior court of Cook county, appellant filed his declaration in assumpsit, together with an account, verified by affidavit, against appellee, to recover the sum of \$4,817.67. During the April term of said court the following orders were made in the case: On the 9th, judgment by default was entered for the amount of said account, and costs of suit. On the 21st, appellee entered his motion to vacate that judgment, and for leave to plead, but his motion was overruled, and he prayed an appeal. On the 25th, he was allowed to withdraw his appeal, and file pleas, but it was ordered that said judgment by default should stand as security to the plaintiff for his claim against the defendant. On the 28th, a plea of the general issue was filed, together with a notice, under the statute of special defenses, of accord and satisfaction, and set-off. On the 14th of May so much of the order of the 25th of April as allowed the judgment by default to stand as security for plaintiff's claim was set aside. On the 25th of the same month, appellant entered his motion to set aside all orders vacating said judgment, which motion was overruled. Thereupon a trial by jury was had, resulting in a verdict and judgment for appellee for \$418.17 and costs of suit, which judgment has been affirmed by the appellate court.

The questions of law attempted to be raised on this appeal are: First, the appellate court erred in refusing to consider the case upon its merits because of the insufficiency of the bill of exceptions; second, the trial court erred in setting aside the judgment by default against appellee; third, the trial court erred in instructions given to the jury on behalf of appellee. The first of the above errors is assigned on the opinion of the appellate court, rather than upon the record, but the same question will properly arise in passing upon the other point made. There is no pretense that the facts upon which the trial court set aside the judgment by default against appellee are in any manner preserved in the record. That the court had the discretionary power to vacate that judgment at the time the order was made, and that its action in that regard could only be reversed for an abuse of discretion, admits of no argument. The presumption being that the court proceeded regu-

larly, and upon sufficient evidence, there is no ground for saying the judgment was not set aside for good cause shown. Objection is made to the 2d, 3d, 4th, and 5th instructions given on behalf of appellee, but no attempt is made to point out any specific objection to either of them. As propositions of law applicable to the case made by the pleadings, they are free from objections. The most that could be said of them would therefore be that, under the facts of the case, they were misleading, which could only be determined by looking into the evidence produced upon the trial; and this raises the question as to the sufficiency of the bill of exceptions. The bill of exceptions signed by the judge who tried the case stated that the depositions of four witnesses, giving their names, were read in evidence by appellee, but the depositions were not set out, or in any manner made a part of the bill, and it is conceded that it did not present the evidence in the case, so that it could be properly considered by the appellate court. While the case was pending there, appellant entered a motion in the case in the trial court for leave to amend said bill of exceptions by inserting the words "the clerk will here insert the same" after each of the names of the witnesses whose depositions were mentioned as having been read in evidence, which motion the court allowed. No amendment, however, was made to the bill of exceptions, but the clerk, in making up the record of said motion, after copying the same and the order granting the leave, recited: "And heretofore, to wit, on the 25th day of June, 1891, there was opened and filed in the office of the clerk of said court certain depositions, which are in words and figures as follows, to wit." He then copied the depositions of witnesses whose names correspond with those mentioned in the bill of exceptions. This record being certified to by the clerk as a complete copy of "certain affidavits on file in his office, and of a certain order," etc., "together with a certain amendment to the bill of exceptions of plaintiff heretofore filed herein," was presented by appellant's counsel to the appellate court as an amended record, and it is now insisted that thereby the bill of exceptions was made complete. That a bill of exceptions may, upon proper notice and proceedings, be amended, is well settled, but how it can be seriously contended that there was such an amendment in this case we are at a loss to perceive. The clerk of a trial court has no power to certify to the evidence heard upon a trial. It can only be preserved by a bill of exceptions signed and sealed by the judge. If evidence is not copied into the bill itself, it must be particularly referred to, and by express terms made a part of it, in such a way that it shall clearly be presented under the sanction of the judge who tried the case. It is by virtue of the signature and seal of the judge that the papers not otherwise constituting part of the record are incorporated into it, and not in consequence of their being copied into the record by the clerk who makes out the transcript. *Moss v. Flint*, 13 Ill. 570, and cases cited. New-

man v. Ravenscroft, 67 Ill. 496. Here appellant, instead of having the clerk obey the instruction of the judge by copying the depositions read on the trial into the bill of exceptions, and certifying to it as amended, attempted to make certain depositions a part of the record by having the clerk certify that they were "opened and filed in his office." There was in this case no proper bill of exceptions, signed by the judge as originally made, and, while leave of the court was obtained to amend it, that leave was not availed of. We think the conclusion reached by the appellate court as to the sufficiency of the bill of exceptions as shown by its opinion was right. We find no error in the record. Affirmed.

(146 Ill. 437)

KOPP v. REITER.<sup>1</sup>

(Supreme Court of Illinois. March 31, 1893.)  
STATUTE OF FRAUDS—SALE OF LAND—MEMORANDUM—DEED.

An undelivered deed which does not recite the terms of the contract of sale, and which is in no way connected with any written contract signed by the grantor, or by any one under authority from him, is not a sufficient "memorandum or note" of the contract of sale to satisfy the statute of frauds.

Appeal from circuit court, Cook county; L. C. Collins, Jr., Judge.

Bill by Cora E. Reiter against William B. Kopp and others. Decree for complainant. Kopp appeals. Affirmed.

The other facts fully appear in the following statement by MAGRUDER, J.:

The original bill in this case was filed in the circuit court of Cook county on July 8, 1891, by the appellee Cora E. Reiter, against the appellant William P. Kopp, the appellee Edward Reiter, and B. F. Croukrite and Henry M. Bacon, for the purpose of removing the contract and trust deed hereinafter described as clouds upon her title to a lot owned by her, and situated in the town of Hyde Park, in said county. Subsequently, the appellants William A. Hammond and Frank C. Vierling, claiming to be the real purchasers of the lot in Kopp's name, were made defendants. Answers were filed to the original bill, and a cross bill and amended cross bill were filed by Kopp, Hammond, and Vierling against Cora E. and Edward Reiter, praying for a specific performance of said contract, which cross bills were answered by the defendants thereto, and in the answers the statute of frauds was pleaded. The bill was afterwards dismissed as to Croukrite upon his delivering into the hands of the clerk of the court the said contract and the \$250 therein mentioned. The cause was referred to a master to take the evidence and report his findings thereon. Upon the hearing, the circuit court decreed in favor of the complainant in the original bill, granting the relief therein prayed, and dismissed the cross bill, ordering the clerk to pay over the \$250 to said Kopp, and directing

<sup>1</sup> Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

<sup>2</sup> Rehearing denied October term, 1893.

Bacon, the trustee, to release the trust deed. From this decree the case is brought here by appeal.

On December 27, 1890, and prior thereto and thereafter, the appellee Cora E. Reiter was the owner in her own right of the lot in question. On that day her husband, Edward Reiter, entered into a written contract with said Kopp, agreeing to sell the lot to him for \$3,000, Kopp paying \$250 down as earnest money, and agreeing to pay \$2,750 within five days after the title should be examined and found good, provided a warranty deed conveying a good title should then be ready for delivery, and, for the balance, to give his note for \$2,000, payable in one year, with interest at the rate of 6 per cent. per annum, secured by a trust deed upon the property; an abstract of title to be furnished within a reasonable time, etc. Before December 27th, Edward Reiter had placed a sale board upon the lot, offering it for sale in his own name, and had also authorized the real estate firm of B. F. Croukrite & Co. to place their sale board upon it. Reiter and Kopp were brought together by George E. Farley, an employe of Croukrite & Co., at whose office the contract was drawn by Farley, and with whom the earnest money and the contract were left. On December 31st the abstract was delivered to Kopp. Within 10 days thereafter, Kopp presented to Croukrite & Co., as the only objection to the title raised by his attorney, a written memorandum suggesting that an affidavit be obtained showing the death of a party whose death was recited in a deed in the chain of title. On January 7, 1891, Farley drew up a warranty deed and a note and trust deed, as above specified. The warranty deed was executed on January 7th or 8th, by Mrs. Reiter and her husband, but was retained by the latter and never delivered; nor does it appear that it was ever approved by Kopp, or submitted to him or seen by him. The note and trust deed appear to have been thereafter executed by Kopp, but were never delivered to or received by Reiter, though he examined the original drafts before their execution. Reiter never obtained the required affidavits, and treated the objection to the title as trivial, claiming that it was made for delay only. Matters remained in this condition, Reiter calling at the office of Croukrite & Co. several times to know why the money and note and trust deed were not ready, and Kopp calling to ask if the affidavit was obtained, until January 16, 1891, when the residence of Mr. and Mrs. Reiter was destroyed by fire. On the morning of January 17th, which was Saturday, Mrs. Reiter told her husband that she was tired of the delay, and that, unless the matter was closed that day, she would not allow the deed to be delivered. Accordingly he went, during the forenoon of that day, to the office of Croukrite & Co., and demanded that the matter be closed. Farley at once telephoned to Kopp, who was at work in a bank, informing him of Reiter's presence and demand. Upon being told that the affidavit was not yet procured, Kopp answered that he would waive the production of the affidavit, as he was to

receive a warranty deed, but could not leave the bank, and would not be able to pay the money until Monday, January 19th. When this answer was communicated by Farley to Reiter, the latter stated that the transaction must be completed on that day, (Saturday,) or not at all. On Monday, Kopp came to the office of Croukrite & Co. to pay the money and exchange the papers, but was told that it was too late. On Wednesday, January 21st, he tendered to Mr. Reiter the \$2,750 and the note and trust deed, and demanded the deed, but Reiter refused to deliver the deed, or to accept the money and securities. On January 21st, Kopp recorded a copy of the contract, and also the trust deed. Some days afterwards, Reiter destroyed the deed.

George R. Grant and Charles E. Pope, for appellant. Ashcraft & Gordon, for appellee.

MAGRUDER, J., (after stating the facts.) Under the facts, did Mrs. Reiter, the owner of the lot, make any such contract for its sale and conveyance as a court of equity will compel her to perform? Section 2 of the statute of frauds provides as follows: "No action shall be brought to charge any person upon any contract for the sale of lands, etc., \* \* \* unless such contract or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized in writing, signed by such party." 1 Starr & C. Ann. St. c. 59, § 2, p. 1192. It cannot be contended here that there has been any such part performance of a parol contract by payments, possession, and improvements as will take the case out of the statute of frauds. The purchaser, Kopp, never took possession of the lot, nor made any improvements upon it. The only payment he made was that of the earnest money, \$250. This amount, however, was not paid to Mrs. Reiter, but to Croukrite & Co., who never had any authority from her, written or otherwise, to make sale of the lot, or to take any other steps in regard to it. We have held in a number of cases that, in order to ascertain what sort of writing is sufficient to meet the requirements of the statute as above quoted no form of language is necessary, if only the intention can be gathered, and that any kind of writing, from a solemn deed down to mere hasty notes or memoranda in books, papers, or letters, will suffice, but that the writings, notes, or memoranda must contain on their face, or by reference to others, the names of the parties, vendor and vendee, a sufficiently clear and explicit description of the property to render it capable of being identified from other property of like kind, together with the terms, conditions, (if there be any,) and price to be paid, or other consideration to be given; and such writing, note, or memorandum must be signed by the party to be charged, or, if signed by an agent, the authority of such agent must be in writing, signed by the party to be charged, and the contract or memorandum or note

thereof made by the agent must also be in writing, and signed by him. *McConnell v. Brillhart*, 17 Ill. 354; *Cossitt v. Hobbs*, 56 Ill. 231; *Wood v. Davis*, 82 Ill. 311; *Albertson v. Ashton*, 102 Ill. 50; *Chappell v. McKnight*, 108 Ill. 570; *Lasher v. Gardner*, 124 Ill. 441, 16 N. E. Rep. 919. The only writing ever signed by Mrs. Reiter in this case was the warranty deed which she executed on or about January 7, 1891, and which remained in the hands of her husband, and was never delivered to Kopp, or to Vierling or Hammond. We do not think that this deed can be regarded, under the facts disclosed by the record, as such a memorandum or note of a contract for the sale of the land as is sufficient to take the case out of the statute of frauds. The contract of December 20, 1890, was executed by and between Mr. Reiter and the appellant, Kopp, but not by Mrs. Reiter, the owner of the lot. She gave her husband no written authority to act as her agent for the sale of the lot, or to sell it, or to sign any contract for the sale of it. We think that the findings of the master, to whom the cause was referred, and whose report was confirmed by the court below, are sustained by the evidence. He finds in his report that, before said contract was executed, Mrs. Reiter was not consulted about it, and did not consent to it, and did not even give her husband any parol authority to sell the lot. The testimony shows that she was opposed to selling the lot, and reluctantly executed the deed at the request of her husband. Although he informed her of the execution of the contract after he had signed it, yet it was never shown to her, and she never saw it until the hearing of the cause. The master has found, and the evidence shows, that the deed was not executed with reference to the previous written contract between Reiter and Kopp, but with the understanding that Mr. Reiter was to deliver it upon receiving \$3,000 in money and a note and trust deed for \$2,000. The deed simply purported to convey the premises from the grantors to the grantee for a consideration of \$5,000, but it did not recite the terms of the contract, or in any manner refer to the contract. Counsel for appellant disclaim any reliance upon the undelivered deed as a conveyance of title, but contend that it is such written evidence of the contract of sale as satisfies the statute of frauds, whose object and meaning "is to reduce contracts to a certainty, in order to avoid perjury on the one hand, (by the setting up of parol evidence, which is easily fabricated,) and fraud on the other," (*Welford v. Beazely*, 3 Atk. 503;) that the non-delivery of the deed, regarded as such written evidence, is immaterial; that it is immaterial whether Mrs. Reiter did, or did not, intend to charge herself thereby; and that the deed was an admission in writing of what the contract was. It is true that an undelivered deed is sometimes resorted to in order to help out the requirements of the statute of frauds, but it can hardly be said that the circumstances under which such a deed can be so used are disclosed by the facts in the present record. The language of the statute

is, "some memorandum or note thereof." The word "thereof" refers back to the word "contract." There must be some memorandum or note in writing of the contract. Hence, if an undelivered deed executed by the owner can be regarded as meeting the requirements of the statute, it must be a memorandum or note of the contract, or, in other words, must refer to the terms and conditions of the contract.

In *Caggar v. Lansing*, 43 N. Y. 550, it is said: "The counsel \* \* \* insists that the deed executed by the intestate, and delivered in escrow, is a contract for the sale of the land executed by the intestate. This position cannot be sustained. The deed purports to be a conveyance of all the intestate's interest in the premises, for a consideration therein expressed of \$1,000, but is wholly silent as to the terms of the contract pursuant to which it was made." In *Campbell v. Thomas*, 42 Wis. 437, it was held that one who had deposited a deed with a third person, with directions to deliver it to the grantee on the happening of a certain event, but had made no valid executory contract to convey the land, could revoke the directions to the depository, and recall the deed at any time before the conditions of the deposit had been complied with, provided those conditions were such that the title did not pass at once to the grantee upon delivery of the deed to the depository; and it was there said: "If a person, who has made a parol agreement to sell land, sign an instrument in the form of a conveyance of such land to the vendee, and deposit it in escrow, if such instrument contains the terms of the parol agreement including the consideration, it is a sufficient compliance with the requirements of the statute of frauds." In *Swain v. Burnette*, 89 Cal. 564, 26 Pac. Rep. 1093, it was held that an undelivered deed, executed in pursuance of an oral agreement of sale, cannot be regarded as a sufficient memorandum to satisfy the statute of frauds, unless it is shown to have contained a memorandum of the oral agreement. *Freeland v. Charmley*, 80 Ind. 132; *Parker v. Parker*, 1 Gray, 409; *Overman v. Kerr*, 17 Iowa, 485; *Cannon v. Cannon*, 26 N. J. Eq. 316; *Johnston v. Jones*, 85 Ala. 286, 4 South. Rep. 748. Many of the cases cited as authority for the position that a deed executed by an owner of land, but not delivered, is a sufficient memorandum of a contract of sale, under the statute, will thus be found, upon examination, to refer to deeds containing the terms of the contract. In the case at bar, however, as has already been stated, the deed executed by Mrs. Reiter and her husband was a simple conveyance of the lot for a consideration of \$5,000, and was silent as to the terms of the contract of December 27, 1890. Where the owner of land has signed a written contract of sale, or some writing amounting to such a contract, but has failed therein to properly describe the property, a deed executed by him, but not yet delivered, may be looked to as a part of the transaction, and may be made to aid the prior agreement, and secure its enforcement, by supplying the defect in such

description. Thus, in *Jenkins v. Harrison*, 66 Ala. 845, to which reference is made by counsel for appellant, a memorandum in writing, purporting to contain the terms of a contract for the sale of land, and signed by both of the parties, failed to describe the property with the certainty and definiteness required to a specific performance, but deeds, inoperative for want of delivery, were executed by the parties a few days afterwards, which did correctly describe the land; and it was held that such undelivered deeds, and the memorandum signed by the parties, might, when taken together, satisfy the requisitions of the statute of frauds, the court saying: "When the memorandum \* \* \* is taken and read, as it must be, in connection with the deeds subsequently executed, there is no doubt or uncertainty as to the terms of the contract for the sale of the lands. True, the deeds do not expressly refer to the memorandum, but they were all executed as parts of a single transaction, between the same parties, having reference to the same subject-matter." In *Work v. Cowhick*, 81 Ill. 317, property was struck off to appellant as the highest bidder at an administrator's sale, and the administrator's deed of the land, and a note signed by the purchaser, in which she promised to pay to the administrator the purchase money "for land purchased by Elizabeth Worth this day at administrator's sale," were left with a third person to be held until the purchaser should obtain personal security on the note, and execute a mortgage, at which time the deed was to be delivered. It was held, in a suit by the administrator against the purchaser for a failure to carry out the sale, that the making of the deed and the signing of the note might be regarded as one transaction, and that together they constituted such proof as amounted to a compliance with the statute of frauds; the description in the deed indicating what land was referred to by the imperfect description in the note. So, in *Wood v. Davis*, supra, written authority to an agent to sell land, and the terms of a contract of sale, were embodied in letters written by the owner, who also sent to the agent an executed deed to be delivered, but which was never in fact delivered; and when, after refusal by the agent to consummate the trade, suit for damages was brought by the purchaser against the owner, it was held that such a contract was established as took the case out of the operation of the statute of frauds, and that, although the memoranda contained no description of the land, the description in the undelivered deed could be referred to to supply the defect.

It is manifest, however, that all these cases differ from the case at bar. Here, the undelivered deed executed by Mrs. Relter cannot be used to supplement, or supply any defect in, a prior contract of sale, or a prior note or memorandum of a contract of sale, because there was no prior contract or note or memorandum which she had signed, or to which she was a party, or which she had authorized to be made. The contract of sale, therefore, entered into, was made by Mr. Relter, with-

out either written or parol authority from her. Nor can her undelivered deed, subsequently destroyed, be regarded as a ratification of the agreement made by her husband, because it was not made in pursuance of that agreement, or to carry it out, but without any reference to it. Where, as is the case here, the owner of land, without making a valid executory contract to convey it, deposits a deed of it with a third person, to be delivered to the grantee upon certain terms, he may cancel the instructions given to such third person, and recall the deed, at any time before the specified terms have been complied with; nor can such deed, invalid as a conveyance for want of delivery, be considered as a memorandum in writing, signed by the owner, agreeing to convey the land therein described, so as to authorize a decree of specific performance. A deed which has not been delivered is not, by its own force, and aside from any contract to which it may be related, a sufficient writing to meet the requirements of the statute of frauds. For these reasons we think that the decree of the circuit court was right, and the same is accordingly affirmed.

(146 Ill. 532)

PEOPLE ex rel. HAMBEL v. McCONNELL, Judge.<sup>1</sup>

(Supreme Court of Illinois. May 9, 1893.)<sup>2</sup>

MANDAMUS TO JUDGE—NEW TRIAL.

1. Mandamus will not lie to compel a judge to pass upon a motion for a new trial in a cause tried before another judge, who has since died, where no competent evidence of the testimony introduced at the trial is offered upon the motion for new trial, since without such evidence the motion could not properly be decided.

2. A transcript of the testimony, made by the unofficial stenographer who took it down, is not evidence where it is not corroborated by oath or affidavit.

Application by the people on the relation of Alle J. Hambel for a writ of mandamus against S. P. McConnell, judge of the circuit court. Denied.

Byam, Weinschenk & Hirschl, for plaintiff. Milford J. Thompson, for defendant.

BAILEY, C. J. This is an original proceeding in this court for mandamus. The petition represents, in substance, that there was heretofore and is now pending in the circuit court of Cook county a certain action at law in which Alle J. Hambel is plaintiff and Charles F. Hayes is defendant, and that such proceedings were had therein that on the 3d day of March, 1892, a trial was had before the Honorable George Driggs, one of the judges of that court, and a jury, resulting in a verdict in favor of the plaintiff for \$400; that on the 8th day of March, 1892, Hayes, the defendant, entered in the cause his motion in writing for a new trial, and that on the 18th day of March, 1892, while the motion was pending and undisposed of, Judge Driggs died; that the Honorable Samuel

<sup>1</sup> Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

<sup>2</sup> Rehearing denied October term, 1893.

P. McConnell is now, and for more than a year last past has been, one of the judges of said circuit court; that on or about May 2, 1892, Hambel, the plaintiff entered her motion in said court before defendant McConnell, presiding as judge of and over said court, that he should entertain, hear, consider upon its merits, and decide the motion for a new trial, which had been made by defendant Hayes. The petition further represents that the plaintiff then and there, in open court, tendered to said judge a true, full, and correct transcript of all the evidence and proceedings given, taken, or had at and during the trial before Judge Driggs; that thereupon arguments were made before Judge McConnell, in open court, he then and there presiding, by the attorneys of Hambel and Hayes, respectively, and upon the 3d day of June, 1892, the court, Judge McConnell presiding, denied Hambel's motion, and refused, and still refuses, to either entertain, hear, or consider on the merits, or decide upon the merits, the motion by Hayes for a new trial, and refuses to do any one of those matters, and asserts and alleges that he has neither power nor jurisdiction to entertain, hear, consider, or decide upon its merits the said motion; that in so doing Judge McConnell is refusing to perform a legal and statutory duty, and that it is his duty to consider the motion upon the merits, and to overrule the same if the merits of the controversy so require. The petition prays for a mandamus, compelling Judge McConnell, as such circuit court, to entertain, hear, consider upon its merits, and decide the motion for a new trial, and for such other relief as the circumstances of the case may require. Judge McConnell has appeared, but no demurrer or answer to the petition nor other subsequent pleading has been filed. Instead of such pleading, the parties have filed a stipulation as to the facts, and have submitted the cause for decision on such stipulation, it being as follows: "The parties hereto submit the above-entitled case under the following agreed state of facts, to wit: First. That prior to March 3, 1892, a case was and still is pending in the circuit court of Cook county, under general number 77,645, term number 3,408, entitled Allie J. Hambel vs. Charles F. Hayes. Second. That upon the 3d day of March, 1892, a trial was had in said case before a jury, resulting in a verdict against the defendant for \$400. Third. That on the 8th day of March, 1892, a motion was duly entered for a new trial by the defendant Hayes, a copy of which motion is attached to the plaintiff's petition herein, and is made a part of this agreement. Fourth. While said motion was pending, and before it was disposed of, Judge Driggs, who presided over the court before which the trial was had, died. Fifth. By agreement of counsel, the hearing was referred to the defendant, Judge Samuel P. McConnell, upon motion of the plaintiff asking him to hear said motion for a new trial upon its merits. Said McConnell was then and there, and still is, a judge of said circuit court. Sixth. That at the hearing before his honor, Judge Samuel P. McConnell, the plaintiff's attor-

ney stated to the court that he had the minutes of the testimony and proceedings taken by the stenographer at the trial, and the transcript of which was alleged by the plaintiff to be full and true, and was by him alleged to have been taken at the trial by a stenographer at the instance of both parties, and was by him offered for the inspection of the court. The court thereupon heard the motion on the theory that a transcript of said minutes had been presented, but it is hereby expressly understood that the defendant did not agree that the minutes of such testimony were correct or true, or in any way authenticated under the rules of court making such minutes part of the record; neither did the defendant allege any error in such transcript or minutes. Seventh. After hearing the arguments of counsel, his honor, Judge McConnell, held that he could not lawfully pass upon the motion for a new trial upon its merits in this case."

Upon the facts appearing by this stipulation, and upon those facts alone, the relator seeks the judgment of this court, awarding her a peremptory mandamus as prayed for in her petition. "The writ of mandamus is a high prerogative writ, to be awarded in the discretion of the court, and ought not to issue in any case unless the party applying for it shall show a clear legal right to have the thing sought by it done, and in the manner and by the person or body sought to be coerced, and must be effectual as a remedy if enforced; and it must be in the power of the party, and his duty also, to do the act sought to be done. It is well settled that in a doubtful case this writ should not be awarded. It is never awarded, unless the right of the relator is clear and undeniable, and the party sought to be coerced is bound to act." The rule laid down in the foregoing language by Mr. Justice Breese in *People v. Hatch*, 33 Ill. 9, 140, has been so frequently reaffirmed and applied that the citation of other cases is unnecessary. The question which the relator seeks to have presented to and passed upon by this court is as to the power and duty of Judge McConnell, one of the judges of the circuit court of Cook county, to hear and decide upon its merits a motion for a new trial in a case tried before Judge Driggs, another judge of the same court, and which was pending and undetermined at the time Judge Driggs died. Before that question can be presented in this proceeding, it must appear clearly and unequivocally that Judge McConnell has been called upon by the relator to decide the motion, and that, too, under circumstances which made it his legal duty to take jurisdiction of and decide it upon the merits, and that he refused to act. Until that is shown, it cannot be seen that a mandamus is necessary, or that the relator has any occasion to resort to the writ. In proceedings of this character it will be presumed, until the contrary is clearly shown, that a judicial officer will perform his duty, when placed in circumstances which require such performance, and his action will not be compelled by mandamus until his conduct is



such as to clearly negative that presumption.

Recurring to the facts shown by the stipulation,—and it is to those alone we can look,—it will be seen that there is an entire failure to show that the motion for a new trial has ever been presented or offered to be presented to Judge McConnell in such form as to make it possible for him to decide it upon the merits, even if it should be conceded that such decision is within his jurisdiction. When the matter was before him for consideration, so far as is shown by the stipulation, no proof whatever was made as to what the evidence or proceedings at the trial were, nor was any offer made to supply such proof. It is true the relator's attorney produced and exhibited to the judge a document which he said was a transcript of the stenographer's notes taken at the trial, but, so far as the stipulation shows, he neither produced nor offered to produce any evidence that the document was a correct transcript of the testimony and proceedings at the trial, and it is admitted that the opposite party expressly refused to concede that what purported to be the stenographer's notes was correct or true. The judge may well have refused to decide the motion for a new trial upon the ground that there was nothing before him upon which his decision could be based. The unauthenticated transcript of the stenographer's notes was not evidence upon which the judge could act, nor was the unsworn statement of the relator's attorney that the transcript was correct. It is by no means clear that the judge's refusal to decide the motion was not, and was not intended to be, based upon the want of evidence of what took place at the trial. The stipulation is that, after hearing the arguments of counsel, he held that he could not lawfully pass upon the motion for a new trial upon its merits, but, as there was no competent evidence before him as to what the merits of the motion were, it is just as fair to assume that his decision was based upon that ground as upon the ground that he had no jurisdiction to decide a motion for a new trial in a case tried before another judge. The want of competent evidence of the proceedings at the trial was clearly a justification of his refusal to decide the motion for a new trial on its merits. We would not be understood as expressing any opinion whether Judge McConnell has or has not jurisdiction to decide such motion, as this case is not so presented as to call for a determination of that question. But for the reasons above stated the writ of mandamus must be denied.

(146 Ill. 460)

### NEAGLE v. KELLY.<sup>1</sup>

(Supreme Court of Illinois. May 9, 1893.)<sup>2</sup>

**FORCIBLE DETAINER—ACTION ON APPEAL BOND—RENT AND TAXES—STATUTE OF FRAUDS—APPEAL.**

1. An appeal bond in forcible detainer proceedings, that is conditioned for payment of all

<sup>1</sup> Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

<sup>2</sup> Rehearing denied October term, 1893.

rent due or to become due, creates a liability for taxes not paid by the tenant, where the lease provides that he shall pay such taxes as part of the rent reserved therein. 44 Ill. App. 234, affirmed.

2. Where a subtenant obtains possession under an agreement with the tenant to pay the rent reserved in the lease, such agreement is not within the statute of frauds, since it is an original undertaking. 44 Ill. App. 234, affirmed.

3. The statute of frauds cannot be used as a defense on appeal, when not pleaded or relied on in the trial court.

**Error to appellate court, first district.**

Action by Edward M. Kelly against John F. Neagle. Plaintiff obtained judgment, which was affirmed by the appellate court. Defendant brings error. Affirmed.

The other facts fully appear in the following statement by CRAIG, J.:

This was an action brought by Edward M. Kelly against John F. Neagle on an appeal bond executed upon an appeal from a justice of the peace to the circuit court in an action of forcible detainer. The bond upon which the action was brought was as follows: "Know all men by these presents, that we, Simon Stafford and John F. Neagle, are held and firmly bound unto Edward Kelly in the penal sum of one thousand dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs and administrators, jointly and severally and firmly by these presents. Witness our hands and seals this 26th day of November, 1890. The condition of the above obligation is such that whereas, the said Edward Kelly did, on the 30th day of July, 1890, before H. B. Brayton, J. P. of Cook Co., recover a judgment against Simon Stafford for the restitution of lot 5, S. 9 feet of L. 6, B. 4, Newberry's addition to Chicago, and the buildings thereon situated, in Chicago, in said county, and costs of suit, from which said judgment the said Simon Stafford has taken an appeal to the circuit court of Cook county, state aforesaid: Now, if the said Simon Stafford shall prosecute his appeal with effect, and pay all rent due, and that may become due, before the final termination of the suit, and all damages and loss which the said plaintiff may sustain by reason of withholding of the premises in controversy, and by reason of any injury done thereto during such withholding, together with all costs, until the restitution of the possession thereof to the plaintiff, in case the judgment from which the appeal is taken is affirmed, or appeal dismissed, then this obligation to be void; otherwise, to remain in effect. [Signed] Simon Stafford. [Seal.] John F. Neagle. [Seal.]" On a trial in the circuit court before a jury, the plaintiff recovered a judgment for \$1,000, which was affirmed in the appellate court.

Frank P. Reynolds, for plaintiff in error.  
Booth & Booth, for defendant in error.

CRAIG, J., (after stating the facts.) No complaint is made in the argument in regard to the ruling of the court in the admission or exclusion of evidence. The court, however, gave one instruction in

behalf of the plaintiff which is claimed to be erroneous. The instruction was substantially as follows: The court instructs the jury that if they believe from the evidence that the defendant Neagle signed the bond offered in evidence as surety for Simon Stafford; and they further believe from the evidence the defendant Stafford, deceased, agreed with the plaintiff to pay the ground rent and taxes for the premises described in the bond, in consideration of being allowed to occupy the said premises; and if the jury further believe from the evidence that at the time of restitution, as shown by the evidence, there was any ground rent or taxes due and unpaid for the said premises, or that the plaintiff had, prior thereto, paid any ground rent or taxes that ought, as they believe from the evidence, to have been paid by the defendant Stafford,—then they should find for the plaintiff. It is claimed in the argument that, as the bond upon which the action was brought contained no provision in regard to the payment of taxes, the direction to the jury in regard to plaintiff's right to collect taxes is erroneous. Upon looking into the record it appears that Kelly, at the request of Simon Stafford, purchased a building located on a leased lot, and agreed with Stafford that the latter might have the possession and use of the property upon the payment of the rents and taxes as the same became due according to the terms of the ground lease. Stafford entered into possession of the premises under this arrangement, but failed to pay the rent and taxes, as agreed upon, and Kelly was obliged to pay, according to the terms of ground lease, rent and taxes amounting to over \$1,000. The condition of the bond upon which the action was brought required Stafford to prosecute his appeal with effect, and pay all rent now due, and that may become due before the final termination of the suit, and all damages and loss which the plaintiff may sustain by reason of withholding the premises in controversy. It is true the condition of the bond does not require Stafford to pay taxes in terms, but it does require him to pay all rent due, and that may become due, and, as the taxes constituted a part of the rent which Stafford had agreed to pay, he and his sureties were liable for the taxes. The ground lease required the taxes to be paid as they matured, as a part of the rent, and, so far as appears, the taxes were as much a portion of the rent as the monthly sum (\$43.75) required to be paid in money. For a failure to pay the rent—the taxes and \$43.75 monthly—the judgment in the action of forcible detainer was rendered, and the taxes and monthly payment of \$43.75 constitute the rent named in the bond. We do not, therefore, regard the instruction erroneous. It is also suggested in the argument that the statute of frauds may be availed of as a defense. Stafford obtained the possession of the premises from Kelly under an agreement to pay the rent. It was not collateral to any agreement made by Kelly, but, on the other hand, it was an original undertaking on his part, and the statute of

frauds has no application to such an agreement. Besides, the statute of frauds was not pleaded or relied upon in the circuit court, and it is too late now, for the first time, to claim the benefit of the statute on appeal here. We think the judgment of the appellate court was correct, and it will be affirmed.

(146 Ill. 320)

UNION MUT. LIFE INS. CO. v. CHICAGO  
& W. I. R. CO.<sup>1</sup>

(Supreme Court of Illinois. June 19, 1893.)<sup>2</sup>

CONSTRUCTION OF CONTRACT — MORTGAGE — REDEMPTION — EMINENT DOMAIN.

A railroad company bought land from a mortgagee in possession with notice that the mortgagor claimed the right to redeem. The mortgagee gave the company an agreement that if redemption was made he would repay the company the amount paid by it for the land, with interest. Afterwards the railroad company condemned the land, and deposited with the county treasurer the compensation awarded therefor on the very day that the mortgagor redeemed the land and paid the redemption money to the railroad company. *Held*, that the mortgagee was only liable to the company for interest up to the date of the deposit, since the railroad company, as equitable assignee of the mortgage, was entitled to retain that part of the compensation representing the mortgage debt, and need not have deposited it with the county treasurer. 44 Ill. App. 88, reversed.

Error to appellate court, first district.

Bill by William J. Slee against the Union Mutual Life Insurance Company and the Chicago & Western Indiana Railroad Company. The latter company filed a cross bill, on which a decree was rendered, to which the insurance company brings error. Reversed.

Grossepup & Wean, for plaintiff in error.  
Osborn & Lynde, for defendant in error.

WILKIN, J. On the 20th of July, 1890, the circuit court of Cook county entered its decree in favor of defendant in error against plaintiff in error for the sum of \$2,262.92, being for accrued interest at the rate of 6 per cent. per annum on \$4,680 from December 27, 1880, to January 17, 1889. That decree was affirmed by the appellate court. (44 Ill. App. 88,) and hence this writ of error.

It appears that on the 24th of March, 1880, plaintiff in error held the legal title to certain real estate in the city of Chicago, which William J. Slee claimed the right to redeem. Defendant in error, desiring the property for railroad purposes, through its agent, Albert J. Averill, after some previous negotiations, obtained from the company a quitclaim deed, at the same time taking from it the following agreement in writing: "Agreement by Union Mutual Life Insurance Company with A. J. Averill, dated March 24th, 1880, as follows: \* \* \* Witnesseth that, whereas, the said Averill has purchased from the said company, for the sum of forty six hundred and eighty dollars, the fol-

<sup>1</sup> Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

<sup>2</sup> Rehearing denied October term, 1893.

owing described real estate, situate in the city of Chicago, county of Cook, and state of Illinois, to wit, [here follows a description of the property,] the title to which and was acquired by the said company by virtue of a sale made under and by virtue of the power of sale contained in a certain trust deed given by William J. Slee and wife to Levi D. Boone, dated June 4, A. D. 1870, and recorded in the recorder's office for said county of Cook in Book 566 of Deeds, page 118, and in Book 561 of Records, page 317; and whereas, the said William J. Slee has placed on record in said recorder's office notice to the effect that he claims the right to redeem said property from said sale, the validity of which claim the said company denies: Now, therefore, it is agreed that in the event of redemption made by said Slee, his heirs, executors, administrators, or assigns, of the property described in said trust deed, the said Averill, his heirs or assigns, shall be entitled to have and receive out of the redemption money paid by said Slee, his heirs, executors, administrators, or assigns, the said sum of forty-six hundred and eighty dollars, with interest thereon from the day of the date hereof, at the rate of six per centum per annum, and also whatever money shall in the event of such redemption be decreed by the court to be paid by the said Slee, his heirs, executors, administrators, or assigns, for or on account of any taxes, assessments, or other outlays made by the said Averill upon the property so as aforesaid purchased by him. In witness whereof the said Union Mutual Life Insurance Company hath caused this agreement to be subscribed by John E. De Witt, its president, the day and year first above written. Union Mutual Life Insurance Company. By John E. De Witt, President." In January preceding this transaction, defendant in error had begun proceedings in the county court of said Cook county to condemn the same property for right of way, to which Slee was made a party defendant. On the 26th of April, 1880, (being after the purchase from plaintiff in error,) that condemnation proceeding resulted in a judgment, the compensation being fixed at \$6,615, which amount defendant in error, on December 27, 1880, deposited in the county treasury, and took possession of the premises. After judgment, but before the deposit of said money, on the 18th of October, 1880, Slee filed his bill to redeem against plaintiff in error, to which he afterwards made defendant in error a party, setting up the conveyance to it by plaintiff in error, and also the condemnation proceeding. That case has been before this court twice,—first on appeal by plaintiff in error, before defendant in error was made a party, (110 Ill. 35;) and again on appeal by both of these parties, (128 Ill. 57, 12 N. E. Rep. 543.)

The decree of the circuit court, from which the last-named appeal was prosecuted, finds, among other things, that Slee was entitled to redeem the premises, "but that by reason of said condemnation judgment, and the payment of said \$6,615 to the county treasurer, the right of com-

plainant in said lot 1 was transferred to said fund of \$6,615, and that he should have the same, less such indebtedness as was then due to said insurance company, and that the master has properly charged it with the amount due from complainant when or at the time said sum was deposited, and that it was then its duty to take enough thereof to satisfy the indebtedness of the complainant to it, and that the complainant is entitled to the residue thereof, to wit, to \$531." The decree was in accordance with those findings. The result of the hearing in this court upon that appeal was that the cause was remanded to the circuit court for further proceedings. The condemnation money remained in county treasury until the 17th day of January, 1889, when, by stipulation of parties, viz. plaintiff in error, defendant in error, and William J. Slee, it was withdrawn, and distributed as follows: To defendant in error, \$4,872.60, being the amount of said \$4,680 with 6 per cent. interest thereon from the date of its payment to plaintiff in error to December 27, 1880, the date of the deposit in the county treasury; to plaintiff in error, \$1,211.34, the balance found due from Slee after deducting the sum paid defendant in error by the report of the master in chancery, referred to in the decree heretofore quoted from; to William J. Slee the balance of the \$6,615, amounting to some \$531. In the stipulation of parties for said distribution it was agreed that it was made "without prejudice to or to affect any of the questions at issue between the parties as against each other or in said fund or otherwise." Prior to said distribution, on July 2, 1888, the cross bill on which the decree now in question was rendered was filed, by which defendant in error set up the agreement signed by plaintiff in error, and its quitclaim deed, claiming that thereby the latter became and was liable to pay it 6 per cent. interest on \$4,680 between the dates December 27, 1880, and January 17, 1889. The only question we are now called upon to decide is, did the circuit court err in holding plaintiff in error liable for interest between the dates named?

There is a contention in the argument of counsel for defendant in error that the decree should be sustained, upon the ground that, pending the negotiations between the agent of the insurance company and Averill, the former represented that there was due the company \$7,680 from Slee, and that plaintiff in error should in this proceeding be held to make good that statement. No such case is attempted to be made by the bill; neither is there any theory of fact presented by the record upon which the claim could be properly predicated. The bill proceeds upon the contract of March 24, 1880, and that alone. Thus it is alleged that if Slee was allowed to redeem the premises, "then and in that case Averill or his assigns should be entitled to have and receive out of the redemption money paid by Slee the said sum of \$4,680, with interest thereon from the date of said agreement, to wit, the 24th day of March, 1880, at the rate of six per cent. per annum; \* \* \* that

this agreement was made and executed between said Averill and the said insurance company in writing, a copy of which is filed herewith, and made a part hereof." And again: "That by the said agreement \* \* \* the said insurance company in substance and effect warranted the title, which it at the same time conveyed to the said Averill for your orator, to the extent of the purchase price paid for said premises, to wit, the sum of \$4,680, and interest thereon at the rate of six per cent. per annum from that date against the said claim of said Slee of a right to redeem the same, and agreed that, in case said Slee should be allowed to redeem from said sale under said trust deed, the redemption money thereof, to the extent of the sum of \$4,680, so paid, and interest thereon, should be paid over to your orator." The answer denies that under the agreement it can be held liable for the interest claimed. Our decision must therefore depend upon the construction of that agreement.

Recurring to case reported in 123 Ill. 57, 12 N. E. Rep. 543, it will be found that in passing upon that part of the decree then before the court above set forth we said: "It is contended that the court below erred in crediting Slee's indebtedness with the amount of the condemnation money as of the date it was paid into the hands of the county treasury, December 27, 1880. We do not think the objection is tenable. It is true that Slee, in his original bill filed before the condemnation money was paid into the county treasury—that is, on the 13th of October, A. D. 1880—prayed that the insurance company might be enjoined from collecting the condemnation money from the county treasury. But the insurance company answered this bill before the condemnation money was paid to the county treasury, (on the 16th day of November, A. D. 1880,) denying that it had any interest in the condemnation money, and alleging that it belonged to A. J. Averill, to whom it had been conveyed, etc., and who, as we have before seen, in fact held for the railroad company; and this, in our view, as we have heretofore shown, was true. Averill, or rather the railroad company, as assignee, stood, as respects the land conveyed by the insurance company, in its place. The condemnation money took the place of the land, and the mortgagee—and by consequence its assignee—was entitled to be satisfied out of it before Slee was entitled to any part of it. *Jones, Mortg. § 708; Railroad Co. v. Chamberlain*, 84 Ill. 333." 123 Ill. 95, 12 N. E. Rep. 543. In a former paragraph of that opinion, in passing upon the question as to what interest in the property passed by the deed of the insurance company to the railroad company, we held that "when, therefore, the insurance company assumed to convey a fee to Averill, it only conveyed its interest as mortgagee, because Averill was charged with notice that it had no other interest to convey. The deed operated as an equitable assignment of the mortgage, and thereafter Averill, and the railroad company, for whom he purchased, held as mortgagees, just as the insurance company had done before its conveyance. 1 *Jones,*

*Mortg. (2d Ed.) § 808*, and authorities cited in notes 4 and 5." It was this part of the opinion to which reference was made when we said in the paragraph just quoted: "And who, as we have before seen, in fact held for the railroad company; and this, in our view, as we have heretofore shown, was true." And it was further said in that opinion: "There was, therefore, no necessity for the railroad company paying the money to the extent of the balance due from Slee into the hands of the treasurer. Being entitled to retain it as assignee, it would have been sufficient for the railroad company to have set up that fact in its answer, and proved it in the trial. Certainly it is not Slee's fault that it has been deprived of the use of the money." 123 Ill. 96, 12 N. E. Rep. 543.

It thus appears that we are committed to the position that the transaction between these parties of March 24, 1880, operated as an equitable assignment of the mortgage interest of the insurance company to the railroad company, and that thereafter the latter, as to that interest, stood in the place of the former; that the condemnation money took the place of the land, and the railroad company was entitled to be satisfied out of that fund before Slee was entitled to any part of it; that there was no necessity for the railroad company's paying that money to the extent of the amount due it as such assignee into the county treasury, and that it was neither the fault of Slee or the insurance company that it did so. As is shown by that opinion, the insurance company had by its answer, filed before the deposit was made, denied that as against Slee it had any interest in that money, and alleged that it belonged to Averill, representing the railroad company. By affirming that part of that decree of the circuit court above set forth, we there held that the master had properly charged the condemnation money with the amount due from Slee as of the date of the deposit, and that it was then the duty of the railroad company to take enough of that fund to satisfy the indebtedness of Slee to it. Nothing whatever has been shown against the construction then placed upon the contract, and the rights of the parties under it. The reasons given and authorities cited in support of the conclusion there announced abundantly sustain it. Under that decision, but for the written agreement entered into contemporaneously with the execution and delivery of the quitclaim deed, defendant in error would no doubt have been entitled to retain out of the \$6,615 the whole amount of redemption money due from Slee; not as interest on the money paid the insurance company, but as assignee of the mortgage interest of that company. But by the express terms of that written agreement it was to have only so much of the redemption money as would be sufficient to repay it \$4,680, with interest to the time of redemption. As we have seen, the redemption money was paid by Slee, and came into the hands of the railroad company December 27, 1880, the date of the deposit. From and after

that date Slee owed it nothing, and it held, subject to its own disposition, all the money due it from the insurance company. By the subsequent distribution it received the full sum of \$4,686, with 6 per cent. per annum interest thereon from the date of its payment to the insurance company to the time it is chargeable with having obtained the redemption money, and that was all it was entitled to under the contracts. Certainly it had no claim against plaintiff in error for interest after December 27, 1880. If it lost the use of money after that date it did so because it voluntarily chose to pay it into the county treasury, and suffer it to remain there. The decree of the circuit court is erroneous, and the judgment of the appellate court affirming the same must be reversed. The cause will be remanded to the circuit court of Cook county, with directions to dismiss the bill. Reversed and remanded.

159 Mass. 493)

MANLEY v. BOSTON & M. R. CO.

(Supreme Judicial Court of Massachusetts.  
Hampshire. Oct. 18, 1893.)

RAILROAD CROSSING — TRAVELER ON HIGHWAY —  
GROSS NEGLIGENCE — WHAT CONSTITUTES — IN-  
STRUCTIONS.

1. It is not gross negligence, as a matter of law, for a person who is familiar with a certain railroad crossing, and the time trains are due to pass it, to attempt to drive over it about train time, without looking to see whether the train is approaching, but such fact is to be considered by the jury with all the other circumstances in determining whether such person is guilty of gross negligence.

2. Nor is it necessarily gross negligence, as a matter of law, for such person to attempt to drive over such crossing in front of a train which he sees approach it.

3. A request to charge, which selects a certain circumstance that is merely evidence tending to establish the ultimate fact, and assumes that if it is proved it is conclusive, is properly refused.

Exceptions from superior court, Hampshire county; Albert Mason, Judge.

Action by George Manley, administrator of the estate of Joseph Wallace, deceased, against the Boston & Maine Railroad Company, to recover for the death of plaintiff's intestate caused by defendant's negligence. There was a verdict for plaintiff, and defendant excepted. Exceptions overruled.

Deceased was killed at a grade railroad crossing, and the alleged negligence of defendant consisted in a failure to give the signals required by law of the approaching train. Defendant pleaded that deceased was guilty of gross negligence. The bill of exceptions states that said Wallace had lived in the vicinity for several years; was familiar with the locality where the collision occurred. He frequently traveled the road. The train which caused his death was a regular one, which had for a long time passed the point in question at the same time, about 3:21 P. M. There was evidence tending to show that the train was on time; also evidence that the train was late. The train was moving in a northerly direction,

and Wallace was approaching the crossing from the west, driving, towards the east, at a slow trot, one horse, attached to a covered wagon, the cloth sides of which extended to the front end of the wagon. He sat back in the wagon, so that his feet were inside, and he was in a position where he could see objects to the right or left, obliquely, but not at right angles with the line of motion of his horse. There was evidence tending to show that he approached the crossing at a slow trot, slackening to a walk at the ascending grade near the railroad track, and that the train was approaching around the curve of a hill. It was not in sight when at the whistling post, 80 rods from the crossing, being hidden by the hill around which the road curves. That to a traveler distant 28 feet from the crossing a train approaching from the south is in sight when 631 feet away. That to a traveler approaching as stated, and distant 170 feet, the approaching train could be seen at least 885 feet away, towards the south. That 10 or 15 minutes before the collision, while Wallace was at the house of one Richards, 900 feet from the crossing, but not in view of it, another train passed said crossing. That said Wallace, when approaching the track, had his head turned around to the right, as if looking at some pigs which he had in a box in the rear of his wagon, and that he did not look to see whether a train was approaching until his horse was going upon the track, when, just as two sharp signals were given with the whistle, he looked out of his wagon towards the train, and was hit by it and killed. A plan of the location is annexed. There was other evidence of the physical features of the locality, and the jury took a view. The defendant prayed the court to instruct the jury that (1) "if Joseph Wallace was familiar with the locality, and knew the time when the train was due to pass this crossing, and if he attempted to pass it without looking to see whether the train was approaching, his negligence was gross;" (2) "that, if he was familiar with the locality, and knew the time when the train was due to pass this crossing, he did look and see the approaching train, and then did attempt to cross in front of it, his negligence was gross and willful." The court declined to give the instructions prayed for, and the defendant excepted.

W. H. Brooks, for plaintiff. Edgar J. Rich, John C. Hammond, and H. P. Field, for defendant.

ALLEN, J. For the purpose of determining these exceptions, it must be assumed that the jury were satisfied that the defendant neglected to give the signals required by Pub. St. c. 112, §§ 162, 213, and that such neglect contributed to the injury. In order to escape liability, it was therefore incumbent on the defendant, under the statute, to prove that the deceased, in addition to a mere want of ordinary care, was guilty of gross or willful negligence which contributed to the injury. It is conceded on the part of the

defendant that the chief justice, who presided at the trial, was right in submitting this question to the jury; but the defendant complains that no sufficient explanation of what would constitute gross negligence was given to the jury, and that the instructions which were requested upon this subject ought to have been given. The requests, however, were too broadly put. The error consisted in selecting certain circumstances, and assuming that these alone, if proved, would be conclusive. But other circumstances might enter into the question. Looking to see whether a train was approaching might not be the only test, nor even the best one, under all circumstances; and knowledge that a train was approaching would not necessarily render an attempt to cross the track in front of it gross negligence. Certainly, the circumstances mentioned would be strong evidence of gross negligence. All we say is, they were not conclusive. The deceased might have listened. His ears might have been better than his eyes. There might have been obstacles in the way. He might have been close upon the track before seeing the approaching train, and have become confused or excited by the immediate danger. The condition of the road might not have admitted of his turning round. There might be various circumstances which would have some bearing upon the question of his negligence, or the degree of it, even though he failed to look. *Chaffee v. Railroad*, 104 Mass. 108; *Hanks v. Railroad Co.*, 147 Mass. 495, 18 N. E. Rep. 218; *Williams v. Grealy*, 112 Mass. 79. The instructions to the jury were carefully guarded, and were sufficient to protect the legal rights of the defendant, the burden of proof being upon the defendant to establish affirmatively the existence of gross negligence. The case is distinguishable from *Debbins v. Railroad Co.*, 154 Mass. 402, 28 N. E. Rep. 274, where it was held that the undisputed facts showed gross negligence. See, also, *Sullivan v. Railroad Co.*, 154 Mass. 524, 28 N. E. Rep. 911. The decisions in cases where it was necessary for the plaintiff to prove that he was in the exercise of ordinary care are also distinguishable from the present case. Exceptions overruled.

(159 Mass. 491)

# INHABITANTS OF GREENFIELD v. INHABITANTS OF BUCKLAND.

(Supreme Judicial Court of Massachusetts.  
Franklin. Oct. 18, 1893.)

## SETTLEMENT OF PAUPER.

1. Under Pub. St. c. 83, § 1, cl. 5, which provides that any person of the age of 21 years, who resides in any place within the state for 5 years together, and pays all taxes assessed against his poll or estate for any 3 years within that time, shall thereby gain a settlement in such place, a temporary absence of a few months during the period of the 5 years is not a sufficient interruption of the continuity of residence to defeat a settlement.

2. Under Pub. St. c. 83, § 1, cl. 4, which provides that any person of the age of 21 years, having a freehold in any place within the state, and living on the same 3 years suc-

cessively, shall thereby gain a settlement in such place, living on a freehold for 2 years, followed by renting of the same, and removal from the state, with no definite intention of returning, is not sufficient for a settlement.

Case reserved from superior court, Franklin county; John Hopkins, Judge.

Action by the inhabitants of Greenfield against the inhabitants of Buckland for supplies furnished a pauper, alleged to have a settlement in defendant town. Heard on an agreed statement of facts. Judgment for plaintiff.

The following is the agreed statement of facts:

This was an action of contract, in which the plaintiffs sought to recover from the defendants the sum of \$133.84, alleged to have been expended for the support and relief of one Patrick Kelliher, and members of his family, named in the declaration, a poor person who had fallen into distress in the plaintiff town, and was alleged by the plaintiff to have a settlement in Buckland. The writ was dated 4th March, 1893. Due notice was given by the overseers of the poor of the plaintiff to the overseers of the poor of the defendant, and a reply, denying the settlement of the pauper in the defendant town, was duly made by the overseers of the poor of the defendant. It appeared that the pauper, Patrick Kelliher, being then more than 21 years of age, was taxed for a poll tax in the defendant town for each of the years 1880, 1881, 1882, 1883, 1884, 1885, and 1886, and that he paid all taxes duly assessed upon him in said town for the years 1880, 1883, 1884, and 1885. His taxes for 1881, 1882, and 1886, were abated. It also appeared that he resided in said defendant town from some time in the year 1880 to some time in the summer of 1886, unless the facts hereinafter stated constitute an interruption of such residence. In the fall of 1881, Patrick Kelliher, with his wife and child, being out of work in Buckland, went to Bardwell's Ferry, in Conway, rented a house, and there kept boarders (who were working in a railroad cut) through the winter of 1881 and 1882, when he returned to Buckland, as hereinafter stated, as early as April, 1882. When he went, as above stated, to Conway, it was with the intention of there remaining until the work in the cut above referred to was completed, which it was expected would be completed in the spring or summer of 1882, and with the intention of returning to Buckland when, by the completion of said cut, keeping boarders at Bardwell's should be no longer remunerative, and without any intention to abandon his home in Buckland, or to remain permanently in Conway, or away from Buckland. It further appeared that the pauper was married in Buckland, 18th April, 1881, to one Johanna O'Connell, both parties being described in the marriage license and record as of Buckland; that children were born to said parties in Buckland, 21st August, 1881, 15th September, 1882, 5th February, 1884, 1st February, 1885, 2d January, 1886; that the child born 5th February, 1884, died in Buckland, 26th July, 1884; that at the date of his marriage,

Johanna O'Connell held the legal title to one undivided half interest in a house and lot in said Buckland, the other half being then held by her sister, Bridget O'Connell, and that the said Johanna continued to hold said interest to the date of her death, December, 1890; that from the date of the pauper's marriage to some time in the summer of 1881, the pauper, with his wife, lived in the house in which she held a half interest as above stated; that they then for two or three months lived in a hired house in Buckland, owned by one Woodard, until the removal to Conway, hereinbefore stated, and on their return from Conway lived in the house in which the wife held the interest aforesaid, until their removal from Buckland in the summer of 1886, and that they paid no rent for any of their occupancy of the house in which the wife held the interest aforesaid. Johanna O'Connell was born in Vermont, 1st April, 1857. The house and lot above mentioned was conveyed to Johanna and Bridget by deed of Patrick J. Fleming, dated 20th May, 1880, duly recorded, and the consideration was paid by their father, Patrick O'Connell. The said Patrick O'Connell occupied said house with his daughter Johanna until her marriage. It was then occupied by Patrick O'Connell and by Kelliher and his wife jointly, neither party paying rent to the other until the Kelliher's removal to the Woodard house. It was then occupied by Patrick O'Connell until the spring of 1882, from which time to the summer of 1886 it was jointly occupied by Patrick O'Connell and the Kelliher's, neither paying rent to the other. Since the summer of 1886 it has been occupied by Patrick O'Connell, paying no rent to any person.

The pauper, with his family, lived in Montague from the time of his removal from Buckland, in the summer of 1886, until he removed to Greenfield, in the spring of 1888. He lived in a house which he rented in Greenfield from the spring of 1888 until 15th April, 1889, when he moved to a house in Greenfield, of which he received a deed in his own name on that day, and in which he has since owned, and still owns, the equity. He lived with his family in said house until August 1, 1891, when he went to Middletown, Pa., to take charge of a gas plant in a factory there. September 1, 1891, he removed his family, consisting of wife and seven children, to Middletown, Pa., where they remained, keeping house, until 5th April, 1892. From September 1, 1891, to some time in March, 1892, Kelliher's house in Greenfield was leased to and occupied by one Robert Reany; since 5th April, 1892, it has been occupied by the pauper and his family. The pauper was taxed for a poll tax in Greenfield in 1888, which he paid, and for real estate and a poll tax for the years 1889, 1890, 1891, and 1892. He paid all taxes assessed upon him in said town for the years 1888, 1889, 1890, and 1891. The taxes assessed upon him for the year 1892 were paid by money contributed by his friends. When Kelliher moved his family to Middletown, Pa., it was with the intention of remaining there for an indefinite time, but

with the intention of returning to Greenfield when he had earned money enough to pay the then existing mortgage on his real estate in Greenfield, amounting to \$530. When his family removed to Middletown, he took a considerable part of his furniture with him, sold some at auction, and left in the house a cook stove and some chairs, and in the barn some tools and other articles. He returned to Greenfield on account of the failure of his health, having not intended to make Middletown his permanent home, or to give up his home in Greenfield. Patrick O'Connell, the father of Johanna O'Connell, has resided in Buckland since about 1863, and was taxed and paid taxes there in each and every year from 1864 to 1892. He was born in Ireland, and has not been naturalized, and was more than 21 years of age in 1864. Patrick Kelliher married for his second wife one Bridget McIntosh, 23d February, 1891, who is now living, and he has now living seven minor children by his first wife, and one by his second wife.

The pauper has no settlement in this state unless he has acquired one in the defendant or plaintiff town upon the facts herein stated. The first aid given to the pauper in the town of Greenfield was 11th May, 1892, and he had never received aid as a pauper prior to said date. Upon the foregoing facts, if the court shall be of opinion that Patrick Kelliher has a settlement in Buckland, judgment is to be entered for the plaintiffs for the amount claimed in their declaration, with interest from the date of the writ; if the court shall be of opinion that none of the paupers have a settlement in Buckland, judgment shall be entered for the defendants for their costs; if the court shall be of the opinion that Patrick Kelliher has no settlement in either Buckland or Greenfield, but that the children of Patrick Kelliher by his wife Johanna O'Connell have a settlement in Buckland, judgment is to be entered for the plaintiffs for the sum of \$50 and costs.

F. L. Greene, for plaintiff. S. T. Field, for defendant.

HOLMES, J. This is an action to recover a sum expended by the plaintiff for the support of a pauper and his family. The only point specified in the defendant's brief, under rule 40, as intended to be relied on, is that the pauper had acquired a settlement in Greenfield. It was not argued that he had not a settlement in Buckland if he had not gained one in Greenfield. It is agreed that he resided in Buckland for five years together, unless a temporary absence of a few months, with the intent to return there as soon as a job was finished, interrupted the continuity of the residence, and that he paid all taxes duly assessed upon him for three years within that time. Pub. St. c. 83, § 1, cl. 5.<sup>1</sup> We

<sup>1</sup> Pub. St. c. 83, § 1, cl. 5, provides that "any person of the age of twenty-one years who resides in any place within this state for five years together, and pays all state, county or city or town taxes, duly assessed on his poll or estate for any three years within that time shall thereby gain a settlement in such place."



assume that the requirements of the fifth clause were satisfied notwithstanding the temporary absence. *Worcester v. Wilbraham*, 13 Gray, 556, 559; *Lee v. Lenox*, 15 Gray, 496; *City of Bangor v. Brewer*, 47 Me. 97; *Warren v. Thomaston*, 43 Me. 406; *Reg. v. St. Ives Union*, L. R. 7 Q. B. 467, 470; *Eatontown v. Shrewsbury*, 49 N. J. Law, 188, 6 Atl. Rep. 319. The language of the Massachusetts cases goes far to identify the residence required by this clause with domicile. *Chicopee v. Whately*, 6 Allen, 508. Elsewhere, under a materially different statute, it has been said that "residence and domicile are not the same thing." *Reg. v. Stapleton*, 1 El. & Bl. 766, 771. So in this state in some cases. *Bank v. Fairbrother*, 148 Mass. 181, 184, 19 N. E. Rep. 345. And see in Vermont, under a statute somewhat like our own, *Barton v. Irasburgh*, 33 Vt. 159. But, in view of the connection in this paragraph between residence and taxation, it is reasonable to infer that, other conditions being satisfied, a residence sufficient to impose the duty to pay personal taxes is sufficient to confer the rights of settlement. It now is settled that domicile is residence for the purposes of taxation. *Borland v. Boston*, 132 Mass. 89.

The ground on which it is argued that the pauper acquired a later settlement in Greenfield is that he had an estate of inheritance there, and lived on it for three years successively, according to the provisions of the fourth clause of the section<sup>2</sup> above referred to. On April 15, 1889, he did receive a conveyance of a house in Greenfield, and moved into it. But on August 1, 1891, he removed to Middletown, Pa., to take charge of a gas plant in a factory there, and intended to remain there an indefinite time, although intending to return when he had earned money enough to pay a mortgage for \$530 on his house in Greenfield. Meantime he let the house to another man, who occupied it. The pauper returned to his place on April 5, 1892. We think it very plain that while the estate was let to and exclusively occupied by another, and the pauper was in Middletown, as stated, he was not "living on" that estate, within the meaning of the statute. Something more is necessary to satisfy those words than would satisfy "residing in any place," of clause 5. A man cannot be said to live on an estate which he does not occupy, and which he has no right to enter. See *Granby v. Amherst*, 7 Mass. 1, 5; *Mt. Washington v. Clarksburgh*, 19 Pick. 294, 296; *Ipswich v. Topsfield*, 5 Metc. (Mass.) 353; *Wellfleet v. Truro*, 9 Allen, 137, 139; *Rex v. St. Nicholas Rochester*, 5 Barn. & Adol. 219, 3 Nev. & M. 21; *Rex v. St. Nicholas Colchester*, 2 Adol. & E. 599, 4 Nev. & M. 422; *Rex v. Ditchat*, 9 Barn. & C. 176, 186, 4 Man. & R. 151; *Rex v. Great Bentley*, 10 Barn. & C. 520, 522. Judgment for plaintiff.

<sup>2</sup> Pub. St. c. 83, § 1, cl. 4, provides that "any person of the age of twenty-one years having an estate of inheritance or freehold in any place within the state, and living on the same three years successively, shall thereby gain a settlement in such place."

\*Transferred to Appellate Court, 37 N.E.739. Superseded by opinion, 41 N.E.848. Rehearing denied, 44 N.E.53.

(135 Ind. 327)

**MORROW, Surveyor, v. GEETING et al.**  
(Supreme Court of Indiana. Oct. 10, 1893.)

COURTS—JURISDICTION OF APPELLATE COURT.

Under Act March 4, 1893, giving the appellate court jurisdiction of cases for the enforcement of statutory liens, that court has jurisdiction of proceedings for the collection of assessments against lands for the repair of a public drain.

Appeal from circuit court, Howard county.

Action by Jackson Morrow, surveyor, against Lawrence K. Geeting and others. From the judgment rendered, plaintiff appeals. Transferred to appellate court.

Blackledge, Shirley & Moon and Bell & Purdum, for appellant. Elliott & Overton, for appellees.

HOWARD, J. This is a proceeding for the collection of assessments against lands for the repair of a public drain. Such assessments are liens of a purely statutory origin, and by the act of the general assembly approved March 4, 1893, granting additional jurisdiction to the appellate court, the jurisdiction is in that court. The case is accordingly transferred to the appellate court.

(126 Ind. 287)

**STATE v. OTIS.**

(Supreme Court of Indiana. Oct. 10, 1893.)

SEDUCTION—MARRIAGE AS A DEFENSE.

A prosecution for seduction is barred by marriage of the female to her seducer, though he agreed to the marriage to escape punishment.

Appeal from circuit court, Huntington county; J. S. Dailey, Judge.

Information was filed against John C. Otis for seduction. A demurrer to his answer was overruled, and a demurrer to the state's reply sustained, and the state appeals. Affirmed.

S. E. Cook and W. A. Branyan, for the State. C. W. Watkins, for appellee.

HOWARD, J. Under section 1992, Rev. St. 1881, an affidavit and information were filed against the appellee, and he was arrested for the seduction of the prosecuting witness, Ella M. Otis. To the affidavit and information the appellee answered by special plea in bar, saying: "He is not guilty, for the reason that after the matters and things as set up in the affidavit and information he married the prosecuting witness, and that she is still his wife." A demurrer to this plea for want of sufficient facts was overruled. The prosecuting attorney then filed a reply, admitting that the appellee, "after the seduction, went through the form of marriage with Ella M. Otis, the person named in the affidavit and information as being seduced;" but saying that at the time of the marriage ceremony the appellee was in the custody of the sheriff, awaiting the action of the circuit court on a charge of bastardy, "having been

adjudged by a justice of the peace to be the father of a bastard child born to said Ella Otis;" that he fraudulently went through the ceremony of marriage "for the purpose of avoiding the continuance of imprisonment for bastardy, and for the purpose of avoiding a prosecution for criminal seduction;" that at the time of the marriage ceremony he did not intend to live as the husband of Ella M. Otis, and keep his marriage vows, "but to break his promise immediately, and leave the said Ella Otis without remedy;" and that he "did, immediately after the marriage, break his marriage vows and promises;" averring, therefore, "that such marriage was a mere sham, a fraud, a deception, a trick, a device to avoid prosecution and imprisonment, and that defendant ought not to go acquit, but be held to answer said charge." To this reply a demurrer was sustained, and the appeal followed. The overruling of the demurrer to the plea in bar and the sustaining of the demurrer to the reply are assigned as errors.

In case of seduction under promise of marriage, we think there can be little doubt that the subsequent marriage of the parties is a bar to further prosecution for the crime committed. The keeping of the promise of marriage is a partial reparation for the wrong done,—the only reparation in any degree adequate to the injury. The chief object to be attained by our criminal statutes is the betterment of the condition of society, and the reform, rather than the punishment, of the criminal. Section 18 of article 1 of the constitution of the state provides that "the Penal Code shall be founded on the principles of reformation, and not of vindictive justice." If the wronged woman freely enters into the married relation with her seducer, thus restoring in some measure the honor of her own womanhood, and securing also the good name and well-being of her child, it would seem that her act is a condonation of the offense, so far as she is concerned, and that the policy of the law would be better served by such marriage than by any punishment that might be meted out to the offender. The question does not appear to have arisen heretofore in this state. Our decisions are nearly silent upon the subject. *Dowling v. Crapo*, 65 Ind. 209, was an action for seduction, where the prosecuting witness afterwards married a person other than the seducer, and it was contended that such marriage barred her action. The court said: "We can conceive of no good reason why an action for the seduction of an unmarried female should be barred by her subsequent marriage. Such subsequent marriage does not remove the stigma or compensate the injury caused by the seduction, nor is there any principle of public policy which requires that a subsequent marriage should bar the action. Public policy encourages, rather than discourages, marriage. Of course, we intimate no opinion as to the effect of a subsequent marriage to the seducer." In *bastardy*, the marriage of the parties seems to be considered as terminating all further legal proceedings. In the case of *Noble v. State*, 39

Ind. 352, the relatrix in a bastardy suit appeared in court, and acknowledged that satisfactory provision had been made for the support of her child, and the suit was dismissed. It appeared that the consideration for this dismissal was a promise of marriage on the part of the defendant. The court held this consideration sufficient, saying: "We cannot say that it was not such a provision as is contemplated by the statute." The question before us has, however, been expressly considered in a Michigan case,—*People v. Gould*, 70 Mich. 240, 38 N. W. Rep. 232,—and also in a Pennsylvania case,—*Com. v. Eichar*, 4 Pa. Law J. R. 551. Both hold subsequent marriage of the parties a bar to further prosecution for the offense. In the latter case the court says: "It is the seduction under promise of marriage which is an offense of so grievous a nature as to require this exemplary punishment. What promise? One that is kept and performed? Certainly not; but a false promise, broken and violated after performing its fiendish purposes. The evil which led to the enactment was not that females were seduced, and then made the wives of the seducers, but that after the ends of the seducer were accomplished his victim was abandoned to her disgrace. An objection to this construction is that it places within the power of the seducer a means of escaping the penalty. So be it. This is far better than by a contrary construction to remove the inducement to a faithful adherence to the promise which obtained the consent." See, also, 2 Whart. Crim. Law, § 1760; 5 Lawson, Def. Crime, § 620; 2 Archb. Crim. Pl. & Pr., Pomeroy's notes, p. 1825. Were this an action for damages by a parent for the seduction of a daughter under 21 years of age, there is no question that the fact that the daughter had condoned the wrong done herself, or that she had been compensated by the payment of money, or by marriage, could not be pleaded in bar. The damage and loss to the parent are quite independent of the wrong to the daughter. *Gimbel v. Smidth*, 7 Ind. 627; *Pruitt v. Cox*, 21 Ind. 15; *Bartlett v. Krockel*, 88 Ind. 425; *Eichar v. Kistler*, 14 Pa. St. 282; *Sellers v. Kinder*, 1 Head, 134. In the case before us, however, the prosecuting witness, of her free will, so far as the record discloses, and to protect her honor and that of her child, entered into the marriage relation with her seducer. It is not the policy of the law to discourage such means of atonement for the wrong which she has suffered. This marriage, with all its sad attendant circumstances, was to her a refuge from the shame into which she had fallen. It is true that in this case the appellee may have agreed to the marriage in order to escape merited punishment, but we should not for that reason remove an inducement which may lead another wrongdoer to atone for his fault by making the injured party an honored wife and mother. We think the rulings of the court were based upon a proper construction of the statute. The judgment is affirmed.

DAILEY, J., took no part in the decision of this case.

(135 Ind. 571)

**ADAMS v. STATE<sup>1</sup>**

(Supreme Court of Indiana. Oct. 10, 1893.)

**CRIMINAL LAW—REASONABLE DOUBT—INSTRUCTIONS.**

An instruction on the subject of reasonable doubt, that "you are not at liberty to disbelieve as jurors if you believe as men. Your oath imposes on you no obligation to doubt where no doubt would exist if no oath had been administered,"—is erroneous, as tending to relieve the jury from the obligation of their oath. *Siberry v. State*, 33 N. E. Rep. 681, 133 Ind. —, followed.

Appeal from circuit court, Miami county; R. P. Eppinger, Special Judge.

Almira Adams was convicted under an information charging her with being an accessory to the crime of rape, etc., and appeals. Reversed.

C. W. Watkins, J. C. Branyan, and E. T. Reasoner, for appellant. Frank D. Butler and W. A. Branyan, for the State.

**COFFEY, J.** A prosecution was instituted against the appellant by affidavit and information in the Huntington circuit court. The information is in three counts, charging the appellant with being accessory to the crime of rape, accessory to an assault and battery with the intent to commit the crime of rape, etc. The venue of the cause was changed from the Huntington circuit court to the Miami circuit court, where it was tried, resulting in the conviction of the appellant. The appellant complains of the action of the circuit court in overruling her motion to quash the affidavit and information against her, and in overruling her motion for a new trial. No authority is cited in support of the first complaint, nor is any specific objection pointed out to any one of the three counts contained in the information. After carefully reading them, we are of the opinion that the circuit court did not err in overruling the appellant's motion to quash the affidavit and information in this case. A number of reasons for a new trial were assigned in the motion therefor, among which was that the court erred in its instructions to the jury. Among the other instructions given to the jury by the court upon the subject of reasonable doubt was the following: "You are not at liberty to disbelieve as jurors if you believe as men. Your oath imposes on you no obligation to doubt where no doubt would exist if no oath had been administered." This instruction, in the words here set forth, was given by the court to the jury in the case of *Siberry v. State*, 133 Ind. —, 33 N. E. Rep. 681. In commenting upon it, this court said: "In effect, it relieves the jury from the obligation of their oaths. \* \* \*

The oath is administered for a purpose. \* \* \* It enjoins upon the juror the solemn obligation to carefully consider; that he will 'well and truly try and true deliverance make between the state and prisoner;' and any instruction from the court, having for its purpose or its effect the exonerating of the juror from his oath, and permitting him to disregard it, is erroneous, and the paragraph from the instruc-

tion last quoted could have no other effect or purpose than to tell the jurors that they occupied no other or different relation than if they were not acting under oath. We do not think such an instruction should receive our approval." As was said in the case of *Cross v. State*, 133 Ind. —, 31 N. E. Rep. 473, we think it much better for the nisi prius courts to follow the approved precedents than to undertake the difficult task of formulating new definitions of what does or does not constitute a reasonable doubt. The difficulty attending the definition of the term "reasonable doubt" is so great that any new definition, not found in the adjudged cases, is very liable to be found erroneous in some particular. Such mistakes often result in the reversal of judgments where the accused has been condemned to merited punishment, while in other cases it may result in the conviction of the accused where he should have been acquitted. In this case the evidence was conflicting, and we cannot say, therefore, that this erroneous instruction did not harm the appellant.

Many other alleged errors are pointed out and discussed by counsel for the appellant, but they are of such a character as that they may not arise upon another trial of this cause. For this reason we decline to consider them. For the error of the circuit court in giving the instruction above set out, the judgment must be reversed. Judgment reversed, with directions to the circuit court to sustain the appellant's motion for a new trial.

(135 Ind. 153)

**HORN v. BENNETT et al.**

(Supreme Court of Indiana. Oct. 11, 1893.)

**MORTGAGES—SUCCESSIVE MATURING NOTES—ASSIGNMENT OF NOTES.**

1. A mortgage given to secure several notes maturing at different times is a first mortgage as to the note first maturing, a second mortgage as to the note next maturing, and so on, though it provides that on default in payment of any one of the notes at maturity all shall be due, and the mortgage may be foreclosed.

2. The security of the assignee of the first note is still a first mortgagee as against assignees of the succeeding notes, though the first note is not assigned until after the others.

On rehearing. For former report, see 34 N. E. Rep. 321.

**DAILEY, J.** In the petition for a rehearing in this case the appellant does not challenge or question the doctrine declared in *Bank v. Tweedy*, 8 Blackf. 447, that a mortgage given to secure the payment of two or more notes, maturing at different times, must be considered as if there were as many successive mortgages as there are notes secured, and that the holder of the note first due has priority, and each note has preference in the order of its maturity; but she urges that there is more than this involved in the controversy, because the mortgage securing the notes contains this stipulation: "It is agreed and understood by the parties hereto, upon the failure to pay any one of

<sup>1</sup> Rehearing denied.

said notes at maturity, then all of said notes shall become due and payable, and this mortgage may be foreclosed,"—and takes the case out of the operation of the rule, places it within the exception, and entitles the holders to participate ratably in the funds derived from the security, if there be not enough to pay all. Under this doctrine the proceeds would be applied pro rata in part payment of the several notes, irrespective of the dates of maturity or assignment. Upon this question there are two lines of decision; the one declaring that there is a preference in the distribution of the proceeds in favor of the holders of the pre-existing priorities, the other that the parties must share the proceeds pro rata. The latter position is not supported by an Indiana authority, and we cannot adopt appellant's contention. We think the policy of this state as to the point involved has been long since settled; that is, that the assignment of the note first maturing carries with it a pro tanto interest in the mortgage security,—pro tanto, and not pro rata,—for so much, in other words, and not in proportion. When the notes first maturing were assigned to the appellee Bennett, such act constituted a contract between him and the mortgagee, Landis, which may be formulated in these words: "I herewith transfer to you so much of this mortgage as is sufficient to pay the five notes which I have sold you. If it require all, you shall have it; but, if not, then what remains shall be applied to the other notes secured thereby." Such an assignment is not a transfer of the undivided five-sevenths of the mortgage security. After such an assignment, what is left in the mortgagee to sell and transfer to the appellant is measured by what remains after deducting what he sold appellee Bennett from all he had originally. When he sold the remaining two notes to the appellant, the contract arising from the transfer may be thus stated: "I herewith assign to you whatever is left of this mortgage after the notes assigned to Bennett have been fully paid out of it." If the pro rata rule obtained, this last would be a transfer of two-sevenths of the mortgage security. The rule in this state is not affected by a previous transfer of the notes last due. When Landis had completed the last assignment, and appellee Bennett became the owner of the first five notes of the series, and the appellant of the last two of the notes so secured, the rights of the assignees were fixed and vested as between themselves, and the parties are presumed to have contracted with a knowledge of the law governing such transactions. Bennett, then, had a right, as against appellant, to use just as much of the mortgage security as might be required to pay his notes in full. This correctly defines the rights of the parties during the whole of the period between the completed assignment of the notes and the maker's default in paying the note first due. We do not think the maker's default could change the rights of the assignees as between themselves, and divest the right of Bennett to priority of pay-

ment out of the property pledged. The legal presumption is that contracts will be performed, not violated. Bennett will be presumed to have purchased his notes, and paid more for them than he otherwise would have done, because of the priority which he would obtain. The appellant may be presumed to have purchased her notes and paid less for them on account of that priority. Under such presumption, it would be inequitable to hold that the maker's default, over which Bennett had no control, destroyed the priority, and placed all the notes on an equality, thus substituting pro rata for pro tanto rights. The appellant's contention that if the parties agree upon a contingency upon which a debt shall become due, then, when the event happens, the debt is due, is recognized law, but the rule cannot be carried to the extent of defeating the vested rights of the parties. The priority of payments is fixed and governed by the notes themselves, upon their face, and not by a contingency. This precise question is considered and determined in the case of *Leavitt v. Reynolds*, by the supreme court of Iowa. It was decided February 5, 1890, and will be found in 44 N. W. Rep. 567. The same doctrine is adhered to in *Humphreys v. Morton*, 100 Ill. 592; *Koester v. Burke*, 81 Ill. 436. The case of *Bank v. Finney*, 63 Ind. 460, settles the principle as stated by us, and *Doss v. Ditmars*, 70 Ind. 451, disposes of the case.

Appellant's suggestion that the evidence is insufficient to sustain the finding of the court was presented by assignment of error and argument on the original hearing. The allegations of the complaint with respect to the rights of the appellee Bennett in the notes in suit are "that since the execution of the notes and mortgage described said five notes, marked Exhibits 'A,' 'B,' 'C,' 'D,' and 'E,' had been sold, transferred, and indorsed to plaintiff, who is now the owner thereof." The evidence offered and appearing in the record of the case is a blank indorsement on each of the notes, "B. F. Landis." Appellant insists that this was not only a failure of the evidence to sustain the finding of the court, but an absolute failure of proof upon a material issue in the case. There was no answer in general denial putting in issue the execution of the indorsements, and hence no issue tendered requiring Bennett to put the indorsements in evidence. Petition for rehearing overruled.

(135 Ind. 272)

CATES v. CATES et al.

(Supreme Court of Indiana. Oct. 12, 1893.)

DEED—CONSTRUCTION—RESERVATION OF LIFE ESTATE.

A general warranty deed in the statutory form contained, after the description, the following clause: "The grantor, C., hereby expressly excepts and reserves from this grant all the estate in said lands, and the use and occupation, rents and proceeds thereof, unto himself during his natural life." The instrument was acknowledged, delivered, and recorded 10 years before the grantor's death. *Held*, that

the exception did not give the instrument a testamentary character, which made necessary its attestation and probate in accordance with the statute of wills.

Appeal from circuit court, Fountain county; J. M. Rabb, Judge.

Action by Margaret E. Cates against David C. Cates and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Lindley & Lewis, for appellant. H. H. Dochterman and V. E. Livengood, for appellees.

**HACKNEY, J.** The appellant and her husband, Prior Cates, on the 9th day of May, 1876, executed to the appellees a general deed of warranty in the statutory form, and describing the lands of which the appellant now seeks partition in her right as the widow of said Prior Cates. Said deed, in the premises or granting clause, is without ambiguity, limitation, exception, or reservation, but immediately following the description is an exception and a reservation in these words: "The grantor, Prior Cates, hereby expressly excepts and reserves from this grant all the estate in said lands, and the use and occupation, rents and proceeds thereof, unto himself during his natural life." The appellant's contention is that the deed conveyed no interest which became vested upon the execution thereof, but that the exception of "all the estate in said lands" during the life of the grantor not only postponed the enjoyment of possession, but denied to the grantees all property rights in said lands until after the death of the grantor, thereby giving the grant a testamentary character. It is further insisted by the appellant that the deed, being of a testamentary character, and not having been attested and probated as required by the statutes of wills, is of no validity. On behalf of the appellees it is urged that the exception only carves out of the fee granted by the premises a life estate; but that, if the phrase "all the estate in said lands" shall be held to comprehend the fee-simple interest embraced in the granting clause, then such exception of the fee is void for repugnancy to the grant, and must fail. By sustaining the appellees' demurrer to the appellant's complaint, the lower court accepted the theory of the appellees, and that ruling is before this court for review.

By section 2927, Rev. St. 1881, the instrument in question, omitting the exception, is made a conveyance in fee simple, and it is conceded that the reservation of a life estate in the grantor is not subject to the charge of repugnancy to the grant in fee. Omitting from consideration the exception, but considering the reservation, we have a present estate in the grantees, the enjoyment of which is to commence in futuro. Such a conveyance is valid, under section 2959, Rev. St. 1881. *Spencer v. Robbins*, 106 Ind. 580, 5 N. E. Rep. 728.

It remains to consider the effect of the exception of "all the estate in said lands." Does the phrase, when considered with relation to all parts of the instrument,

bespeak a purpose to make a testamentary provision? The intention of a grantor must be the lamp unto our feet through all the dark paths of the construction of deeds. The instrument is in form a deed in which husband and wife join, and which is properly acknowledged before an authorized officer. Granting by the terms "convey" and "warrant," with their legal significance, to bestow a present estate and defend the title thereto, we discover no design or purpose to make testamentary provision. On the contrary, they evince, in the clearest and most explicit manner known to the forms of conveyancing, an intention to convey, and not to devise. The instrument was delivered and entered of record in the proper recorder's office more than 10 years before the grantor's death,—acts not performed with relation to wills. The position of the appellant is that all of these evidences of an intention to convey an interest in present are defeated, and that testamentary character is given to the instrument, by the exception of "all the estate in said lands" during the lifetime of the grantor. The intention to reserve a life estate is so clearly manifested by the words reserving "the use and occupation, rents and proceeds thereof, unto himself during his natural life" that it is difficult to believe that it was the intention to confer no interest upon the appellees until after his death. It is more difficult to believe that it was the grantor's intention to expressly withhold the fee from the grantees until after his death, for to have done so by the exception would have rendered the reservation of the "use and occupation, rents and proceeds," an idle ceremony. To have reserved the fee and the life estate is to assume that both estates may be held by one and the same person, and we cannot indulge the contention that such a desire existed, when the law permits no such end. Some effective object must be presumed to have been intended by the grantor, and not that the solemn form of a deed was adopted to create a nullity, such as this instrument must be, if it possesses a testamentary character; but the deed in both the grant and exception should be construed most favorably to the grantee. *Darling v. Crowell*, 6 N. H. 421; *Canal Co. v. Hewitt*, 55 Wis. 96, 12 N. W. Rep. 382. There are numerous cases where the deeds under construction contained a condition in all respects the equivalent of that in question in this case, and where it was held that they were not testamentary, but that they conveyed a fee in present, with the use for life reserved to the grantors, and that the effect of the condition was only to postpone the enjoyment of possession by the grantees until after the death of the grantors. In the case of *White v. Hopkins*, (Ga.) 4 S. E. Rep. 863, the deed contained this condition: "And the title to the above-described tract of land to still remain in the said Lemuel Hopkins for and during his natural lifetime, and at his death to immediately vest in the said Lewis Hopkins." The supreme court of Georgia said: "This, in our opinion, conveys an absolute title

from the grantor to the grantee. It conveys a present interest in the land, and takes effect immediately. After it was executed, it was irrevocable by the grantor." As supporting this conclusion, the court cites the following cases: Cumming v. Cumming, 3 Kelly, 460; Spalding v. Grigg, 4 Ga. 75; Robinson v. Schly, 6 Ga. 526; Taylor v. Sutton, 15 Ga. 103; Moya v. Kittrell, 29 Ga. 677; Bunn v. Bunn, 22 Ga. 472; Watson v. Watson, Id. 462; Meek v. Holton, Id. 491; Johnson v. Hines, 31 Ga. 720. In the last case the grant was "to have and to hold, after my death, the aforesaid property." See, also, McGlawn v. McGlawn, 17 Ga. 234, and Jones v. Morgan, 13 Ga. 515. In Graves v. Atwood, 52 Conn. 512, the condition was as follows: "The condition of this deed is such that I hereby reserve all my right, title, and interest in the aforesaid described pieces of land, with all the buildings thereon standing, during my natural life." The court said: "The condition, read in the light of the grant, is to be interpreted as the reservation of the same measure of use thereafter, as tenant for life, as he had theretofore enjoyed as owner." In Webster v. Webster, 33 N. H. 18, the condition was: "Reserving all the right, title, and interest in and unto the above-named land and buildings during my natural life." In Bunch v. Nicks, (Ark.) 7 S. W. Rep. 563, the condition was that "the deed shall go into full force and effect at my death." In Wyman v. Brown, 50 Me. 139, the condition was in these words: "This deed or conveyance not to take effect during my lifetime, and to take effect and be in force from and after my decease." In Shackleton v. Sebree, 86 Ill. 616, the condition was: "This deed not to take effect until after my decease,—not to be recorded until after my decease." In Wall v. Wall, 30 Miss. 93, where right of revocation was reserved, to be exercised at any time during life, and conditioned that possession should not pass until after the grantor's death, it was held to convey a present estate, and that the intention was evident that the instrument should operate as a deed, and not as a will. See, also, Abbott v. Holway, 72 Me. 298; Chancellor v. Windham, 1 Rich. Law, 161. In Owen v. Williams, 114 Ind. 179, 15 N. E. Rep. 678, the instrument was in form a deed, and in the granting clause did "convey and warrant to Thomas Jefferson Williams after my decease and not before." The phrase "after my decease and not before," it was held, did not make the deed testamentary in its character, but operated to show that the grantee's use and enjoyment of the lands conveyed would not begin, under such deed, until after the grantor's death, and not before. Neither from reason nor authority can we conclude that the intention of the grantor in the deed before us was to make testamentary provision, and not to convey a present estate, the enjoyment of which is postponed until after the grantor's death. The exception in Spencer v. Robbins, 106 Ind. 581, 5 N. E. Rep. 726, was that the land was "to be equally divided between them [the grantees] at my decease, \* \* \* and then the title to vest

in them absolutely." The court held that the instrument was a deed, and not a testamentary provision; that it vested a present estate in fee simple, possibly reserving a life estate. In the opinion are cited the cases of Turner v. Scott, 51 Pa. St. 126, and Leaver v. Gauss, 62 Iowa, 314, 17 N. W. Rep. 522, which seem to be in conflict with the numerous cases we cite in this opinion; but they did not control that case, and the court said: "The rule is that unless an instrument, which has been fully executed, from every point of view seems to be a nullity, it will not be intended that the parties meant that it should be invalid, and some effect will, if possible, be given it." This rule is equally applicable in the case before us, and we conclude that the grantor could not have meant to create a nullity, and that from a reasonable point of view it was intended to convey the fee, as the effect of the granting clause does, from which was reserved a life estate. This view renders it unnecessary to determine the effect of conflict between the grant and the exception, though we have no doubt that, where a repugnancy exists, the exception is void. Canal Co. v. Hewitt, 55 Wis. 96, 12 N. W. Rep. 382; Graves v. Atwood, 52 Conn. 512; Farquharson v. Elchelberger, 15 Md. 63, Darling v. Crowell, 6 N. H. 421; 2 Devl. Deeds, § 979, and cases there cited. The judgment of the circuit court is affirmed.

(137 Ind. 397)

# MANOR et al. v. BOARD OF COM'RS OF JAY COUNTY.<sup>1</sup>

(Supreme Court of Indiana. Oct. 14, 1893.)

## BUILDING GRAVEL ROAD—REASSESSMENT—PROCEDURE—ITEMS CHARGEABLE TO FUND.

1. Proceedings for a reassessment in the building of a gravel road can be had at a special term of the board of county commissioners.
2. A board of county commissioners has authority to direct the levying of an additional assessment for building a gravel road, when the first assessment proves insufficient, without notice.
3. After the return of the report of commissioners appointed to reassess and apportion the deficit on the building of a gravel road, a notice for three successive weeks, in a weekly paper published in the county, of the time when the board would meet to hear exceptions thereto, gives the board jurisdiction over the persons of the owners of the land affected.
4. On the hearing on appeal of exceptions to a reassessment for building a gravel road, where the commissioners, on the order of the court, file an itemized statement of expenses, it is in the discretion of the court to refuse to order a more definite statement.
5. Where bonds were sold for the construction of a gravel road, the funds of the road were properly charged with payments on the bonds made by the county treasurer.
6. Under Rev. St. 1831, § 5923, providing that county treasurers shall receive 6 per cent. on delinquent taxes collected, a treasurer is entitled to such compensation for taxes collected for a road fund, the same to be charged to such fund.
7. Where, on appeal from a reassessment for building a gravel road, appellants allege that the viewers did not actually view the land, the burden of the issue is on appellants, and a failure of the court to find either way was equivalent to a finding against them on that issue.

<sup>1</sup> Rehearing denied, 36 N. E. 1101.

8. Where bonds are sold to raise a fund for laying out a gravel road, the interest on the bonds, and the expenses attending their sale, are to be considered in determining the amount of the assessment for building the road.

Appeal from circuit court, Jay county; D. D. Heller, Judge.

Petition of David J. Manor and others to the board of commissioners of Jay county to dismiss certain proceedings in relation to assessments for the building of a gravel road. On appeal from a refusal to dismiss to the circuit court, the ruling of the commissioners was sustained, and petitioners appeal. Affirmed.

Headington & La Follette, for appellants. Thos. Bosworth, John M. Smith, C. Corwin, and F. H. Snyder, for appellee.

MCCABE, C. J. On the 22d day of May, 1889, the board of commissioners of Jay county, at a special session thereof, made the following order: "Hickman Free Gravel Road. Additional Assessment. Whereas, the engineer's estimate for the gravel for the construction of the Hickman free gravel road was made, and the costs based, on the gravel being obtained from the Hickman pit; and whereas, the gravel above referred to was condemned by the engineer in charge of said work, and by the board of commissioners of Jay county, Ind., as being insufficient in quantity and quality for the construction of said gravel road, and said engineer and board of commissioners ordered the gravel for said above-named gravel road to be hauled from the pits of J. B. McKluney, thereby increasing the average haul, and creating an additional expense over and above the original estimate; and whereas, there was on the 25th day of February, 1886, ten thousand (10,000) dollars of bonds issued and sold to pay said expenses; and whereas, the committee appointed by this court on the 12th of March, 1884, to apportion the cost of the construction of said road upon the lands as reported benefited, which report was approved and equalized by said court on the 9th day of June, 1884, and before the completion of the construction of said road: It is therefore considered and adjudged, and this board does find, that the assessment and apportionment heretofore made for the payment of the costs and expenses of said road is insufficient to pay said bonds and the accruing interest thereon, and costs of said road. And it is also found by this board to be necessary, in order to meet the payment of \$7,695.00, to make an additional assessment upon all the lands as heretofore reported benefited by said road. It is therefore ordered by the board that an additional assessment of \$7,693.00 be levied upon the lands heretofore reported as benefited by said road, and that Jonas Votaw, W. H. Harkins, and Nimrod Headington, freeholders of said county, be, and they are hereby, appointed a committee to apportion the additional assessment of \$7,695.00 upon the lands heretofore reported as benefited by said road, being the actual cost of said road, and that the same be the assessment in full for said free gravel

road for the year 1889. And it is further ordered that the said committee meet at the auditor's office in the city of Portland, Jay county, Indiana, on the 23th day of May, 1889, at 10 o'clock A. M., and, after being duly qualified according to law, proceed to make said apportionment and report according to law." And at another special session of said board the following order was entered of record: "Commissioners' Court, July 10th, 1889. Pursuant to notice given by publication in the Portland Sun, a weekly newspaper of general circulation, printed and published in Portland, Jay county, Indiana, the board of commissioners of Jay county, Indiana, met in special session at the auditor's office in the city of Portland, on Wednesday, July 10th, 1889, to hear and determine any and all grievances that may come before them in the matter of the Hickman free gravel road additional assessment. 'To the Hon. Board of Commissioners of Jay County, Ind.: We, the appraisers appointed at your May special term, 1889, to apportion \$7,693.95, additional cost of construction of the Hickman free gravel road, pursuant to notice from the county auditor, met at his office on the 23th day of May, 1889. After being duly qualified, proceeded to make and file the following additional assessment of \$7,693.95 upon the lands and town lots as heretofore reported and assessed.' " Then follows a list of the lands, with the amount reassessed against each tract, which was signed by the committee, and duly verified before the auditor. Thereupon the appellants, whose lands are alleged to be assessed for the construction of the Hickman free gravel road, and each of whose lands are alleged to be assessed with an additional assessment on said road under the order of the board of commissioners made at their May special session, 1889, appeared, and moved the board in writing to dismiss the proceedings because "the same was commenced by the board of commissioners at its special session, to wit, at the May special session, 1889, and the same was set for hearing at a special session of said board, to wit, at July special session, 1889; wherefore they say that said court had no jurisdiction of the subject-matter of these proceedings, nor of the person of these respondents." The board overruled the motion, and they filed a paper they call an "exception," in which they object and except severally and specifically to the confirmation of said additional assessment against their lands, and against the lands of each of them, severally, and specifically to the confirmation of said additional assessment, for the reasons: First. That no notice was given of the time and place where said viewers would meet to view said road and make said assessments. Second. That said assessments were not made by actual view of the lands assessed, but were made by said committee or viewers in the city of Richmond, more than ten miles from the lands assessed, and without any review of said land whatever. Third. That the lands of these exceptors and others along the line of said road, and reported benefited by the construction, were originally as-



essed for the construction of said road in the sum of \$4,663.00; that, before placing the same upon the duplicate, the auditor added to the same 40 per cent., making the sum of \$1,865.25, making in all the sum heretofore assessed against the land of these exceptors and others for the construction of the said road the sum of \$6,528.20, all of which was and is a lien upon the lands of these exceptors and others; that of said sum these exceptors have paid all installments due thereon against them, and are willing to pay the residue, but they would show that the total cost of said road was only \$5,662, or \$866.20 less than the assessments heretofore made, and which they have paid, or are willing to pay, as aforesaid. Fourth. That the assessments heretofore made against the lands of these exceptors for the construction of said gravel road were equal to the full benefits of their said lands by reason of the construction of said road, and the said additional assessments are all in excess of the benefits to their lands, and each of them." "Sixth. That these exceptors and remonstrators, nor either of them, had any notice whatever of the meeting of the board of commissioners on the — day of May, 1889, when the said board determined and found that the assessments heretofore made on the lands of these exceptors and others for the construction of said gravel road were insufficient to pay the cost and expenses of said work, and ordered that the additional sum of \$7,693.95 should be assessed against the lands of these exceptors and remonstrators, nor was any notice whatever given of said meeting of said board in special session on the — day of May, 1889, when said order was made, and said viewers appointed. Seventh. That a part of said deficiency of \$7,693.95 was and is in large part made up of illegal fees and costs paid out, and of sums paid out for illegal purposes, which sums were paid out without warrant or authority of law, \* \* \* and cannot be charged up against them in this reassessment, which payments were specifically described. Eighth. That on the — day of —, 188—, and before the construction of the said free gravel road, a civil engineer and a committee were duly appointed by the board of commissioners of Jay county, who, after being duly qualified, made and reported to the board a full and complete estimate of the cost and expenses of said road, which was — dollars, which was duly approved by the board; that afterwards, on the — day of —, 188—, a committee duly appointed by said board to proportion the expenses of said work among the owners of said lands reported benefited, made a report which was duly confirmed by said board; that the sum so reported by said committee, to wit, \$4,663, with the sum of \$1,865.25 added by the auditor, making a total sum of \$6,528.20, was by the auditor of said county placed upon the duplicate of said county, and became a lien against said lands of these exceptors, \* \* \* was and is sufficient to pay the contract price for the construction of said work, with all proper and necessary expenses in the construction of the

same; \* \* \* that said road was completed by the contractor in the year 1886, was accepted by the said board of commissioners of Jay county, and is now, and for three years last past has been, a part of the free turnpike system of Jay county,—wherefore they protest," etc. "Ninth. They deny that any legal liabilities exist against their lands on account of the haul of the gravel from other pits than those estimated by the engineer and committee on any account whatever." These exceptions were overruled by the board, who, after examination of said report, confirmed and approved the same, and ordered the auditor, after deducting the proper credits for the amounts, as heretofore paid, more than the original assessments, to place the same upon the tax duplicate for the year 1889, against the lands and persons named in said report. Thereupon the remonstrants (appellants) prayed an appeal to the circuit court, which was granted upon the filing a bond in the sum of \$500, with sufficient sureties, etc., which bond was accordingly filed. In the circuit court, on motion of appellants, appellee was required to file an itemized statement and account of the expenses of said turnpike or free gravel road, which the court refused to reject on appellants' motion, and refused to require appellee to comply with the order requiring it to file such itemized account, etc. Appellants relied their motion filed before the commissioners to dismiss the cause, and the court overruled the same, and appellants excepted. There was a trial by the court, which, upon request, made a special finding of the facts, and stated its conclusions of law thereon, to which conclusions appellants excepted.

"The court finds that on the — day of June, 1881, on a petition signed by five landowners for the location of a free gravel road, and bond to secure costs of preliminary survey, etc., the board of commissioners appointed viewers and an engineer to view the said gravel road, which had been described and was the road now in question. That afterwards said viewers and engineer reported to said board the lands that would be affected by the location of said road, and estimated the cost at \$4,800.00, which report was approved, and said road located upon the line prayed for in the petition, and a committee to apportion the cost and expenses upon the lands affected, as reported by the first viewers, was appointed. Said committee made their report to said board. That due notice was given to hear grievances by said board from the landowners affected by the location of the same, as to why said assessments reported by said committee should not be confirmed. That afterwards, on the 9th of June, 1884, said report was heard, and said assessment confirmed on said lands. That on the 16th day of April, 1884, upon due notice, said commissioners let the contract for the construction of said road to J. P. Hickman & Co. for the sum of \$4,800, who gave bond to the approval of said board for the completion of said road. That by said contract said Hickman & Co. were to perform the labor and furnish

all the materials except the gravel, which was to be furnished by the board, and said board and engineer were to have the right to change the specifications before the commencement of the work. That such specifications provided that, should the engineer desire to make any changes in the profiles and plans by which the work would be augmented or diminished from the original intention, said augmentation to be paid for at the pro rata price of the original contract, and, should it be diminished, there was to be a pro rata diminishing of the price of the original contract; and said specifications originally provided that, after the roadbed or sub-grade is accepted by the engineer, the contractor shall proceed to put on gravel 12 inches deep in the center, and 7 inches at the sides, to the width of twelve feet, and, after said specifications and contract were made, the engineer changed said specifications in this: that the contractor should put the gravel on to the depth of 14 inches in the center, and 7 inches at the sides, and to the width of 12 feet. That said bid was made upon the specifications and profile furnished by the engineer. That at the time of the original estimate by the engineer the same was based upon obtaining the gravel from the Hickman hill, which was in the center of said road, and that said estimate did not include said gravel. That said road was four miles long, and the Hickman hill was two miles from either end of said road. That after said contract had been entered into, and the grade of the roadbed had been constructed, and upon examination and prospecting for the same by the engineer and by the board of commissioners with the taxpayers, it was discovered that gravel could not be obtained at the Hickman hill to make said road. That, in order to construct and complete said road, said board and contractors were compelled to go to the gravel pit of J. B. McKinney, in Randolph county, Indiana, one mile south of the south end of said road, for gravel to construct the same. The court further finds, that, before going to the McKinney gravel pit, there was a meeting of the taxpayers and the board of commissioners and contractors at the Hickman hill to ascertain whether there was gravel in sufficient quantities to gravel said road, \* \* \* and, in the presence of the taxpayers, the contractors were directed to go to the gravel pit of said McKinney for said gravel, and into Randolph county for gravel to make said road. The contractors were compelled to haul the gravel on the second south mile of said road one mile further than if the same could have been obtained at the said Hickman hill, and they were compelled to haul the gravel for the third mile of said road two miles further than if they could have obtained the gravel at the Hickman hill; and that the said contractors were compelled to haul the gravel a distance of three miles further than they would have had to haul it if the gravel could have been obtained at the said Hickman hill to gravel the fourth mile.

"The court further finds that in the original estimate and specifications

\* \* \* the gravel on said road was to be 2,061 yards to the mile, and that, after the contract was entered into, the board of commissioners and engineer \* \* \* changed the specifications so the contractors were compelled to put on 2,160 yards of gravel to the mile in the construction of said road. That said road was fully completed by the contractors, and accepted by the engineer. That, in accepting said road from said contractors, the said engineer made a final report and estimate of the work done by the said contractors in the construction of said road to the board of commissioners of said county, in which estimate and report for work and labor done and materials furnished by the contractors in the building and completion of said road there was found to be due the contractors the sum of \$8,162.29, which sum exceeded the original estimate, \$3,362.29. That said final estimate was accepted by the board of commissioners, and there was allowed to the contractors by the said board for the construction of said road the said sum of \$8,162.29; and that there was allowed to J. B. McKinney by the said board of commissioners, for gravel upon the said road, the sum of \$568.80, which sum was compelled to be expended by the board of commissioners in order to obtain gravel to construct said road; and that the gravel could not have been obtained at any nearer point to said road with which to construct the same. That the commissioners allowed J. B. Sharrett \$33.90 for services in prospecting for gravel; to L. J. Craig, \$26 for like services; and that, at the time such services were performed, they were county commissioners of said Jay county. That J. M. Powell & Sons were allowed \$9.50 for livery hire for conveying said board to said gravel pits. That J. A. McConnell was allowed \$5.00 for work in opening gravel pits and prospecting for gravel. That J. P. Hickman & Co. were allowed \$116.50 for extra labor in the construction of said gravel road. That C. E. Rogers, engineer of said gravel road, was allowed \$160.00 for his services as engineer in superintending the construction of said gravel road. That John J. Bell was allowed \$60.00 as watchman during the construction of said gravel road, and who was so placed as watchman at the instance and request of the taxpayers along said road. That J. P. Hickman was allowed \$69.00 for damages and labor occasioned by the opening of the gravel pit at the Hickman hill. \* \* \* That the heirs of E. J. McConnell were allowed \$100 for damages resulting to their real estate by reason of prospecting for gravel thereon. That John T. Hanlan, treasurer of Jay county, was allowed \$18.25 for express charges paid out by him for the delivery of bonds sold for the construction of said road. That said board allowed Palmer J. Smith, as auditor of Jay county, \$20 for making a transcript of the proceedings and records of said board relative to the location of said road, \* \* \* which was made to accompany said bonds in order to show the legality of such proceedings and the issuing of said bonds, \* \* \* in order to effect the sale of said bonds.

That the Sun Publishing Co. was allowed \$8.00 for the publishing a notice in the newspaper of said county, relative to the reassessment on said gravel road, the tax of which reassessment was held to be invalid. That David Manor, one of the remonstrators in this case, was allowed \$4.50 for services rendered on said road as watcher thereon; he being appointed by the taxpayers to represent them in the opening and prospecting for gravel at the Hickman hill. That John T. Hanlan, treasurer of said county, was allowed \$65.52, interest paid on gravel road warrants by him as treasurer of said county, said interest being due. That said treasurer was allowed \$300.00 for interest paid on gravel road bonds that were sold for the construction of said gravel road, which interest was due at the time it was so paid. \* \* \* That said treasurer was allowed \$6.40 as error in taxes, \* \* \* which was credited to said treasurer for errors that occurred on the tax duplicate of said road. That David F. Hoover, as treasurer of Jay county, was allowed \$1,502.83 for interest paid on gravel road bonds, which bonds had been sold for the construction of said road. \* \* \* That said Hoover, as such treasurer, was allowed \$27.29 for collecting taxes on said gravel road. That said David F. Hoover, as such treasurer, was allowed \$6.35 for errors in taxes on said gravel road. That said David F. Hoover, as such treasurer, has been allowed \$3,000 for principal of said gravel road bonds paid by said Hoover, as treasurer of said county, which bonds had been sold by said board of commissioners for the construction of said gravel road. That Palmer J. Smith, auditor of said county, has been allowed \$94.00 for making out tax duplicate of said gravel road. That said auditor was allowed \$216.65 for the use and benefit of Jay county, which was allowed to cover expenses of preliminary survey and expenses of said gravel road, and which was credited to the county fund by said auditor; and that no money was paid to said auditor on said warrant.

"The court further finds that the total cost of the construction of said gravel road as allowed by said board of commissioners, \* \* \* including the amount paid to the contractors, damages for prospecting for gravel, and amount of money paid for the gravel on said road, and for the labor of the engineer, and for all labor and work on said road, the sum of \$9,567.49. The court further finds that there was issued and sold by the said board bonds to the amount of \$10,000, bearing 6 percent. interest, and falling due annually after two years, which were sold at a premium of \$120, and that there is outstanding and unpaid of said bonds \$7,000. The court further finds that there has been allowed by said board, against the sum arising from the taxes on said road, the sum of \$9,567.49, the last of which allowances were made on the 18th day of June, 1889. The court further finds that no appeal was ever taken by either of the remonstrators to this suit, or any one else, from any of the allowances made on said road by said board, that the estimat-

ed expenses and the interest on the bonds issued on said road was and is \$2,425.61, making a total cost of construction, \$11,993.10. The court further finds that the amount of taxes levied against the lands affected by the construction of said road for the construction thereof, and for the payment of the bonds sold thereon, was the sum of \$10,818.17, of which \$4,289.97 was illegally assessed, and part of which was paid by the taxpayers; that there has been collected as taxes by the treasurer of said county on said road the sum of \$8,008.24. The court further finds that after the collection of said taxes there remains, and now is, a deficit of \$3,984.86 in the funds of said road. The court further finds that heretofore, to wit, on the 22d day of May, 1889, the board of commissioners of said county in special session ascertained the amount of the deficit in the fund of said road, and appointed Jonas Votaw, William H. Harkins, and Nimrod Headington, resident householders and freeholders of said county, disinterested persons, to make and apportion upon the lands heretofore reported as benefited and liable to be assessed for the construction of said road, which had been assessed for the construction of said road, the proportionate amount of said deficit, and directed them to meet at the auditor's office of said county on the 28th day of May, 1889, and proceed to make said apportionment and assessment; that the auditor of said county issued his warrants to said viewers and committee, notifying them of the time and place of meeting to make said apportionment and assessment; that said warrant and notice was duly served on said committee in obedience thereto, and, as commanded therein, said committee did meet at the time and place therein specified, and proceeded to make the apportionment and assessment as directed; that said committee made their report to the board of commissioners on the 9th day of June, 1889, which report contained a full and complete list of all the land assessed as benefited in the original proceedings, and the location of said road. The court further finds that the auditor of said county caused a notice to be given as required by law, in the Portland Sun, a weekly newspaper printed and published in said county, which notice was published for three consecutive weeks, and in which notice each and every person affected thereby was notified of the pendency of said report, and named therein a day, to wit, July 10th, 1889, on which said board would meet at the auditor's office of said county and hear the same; that, on the day named in said notice, the said board did meet at the county auditor's office in said county, at which time and place the remonstrators in this action appeared pursuant to said notice, and filed their objections and exceptions in writing, as stated in the pleading in this case, which said remonstrance and exceptions were heard and overruled by said board, and said report was confirmed by said board, which action of the board in confirming said report was entered upon the records, together with the report as confirmed, showing how the said estimated expenses

had been apportioned upon the lands ordered to be assessed as aforesaid, and directed the auditor to place the same upon the tax duplicate against the lands reported as assessed. The court further finds that the benefits to the lands affected by the construction of said road exceed the cost of construction thereof, and the additional assessment made thereon.

"And the court states its conclusions of law as follows: (1) That the item of \$8,162.29, the amount allowed the contractor for the completion of said road by said board, was proper to be allowed by said board, and was properly chargeable to the fund of said road because of additional extra work in the hauling of gravel from the pit of J. B. McKinney instead of the Hickman hill. (2) That the item of \$568.86 allowed by the said board to J. B. McKinney for gravel for the construction of said road; the allowance of \$5.00 to J. A. McConnell; the allowance of \$116.50 to J. P. Hickman & Co. for extra labor and work in the construction of said road; the allowance of \$160.00 to C. E. Rogers, engineer of said road, for superintendence of said road; the allowance of \$60.00 to John J. Bell as watcher during the construction of said road; the allowance of \$69.00 to J. P. Hickman for damages and labor occasioned by the opening of a gravel pit at the Hickman hill on the lands of said J. P. Hickman,—as necessary to the completion of said road. The allowance made to the heirs of E. J. McConnell of \$100.00 for damages resulting to the real estate of said heirs by reason of prospecting for gravel upon the lands of the said heirs of the said E. J. McConnell; the allowance of \$18.25 for express charges paid by John T. Hanlan, as treasurer of said county, for the delivery of the bonds sold for the construction of said gravel road; the allowance of \$20 to Palmer J. Smith, as auditor of said Jay county, for making transcript of the record of the board of commissioners relative to the location of said gravel road, and for the sale of the gravel road bonds; the allowance of \$4.50 to David J. Manor as a watcher on said road; the allowance of \$65.52 to John T. Hanlan, as treasurer of Jay county, for interest on gravel road bonds; the allowance of \$300 to said Hanlan, as such treasurer, for interest paid on gravel road bonds; the allowance of \$6.40 to said Hanlan, as such treasurer, on account of errors in taxes; the allowance of \$1,502.83 to David F. Hoover, as treasurer of said county, for interest paid on gravel road bonds sold on said road; the allowance of \$27.29 to said Hoover for collecting taxes as treasurer; the allowance of \$6.35 for errors in taxes to said Hoover; the allowance of \$3,000 to said Hoover, as treasurer, for payment of principal of gravel road bonds sold on said road; the allowance to the auditor of said county for the preliminary expenses of said road,—each and all of said allowances were made by the board of commissioners of said Jay county against the fund of said gravel road, and were properly so allowed, and should stand chargeable to the fund of said gravel road. The allowance of \$9.50 to J. M. Powell & Sons, for livery

hire; the allowance of \$33.90 to J. B. Sharrett for prospecting for gravel; the allowance of \$26.00 to L. J. Craig, commissioner of said county; the allowance of \$8.00 to the Sun Publishing Co. for publishing notice; and the allowance of \$94.00 to Palmer J. Smith, auditor of said county, for making tax duplicate,—were not proper allowances, and should not be chargeable to the fund of said road. That said assessment should stand against the lands affected by said road as apportioned by the viewers for the deficit, amounting to \$3,984.86, less the items mentioned in the last five conclusions herein, amounting to \$161.40, to be apportioned by the auditor of said county, for the purpose of paying the outstanding bonds and indebtedness occasioned by such deficit upon the ratio and proportion to be fixed by said auditor."

Appellants excepted to each of these conclusions of law. They moved for a venire de novo, which was overruled, and they excepted. Thereupon the court rendered a judgment reassessing said lands for the amount of the deficit as found by the court, namely, for \$3,823.46, instead of \$7,693.95, the amount of deficit found by the board of commissioners to exist, which reassessment is set out in full in the record. Afterwards the court overruled appellants' motion for a new trial.

The overruling the motion to dismiss the cause is the first alleged error assigned. It is contended with much apparent earnestness that as the proceedings for the reassessment of the lands took place at a special term of the board of commissioners, and not at a regular session, the proceedings were void for want of jurisdiction on that account. It is settled in this state that such proceedings may be had at a special session, as well as at the regular session, of the board of commissioners of the county. *Stipp v. Claman*, 123 Ind. 582, 24 N. E. Rep. 131; *White v. Fleming*, 114 Ind. 560, 16 N. E. Rep. 487.

It is further contended that the motion to dismiss for want of jurisdiction was well taken, even if such matters might be acted on at a special session, because, as is claimed, the board had not acquired jurisdiction over the subject and the persons of appellants when the order for a reassessment was made at the May session, because appellants were not notified, and we presume because no petition had been filed before the board calling into exercise their powers. If the board had not acquired jurisdiction over the subject and the parties, then the circuit court would be without jurisdiction over either on appeal, and the motion to dismiss the cause for want of such jurisdiction must prevail.

It has been settled by this court that the board of commissioners has authority to make an additional assessment to pay the cost of the improvement in case the original assessment proves insufficient in free gravel road cases, and that the board of its own motion, without a petition, may direct the levying of an additional assessment. *Board of Com'rs v. Fullen*, 111 Ind. 410, 12 N. E. Rep. 298;

Tucker v. Sellers, 130 Ind. 514, 30 N. E. Rep. 531. It appears from the record that July 10, 1889, was fixed by the board for the hearing of objections to the report of the committee to reassess and apportion the deficit on the lands affected, and that all the appellants were notified thereof by a publication of notice in the Portland Sun, a weekly newspaper printed and published in said Jay county, for three consecutive weeks, and that said board did meet at the auditor's office in said county on said day, where appellants appeared, pursuant to said notice, and filed their objections and exceptions in writing to said report, and, after hearing the said exceptions, the board overruled the same. It has been held by this court that such a notice is sufficient to confer jurisdiction of the persons of the owners of the lands affected. Tucker v. Sellers, supra. Therefore the court had jurisdiction of the subject and the parties, and did not err in overruling the motion to dismiss.

The next assignment of error calls in question the overruling appellants' motion to reject an itemized statement of expenditures of the road, and to require appellee to file a complete itemized statement of such expenses. The statement sought to be rejected had been filed at the instance of appellants under the order of the court. The motion to reject, and to require a fuller one to be filed, did not point out any objection to the one filed. It was as follows:

The preliminary expenses of the	
Hickman G. R.....	\$ 1,288 70
Total cost of construction.....	8,278 79
Estimated expense and int. on	
bonds .....	2,510 61
Total .....	\$12,078 10

In support of appellants' contention that such itemized statement ought to have been required, and that this one was not sufficient, we are referred to section 383, Rev. St. 1881, and decisions under it, regulating the practice in civil cases under the Code. We do not think this proceeding is one regulated by the Code of Civil Procedure, but is a special proceeding provided for by the statutes authorizing the construction of free gravel roads. It is very doubtful whether a demand for such a statement could have been rightfully made in the commissioners' court, and, if not in the commissioners' court, it could not be in the circuit court on appeal. Be that as it may, it is clear that it was such a matter as rested in the sound discretion of the circuit court, and in such a case we could not reverse for making or refusing such an order unless there was an abuse of such discretion that was prejudicial to the rights of appellants. The record does not disclose any injury to them on account of such refusal, but, on the contrary, it discloses that they got all the benefit they could have obtained by a fuller and more detailed account and statement, in that all the items of expenditure on the road, and items charged against the road fund, were duly litigated in the trial.

The next error assigned calls in question the correctness of the conclusions of law. The conclusion numbered 18 is most

seriously assailed. In that conclusion it is stated that the \$3,000 allowed to David F. Hoover, as treasurer, for principal of gravel road bonds sold on said road, and paid by him, was properly chargeable against the fund of the road. The findings of fact show that said treasurer paid said sum of \$3,000 on said principal, and he probably paid it out of funds other than the gravel road fund. The conclusion is that it was a proper allowance against the gravel road fund, belonging to said road. It is complained that this item cannot be added to the cost of construction and incidental expenses, because the payment of the principal of the bonds is no part of the cost of such construction. In other words, it is contended that the full cost of construction and incidental expenses furnish the measure and limit of the amount of tax to be levied, and that nothing else can be added to augment that amount; that nothing else can be charged against the gravel road fund, so as to increase the amount to be levied against the lands affected. We think this contention is correct; but while the conclusion objected to states that the allowance to the treasurer was a proper one, and that the \$3,000 paid by him on the principal of the bonds sold in that case was chargeable against the fund of the road, yet the whole findings and conclusions of law show that said \$3,000 was not added to the cost of construction and incidental expenses of the work. The payment of that \$3,000 was properly chargeable against the fund of the road raised by the sale of bonds, and the treasurer was entitled to a credit as against that fund on account of such payment. That that was what the court meant, and nothing more, by the conclusion stated, is made clear when it appears, as it does from the record, that the said \$3,000 allowance was not added to the cost of construction and incidental expenses, and the court did not allow it to augment the deficit for which the reassessment was made. For these reasons, we are of opinion that the court did not err in that conclusion of law.

It is next objected that the conclusion of law that the allowance of \$27.29 to David F. Hoover, as treasurer, for collecting taxes assessed for the benefit of the fund of the road, was wrong, because it is contended no provision is made for its payment out of the road fund. It has been frequently declared by this court that it is the policy of the statute to impose upon lands specially benefited by the construction of a free gravel road the burden and expense of such construction, and to relieve the county of such burden. Tucker v. Sellers, supra; Rogers v. Voorhees, 124 Ind. 469, 24 N. E. Rep. 374; Board of Com'rs v. Fullen, 118 Ind. 158, 20 N. E. Rep. 771; Strieb v. Cox, 111 Ind. 299, 12 N. E. Rep. 481. Counsel for appellants cite sections 5927 and 5928, Rev. St. 1881, and insist that the provisions thereof cover the collection of all funds collected by the treasurer, and no provision is therein made for charging any part of the treasurer's compensation to any other fund except the fund that belongs to the county.

The first section provides that the treasurer shall be allowed \$800 per annum, to be paid out of moneys belonging to the county. The next section (5928) provides that "county treasurers shall also charge and receive as a further compensation at the rate of one per centum on the first one hundred thousand dollars of taxes by them collected, and on all sums collected in excess thereof one-half of one per cent. They shall also receive and retain out of all delinquent taxes collected six per centum when paid voluntarily and the same if paid after levy." The fair and reasonable interpretation of this section is that the treasurer is entitled to retain his per centum out of the taxes collected. If so, then clearly the treasurer must be paid and receive his per centum for collecting gravel road tax out of the tax collected, or it is chargeable to that fund. This interpretation harmonizes these provisions with the free gravel road law, the policy of which, as we have seen, seeks to shield the county from the burdens of the construction of such roads, and place it upon the lands specially benefited thereby. We therefore hold that the conclusion of law, that the allowance to the treasurer of \$27.29 was properly chargeable against the fund of said road, was not erroneous.

The next error assigned calls in question the ruling of the court in overruling the motion for a venire de novo. The motion was based on two reasons, namely, that the special findings are too uncertain, and that the court does not find on all the issues. We have examined the special findings, and considered the matters of uncertainty in them pointed out in appellants' brief; and while they may not be as aptly and skillfully drawn as they might be, yet we think they are sufficiently certain to support the judgment the court pronounced upon them.

It is further complained, under this head, that the court did not in either pro or con on the matter put in issue by the exceptions, that the committee to apportion, etc., did not do so by actual view of the lands, but did their work in the auditor's office, 10 miles away from the lands. The burden of this issue was on the appellants, and a failure to find either way thereon was equivalent to a finding against them as to that issue. *Hunt v. Blanton*, 89 Ind. 38; *Dodger v. Pope*, 93 Ind. 480; *Quick v. Brenner*, 101 Ind. 230; *Railway Co. v. Gaines*, 104 Ind. 526, 4 N. E. Rep. 34, 5 N. E. Rep. 746; *Quill v. Gallivan*, 108 Ind. 235, 9 N. E. Rep. 99; *Stone v. Brown*, 116 Ind. 78, 18 N. E. Rep. 392; *Railway Co. v. Hart*, 119 Ind. 273, 21 N. E. Rep. 753. The same is true of the issue as to failure to notify appellants of the time and place of the meeting of the committee to make the apportionment. Besides, there is no law which makes it necessary to notify the owners of lands to be affected of the time and place of the meeting of the committee to make the apportionment.

The next error assigned calls in question the ruling refusing a new trial. It is contended that the finding is not supported by the evidence. Appellants' counsel say that the final estimate of the engineer put in evidence includes every item

of the cost of the road, and is only \$8,162.29, and that there had been collected of said taxes, \$8,095.24; and this, it is claimed, would only leave a deficit of \$67.05. That is true, but counsel wholly omit in their calculation the interest on the bonds sold, and the amount paid for the gravel. That must come out of the fund of the road to be raised by taxation. Counsel further say that the court found that "the total cost of the construction of the road, including the amount paid to the contractors, damages for prospecting for gravel, and amount paid for gravel on said road, and for the labor of the engineer, and for all labor and work on said road, amounted to \$9,567.49, and that there had been collected by the treasurer on the assessments on said road, \$8,008.24," and concludes by saying he finds a deficit of \$3,984.86. Says counsel: "According to these figures, the deficit could not exceed \$1,559.25, which would include the \$161.40 allowed the auditor, etc., that the court holds to be improper charges against the funds of the road." And so it is. But counsel for appellants loses sight of an important item that entered into the court's finding from the evidence, and that is the estimated expenses and interest on the bonds, \$2,425.61.

The total cost, etc., found by the court, as we have seen, was.....	\$9,567 49
Deduct taxes collected.....	8,008 24
	<hr/>
	\$1,559 25
From this remainder take the five items the court held not chargeable to the fund of the road.....	161 40
	<hr/>
	\$1,397 85
Add the interest on the bonds.....	2,425 61
	<hr/>
Amount of the deficit.....	\$3,823 46

—As fixed by the judgment of the court below. The evidence, we think, justified the finding and judgment in this respect. It is insisted that the finding was a total disregard of the evidence on another issue, namely, that the exceptions and objections to the report of the committee that they did not apportion the reassessment by actual view, but did so in the auditor's office, 10 miles away from the lands. The evidence was amply sufficient to support this objection to the confirmation of the report, but, on appeal, the case, including all objections to the report, as well as the necessity of making a reassessment at all, must be tried de novo, and, if the necessity for the reassessment is adjudged to exist, it is made by the circuit court, and the old reassessment is superseded by the appeal, and hence it is not a material question how it was made. *Corey v. Swager*, 74 Ind. 211.

Another one of the grounds for a new trial was receiving the evidence of the allowance and payment of \$33.90 to John Sharrett for prospecting for gravel; but the court, in its special finding and conclusions of law, adjudged that that item was not chargeable against the fund of the road, and hence the error, if any, was harmless. The court received in evidence, over the appellants' objection, the final report and estimate of the engineer, which

was a paper in the cause, and had been entered on the record of the commissioners in that case. It was received by the court because it was a paper in the cause. The paper in question, being a part of the record in the cause on trial, was already before the court without being introduced in evidence; hence there was no error in formally introducing it in evidence. *School Town of Monticello v. Grant*, 104 Ind. 168, 1 N. E. Rep. 302. The same is true of the objection to introducing in evidence the record entries concerning the issue and sale of the \$10,000 of bonds. The same is also true of the commissioners' record, where they found the deficit to be \$7,698. A motion to modify the judgment was overruled, which is questioned by the assignment of error. There was no error in overruling this motion, as the evidence was sufficient to support the finding of the court. The court below rightfully overruled appellants' motion to tax costs against the appellee. Counsel virtually concede it would require legislative action before costs could be taxed against the commissioners in a case like this. We find no error in the record for which the judgment should be reversed. The judgment is affirmed.

(135 Ind. 216)

## MONAHAN v. STATE.

(Supreme Court of Indiana. Oct. 21, 1893.)

CRIMINAL LAW—PRACTICE—WITHDRAWAL OF PLEA  
—DISCRETION OF COURT.

Defendant, a 16 year old boy, on being arraigned for larceny, pleaded guilty, having been informed by persons not authorized to do so that some of his associates, on arraignment for the same crime, had pleaded guilty; that sentence had been suspended against them during good behavior, and that he would probably receive the same judgment. The court advised him that he might withdraw his plea at any time before sentence, told him the punishment he was to receive, and gave him an opportunity to withdraw his plea; but, no steps having been taken to do so, sentence was passed. *Held* not an abuse of discretion for the court to refuse to permit defendant to withdraw his plea after sentence.

Appeal from circuit court, Elkhart county; J. M. Van Fleet, Judge.

John Monahan was convicted of larceny and appeals. Affirmed.

Chamberlain & Turner, for appellant. John T. Sullivan and E. E. Mummert, for the State.

HACKNEY, J. The record discloses that the appellant and others were charged with stealing nine cartoons of chewing gum; that three of his associates were arraigned before the defendant was taken into custody, and upon their pleas of guilty the sentence was suspended during good behavior; that while appellant and others were en route to the county seat to answer said charge, they were informed of the plea and the judgment against said three associates, and they were then told by one having no authority to speak for the court or its officers that they would probably receive the same judgment. Upon arraignment they

entered pleas of guilty. The appellant was remanded to the county jail, with the suggestion of the court that time would be taken to consider and determine what punishment should be inflicted, and with the advice from the court that the plea of guilty might be withdrawn at any time before sentence. This proceeding was on the 23d day of December, 1892, and no other steps were taken until January 2, 1893, when the appellant was taken into court for sentence upon said plea, and when the court stated to him that it had been concluded that the punishment should be by commitment to the Reform School for Boys. It was then announced by the court that if any one present desired to interpose in behalf of the defendant, an opportunity would be given to do so. This information was, at the direction of the presiding judge, given to the mother of appellant, then in the court room. After this unusual opportunity for the withdrawal of the plea of guilty, and after the announcement that the punishment should be by commitment, and before sentence an opportunity existing to withdraw the plea, and no such steps having been taken, the court passed the sentence so committing the appellant. On the 4th day of January, 1893, the appellant's counsel filed in his behalf a motion to set aside the judgment, and for leave to withdraw his plea of guilty, and enter a plea of not guilty. This motion alleged that he was not guilty of the crime charged; that he had been induced by the statement of the party who, as before stated, told the appellant that the judgment would probably be the same as that against his associates; that he was young and ignorant of the effect of the plea of guilty, and believed that sentence would be suspended, as in the case against his said associates. Evidence was heard upon the motion, and it clearly justified the conclusion that the appellant was guilty of the larceny charged, and there was evidence from which the court might reasonably hold that no false representations were made to him, and no inducements offered to plead guilty to said charge. The character of the boy's mother, the conduct of the boy while in jail, and a conflict in the evidence as to statements made out of court, contrary to his evidence in court, of the party who was alleged to have induced the plea of guilty upon the assurance of a suspended sentence, are involved in the record, but are either not questions necessary for us to consider, or are questions settled by the trial court upon the weight of the evidence, and not subject to review. Both sides concede that the right to withdraw the plea of guilty was to be exercised within the discretion of the court, and that, if there is an abuse of such discretion, this court should review the action, but, if no such abuse is shown, that this court will not review the action. This concession is affirmed by the case of *Myers v. State*, 115 Ind. 554, 18 N. E. Rep. 42, cited by the appellant as authority for the contention that an abuse of discretion has been shown in the case before us. That case shows a materially different state of facts from that existing in this



case. The defendant there was innocent of the charge, was poor and unable to employ counsel to defend it. He was deceived by the sheriff and the prosecuting attorney by false representations that his sentence, if he pleaded that he was guilty of the charge, should be but two years, when that given upon his plea was ten years. The sheriff and prosecuting attorney were officers of the court, and persons from whose official positions those of ordinary intelligence might very reasonably suppose could secure the promised sentence. There it was evident that the plea had been induced by fraud and misrepresentation, and that an innocent man had been unjustly punished. Here the defendant was clearly guilty of the larceny, and he had not been the victim of fraudulent inducements in entering his plea. He had ample opportunity to withdraw the plea after having knowledge that he would receive punishment and after being told by the judge presiding that the punishment would be by commitment to the reform school. The age, intelligence, and surroundings of the appellant were before the trial court, and all of the facts were presented and there considered, where the witnesses and the appellant could be regarded and their statements weighed with better opportunities for ascertaining the truth than is afforded us by the record. The trial judge acted with unusual care to avoid inflicting a punishment without giving the appellant a fair opportunity not only to know the extent of punishment contemplated, but to withdraw his plea, and contest the charge. If pleas may be entered and acted upon by the courts, and, if defendants therein are displeased with the punishment inflicted, and may for slight cause or false claim set aside the judgments, the only final disposition of such causes will be by trials upon pleas of not guilty. We cannot adopt a rule that pleas of guilty may stand where the punishment pleases the criminal, but may not stand if he is displeased, and will deny the guilt he has already confessed. Nor can we conclude that the statements of a stranger to one charged with crime, as to what punishment will be inflicted on such charge, shall be sufficient to set aside the judgment when the punishment inflicted is not that supposed. The appellant was in the sixteenth year of his age when the proceedings were had in the trial court, and the record does not disclose that he was less informed as to his rights than could have been expected from one of that age. The trial court was in a position to judge of his intelligence, and this court is not, and we cannot presume against the judgment of the trial court upon that question. The judgment is in all things affirmed.

(135 Ind. 308)

## PLUMMER v. STATE.

(Supreme Court of Indiana. Oct. 10, 1893.)

HOMICIDE—SELF-DEFENSE—INSTRUCTIONS—BURDEN OF PROOF.

1. Though defendant may have been guilty of a misdemeanor authorizing his arrest with-

out a warrant, where the officer pursued defendant, and struck him on the head with a billy, and then shot at him with a revolver, without having first informed defendant of any intention of arresting him, and without any violence or resistance on the part of defendant other than his walking toward home with a revolver in his hand, and telling the officer to keep away, defendant was justified in defending himself, even to the taking of the officer's life.

2. On a trial for murder it is error to instruct the jury to find defendant guilty unless it is found beyond a reasonable doubt that the killing was justifiable on the ground of self-defense, or unless it is found beyond a reasonable doubt that defendant was of unsound mind at the time, as the instruction required defendant to prove his innocence in those respects beyond a reasonable doubt, the homicide being established.

3. An erroneous instruction is not cured by giving a correct one, unless the erroneous instruction is thereby clearly withdrawn.

Appeal from circuit court, Benton county; U. Z. Wiley, Judge.

Jackson Plummer was convicted of manslaughter, and appeals. Reversed.

Stuart Bros. & Hammond and Saunderson & Comparet, for appellant. John T. Brown, for the State.

McCABE, C. J. Appellant was indicted by the grand jury of Newton county, charging him, in six different counts, with the murder of James Dorn, in the first and second degrees, in the different counts, respectively. There was a change of venue granted to the court below, where, on a plea of not guilty and a plea of insanity, a trial resulted in a verdict finding appellant guilty of voluntary manslaughter, and fixing his punishment at 15 years' imprisonment in the state prison. After overruling appellant's motions for a new trial, in arrest, and to be discharged, the court below rendered judgment on the verdict. Among the errors assigned here is the overruling the motion for a new trial, and among the reasons assigned for a new trial were the giving, and refusing to give, certain specified instructions, and that the verdict is contrary to the evidence. It appears from the evidence, which is very voluminous, and quite impracticable to set out in this opinion, that the deceased, James Dorn, was a stout man, 48 years of age, with no ailment except at times he had been afflicted with rheumatism, though he seemed free from that at the time of his death; was the marshal of the town of Kentland, and had been for eight or nine years. Appellant, Plummer, was about 60 years old; had been suffering with chronic diarrhea contracted in the army, for which he was receiving a pension; was in bad health generally, and unable to work; somewhat smaller than Dorn, and not so stout; had always been peaceable and quiet; had lived in Kentland, and about there, ever since the war, and owned the house and lot in said town in which he lived. The town board of said town of Kentland had made an order requiring him to trim certain shade trees thereon, to which he objected, and, pending the dispute about it, appellant, Plummer, became very much excited, and about

noon on the 20th day of June, 1892, he left his house with his loaded revolver in his hand, and went onto the business streets of said town inquiring for the members of said town board, making threats that he was not to be fooled with, saying they had ordered his trees to be cut down, and that he would shoot them; and, while so talking in an excited manner he would frequently brandish his revolver around. John Keefe told him that the town board would not cut his shade trees down, and that he had better go home. About this time, one Elliott called out for the marshal, or Dorn, and perhaps both, and he pointed his revolver at said Elliott, and said to him, "Call for the marshal again, damn you, and I will kill you;" and "Bring on your marshal. I'll fix him." He also pointed his revolver at one Conklin, a member of the town board. Immediately after Keefe advised him to go home, he started in the direction of his home, carrying and flourishing his revolver in his hand. While he was yet in sight of those at the place where he started, and still going in that direction, Dorn, the marshal, came from another direction, up to the place from which Plummer had started. Keefe warned Dorn to be careful; that Plummer had a gun. Dorn then stopped, took his coat from his arm and laid it on a box, changed a revolver from his left to his right hip pocket, and took his billy in his left hand, and started on after Plummer, saying he was not afraid of him. When he came within 20 feet of overtaking Plummer, they both walking in the same direction, he took out his revolver, and held it in his right hand, and his billy in his left hand, and ordered Plummer to put up his revolver. Plummer told him to keep off, or keep back, while Plummer walked on, looking back at Dorn as he followed him up. Dorn repeatedly ordering him to put up his gun or revolver, and Plummer repeatedly warned Dorn to keep back, or keep away from him. While the two were thus proceeding, Dorn dodged behind shade trees on the sidewalk, stepped up behind Plummer, as one of the witnesses expressed it, on his "tiptoes," and struck Plummer on the side of his head with his billy, and then on the back and arm, which knocked the revolver out of Plummer's hand, and thereupon Dorn fired on Plummer, missing him. Immediately thereafter, Plummer fired on Dorn, missing him, and they continued firing at each other until three or four shots had been fired. Dorn jumped behind a shade tree, and was making ready to fire again, when Plummer fired the fatal shot that killed Dorn, and he fell down and died. Dorn's second shot lodged a ball in Plummer's left side, making only a flesh wound. It is conceded that Dorn fired the first shot, though Plummer's first shot was so close to Dorn's first that it was difficult to tell which one was first. There is no direct evidence as to what Dorn, the marshal, was intending to do with Plummer, but the theory of the state is that he was intending and attempting to arrest Plummer without a warrant, for his several acts in pointing his revolver at Elliott

and Conklin, and for carrying such revolver with the intent or avowed purpose of injuring his fellow man. Dorn did not inform Plummer that he desired or intended to arrest him. In a written statement made by Plummer, read in evidence, he states that Elliott began to call for Marshal Dorn, as he supposed, to arrest him. Plummer knew that Dorn was marshal of the town. Both offenses for which it is claimed the marshal was attempting to arrest Plummer were misdemeanors. Rev. St. 1881, §§ 1984, 1985.

A marshal is not authorized to arrest in all cases for misdemeanors without a warrant. He can only arrest for such offenses without a warrant when the offense is committed in his presence or sight. Rev. St. 1881, §§ 1702, 5976; section 828, Elliott's Supp.; *Doering v. State*, 49 Ind. 56; *Bow v. Beckner*, 8 Ind. 475; *Gillett, Crim. Law*, § 156; *Murfree, Sher.* § 1161. The attorneys for the state concede this to be the law, but they contend that inasmuch as some of the witnesses testify that, when Elliott called the marshal, in their opinion he was within hearing, and could have heard the call, and come onto the scene within a minute or two, he was, in contemplation of law, present, or the alleged offenses were committed in his presence, in contemplation of law. They cite *Wiltse v. Hoit*, 95 Ind. 469. That case lends some support to that contention. Assuming, however, without deciding, that the alleged offenses were committed in the presence or sight of Marshal Dorn, within the meaning of the law, and that he therefore had legal authority to make the arrest without a warrant, we are led to inquire whether he confined himself to the limits prescribed by the law in the exercise of that authority, and, if he transcended those limits, what effect that had upon his authority, even if he had the right to make the arrest without a warrant. He stepped up behind Plummer, and without requesting him to submit to arrest, or informing him that he desired to arrest him, with his revolver in one hand and his billy in the other, and without any act or provocation or resistance on the part of Plummer other than his traveling on towards his home with his revolver in his hand, and telling Dorn to keep back, or keep away from him, Dorn struck him on the side of the head with said billy, which was a policeman's club. The law does not allow a peace officer to use more force than is necessary to effect an arrest, (1 Amer. & Eng. Enc. Law, 745, and authorities there cited;) and, if he do use such unnecessary force, he thereby becomes a trespasser from the beginning, and may be lawfully resisted, (*Murfree, Sher.* § 1164a, and authorities there cited; *Id.* §§ 1160, 149; *Jarratt v. Gwathmey*, 5 Blackf. 237; *Burton v. Calaway*, 20 Ind. 469.) If the officer is resisted before he has used needless force and violence, he may then press forward and overcome such resistance, even to the taking the life of the person arrested, if absolutely necessary. 1 *Bish. Crim. Proc.* § 180; 1 *Amer. & Eng. Enc. Law*, 745, and authorities there cited; *Murfree, Sher.* § 1164a. But here the evidence wholly fails to show any necessity

for the marshal's act in striking Plummer on the head with his club. He therefore was a trespasser in doing so, and was guilty of an aggravated assault and battery on Plummer. He did not stop at that, but he shot at Plummer with his revolver immediately after he struck him on the head, and before Plummer had fired at him. This gave Plummer a clear right to defend himself, even to the taking the life of his assailant. It is not necessary, to authorize one to exercise the right of self-defense, that the assailant should in fact contemplate injury to him. If he believed, and had reason to believe, from the actions of his assailant, that he is in danger of receiving great bodily harm, he may defend himself to a reasonable extent. *West v. State*, 59 Ind. 113; *Agee v. State*, 64 Ind. 340; *McDermott v. State*, 89 Ind. 187. When a person, being without fault, is in a place where he has a right to be, and is violently assaulted, he may, without retreating, repel force by force, and if, in the reasonable exercise of his right of self-defense, his assailant is killed, he is justifiable. *Runyan v. State*, 57 Ind. 80; *Miller v. State*, 74 Ind. 1. These principles apply as well to an officer attempting to make an arrest, who abuses his authority and transcends the bounds thereof by the use of unnecessary force and violence, as they do to a private individual who unlawfully uses such force and violence. *Agee v. State*, 64 Ind. 344; *Jones v. State*, 26 Tex. App. 1, 9 S. W. Rep. 53; 1 Amer. & Eng. Enc. Jaw, 745, and note 1; *Golden v. State*, 1 S. C. 292; *Beaverts v. State*, 4 Tex. App. 175; *Skidmore v. State*, 48 Tex. 93. Plummer was on the street, going home. He had a right to be there, and he had a right to carry his revolver home with him, and even though the marshal supposed he was carrying it openly, with intent or avowed purpose of injuring his fellow man, that did not justify the extreme measures he resorted to. He approached Plummer with his revolver in one hand and his club in the other, and struck Plummer on the head. This furnished reasonable ground for the belief in Plummer's mind that he was in danger of receiving great bodily harm, and the circumstances show that he did believe it; and, though Plummer may have instantly begun to prepare to defend himself against this unlawful assault, he did not shoot until after Dorn fired on him. The statute provides that an arrest under a warrant is made by an actual restraint of the defendant, or by his submission to the custody of the officer, but that the person arrested shall not be subject to any more restraint than is necessary for his arrest and detention, and the officer must inform him that he acts under the authority of a warrant, and show it, if required. Rev. St. 1881, §§ 1687, 1688. Where an arrest is made for a misdemeanor, without a warrant, the reasons for requesting the person to submit to such arrest are as great as, if not greater than, where there is a warrant. We are constrained to hold that Dorn, if he even had the right to make the arrest without a warrant, abused that authority by striking Plummer over the head with his policeman's club. Had he

informed Plummer that he intended to arrest him, and requested him to submit to such arrest, and then Plummer had refused to submit, and resisted, or threatened to resist, arrest, with any demonstration of force, a very different question would have been presented. In such a case the officer, as we have seen, having authority to arrest, would have been justified in using force sufficient and necessary to overcome such resistance, even to the taking of the life of the person he was attempting to arrest. We therefore hold that the verdict was contrary to the evidence.

The ninth instruction of the series of instructions given by the court on its own motion was to the effect that Dorn had a right to strike Plummer with his billy or club for the purpose of making him surrender to his authority. This was error. The fourteenth instruction of said series was as follows: "(14) If you find from the evidence that, on the day of the alleged homicide, the defendant left his house in the town of Kentland, Indiana, at about or shortly after noon, with a loaded revolver in his possession, and that with such revolver he went upon the public streets of Kentland, where citizens were passing to and fro; that, when he was upon the street or streets, he openly carried said revolver in his hand or hands; that he was in an excited condition of mind, and while in this condition he inquired for members of the town board, and made threatening remarks about the members of said town board, or any other citizen of said town, or any other fellow man, with intention and purpose to injure such person or persons; and if you further find that he then and there flourished or brandished said revolver,—then I instruct you that such open wearing or carrying said revolver was a violation of a criminal statute of this state, and that the defendant was a wrongdoer, and for which violation of law he was subject to immediate arrest without a warrant, and could have been held in custody until a legal warrant could have been procured, and proceedings had under it, according to law. And if you further find that while said defendant was on the street flourishing or brandishing his revolver, if in fact you so find, he was talking or muttering to himself, or if you further find under the facts stated, if they be facts, that while he was in conversation with others, or talking or muttering to himself, one J. R. Elliott called for the town marshal in a loud tone, so that the defendant heard him, and that he immediately turned toward the said Elliott, and pointed said revolver at him, although you may find he was some distance away, and if you find that when he pointed said revolver at the said Elliott, if you find that he did so point it, he cried out: 'Bring on your marshal. I'll fix him,' or words to that effect, then I instruct you that such pointing at said Elliott, whether it was done with wicked intent or for mere foolishness or in jest, was a violation of a criminal statute of this state, for which the defendant was liable to immediate arrest with-

out a warrant, and could be held until such reasonable time that a legal warrant could be obtained, upon which he could be legally tried. And I instruct you further that under the facts stated, if they be facts, and while the said defendant was still upon the street, and the marshal came upon the street, though at some distance away, but where he could see the defendant while he was still flourishing and brandishing his revolver, or while he was still pointing it towards the said Elliott, it was not only his right, but his duty, as a peace officer, to pursue and arrest the defendant without a legal warrant, and such arrest, if made, would be justifiable under the law. And I instruct you further that if you find from the evidence that the said marshal, James Dorn, under the facts above stated in this instruction, if they be facts, pursued the defendant, even though you may find the defendant was going towards his house, with the intention of arresting the defendant for said violation of law, and, when the said Dorn came up to or near the defendant, he found the defendant still had his revolver in his hand, that he was talking to himself, and was acting in an unnatural manner, either from excitement, anger, or otherwise; and if you find from the evidence that the said Dorn called to the defendant, and commanded him to put up his gun or revolver; and if you further find from the evidence that, instead of putting up his revolver, he turned towards the marshal, pointed his revolver at him, flourished and brandished it in his face, and made any threatening remarks to the marshal; and if you find that the defendant knew Dorn was the marshal,—then I instruct you that such acts of the defendant would be in violation of the criminal law of this state, for which he was liable to immediate arrest without a warrant; and it was not only the right, but the duty, of the marshal to arrest him at once, and the marshal was authorized to use such force as was necessary to accomplish his arrest. And if you find that the said Dorn did, as such marshal, in discharge of his duties as a peace officer of said town, undertake to arrest the said defendant, that the defendant resisted his attempts to arrest him, and that Dorn did not use unnecessary force or rigor in attempting to make the arrest, and that, while he was so attempting to make said arrest, the defendant shot and killed him, then you should find the defendant guilty, unless you find beyond a reasonable doubt that the killing was justifiable on the ground of self-defense, or unless you find, beyond a reasonable doubt, that the defendant was of unsound mind at the time."

There are several errors in this instruction. The first is that it in effect tells the jury that if the appellant, in an excited state of mind, inquired for members of the town board, and made threatening or menacing remarks about them, or any other citizen of said town, or any other fellow man, with intention to injure such person or persons, and if he flourished or brandished said revolver, then such open wearing was a violation of a criminal statute

of this state. It is only the act of openly carrying or wearing a dangerous or deadly weapon with intent or avowed purpose of injuring a fellow man that is made criminal by the statute. Rev. St. 1881, § 1985. That part of the instruction makes the offense to consist of making threatening or menacing remarks about the town board or other citizen with intent to injure, etc., instead of the act of openly carrying the revolver with such intent. The instruction was erroneous in that it, in effect, told the jury that for pointing his revolver at Elliott, and saying, "Bring on your marshal. I'll fix him," the defendant was liable to immediate arrest without a warrant, and that it was the right and duty of the marshal to pursue and arrest him, though no part of said acts were perpetrated either in the presence or sight of the officer, because it says: "And while the defendant was still upon the street, and the marshal came upon the street, though at some distance away, but where he could see the defendant while he was still flourishing and brandishing his revolver, or while he was still pointing it toward said Elliott," then he might make the arrest, etc. The instruction had already told the jury that pointing the revolver at Elliott would be sufficient cause for arrest without a warrant, and then supplemented the same by stating, as a qualification thereto, the proviso that the officer was near enough to see the act done, but puts it, "could see defendant while he was flourishing and brandishing his revolver, or while he was still pointing it at Elliott." This would leave the jury to conclude that the officer would have the right to make the arrest if he saw the defendant either brandishing his revolver or pointing it at Elliott. The statute does not make the brandishing or flourishing a dangerous or deadly weapon a misdemeanor, but it is the drawing, or threatening to draw, such a weapon upon any other person, that is made criminal. Rev. St. 1881, § 1984. The instruction proceeded upon the theory that appellant had resisted arrest, and, while so doing, made threatening remarks towards the marshal. There was no evidence of either, and the instruction was calculated to mislead the jury to conclude that there had been such evidence. There are perhaps other respects in which the instruction set out was erroneous.

The fifteenth instruction by the court of its own motion is still more objectionable, because it told the jury that a peace officer might make an arrest in such a case without a warrant, and without any qualification whatever. This, we have seen, is not the law. But the most serious and fatal objection to the fourteenth instruction above set out is the concluding part, which tells the jury, if they find a certain state of facts recapitulated to be true, then they must find the defendant guilty, unless they find beyond a reasonable doubt that the killing was justifiable on the ground of self-defense, or unless they find, beyond a reasonable doubt, that the defendant was of unsound mind at the time. The sixteenth repeats the same proposition as to the defense of

insanity. As long as there is a reasonable doubt of the sanity of a defendant in a criminal case at the time of the commission of the alleged offense, there must necessarily be a reasonable doubt of his guilt, and, as long as there is a reasonable doubt whether the homicide was not committed in the reasonable exercise of the right of self-defense, there is also a reasonable doubt of the guilt of the accused. The instructions in question required the defendant to prove his innocence in that respect beyond a reasonable doubt, the homicide being established. There was much evidence tending to prove appellant's insanity at the time of the commission of the alleged offense, and the evidence strongly tended to establish that the homicide was committed in self-defense. It was therefore error to instruct the jury that they should find the defendant guilty unless they found beyond a reasonable doubt that the killing was justifiable on the ground of self-defense, or unless they found beyond a reasonable doubt that the defendant was of unsound mind at the time. *Polk v. State*, 19 Ind. 170; *Stevens v. State*, 81 Ind. 485; *Guetig v. State*, 66 Ind. 94; *McDougal v. State*, 88 Ind. 24; *Plake v. State*, 121 Ind. 433, 23 N. E. Rep. 273. The attorneys for the state, conceding that the instructions under consideration were erroneous in the respect mentioned, claimed that in the instructions given at the request of the appellant, and those given at the request of the state, and those given by the court on its own motion, all of which are exceedingly voluminous, the court had correctly instructed the jury upon the point in question at least 25 times, and that therefore it must have been a "slip of the pen" by which the court had made these two read as they do, and therefore they say we cannot think that it could have influenced the jury to find the defendant guilty. It is true that quite a number of the instructions given do correctly state the law on the point in question; but this court has frequently decided that an erroneous instruction cannot be cured by giving a correct one, unless the erroneous instruction is thereby plainly withdrawn. *McDougal v. State*, supra; *Kingen v. State*, 45 Ind. 518; *Howard v. State*, 50 Ind. 190; *Kirland v. State*, 43 Ind. 146; *Heyl v. State*, 109 Ind. 589, 10 N. E. Rep. 916. There was no attempt to withdraw the erroneous parts of the instructions mentioned. The instructions were all in writing, and none of them attempted to withdraw the erroneous instruction. The judgment is reversed, with instructions to sustain the motion for a new trial.

(135 Ind. 254)

#### DAVIDSON v. STATE.

(Supreme Court of Indiana. Oct. 13, 1893.)

HOMICIDE — INDICTMENT — EVIDENCE — INSTRUCTIONS — JURORS — CHALLENGE — SPECIAL TERM OF COURT — VALIDITY.

1. An indictment for murder, which alleges that defendant inflicted a mortal wound on the body of deceased, at A. county, in the state of Indiana, at a date named, of which mortal wound he then and there died, is not

open to the objection that it does not allege in what county deceased died, if such allegation is material.

2. In a murder case it appeared that deceased was defendant's uncle. Defendant, an unmarried man, resided with him a while, during which time deceased deeded him 80 acres of land, the deed providing that he should maintain the uncle during his life. Afterwards, owing to disagreement, defendant went about three miles distant to live, and an action was soon commenced to set aside such deed. Not long thereafter deceased was found in his stable, with his ribs broken, having been suffocated. The theory of the state was that defendant murdered deceased at the house, and carried the body to the stable, to create the impression that he was killed by the horses. *Held*, that evidence that deceased was old and feeble, and that defendant was young and stout, was properly admitted.

3. In such case, evidence as to the property deceased owned, and its value, was admissible on the question of motive.

4. It is not error to permit the state to exhibit to the jury the clothing found on deceased, and show the position in which his body was found, and the condition of things at the house immediately after it was found.

5. Proof of any declaration by defendant tending to show the relations existing between him and deceased is admissible.

6. It was also proper to admit in evidence a deed from deceased to defendant in consideration of which the latter agreed to support the former during his life.

7. The fact that the acknowledgment of such deed was void does not render it inadmissible.

8. An acknowledgment taken by a notary who is at the time deputy county auditor is not void, since such notary is, at least, an officer de facto, and his acts are valid as to third parties.

9. In a murder case the voluntary statements made by defendant at the coroner's inquest, and signed by him, are admissible in evidence against him; and to render them admissible it is not necessary to introduce all the proceedings at the inquest.

10. It is not necessary that a hypothetical question propounded to an expert witness shall embrace all the facts as to the particular subject under investigation.

11. In a murder case, it is not error not to permit defendant to prove, by cross-examination of the state's witnesses, that deceased had the reputation of being a strong, quarrelsome man, ready to fight at any time, where such reputation is not referred to in their evidence in chief; especially where, under the theory on which the case is tried, such evidence is immaterial.

12. Nor is it error not to permit defendant to show that he said, in the absence of deceased, that he could not live with the latter, and that as soon as he got his wood and crops off he intended to deed the land back that deceased deeded to him; since such declaration is self-serving.

13. Defendant offered evidence that soon after the body was discovered, a tramp, who had been stopping about three weeks in the neighborhood, appeared at deceased's premises, demanded that the body be taken to the house, and attempted to exercise supervision over it; that he said that it should not remain in the barn longer, and that the coroner's jury would not know anything about it anyway; that on account of his conduct he was threatened with arrest; that he had been accused of robbery, and the officers were looking for him; and that on the night of the murder he was not at the house where he usually stayed. *Held*, that such evidence was properly excluded.

14. It is not error to exclude competent evidence when offered in connection with incompetent evidence, since it is not the duty of the

court, but of the party offering it, to separate it.

15. In a murder case, it is not error to charge that malice includes not only hatred and revenge, but every other unlawful and unjustifiable act; that it is not confined to ill will towards an individual, but is intended to denote an action flowing from any wicked or corrupt motive,—a thing done with a wicked mind, attended with such circumstances as plainly indicate a heart regardless of social duty, and fatally bent on mischief. *McDonel v. State*, 90 Ind. 320, followed.

16. A charge that "among" the usual evidences of premeditation are previous difficulty, ill will, and hatred, previous threats to kill, and previous preparation to take life, is not open to the objection that it does not enumerate all the evidences of premeditation, since it does not purport to do so.

17. A request to charge that, if there was any one single fact proved to the satisfaction of the jury by a preponderance of the evidence, inconsistent with defendant's guilt, it was sufficient to raise a reasonable doubt, is too broad, and properly refused.

18. At defendant's request, the court charged that the law presumed his character to be good until the contrary appeared from the evidence, and that he was under no obligation to prove a good character. *Held*, that it was not error to refuse to charge further that the law presumed defendant had a good character and reputation as a peaceable and humane man until the contrary was shown by the evidence.

19. An instruction which attempts to throw discredit on certain evidence for the state in a murder case is properly refused.

20. In a murder case, it appeared that defendant filed an affidavit on which he asked the court to postpone the trial, and set it for hearing at a special term, to be held six weeks thereafter; that the request was granted, and at such special term he appeared in person and by attorney, and without objection examined and rejected jurors, and moved the court to require the jury commissioner to draw from the box a special jury to try the case. *Held*, that the overruling of an objection to trial at the special term will not be held error, as the statute authorizes special terms when necessary, and it will be presumed that the court rightfully assumed jurisdiction.

21. It is not an abuse of discretion for the court, in a murder case, to permit the state to challenge for cause a juror who answers that he has conscientious scruples against affixing the death penalty in a capital case.

Appeal from circuit court, Whitley county; J. W. Adair, Judge.

Thomas Davidson, Jr., was convicted of murder in the first degree, and he appeals. Affirmed.

S. M. Hench and C. M. Dawson, for appellant. A. G. Smith, for the State.

COFFEY, J. The appellant was indicted in the Allen circuit court on the 7th day of February, 1890, upon a charge of murder in the first degree. Upon his application, the venue of the cause was changed to the Whitley circuit court, where a trial resulted in his conviction. He appeals to this court, and assigns as error: First, that the circuit court erred in overruling his motion to quash the indictment; second, that the circuit court erred in overruling his motion for a new trial.

The indictment in the case is in the usual form, and contains all the allegations usually found in an indictment for murder. The objection urged against it is that it

does not allege in what county the deceased died. The supposed defect does not in fact exist. The indictment alleges that the appellant inflicted a mortal wound upon the body of the deceased at Allen county, in this state, at a date named, of which mortal wound he then and there died. This was sufficient. The court did not err in overruling the appellant's motion to quash the indictment. *Turpin v. State*, 80 Ind. 148; *State v. Schults*, 57 Ind. 19.

The evidence in this cause tended to show that Thomas Davidson, Sr., the deceased, at the time of his death was more than 70 years of age, in good health, but somewhat enfeebled by age. He was a widower, without children, and for nearly 20 years had resided alone on a farm in Allen county. In the month of September, 1888, the appellant, an unmarried man, the nephew of the deceased, went to reside with the deceased, who was his uncle. On the 25th day of October, 1888, the deceased executed to the appellant a deed for 80 acres of land, which deed contained an agreement on the part of the appellant to maintain the deceased during the period of his natural life, in consideration of the land so conveyed. In August, 1889, the appellant and the deceased failing to agree, the appellant left his uncle's house, and went to live with one Maddens. The distance from Maddens' to the house of the deceased was about three miles. Soon after the appellant left the house of the deceased, an action was commenced to set aside the deed above mentioned. On the morning of the 25th day of November, 1889, the deceased was found dead in his stable, some distance from his dwelling house. A post-mortem examination disclosed the fact that the deceased had been suffocated, and that his ribs had been broken. The theory of the state upon the trial of the cause was that the deceased had been murdered by the appellant at his dwelling house, and had afterwards been carried to the stable, and deposited near the horses, for the purpose of creating the impression that he had been killed by the horses. The evidence in support of this theory was purely circumstantial. On the trial of the cause the appellant made numerous objections to the admission of evidence upon the ground that it was irrelevant and immaterial, but his objections were overruled. Much of this evidence, when standing alone, would seem to be immaterial, but, when considered in connection with the other facts and circumstances in the case, its relevancy becomes apparent.

For the purpose of supporting the theory of the state, we think it was competent to show what property the deceased owned at the time of his death. As the appellant was one of his heirs, it was competent upon the subject of motive. It is always competent to prove the motive which prompted, or might be supposed to prompt, a murder. *Jones v. State*, 64 Ind. 478. For this purpose it was also competent to prove the value of such property. It was not error to permit the state to exhibit to the jury the clothing worn by

the deceased at the time of his death, and to permit witnesses to testify to the position of the deceased when found. *McDonel v. State*, 90 Ind. 320. All clothing worn by the parties concerned, and all materials in any way forming part of the transaction, from which inferences of guilt or innocence may be drawn, may be produced at the trial for the inspection of the jury. *Com. v. Brown*, 121 Mass. 69; *People v. Gonzalez*, 35 N. Y. 49; *State v. Graham*, 74 N. C. 616. In such cases it is the province of the jury to determine what inferences are to be drawn from the condition and appearance of the clothing, in connection with the other evidence in the cause. *Story v. State*, 99 Ind. 413.

It was competent for the state to prove any declaration made by the appellant tending to show the relations between him and the deceased, and the state of feeling between them; and it was also competent for the state to fully show, in support of its theory, the condition of things at the house of the deceased immediately after the body was found. *Goodwin v. State*, 96 Ind. 550; *Koerner v. State*, 98 Ind. 7. So, too, it was proper to prove that the deceased was old and feeble, and that the appellant was young, stout, and vigorous, in support of the theory that the deceased was suffocated by the appellant. 1 *Whart. & S. Med. Jur.* § 902, pp. 802, 803.

It was not error to admit in evidence the deed executed by the deceased to the appellant, in consideration of which the appellant had agreed to support the deceased during his life. It was competent upon the subject of motive. The objection made by the appellant to the effect that the deed was inadmissible because the acknowledgment was void, having been taken before a notary public who was at the time filling the office of deputy county recorder, is not tenable. The notary was at least an officer de facto, and his acts as to third parties were valid. *Leech v. State*, 73 Ind. 573; *Baker v. Wamhaugh*, 99 Ind. 312. Generally, an acknowledgment is not essential to the validity of a deed as between the parties to it, but is only necessary in order to admit the deed to record in the proper recorder's office. *Hubble v. Wright*, 23 Ind. 322; *Hays v. Hedges*, 79 Ind. 288; *Westhafer v. Patterson*, 120 Ind. 461, 22 N. E. Rep. 414.

The statements made by the defendant before the coroner at the inquest upon the body of the deceased, having been signed by the appellant, were properly admitted in evidence against him on the trial of this cause, it appearing that he voluntarily testified at such inquest. *Snyder v. State*, 59 Ind. 105; *Epps v. State*, 102 Ind. 540, 1 N. E. Rep. 491; *Brown v. State*, 71 Ind. 470; *Sage v. State*, 127 Ind. 16, 26 N. E. Rep. 667. In order to admit such statements in evidence it was not necessary, in our opinion, that the state should have introduced in evidence all the proceedings had before the coroner. The statements of the appellant were the only matters material to the issue in this case. Under our statute, (section 1802, Rev. St. 1881,) all confessions by an accused are admis-

sible in evidence against him, except such as are made under the influence of fear, produced by threats. *Benson v. State*, 119 Ind. 488, 21 N. E. Rep. 1109; *Harding v. State*, 54 Ind. 359; *State v. Freeman*, 12 Ind. 100; *O'Brien v. State*, 125 Ind. 38, 25 N. E. Rep. 137.

It is earnestly contended by the appellant that the circuit court erred in the admission of certain expert testimony given by physicians called by the state. The objections urged against this testimony relate (1) to the form of the questions by which it was elicited; (2) to the fact that the hypothetical questions propounded to the witnesses did not embrace all the facts proved upon the particular subject under investigation. Under the first objection it is contended that the form of the questions required the experts to answer as to matters which it was the exclusive right of the jury to determine. We do not think the questions are susceptible to this construction. An expert witness may be asked whether a certain wound did or did not, in his opinion, produce death, or whether such wound was or was not necessarily fatal. *Batten v. State*, 80 Ind. 399; *Epps v. State*, supra. The questions to which the appellant urged his objection did nothing more than call for the opinion of the witnesses upon subjects to which they were competent, as experts, to testify. As to the second objection, it would seem to be sufficient to say that it was not necessary that the hypothetical questions propounded to the witnesses should embrace all the facts proven upon the particular subject under investigation. In the examination of expert witnesses counsel may embrace in his hypothetical question such facts as he may deem established by the evidence, and if opposing counsel does not think all the facts established are included in such question, he may include them in questions propounded on cross-examination. Any other course would result in endless wrangles over the question as to what facts were and what were not established. *Goodwin v. State*, 96 Ind. 574; *Rog. Exp. Test.* 39; *Stearns v. Field*, 90 N. Y. 640.

The court did not err in refusing to allow the appellant to prove on the cross-examination of one of the state's witnesses that the deceased had the reputation of being a hard, quarrelsome, and strong man, ready to fight at any time. Such matter was not cross-examination. Furthermore, under the theory upon which the case was tried, it was wholly immaterial. Nor did the court err in refusing to permit the appellant to prove that he said, in the absence of the deceased, that he could not live with the deceased, and that as soon as he got his wood and crops off he intended to deed the 80-acre tract of land back to the deceased. Such declarations were self-serving, and were not admissible in evidence on behalf of the appellant. *Kahlenbeck v. State*, 119 Ind. 118, 21 N. E. Rep. 460; *Spittorff v. State*, 108 Ind. 171, 8 N. E. Rep. 911.

On the trial of the cause the appellant, at the proper time, offered to prove by a



competent witness that about 9 o'clock P. M. on the evening after the body of deceased was discovered, and while they were waiting for the coroner's jury to assemble, one Johnson, who was a tramp, and who had been stopping at a house in the neighborhood for about three weeks prior to that time, appeared on the premises of the deceased, and in the presence of the witness cursed and swore and demanded that the body be taken from the barn to the house, and attempted to exercise supervision over the body; that he said to witness that he should not allow the body to remain at the barn any longer, but should take it to the house, and that the jury would not know anything about it anyhow; that Johnson conducted himself in such a profane and unseemly manner that the witness, who had charge of the affairs on the premises of the deceased, threatened to place him under arrest if he did not absent himself; that Johnson had been accused of robbing a store at Hadley station, and that the officers had been looking for him; that on the night the deceased was killed, Johnson was not at the house where he usually stayed. This offered evidence was excluded by the court, and the appellant excepted. We are of the opinion that the court did not err in refusing to admit this offered testimony. Johnson was not on trial. If he had been, his declarations would have been admissible against him; but his declarations when not under oath, and not explanatory of any act admissible in evidence, were not, in our opinion, admissible in favor of the appellant. We see nothing in the acts of Johnson which the appellant offered to prove which tended to show that he, and not the appellant, committed the crime for which the appellant was upon trial. If by any possibility any of the acts above set out were admissible in evidence, the offer to prove them was in connection with other evidence, which, we think, was clearly incompetent. It was not the duty of the court to separate the competent from the incompetent evidence, but it was the duty of the appellant to make the separation himself, and to offer none but the competent. *City of Terre Haute v. Hudnut*, 112 Ind. 542, 13 N. E. Rep. 686; *Sohn v. Jervis*, 101 Ind. 578, 1 N. E. Rep. 78; *Cuthrell v. Cuthrell*, 101 Ind. 376; *Walker v. State*, 102 Ind. 502, 1 N. E. Rep. 856; *Jones v. State*, 64 Ind. 473; *Bonsall v. State*, 35 Ind. 460; *Stephenson v. State*, 110 Ind. 358, 11 N. E. Rep. 860.

The court did not err in permitting the state to challenge for cause a juror who answered that he had conscientious scruples against affixing the death penalty in a capital case. The question of the competency of a juror, under his statements, is, in a measure, left to the sound discretion of the trial court, and will not be reviewed unless the facts show that such discretion was abused. *Stephenson v. State*, supra.

The appellant also contends that the court erred in its instructions to the jury, and in refusing to give to the jury certain instructions asked by him. In instruction 17, given by the court on its own motion, the jury were told that malice, within the

meaning of the law, includes not only hatred and revenge, but every other unlawful and unjustifiable act; that malice is not confined to ill will towards an individual, but is intended to denote an action flowing from any wicked or corrupt motive,—a thing done with a wicked mind attended with such circumstances as plainly indicate a heart regardless of social duty, and fatally bent on mischief. It is claimed by the appellant that this definition was too broad, and that it includes many matters which in law do not constitute malice. This instruction, however, was approved in the case of *McDonnell v. State*, 90 Ind. 320, and is, we think, correct. See, also, *Achey v. State*, 64 Ind. 56. Instruction 18 given by the court seems to have been copied from an instruction in the case of *Binns v. State*, 66 Ind. 428, and we think states the law upon the subject of premeditated malice correctly. *Koerner v. State*, 98 Ind. 7. The twenty-first instruction given to the jury by the court is as follows: "Among the usual evidences of premeditation are previous difficulty, ill will, and hatred, previous threats to kill, and previous preparation to take life." The objection urged against this instruction is that it does not enumerate all the evidences of premeditation. This objection is not well taken, for the instruction does not purport to set them all out. When it is undertaken to state in an instruction all the elements of an offense necessary to a conviction, such instruction is bad if an essential element is omitted; but an instruction partially stating the facts, which does not charge that they alone, without reference to other facts and other instructions, will justify a conviction, is not erroneous. *Bird v. State*, 107 Ind. 154, 8 N. E. Rep. 14; *Boyle v. State*, 105 Ind. 469, 5 N. E. Rep. 203; *Henning v. State*, 106 Ind. 389, 6 N. E. Rep. 803, and 7 N. E. Rep. 4. In the eighth instruction tendered by the appellant he asked the court to say to the jury, as matter of law, that if there was any one single fact proved to the satisfaction of the jury by a preponderance of the evidence, inconsistent with the appellant's guilt, that was sufficient to raise a reasonable doubt and that he should be acquitted. This instruction, as asked, was entirely too broad. The doctrine of reasonable doubts, as a general rule, has no application to mere matters of subsidiary evidence taken item by item. It is applicable to the constituent elements of the crime charged, and to facts or groups of facts, which constitute the entire proof of the constituent or elementary facts. *Wade v. State*, 71 Ind. 535; *Koerner v. State*, supra. The instruction, as asked, would apply as well to the subsidiary facts as to the constituent facts, and for that reason was properly refused. Instruction 10 asked by the appellant was fully covered, we think, by the instructions given by the court. What we have said with reference to instruction No. 8 asked by the appellant applies also to the instruction number 11, asked, and refused by the court. Instructions 13 and 14 asked by the appellant, and refused by the court, were, so far as they state the law correctly, cov-

ered by the instructions given by the court to the jury upon the subject of reasonable doubt. At the request of the appellant, the court instructed the jury that the law presumed his character to be good until the contrary appeared from the evidence, and that he was under no obligation to prove a good character. He asked the court to instruct the jury, in addition to the above, that the law presumed he had a good character and reputation as a peaceable and humane man until the contrary was shown by the evidence in the case, which the court refused. There was no error in this ruling. No evidence was introduced on the trial of the cause touching the character of the appellant, and for that reason his character formed no element in the case. *McQueen v. State*, 82 Ind. 72; *Knight v. State*, 70 Ind. 375; *Cluck v. State*, 40 Ind. 264. Instructions 17, 18, and 19 asked by the appellant, so far as they state the law correctly, were fully covered by the instructions given by the court. Instruction No. 21 asked by the appellant attempted to throw discredit upon certain evidence introduced by the state on the trial of the cause, and was for that reason correctly refused. Such an instruction should never be given, as it is for the jury to say what weight should or should not be given to the evidence in the cause. *Line v. State*, 51 Ind. 172; *Aszman v. State*, 123 Ind. 347, 24 N. E. Rep. 123. Instruction No. 22, asked and refused, was fully covered by the instructions given by the court, as was also instruction No. 5, asked and refused.

The record before us discloses the fact that on the 7th day of April, 1890, the appellant filed an affidavit upon which he asked the court to postpone the trial of this cause, and to set the same down for trial at a special term, to be held about the 20th day of June, 1890. Upon this motion the cause was postponed and set for trial at a special term to begin on the 17th day of June following. On that date the appellant appeared in person and by his attorney, and without objection examined and rejected jurors. He also moved the court to require the jury commissioners to draw from the box a special jury to try his cause. After the selection of a jury, but before it was sworn, he objected to swearing the jury and entering upon the trial of the cause, for the reason that the cause was being tried at a special term of the court, and, under the constitution and laws of the state, such term was not authorized, and could not be held. It is not denied that the statutes of this state authorize the holding of a special term when necessary to dispose of the pending business. No argument is advanced by the appellant in support of the proposition that such statutes are unconstitutional. A conviction at a special term was sustained in the case of *Smurr v. State*, 105 Ind. 125, 4 N. E. Rep. 445. No irregularity appears in the record in this case relating to the special term in question, and, as the court assumed jurisdiction, we must indulge the familiar presumption that everything was rightly done. *Carlisle v. State*, 32 Ind. 55; *Shirts v. Irons*, 23 Ind. 458; *Passmore v. Pass-*

*more*, 113 Ind. 237, 15 N. E. Rep. 338; *O'Brien v. State*, 125 Ind. 38, 25 N. E. Rep. 137.

The evidence, we think, strongly tends to prove the guilt of the appellant of the charge preferred against him. We cannot disturb the verdict of the jury on the evidence. Judgment affirmed.

(125 Ind. 232)

STUART et al. v. BROWN et al.  
(Supreme Court of Indiana. Oct. 10, 1893.)

SHERIFF'S SALE—CANCELLATION FOR FRAUD.

In an action to set aside a sheriff's sale of the rents and profits of certain land it appeared that plaintiffs were the life tenants of the land, remainder to their children; that the land was leased to defendant S.; that plaintiffs, under the title by which they held, were liable for the taxes, which they were unable to pay; that they agreed with one C. that, at the sheriff's sale of the rents and profits to pay the taxes, he should buy the same, subject to the lease to S., and, after the rents paid the debt, should release to plaintiffs; that the rents were sold for a term of seven years; that they were reasonably worth \$1,500; that, at the sale, S. agreed with C. that the property should be sold to S., but really for said C., and that the deed should be made to C. The land was sold to S. for \$455.82. S. then refused to convey to C. *Held*, that S. is estopped by fraud from claiming the benefits of the purchase, and that the sale should be set aside, subrogating S. to the rights under the judgment on which the sale was made.

Appeal from circuit court, Fountain county; J. M. Rabb, Judge.

Action by Esau Brown and others against Zachariah Stuart and others to set aside a sheriff's sale. Judgment for plaintiffs. Defendants appeal. Affirmed.

Dochterman & Simms, for appellants.  
C. M. McCabe and J. Bingham, for appellees.

DAILEY, J. This was an action by the appellees against the appellant, Zachariah Stuart, who was the purchaser of the rents and profits of certain real estate at sheriff's sale, and the other persons named as appellants, who were judgment defendants in the judgment and decree, to set aside such sale. The appellant Stuart demurred to each paragraph of complaint. The court sustained the demurrer as to the second, and overruled the same as to the first, paragraph of the complaint, to which Stuart excepted. Stuart answered the remaining paragraph of the complaint by a plea in denial, with request that, if the sale be set aside, he be subrogated to the rights of plaintiffs. The cause was submitted to the court for trial, and at the request of said Stuart the court made a special finding of facts, and stated conclusions of law thereon. There were two conclusions of law, and the appellant Stuart excepted to each. These conclusions were such that a judgment was entered, setting aside said sheriff's sale, and subrogating appellant Stuart to the rights of the judgment plaintiff, in the judgment and decree on which the sale was made. From the judgment said Stuart has appealed to this court, and made his codefendants coappellants, and caused notice

of the appeal to be served upon them and the appellees. The appellant Stuart has assigned as errors against him the following: First, that the court erred in overruling the demurrer of said Stuart to the first paragraph of the complaint; second, that the court erred, as against Stuart, in its first conclusion of law; third, that the court erred, as against said Stuart, in its second conclusion of law.

The appellant Stuart declines to discuss the first assignment of error, challenging the sufficiency of the complaint. We therefore proceed to the consideration of the questions in the case arising on the second and third assignments of error. These assignments of error call in question the conclusions of law. If the first conclusion of law was wrong, so was the second, and so we may consider the assignments of error together. The first conclusion of law was "that the plaintiffs are entitled to have the sheriff's deed and sale set aside." Whether the conclusion of law is correct depends on the findings of fact on which it is based. The findings of fact are as follows: "(1) The court finds that the premises mentioned and described in the complaint were owned by Simon Brown at the time of his death. (2) That Simon Brown by his last will devised said premises for life to the plaintiffs, with remainder in fee to their children, and by his will specially charged the plaintiffs with the taxes assessed against the same, and provided that, on the failure of the plaintiffs to pay said taxes, his executor should take charge and possession of said lands, or so much thereof as should be necessary for the purpose, and apply the rents to the payment of such taxes; and that Simon Brown died on the 6th day of May, 1874. (3) The court further finds that, after the death of Simon Brown, the plaintiffs failed and neglected to pay the taxes charged and assessed against said lands, and that said premises were sold by the county treasurer for the taxes charged and assessed against said land for three years to one Sampson Reed, and that, no one redeeming said land from said tax sale, the auditor of said Fountain county executed to said Reed a tax deed therefor. (4) The court further finds that, afterwards, the plaintiff Esau Brown procured one J. Mahlon Coffing to purchase the interest of Sampson Reed in said premises, under a verbal agreement that said Coffing should purchase said tax title, and foreclose by due procedure in court the lien given by statute on the premises to purchasers of lands at void tax sales, and that said premises should then be, by order of said Coffing, sold at sheriff's sale to pay said decree, and that at said sale Coffing should buy in said property, and hold the same for the use and benefit of said plaintiffs, until the rents thereof should repay said Coffing the amount by him advanced to pay said tax lien and the costs of said foreclosure suit, with interest thereon, and also pay to said Coffing a debt owing by the plaintiff Esau Brown to said Coffing, and should thereupon convey said premises to said plaintiffs or their children. (5) The court further finds that, under and pursuant to said

agreement, the said Coffing did purchase from said Reed his interest in said premises under said tax deed, and that said Coffing did on the 8th day of March, 1890, procure a decree from the Fountain circuit court foreclosing said tax lien upon said premises for the sum against the plaintiffs and the defendants other than Zachariah Stuart; that said Coffing procured a decretal order to issue by the clerk of said court, directing the sheriff of said county to sell said premises to pay and satisfy said lien, and that on the 7th day of June, 1890, the said sheriff of said county sold the rents and profits of said premises for a term of seven years to the defendant Zachariah Stuart for the sum of \$455.82, the principal, interest, and costs due on said decree, which sum said Stuart paid in cash, and said Coffing, the plaintiff in said decree, received said sum from the sheriff, and receipted said officer therefor, upon said writ. (6) The court further finds that the rents, issues, and profits of said premises for the term of seven years were, at the time of said sale, fairly worth \$1,500. (7) The court further finds that said premises consisted of a farm of one hundred and forty acres, and that, at the time said decree was so rendered as aforesaid, the defendant Zachariah Stuart had leased 60 acres of the same from the plaintiffs for a period of five years for the annual rental of \$225, for which sum he had executed his notes, payable as said rent became due, to the plaintiffs, two of which notes had, prior to said sheriff's sale, been assigned by the plaintiffs under such circumstances as to preclude the defendant from making any defense thereto; and that a third note was by the plaintiffs, with the consent of said Stuart, assigned to J. Mahlon Coffing, who had at the time full notice of the consideration for said note as security for the payment of a debt from Emma Brown to said Coffing; and that said defendant Stuart was not a party to said proceeding to foreclose said tax lien, nor was his lease, though in writing, of record in the recorder's office of said county. (8) The court further finds that it was a part of the agreement of said Coffing and the plaintiffs that he, the said Coffing, would protect the rights and interests of said Stuart under his lease. (9) The court further finds that the plaintiffs had a large family of children, some of whom were born prior to the death of Simon Brown, and some subsequent to the death of Simon Brown, and that plaintiffs conceived the idea that all of their said children born subsequent to the death of Simon Brown would be excluded from any share in said lands upon the death of the plaintiffs, and that their object and purpose in entering into the agreement heretofore set out with said Coffing was to procure the title to said lands to be so fixed, that, upon the death of the plaintiffs, their children would all share alike in the same. (10) The court finds that neither of the plaintiffs attended said sale, but relied upon said Coffing to bid off said property for them at the same. (11) The court further finds that, on the day fixed by the sheriff for the sale of said premises, the executor of the will of Simon

Brown appeared at said sale, and proposed to bid off the rents and profits of said lands for a sum sufficient to satisfy said sum, rather than have the fee in said lands sold; that the defendant Stuart appeared as a bidder, and said Coffing also appeared, and that, for the purpose of avoiding competition from said Coffing as a bidder at said sale, the defendant Stuart agreed with said Coffing to bid off the property sold in his (Stuart's) name, but really for said Coffing, and that said Coffing should receive the sheriff's deed for said premises in his own name, but should protect the interest of Stuart under his lease. (12) The court further finds that, relying upon the promises of said defendant Stuart, said Coffing did refrain from bidding on said property when so offered by said sheriff for sale, and that the same was struck off and sold to said Stuart without competition for the sum of \$455.82, and that afterwards said Stuart refused to comply with his said contract and agreement with said Coffing. (13) The court further finds that, at the time said Stuart bid off the premises as aforesaid, and at the time of making the agreement with said Coffing to purchase said lands for him, the said Coffing, said Stuart had full notice and knowledge of the agreement between the plaintiffs and said Coffing with respect to said lands. (14) The court further finds that the attorney for the plaintiffs was present at the sale, and was fully cognizant of the agreement between Coffing and Stuart in reference to bidding off the property at the sheriff's sale. (15) The court further finds that said sale fully paid and satisfied said decree, and the sheriff executed a deed of lease to said defendant, conveying to him said premises for the term of seven years."

Counsel for appellants, in criticizing the conclusions of law, assume, from the facts found, that the appellees were engaged with one Coffing in a fraudulent scheme to secure the fee simple of the real estate in controversy in their own names, and thereby defeat the estate of the remaindermen therein, and that, having procured a sale of the property under such circumstances, they are not in a condition to be heard in a court of equity; that such court does not aid them, but leaves them where it finds them. The principle in equity which counsel seek to invoke is axiomatic, viz. that one who asks relief in a court of equity must come in with clean hands. The basis of appellant's argument is that there was an arrangement by appellees and others to prevent competition among bidders. If the premise is correct, his conclusion would necessarily follow. The finding shows that, for the purpose of avoiding competition from said Coffing, as a bidder at the sale, the defendant (appellant) Stuart agreed with said Coffing to bid off the property sold in appellant's name, but really for said Coffing, and that the latter should receive the sheriff's deed for said premises in his own name, but should protect the interest of Stuart under his lease. It is not found that Coffing entered into this agreement with Stuart with the intent of avoiding competition from him. It may

be assumed that it was his design, if he had any, to protect Stuart in his right as lessee of the real estate. But if we could indulge in the strained construction that Coffing entered into an arrangement with appellant to suppress competition, it could not bind appellees, who were not present at the sale, and whose agreement with him contemplated nothing of the kind. The act would not be within the scope of Coffing's authority. If Stuart had induced Coffing to enter into a combination to suppress competition, knowing, as he did, the relation Coffing occupied to appellees and the extent of his authority, it would violate the well-known maxim, "No one will be allowed to take advantage of his own wrong." Appellant is bound by the contract he made with Coffing to the same extent that the latter would have been bound had he purchased at the sale. Stuart, by his agreement and purchase, was the agent of Coffing, and the trustee ex maleficio of the appellees. "A person agreeing verbally to bid in land for another at sheriff's sale will be decreed to hold in trust, though he takes the title in his own name, and pleads the statute of frauds in bar. If one purchase property at a sale on execution, at the request of the execution debtor, whereby the debtor is induced to relax his exertions to satisfy the execution, the agreement will be enforced. A court of equity will not permit the statute of frauds to be set up as a defense by a party infected with fraud; and parol trusts of real estate are frequently established in direct contravention of the statute, upon the principle that instruments which would have been executed, or would have existed, but for the fraud, are to be treated as if actually executed and existing. Where a grantee agrees to give a defeasance, and, after he has got the deed, evades doing it, chancery will relieve against the fraud, and enforce the agreement. A court of chancery relieves against the fraud by converting the person guilty of it into a trustee for those injured thereby." *Arnold v. Cord*, 18 Ind. 177; *Brown v. Lynch*, 1 Paige, 147; *Grumlev v. Webb*, 100 Amer. Dec. 304; *Beegle v. Wentz*, 98 Amer. Dec. 762; *Ryan v. Dox*, 90 Amer. Dec. 696; *Combs v. Little*, 40 Amer. Dec. 207; *Martin v. Blight's Heirs*, 4 J. J. Marsh. 491. In the last-named case the purchase of certain lands at sheriff's sale was made by one Martin. Prior to the sale, one Southard became the agent of Blight, the owner of the lands, to attend the sale and buy it in for him. An arrangement was subsequently made between Southard and Martin by which Martin agreed to act for Southard as an agent, and buy in the land for him. On the day of the sale, Martin bought in the property, and repudiated the agreement. The court, in affirming the decree of the lower court setting aside the sale, say: "If he [Martin] had not made the agreement with Southard, and thereby prevented him from attending the sale, the land might have sold at a much higher rate. If he had, in good faith, fulfilled his engagement, he would have purchased for Southard; and in that event, if Southard

was the agent for Blight in getting Martin to attend the sale and buy the land, and had, by promising Blight to attend the sale, through Martin, prevented Blight from attending as charged, the purchase of Martin would have been for the benefit of Blight. \* \* \* Whether he was acting as agent, directly, of Blight, or as agent being employed by Southard, is not a matter of any importance. If in either capacity he violated his trust and confidence reposed in him, and thereby prevented Blight or his agent from attending in person, or from procuring another to attend the sale for him, such a breach of trust, operating to the prejudice of Blight, is sufficient to justify the vacation of Martin's purchase."

Appellant is right in his contention that fraud without injury is not available as a cause of action. A fraud or loss without injury is one for which no recompense can be had, but we gravely doubt its application in this case. Counsel, in discussing this proposition, found their argument upon the premise that the finding fails to show that any person would have bid more for the land than Stuart bid, and insist that the burden rested on appellees to show that fact, and that the failure of the finding to show such fact is equivalent to a finding that no person would have bid more. We think this too broad an assertion where the findings show a breach of confidence involving moral turpitude on the part of the person who insists upon it, by which a trusted agent is induced to substitute him in that agency, and thus prevent competition from such agent, and secure title in himself. The findings show this to have been his purpose, and he cannot now say that the deceit was not effectuated. The findings show that Coffing was there, as a bidder, to buy in the land, to hold as security until he should be repaid out of the rents of the premises. This he had agreed to do, but was prevented by the conduct of the appellant. Whether he would have bid more than Stuart, or not, cannot be known. The nearest proof possible is that of intention, which would be controlled largely by the action of other bidders. We will waste little time in discussing the question as to whether or not a real injury resulted from appellant's conduct. If there be none, then appellees are in as good condition as if appellant had been faithful to his contract. Had he adhered to his contract, he would have permitted Coffing, as appellees' agent, to take the sheriff's deed in his own name, which, by the force of the agreement with appellees, would have been in trust, subject to appellant's lease, as a mere security until the rents satisfied the indebtedness due him. Instead of this, appellant is now claiming in his own right, by virtue of his fraudulent purchase, the 140-acre lease for the period of seven years, fairly worth \$1,500 when sold, for which he paid but \$455.82. Would not such undue advantage, if upheld, result in injury? The case of *Gilbert v. Carter*, 10 Ind. 16, is not analogous. In that case it did not appear that the property sold for less than its real value, nor was there a con-

tract or understanding shown between the purchaser and the execution defendant, either mediately or immediately, relative to the purchase. The suggestion by appellant that the onus rests upon the owner, whose land has been sacrificed at judicial sale, to show that any person would have bid more than the purchaser, if the latter had not falsely represented that he was bidding for the use of the execution defendant and his family, is in conflict with many decisions of this court. *Bunts v. Cole*, 7 Blackf. 265; *Plaster v. Burger*, 5 Ind. 232; *Vantrees v. Hyatt*, Id. 487; *Forelander v. Hicks*, 6 Ind. 448; *Seller v. Lingerman*, 24 Ind. 264; *Lynch v. Reese*, 97 Ind. 360; *Wright v. Dick*, 116 Ind. 538, 19 N. E. Rep. 306; *Fletcher v. McGill*, 110 Ind. 395, 10 N. E. Rep. 651, and 11 N. E. Rep. 779; *Ikerd v. Beavers*, 106 Ind. 483, 7 N. E. Rep. 826; *Arnold v. Cord*, supra; *Tracy v. Kelley*, 52 Ind. 585; *Catalani v. Catalani*, 124 Ind. 54, 24 N. E. Rep. 875; *Scheffermeyer v. Schaper*, 97 Ind. 70; *Freem. Ex'ns*, §§ 337, 297; *Freem. Jud. Sales*, § 40; *Tied. Sales*, § 169.

In *Gramley v. Webb*, supra, it is said: "Had there been no agency, under the facts in this case, the defendant would still have been placed in the position of a trustee. He obtained the property at a sacrifice, by representing that he was buying for his principal; and no principle is clearer than that where one becomes a purchaser under such circumstances as would make it a fraud to permit him to hold onto his bargain, as by representing that he is buying for the benefit of an embarrassed debtor in the execution, or that he intended to reconvey the property, and thereby obtains it at a sacrifice, the courts will relieve against such fraud, and the person who has gained an advantage by means of such fraudulent act will be converted into a trustee for those who have been injured thereby." In *Kinnard v. Hiers*, 55 Amer. Dec. 648, it is held that "when purchases are made by one representing himself to be acting under an agreement with the judgment debtor, and for the latter's benefit, when in fact there was no agreement, the advantages thus obtained will be taken from him on the ground of fraud." In support of this doctrine the court cite and quote *McDonald v. May*, 1 Rich. Eq. 95, as follows: "The statute of frauds, it appears to me, has no application here. This branch of the case does not proceed upon the contract,—does not look to an execution of the contract,—but founds the remedy upon a fraud by the practice of which the purchaser obtained possession of the plaintiff's property. Can it admit of doubt that, if a bidder at a sheriff's sale, either of real or personal property, represents that he has contracted to purchase in the property for the debtor's benefit, when in fact there never was such a contract, and in consequence he becomes the purchaser, he shall be allowed to retain the advantage he has thus unjustly obtained? It seems to follow that all the purchases by the purchaser here must be deemed liable to a trust in his hands; for although it appears that no proof can be made that his representations drove off

any particular competitor, and the majority persisted in bidding and made the property bring a pretty full price, proof of an actual injury is not necessary when actual fraud is established." In *Turner v. King*, 2 Ired. Eq. 132, it is said: "On this agreement [to purchase the lands and let the owner redeem] being made known to the people attending the sale, two persons desisted from bidding on the land, and the defendant was permitted to purchase lands worth \$450 for the small sum of \$190.20. \* \* \* The attempt in the defendant to set up an irredeemable title, after the agreement he entered into, is such a fraud as the court will relieve against." In *Ryan v. Dox*, supra, it is held that "if one makes a parol agreement to buy at a foreclosure sale for the mortgagor, and prevents others from bidding by declaring such to be his purpose, and thus acquires the title at a price greatly below its value, and he afterwards attempts to claim the property for his own benefit, after leaving the mortgagor in possession for several years, the law makes him a trustee ex maleficio, and equity, notwithstanding the statute of frauds, will treat him as a trustee for the owner, and, on tender to him of the purchase money and interest, he will be compelled to convey the property to the party equitably entitled to it." In *Combs v. Little*, 4 N. J. Eq. 310, it is held that "a right of redemption of land sold under an execution exists where the land is sold at a low figure, and others do not bid because it was understood that the purchaser was buying it for the execution debtor." In *Mills v. Rogers*, 13 Amer. Dec. 263, it is held that when the plaintiff in an execution prevents others from bidding at the sale by promises that he will sell certain tracts to them at a low price, and thereby purchases in the land for much less than its value, the sale will be set aside on motion. In *Farr v. Sims*, Rich. Eq. Cas. 122, it is held that "any act of preventing competition among bidders at an auction, on the part of the auctioneer or persons causing the sale, vitiates the sale." In *Foulk v. McFarlane*, 1 Watts & S. 297, it is said: "The fraudulent vendee gains no title to the land by the sale, nor interest in it, notwithstanding an innocent creditor may by that very sale obtain a good title to the money. It shall be a good sale as to the creditor, to entitle him to receive the money, and yet no sale as to the fraudulent vendee, to enable him to shelter the land against pursuit. Nor would the policy of the law, which abhors fraud, be promoted by permitting such defense to the purchaser. All the avenues that facilitate the detection and overthrow of fraud should be kept open and free from bars and estoppels." In *Fletcher v. McGill*, supra, at page 400, 110 Ind., and page 653, 10 N. E. Rep., the court say: "Now, while it appears, from the facts found in this case, that the owner of the property had no knowledge of the sale until after the year for redemption had expired, it does not appear whether or not the purchasers were aware of his ignorance, nor does it affirmatively appear that they did anything to conceal the facts from

him;" and on page 402, 110 Ind., and page 654, 10 N. E. Rep., the court further say: "Conceding the rule to be that a sheriff's sale will not be set aside for mere inadequacy of price, yet if the inadequacy be so gross as to shock the conscience, or if, in addition to gross inadequacy, the purchaser has been guilty of any unfairness, or if the owner of the property has for any reason been misled or surprised, the sale will be regarded as fraudulent, and the party injured may be permitted to redeem." "Great inadequacy requires only slight circumstances of unfairness in the conduct of the party benefited to raise the presumption of fraud." "Such circumstances appear in this case, and it was therefore incumbent on the appellants to repel the presumption by affirmatively showing that they acted in good faith, and that they took no advantage of the appellee's actual want of knowledge of the sale." In *Wright v. Dick*, supra, on page 544, 116 Ind., and page 309, 19 N. E. Rep., the court say: "A sale such as the one under consideration, being of an amount of property so grossly excessive as to raise a presumption of unfairness and oppression, is presumably fraudulent, and the law imposes upon the purchaser the burden of showing that he took no advantage," etc.

Applying these principles to the case under consideration, we are forced to the conclusion that the appellant Stuart is estopped from claiming the benefits of his purchase, and that appellees were guilty of no fraud leading to the result complained of. As shown by the findings, the testator, by his will, charged appellees, who were life tenants of the land, with the payment of the general taxes, which was also their duty in the absence of a provision of the will, and also provided that, in case of their failure to pay, the executor should take charge and possession of the premises, or so much thereof as should be necessary for the purpose, and apply the rents to the payment of such taxes. The testator seems to have foreseen the event of the failure to keep the taxes paid, but it does not appear whether it was anticipated from the weakness and improvidence of the life tenants, or from the large family dependent on them for support. The agreement between appellees and Coffing, as shown by the finding, was in line with the provisions of the will, effectuating its intent and purpose, making the rents of the farm discharge the tax lien, thereby saving the rights of the remainder-men. There is no finding that appellees owned any property other than the life estate devised them by their father. Had they possessed anything else, it is fair to infer that the officers would have discharged their duty by causing it to be sold for the taxes, instead of the land. They were impecunious and in debt. Their necessities were such that they were compelled to secure their neighbor by permitting him to hold their title and lands until their liabilities were paid in rental therefrom. The tax sale they sought to vacate would have exhausted the fee of the lands, if allowed to stand. They had no estate to leave their children.

save what the grandfather left them, and it could be reclaimed only by a foreclosure proceeding conducted by a friend. Natural love and affection, free from covin and fraud, should dictate the course pursued for the purpose intended. Appellees' conduct is susceptible of a construction in favor of honesty and fair dealing in this transaction, and we will not deprive them of its benefits where the facts indicate that an undue advantage has been taken, either of their ignorance and weakness, or distress and necessities, by which, if the judgment should be reversed, they would sacrifice \$1,500 in rentals for \$455.82. Appellant and appellees seem to concur in the notion that the court erred in its second conclusion of law. Appellant paid the purchase price of the rental, and is entitled to the equitable lien of a vendee. *Stults v. Brown*, 112 Ind. 372, 14 N. E. Rep. 230. The judgment is affirmed, with costs.

(135 Ind. 614)

MILLER et al. v. RAPP.<sup>1</sup>

(Supreme Court of Indiana. Oct. 11, 1893.)

PARTNERSHIP — ACCOUNTING — PLEADING — JOINT DEMURRER — MOTION TO STRIKE OUT PLEA — TRANSCRIPT OF EVIDENCE.

1. A plea not responsive to allegations of the complaint is not for this reason demurrable, but the remedy is by motion to strike out.

2. A cross complaint good as to any of the defendants thereto is good as against a joint demurrer of all of them. If bad as to some, they alone should demur.

3. A complaint alleged a partnership between plaintiff and defendant, and asked for an accounting and a division of the proceeds. Defendant's cross complaint alleged a partnership slightly different from that claimed by plaintiff, asked for a dissolution of the partnership, an accounting, an award to the parties of the amounts which might be found due them, and judgment against plaintiff for a certain amount. *Held* that, notwithstanding the prayer for a sum certain, the cross complaint was not a mere demand for money due, but was, like the complaint, a demand for an accounting.

4. A document certified by an official reporter to be a longhand manuscript of the shorthand report, and bearing no file mark or certificate of the clerk or court, cannot be treated as a transcript by the clerk of the evidence, and not having been brought into the record by compliance with the provisions of Rev. St. 1881, § 1410, for incorporating in the record the original longhand manuscript of the evidence, the evidence is not in the record.

Appeal from circuit court, Wells county; J. S. Dalley, Judge.

Action by Frederick G. Miller and others against Andy Rapp for a partnership accounting. Judgment for defendant. Plaintiffs appeal. Affirmed.

G. A. Mason, A. L. Sharpe, and Wilson & Todd, for appellants. Martin & Vaughn, for appellee.

HOWARD, J. Appellants' complaint states that appellants and appellee, in March, 1883, formed a partnership for carrying on a butcher business in the town of Montpelier, in Blackford county; that said business was to be carried on under the firm name of A. Rapp & Co.; that ap-

pellee was to take charge of the shop, and attend to the business of buying stock, butchering, and selling, and to furnish his experience, while appellants were to furnish the money needed to manage the shop, both parties to share equally in the profits or losses; that the money received by appellee in conducting the business was to be deposited in the firm name, out of which each party was to draw one-half; that the appellee has had sole control of the partnership, property, and business; and that he has refused to account to appellants for their share of the proceeds, but has appropriated the same to his own use, although requested by appellants to account to them,—praying for a dissolution of the partnership, and that appellee be compelled to account, and that a receiver be appointed to take charge of the business and close out the same, dividing the proceeds equally between appellants and appellee. Appellee answered this complaint by a general denial, and also by a plea of payment, and, in addition, filed his cross complaint, in which he averred the formation of the partnership substantially as stated in the complaint, except that he alleged that he was to have three-fifths, and the appellants two-fifths, of the profits, sharing the losses in like proportion. The cross complaint further states that the money deposited in the name of the firm was to be drawn out, as needed, on checks of the appellee, and not otherwise; that appellee was compelled to furnish delivery wagons, teams, and hired help, and board for said help, which horses, wagons, help, and boarding of help were done and procured at the instance and request of said firm, for which appellee has never received any pay; that appellants never furnished any money or capital to carry on said business, or rendered any services of any kind; that the firm was compelled to borrow money to carry on the business, and to buy on credit the machinery, tools, buildings, and apparatus necessary for the same, all of which, by the terms of the partnership, should have been furnished by appellants; that the appellants have drawn from said partnership \$1,114.04; that the partnership has been interrupted and destroyed by the acts and conduct of appellants in refusing to perform their part of the agreement, and in commencing this suit to dissolve partnership and place the business in the hands of a receiver; that there has been no accounting between or among the members of said partnership; that strife has arisen among them, whereby a settlement and accounting is made impossible; that the property and assets of said concern are now in the hands of a receiver,—praying that, in order that said partnership may be dissolved, and that the members may be protected according to their several interests, an accounting be had, and a full and complete examination of the books, accounts, claims, and demands, as well as the liabilities and obligations, be taken, together with a complete inventory of the property and effects of the firm; and that, on such accounting, whatever amounts shall be found due each party shall be awarded them; de-

<sup>1</sup> Rehearing denied 35 N. E. 693.



manding judgment, also, against appellants. Appellants demurred jointly to this cross complaint, which demurrer was overruled by the court; the court also overruled a demurrer to the second paragraph of the answer,—to each of which rulings the appellants excepted. The cause was submitted to the court for trial, and on motion of appellants the court made a special finding of facts and conclusions of law, finding for the appellee, on his cross complaint, a balance due, \$1,808.31, for which judgment was rendered against appellants.

Various errors are assigned by appellants. We shall consider those discussed by them in their brief. The second paragraph of the answer to the complaint was a plea of payment. It was correct in form, and not subject to demurrer. Appellants contend that it was not responsive to any allegation of the complaint. If this were true, it might have been stricken out on motion. Even if the ruling were incorrect, it has done the appellants no harm. The finding and judgment of the court were on the cross complaint.

Appellants also contend that the court erred in overruling their joint demurrer to the cross complaint. They insist, first, that the cross complaint is insufficient as against the appellants Spaulding and Spaulding, who, with the appellant Miller, formed another partnership, inasmuch as it is not stated that the Spauldings assented to the formation of the partnership with appellee. If this were true, the Spauldings should have demurred separately to the cross complaint. If a complaint or a cross complaint is good against any of the defendants, it is good against a joint demurrer from all of the defendants. *Thornt. & B. Ann. Ind. Pr. Code, § 339, note 1; Shore v. Taylor, 48 Ind. 345; Wilkerson v. Rust, 67 Ind. 172; Campbell v. Martin, 87 Ind. 577; Carver v. Carver, 97 Ind. 497; Holzman v. Hibben, 100 Ind. 338.*

It is further insisted that the cross complaint is bad for the reason that it seeks to recover a sum certain, a balance due against the other partners, and does not allege that the debts of the firm are paid, and the amounts due the firm collected. We are of opinion that in this contention the appellants are wholly in error as to the nature of the cross complaint. It is not a demand for an amount due. It is, like the complaint itself, a demand for accounting, and for the payment to each party of whatever balance should be found due. "One partner may maintain an action to compel an accounting, and to recover such sum as may be found due him upon the final adjustment of the partnership affairs." *Meredith v. Ewing, 85 Ind. 410.* This is not such a case as that of *Lang v. Oppenheim, 96 Ind. 47.* That was a suit brought by one partner to recover from another for an amount unadjusted, due out of copartnership assets. The suit in that case could not lie, since the amount claimed might be needed to pay creditors, whose rights are superior to the rights of partners. In the case at bar there is, on the contrary, a simple demand for an accounting, and for the

payment of whatever may be found due to each partner. The circumstance that the cross complaint concludes with a demand for \$5,000 does not of itself change a complaint for an accounting into a mere demand for money due. We think the cross complaint stated a good cause of action for an accounting between the partners, and for the payment to each of whatever sum should be found due him. *Dehority v. Nelson, 56 Ind. 414; Kimble v. Seal, 92 Ind. 276; 17 Amer. & Eng. Enc. Law, p. 1810.* Neither is the cross complaint bad for the reason that it seeks to recover for special services rendered the firm, without alleging a special agreement to pay for such services. The appellee makes no claim for his own services. He claims for expenses necessarily incurred in the conduct of the partnership business, and which were to be paid by appellants, whose agreement was to furnish the money needed for that purpose.

The remaining alleged errors discussed by appellants relate to the findings and the evidence. It is very doubtful whether the evidence is in the record. There seems to have been an attempt to bring the evidence into the record under the provisions of section 1410, Rev. St. 1881. There is, however, no certificate showing that a verbatim report was taken by an official reporter, or that the original longhand manuscript of the evidence was ever filed with the clerk, or that the same was incorporated into the bill of exceptions. We might, perhaps, take what appears to be the original longhand manuscript for a transcript of the evidence, but there is entered, after the recital of the alleged evidence, what purports to be a certificate of an official reporter, stating that the "foregoing is a correct, true, and complete longhand manuscript of the shorthand report above mentioned, including all the oral and documentary testimony introduced in the trial of said cause." There is no certificate from the clerk nor from the court showing either the filing of this manuscript in the clerk's office or its incorporation into the bill of exceptions; neither is there any file mark upon the manuscript to show that it was ever before the court or in the clerk's office. It is quite unauthenticated, and as it contains on its face, in the form of the reporter's certificate, internal evidence that it is not a transcript by the clerk of the evidence taken on the trial, it would seem that it is a document having no proper place in the transcript. In *Wagoner v. Wilson, 108 Ind. 210, 8 N. E. Rep. 925*, a plain statement was made of what is necessary in order to bring the evidence into the record under the provisions of section 1410. There is here a total failure to proceed as there directed. We have, however, carefully considered the claims of error made by appellants as to the ruling of the court on motions to modify findings, and other matters embraced in the motion for a new trial, and are satisfied that the rulings of the court were correct under the evidence as purported to be set out in the transcript. All the findings are amply supported by that evidence, and the motion of appellants to modify certain findings was

decided favorably to appellants. We think the case was fairly tried upon its merits, and a painstaking and just decision arrived at by the court. The judgment is affirmed.

DAILEY, J., took no part in the decision of this case.

(136 Ind. 680)

**MILBURN v. PHILLIPS et al.<sup>1</sup>**

(Supreme Court of Indiana. Oct. 12, 1893.)

**FRAUDULENT CONVEYANCE—EXECUTION SALE—APPRAISEMENT.**

1. The owner of a farm of 160 acres, being in debt at the time, conveyed the same to his son for an expressed consideration of \$5,000. The son was worth at the time about \$400; but claimed the transfer was in payment of a debt due from the father. The son had never filed with the assessor any statement of such debt. After the conveyance he allowed the property to be sold for taxes. The father also continued to rent the farm and collect the rent, and exercise acts of ownership. *Held*, that the conveyance was in fraud of creditors.

2. The consideration expressed in the deed is not even prima facie evidence against third parties.

3. Where a judgment does not direct a sale of real property without appraisement, and the rents and profits are offered without appraisement, and no bid is received therefor, and the fee simple which has been appraised is sold, there is no valid offer of the rents and profits, and the sale of the fee simple is void.

4. Where a judgment is obtained in an action for breach of warranty, and execution issues thereon, and land conveyed by the judgment debtor is sold before an order has been made decreeing such transfer to be fraudulent and void, failure to appraise the rents and profits before the sale on execution is not cured by Rev. St. 1881, § 743, providing that property conveyed by a debtor with intent to delay or defraud his creditors may be sold without appraisal.

Appeal from circuit court, Boone county; Stephen Neal, Judge.

Action by Robert C. Milburn against Phydella E. Phillips and others to set aside a sheriff's certificate of sale. Judgment for defendants. Plaintiff appeals. Reversed.

Palmer & Palmer and A. E. Paige, for appellant. C. S. Weener and Ralston & Keefe, for appellees.

DAILEY, J. This cause was commenced in the Clinton circuit court by appellant against all of the appellees except Joseph E. Milburn. He alleged that he was the owner in fee of the S.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  of section 25, in township 21 N., range 2 W., in said county. The complaint sought to set aside a certain sheriff's certificate of sale which appellees Phillips and Moore had against said premises. It sets out the judgment on which the sale was made, showing that it was against Joseph E. Milburn, and not, therefore, a lien on the land of the appellant, who was the plaintiff in said cause. The complaint was answered, in the first instance, in three paragraphs: First, in general denial. The second, in substance, admits that on and before the 11th day of September, 1888, Joseph E. Milburn was the owner of said

real estate, and conveyed the same by deed to Robert C. Milburn, but says that said deed was executed without any consideration, and in fraud of the creditors of Joseph, and that Phydella E. Phillips was at the time a creditor of the grantor. The third paragraph of answer is the same as the second, save it also alleges that Joseph E. Milburn is the father of the plaintiff, the appellant herein, and that said Robert and Joseph, with the intent to hinder, delay, and defraud the creditors of Joseph, conspired and confederated together, and caused the deed to be made to the former by the latter. Both paragraphs aver that the father had not, after the conveyance was made, sufficient property subject to execution with which to pay his debts, and ever afterwards continued insolvent. Appellees herein also filed a cross complaint in two paragraphs, containing, in substance, the same allegations as are embraced in the second and third paragraphs of the answer, and setting out therein the judgment and sale of the real estate, and asking that the deed of date September 11, 1888, to Robert by his father, be set aside, and the sale of the land on defendants' judgment sustained. Joseph E. Milburn is made a party to answer the cross complaint, and the Milburns answer by general denial. Appellees, defendants below, having secured a sheriff's deed for said tract pending the suit in the Clinton circuit court, filed a supplemental cross complaint of ejectment against the Milburns, which was answered by general denial. The cause was first tried in the Clinton circuit court, which resulted in a finding and judgment for the defendants on their cross complaint, and against appellant on his complaint. The supplemental complaint being in ejectment, the appellant was granted, on his own motion, a new trial as a matter of right. Afterwards, on proper affidavit, the venue of the cause was changed to the Boone circuit court. In the latter court the denial was withdrawn to plaintiff's complaint. The trial of the cause was submitted to a jury, and at the close of the evidence on the part of the defendants, appellees herein, the plaintiff filed his demurrer thereto, and the cause was withdrawn from the further consideration of the jury. The demurrer was by the Boone circuit court overruled, and the ruling of the court below thereon presents the only question for the consideration of the court. The appellant has assigned as error: First, the court erred in overruling plaintiff's demurrer to defendant's evidence; second, the court erred in rendering the judgment and decree which is rendered in this cause.

The real question presented for our consideration is, did the court err in overruling the demurrer to the evidence? Before presenting the material features of the evidence it is proper and essential that we should advert to certain rules, the aid of which is invoked as a guide to courts in the consideration by them of the evidence in a cause, where a demurrer to the evidence has been interposed. In *McLean v. Insurance Co.*, 100 Ind. 130, 131, is a collation of authorities, and their correctness

<sup>1</sup> Rehearing denied, 36 N. E. 360.

is borne out by an examination of the decisions to which reference is made. The effect of the demurrer is to concede the truth of all the facts of which there is any evidence against the demurring party, and, if there is a conflict in the evidence, it prevents him from insisting upon any evidence in his favor as to the disputed facts. *Willcuts v. Insurance Co.*, 81 Ind. 300. The demurrer admits all the facts which the evidence tends to prove, and all such inferences as can be drawn therefrom. *Willcuts v. Insurance Co.*, supra; *Radcliff v. Radford*, 96 Ind. 482. It excludes from consideration the evidence of the party demurring, (*Ruddell v. Tyner*, 87 Ind. 529,) which is treated as withdrawn, (*Adams v. State*, 87 Ind. 573,) as the evidence of his adversary alone is involved in the issue raised by the demurrer, (*Fritz v. Clark*, 80 Ind. 591.) If, upon such evidence, with every reasonable inference which may be drawn therefrom, a jury might rightfully find against the party demurring, the demurrer should be overruled, (*Hagenbuck v. McClaskey*, 81 Ind. 577; *Nordyke & Marmion Co. v. Van Sant*, 99 Ind. 188,) as the party demurring admits all the facts of which there is any evidence, (*Trimble v. Pollock*, 77 Ind. 576,) and consents that whatever reasonable inferences can be, shall be, drawn from the evidence against him, (*Ruff v. Ruff*, 85 Ind. 481;) and the court is bound to take as true all the facts which the evidence tends to prove, and such inferences from them as the jury could have drawn, though the jury might not have drawn them, (*Railway Co. v. Collarn*, 73 Ind. 261.) But the court is not required, in considering the demurrer, to weigh or reconcile conflicting evidence, nor consider that which favors the party demurring, when it is in conflict with the other evidence against him. *Railroad Co. v. McLin*, 82 Ind. 485. The demurrer waives objections to the admissibility of the evidence, (*Miller v. Porter*, 71 Ind. 521;) and no advantage can be taken of any defect in the pleadings as a reason for sustaining the demurrer, (*Lindley v. Kelley*, 42 Ind. 294.) As sustaining a demurrer to the evidence works a final disposition of the case, the court does not err in overruling such a demurrer whenever there is testimony which, although weak and inconclusive, fairly tends to prove every material fact, and is sufficient to justify a court in overruling a motion to set aside a verdict based thereon, (*Railway Co. v. Couse*, 17 Kan. 571;) and if, from the evidence, a jury might infer that the plaintiff's action should be sustained, the demurrer should be overruled, and the plaintiff should have judgment, (*Wright v. Julian*, 97 Ind. 109.) In line with these authorities, and in addition thereto, we cite *Palmer v. Railroad Co.*, 112 Ind. 250, 14 N. E. Rep. 70; *Railroad Co. v. Marohn*, (Ind. App.) 34 N. E. Rep. 27. It is the law that a voluntary conveyance is not, for that reason alone, fraudulent, for it is the right of every person owning property to dispose of it at any price he may see fit, or donate it to others, provided, always, that at the time of the conveyance he retain sufficient assets to pay all existing liabilities; and, when a voluntary conveyance is

made by one largely indebted in comparison to his resources, the transaction in itself raises a presumption of constructive fraud, and, no matter what the motive which induces it, the deed will be void as to creditors. *Story, Eq. Jur.* §§ 353, 355. *Warv. Vend.* 623. A person cannot give away any of his property to the injury of his creditors. *Sherman v. Hogland*, 73 Ind. 472; *Barkley v. Tapp*, 87 Ind. 27; *Eller v. Crull*, 112 Ind. 319, 14 N. E. Rep. 79. One great circumstance which should always be attended to in these transactions is whether the person was indebted at the time he made his conveyance, and, if he was, it is a strong badge of fraud. *Paine v. Doe*, 7 Blackf. 487. If the effect is to withdraw any portion of the property, so that there does not remain sufficient to enable creditors to pay themselves, the conveyance is clearly within the statute. A transfer of all the donor's property is for this reason fraudulent. A universal donee is bound to pay the debts of the donor existing at the time of the donation, or abandon the property thus given. *Bump, Fraud. Conv.* 292. When no consideration is paid, it is not necessary that the grantee should have notice of the grantor's fraudulent intent. *Barkley v. Tapp*, supra; *Spaulding v. Blythe*, 73 Ind. 93. Where a vendee participates in the fraud of the vendor to delay, hinder, or defraud the creditors of such vendor, even though a full consideration has been paid for the property, the conveyance will be set aside. *Gardiner v. Otis*, 13 Wis. 460; *Briscoe v. Clarke*, 1 Rand. (Va.) 218; *Tootle v. Dunn*, 6 Neb. 93. This is a well-recognized principle of the law, and the courts have held that the purchaser is to be charged with notice of the character of the transaction when he is acquainted with the circumstances sufficiently to convince the court or jury that he knew the facts, (*Green v. Tatum*, 19 N. J. Eq. 105,) or, if he has a knowledge of such facts as would excite the suspicion of an ordinarily prudent man, and fails to make inquiry, and purchases from a fraudulent vendor, he is not a bona fide purchaser, and will be charged with notice of any fraud upon creditors affected by the sale and transfer, (*State v. Estel*, 6 Mo. App. 6.) It is true, fraud is never presumed, but must be proved by the party charging it; and, to make fraud available in any given case, it must be proved as alleged, the presumption always being against bad faith. *Stewart v. English*, 6 Ind. 176; *Morgan v. Olvey*, 53 Ind. 6; *Luce v. Shoff*, 70 Ind. 152; *Wallace v. Mattice*, 118 Ind. 60, 20 N. E. Rep. 497. It is part of the equity doctrine of fraud not to define it, not to lay down any rule as to the nature of it, lest the craft of men should find ways of committing fraud which might escape the limits of such a rule or definition. It includes all acts, omissions, or concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another. 1 Bouv. Law Dict. 617. The proof of fraud is seldom direct; it usually consists of a chain of circumstances that indicate and accompany the wrongful act:

First, there may be the confidential relation of the parties; second, the vendor being involved at the time of the transfer, and pressed for payment; third, the transfer of all the vendor's property; fourth, the vendee being insolvent at the time, and before the transfer is made; fifth, the deed being kept off the record for the space of several months. *Sherman v. Hogland*, 73 Ind. 475, 476. Whether a deed made upon a valuable consideration is fraudulent or not is, under the statute, a question of fact, and not of law. *Hubbs v. Bancroft*, 4 Ind. 388. Fraud will be presumed in courts of equity from the circumstances of the parties, (*Booth v. Bunce*, 33 N. Y. 139;) and when the evidence tends to show the fraudulent character of the transaction to one claiming to be a bona fide purchaser, and he remains silent, this is presumptive evidence of fraud. A conveyance of a parent, who is largely indebted, to his son, of large and valuable property, for a small sum down and notes for the balance, or when the consideration is the assumption of a mortgage on the property simply, it will be held to be fraudulent. *Zoeller v. Riley*, (N. Y. App.) 2 N. E. Rep. 396, note; *Wagon Co. v. Maurer*, (Iowa,) 5 N. W. Rep. 576; *Knowlton v. Hawes*, (Neb.) 7 N. W. Rep. 286; *Dickerman v. Farrell*, (Iowa,) 18 N. W. Rep. 422. A conveyance, however made, is void if the intent and purpose of the grantor and grantee is to defraud creditors. What cannot be done directly cannot be done by indirection. Forms are of little moment, for, where fraud appears, courts will drive through all matters of form, and expose and punish the corrupt act. A conveyance is not protected, although full consideration has been paid, where grantor and grantee unite in a fraudulent design to defraud creditors. Here, however, the consideration upon which the conveyance rests was grossly disproportionate to the value of the property. Where property is fraudulently conveyed, the grantee holds it in trust for the creditors of the grantor; but this is not a trust created by the contract of the parties, and appellees are in error in supposing such a trust to be within the statute. Few principles are more firmly settled than that the statute creating trusts by parol has no reference to resulting trusts. *Buck v. Vorels*, 89 Ind. 117. It is not enough, in order to support a settlement against creditors, that it be made for a valuable consideration. It must be bona fide. If it be made with intent to hinder, delay, or defraud them, it is void as against them, although there may be, in the strictest sense, a valuable, or even an adequate, consideration. *Walt, Fraud. Conv. § 207*; *Blennerhassett v. Sherman*, 105 U. S. 117. Bump, in his work on *Fraudulent Conveyances*, lays down the following excellent rules as a guide in determining the transaction: First. The tendency, pro tanto, of every transfer that can be made by a debtor, is to hinder and delay his creditors, for it diminishes the fund out of which they can enforce payment. A transfer of all the property of a debtor not only diminishes the fund, but is not an ordinary transaction, and is therefore a badge of

fraud. Page 79. Second. As every transfer by a debtor tends to diminish the fund from which payment can be enforced, embarrassment and heavy indebtedness are badges of fraud. Page 80. Third. The expectation or pendency of a suit is a badge of fraud, because a transfer tends to deprive the creditor of the means of enforcing his judgment when he obtains it. Page 81. Fourth. Secrecy is a badge of fraud because it tends to deceive the creditors, and is not in the course in which men ordinarily transact business. Page 81. Where the proof shows that the deed was withheld from record for an unusual time, the secrecy of the transaction adds weight to the presumption to be overcome by satisfactory evidence. *Zimmer v. Miller*, 64 Md. 296, 1 Atl. Rep. 858. Fifth. A vendee who purchases the property of an insolvent debtor for less than its value thereby deprives the creditors of the difference, and defeats their just expectations. Inadequacy of price thus tends to defraud them, and is a badge of fraud. *Bump, Fraud. Conv. 86*. Sixth. The retention of the possession of land, and the exercise of unequivocal acts of ownership over it, is a badge of fraud, for it is not in the usual course of business, and indicates a secret trust for the benefit of the debtor. The acts of ownership may consist either in renting or collecting rents. *Id.* 90, 91. Seventh. Anything out of the usual course of business is a sign of fraud. The same principle applies to the absence of accounts between the parties, when the consideration purports to be in consideration of a debt due to the grantee; to the retention of the deed or the mortgage note by the debtor; to the omission to execute the mortgage note at the same time with the mortgage; to any alteration of a mortgage note; to the alienation of valuable property without payment or security; to the purchase of property for which the grantee has no use; to the grantee's entrances into business foreign to his own; to the grantee's pecuniary ability to make the purchase; and to the grantee's failure to pay taxes. *Id.* 92, 93. Eighth. The omission of the grantee to testify or produce the debtor, or any other important witness, is ground for an unfavorable presumption, and frequently exercises an important influence upon the final determination of the question of fraud. *Id.* 95.

Keeping in view, and applying to this case, so far as they are applicable, the rules to which we have referred, we will briefly present the facts in the case, as disclosed by the evidence. It is established that on September 13, 1884, Joseph E. and Malinda Milburn, parents of appellant, executed a warranty deed to one Thomas S. Peake for a certain 12-acre tract of land in Clinton county, Ind., for a valuable consideration; that on November 22, 1884, said Peake, unmarried, conveyed said real estate by warranty deed to one David Dukes, who on the 19th of October, 1885, his wife joining him therein, conveyed the same by deed of warranty to Phyllida E. Phillips, an appellee, for the sum of \$500; that the respective grantees took possession of said tract; that, prior to the execution of said several deeds, the grantor

Joseph had incumbered the realty with a mortgage to one Martha Gher; that afterwards, to wit, at the September term, 1887, of the Clinton circuit court, said mortgage debt still remaining unpaid and being due, said Gher caused suit to be instituted, whereby said mortgage was foreclosed; that by virtue of said judgment and decree the sheriff of said county, on November 30, 1887, sold said land to said Gher; that there was no redemption from said sale; that said Gher assigned the certificate to Simon Foulke, who, after the year for redemption had expired, obtained a sheriff's deed therefor, and the appellee Phillips was evicted, and the premises taken from her. It is also conceded that on September 11, 1888, and for a long time prior thereto continuously, Joseph E. Milburn was the owner of 160 acres of real estate described in the complaint in this action, which includes the land in controversy, and was of the value of \$40 per acre, and that on said day he conveyed the same to his son Robert, appellant herein; that there was a consideration of \$5,000 expressed in the deed; and that Joseph's wife did not join therein. It was admitted by the parties to this suit, for the purpose of the trial, that appellant had, at the time of this conveyance, aside from the debt which his father owed him, property of the value of \$400, and that he was a resident householder of the state, and that after the transfer said Joseph was possessed of property of the value of between \$300 and \$400, and that he was a resident householder of the state; that the deed to appellant was not recorded until April 10, 1889. No sum of money was ever paid by the grantee for the land, and no notes, mortgage, or other evidences of indebtedness were executed therefor, but the deed states a consideration of \$5,000. After the conveyance to appellant, he allowed the west 80 of the tract to be sold to pay a ditch assessment of \$85. He paid no taxes, but suffered the east 80 to be sold by the county treasurer in satisfaction of taxes, which indicates that the grantee was insolvent. The facts further show that while appellant assumed that his father owed him prior to the conveyance, and that he received the deed to discharge in part a pre-existing debt, the appellant testified that he never filed with the assessor any such credit. This statement is important. If appellant gave a true list to the assessor of all his personal estate and choses in action, he had no claim against his father. The jury would have a right to believe that he was assessed upon all of his property. *Towns v. Smith*, 115 Ind. 488, 16 N. E. Rep. 811; *Lefevre v. Johnson*, 79 Ind. 554. The statement contained in the assessment list can with propriety be looked to, to ascertain what particular personal property or claims a person owns at the time, and, in the absence of controlling proof, his condition is presumed to have remained the same when the conveyance was made. *Adams v. State*, 87 Ind. 573; *Towns v. Smith*, supra. The evidence of Isaac Wainescott shows that, prior to the conveyance to appellant, the grantor told him "he was going to have his son come onto

the farm; that it would pay him better than to run it himself." "He thought this plan would pay his debts more rapidly." "He was in debt, and he wanted to get out." "That he thought the Phillipses would not make their money out of this land." Witness also testifies to being in possession of the farm in controversy as tenant of Joseph E. Milburn, who in February, 1889, signed and served upon him a written notice to quit the possession. Frank Caldwell testified that he and the appellant rented this farm of Joseph in the fall of 1888; that appellant gathered his share of the corn, and the oats were turned over to the father. Robert told this witness that his father deeded him the land, and had nothing of his own, and that he did not intend to pay the Phillips' debt if he could help himself. William Crouch says Robert told him he was going to run the farm and fix it up. There was evidence that the father was exercising possessory acts over the farm long after the son claimed to have procured a deed for it, and the witness Frank Culver testified, in substance, that, a short time before hay harvest in 1890, Robert said to him that he had no hay to put up on the shares, but his father had, identifying the hay, and locating the meadow on the land in dispute. Taking all the facts together which the evidence adduced tends to prove, and a fair inference might be drawn that it was the intention of the father, shared in by the son, that the claim of Mrs. Phillips should not be paid; that to accomplish such purpose the transfer of the real estate was made, and that the son was placed in possession of the land merely as his father's tenant. We attach no importance to the recital in the deed that the consideration is \$5,000. This is not an action between the grantee and the grantor, or any of the heirs or privies of the grantors, but it is one between the creditors of the grantor and the grantee, and hence the consideration expressed does not constitute prima facie evidence against the appellees. 2 Warr. Vend. § 19, p. 622, reads: "Nor will one who takes land as a volunteer, although without notice of the equity of others, be protected against third parties claiming equitable rights. He must prove that he paid the purchase money, and this independently of the recital in his deed." "There must be evidence dehors the instrument." *Baskins v. Shannon*, 3 N. Y. 310. The same motive which would induce a party to execute a fraudulent conveyance would induce him to insert and acknowledge a receipt of payment. "The recital of consideration in the deed cannot be considered as evidence against creditors, for they are strangers to the transaction." *Allen v. Cowan*, 28 Barb. 99; *Bump, Fraud. Conv.* p. 554; *Wait, Fraud. Conv.* § 220; *Devl. Deeds*, §§ 818, 819; *Peck v. Mallams*, 10 N. Y. 528. Appellant and appellees in this case all trace their claim of title to a common source. "Where both plaintiff and defendant claim title from a common source, the plaintiff is only required to prove such source of title." 6 Amer. & Eng. Enc. Law, p. 524. Appellant's contention that a party must

recover, if at all, on the theory of at least one paragraph of his pleadings, is sound law. *McAroy v. Wright*, 25 Ind. 30; *Paris v. Strong*, 51 Ind. 343; *Boardman v. Griffin*, 52 Ind. 106; *Terry v. Shively*, 64 Ind. 111; *City of Huntington v. Mendenhall*, 73 Ind. 464; *McConnell v. Bank*, (Ind. Sup.) 27 N. E. Rep. 616.

But the cases cited do not apply to the facts in the case now under consideration. The supplemental cross complaint makes an action of ejectment to which the proofs were directed. Appellant availed himself of this in the court below when he secured himself a new trial as of right. The record shows that the sheriff had the land appraised prior to the sale, but did not have the rents and profits appraised. He offered the rents and profits, and, receiving no bid, offered the fee simple. We think this vitiated the sale. In *Davis v. Campbell*, 12 Ind. 192, the court say: "Where property cannot be sold by the sheriff without appraisal, it cannot be legally offered for sale without appraisal. Such an offer would be a vain act, which no bidder at the sale could be expected to notice." The force of the decision is that where the judgment did not direct a sale of real property by the sheriff without appraisal, and the rents and profits were offered for sale without appraisal, and, no bid being received, the fee simple was sold, there was no valid offer of the rents and profits, and the sale of the fee simple was therefore erroneous. In this connection we also cite *Rev. St. 1881, § 754; Railway Co. v. Bradley*, 15 Ind. 26; *Tyler v. Wilkerson*, 27 Ind. 453.

It is urged by appellees that the sale was made by virtue of clause 2, § 752, *Rev. St. 1881*, ("Lands Fraudulently Conveyed with Intent to Defraud Creditors.") If this were true, the provisions of section 743, *Rev. St. 1881*, would apply, which reads as follows: "Property conveyed by a debtor, with intent to hinder, delay, or defraud creditors, shall be sold without appraisal." In our opinion, these sections can have no application to the case at bar, in which there was an ordinary judgment rendered in an action for breach of the covenants of warranty; an execution issued thereon, and the premises sold to appellee before an order had been made decreeing the previous sale and transfer to appellant fraudulent. This court, in *Mugge v. Helgemeler*, 81 Ind. 120, carried the rule to its utmost limit in holding that "real estate which the debtor has conveyed, or caused to be conveyed, with intent to defraud his creditors, may be sold without appraisal, there having been an adjudication that the conveyance was fraudulent, although the original judgment and execution had not so provided. The equities in this case appear to be with the appellee. She lost her land in a foreclosure suit to collect a debt created by Joseph E. Milburn, and which, from the evidence, he ought to pay. She was compelled to institute against him an action for the breach of the covenants of warranty, which he resisted at every step until she obtained a judgment for \$549.25, that will remain unpaid if she be defeated

in her claim to the land in controversy. The tract now in litigation was sold on an execution to satisfy said judgment, and the son has contested the right to the premises by this proceeding. The transfer to him was a colorable transaction,—mere form. Two nisi prius courts have found against him, and we regret that we are compelled to disturb the finding and judgment. Judgment reversed, at cost of appellees, with instructions to the circuit court to grant a new trial.

(125 Ind. 634)

MINNICH et al. v. SHAFFER et al.<sup>1</sup>

(Supreme Court of Indiana. Oct. 13, 1893.)

FRAUDULENT CONVEYANCES—EXEMPTIONS.

1. Where a wife allows the title to land paid for by her to be taken in the name of her husband, persons who give him credit without notice of the wife's claim may subject the land to their debts.

2. Land conveyed after rendition of a judgment against the grantor is subject to such judgment where it appears that, when the judgment was rendered, the grantor owned enough property to satisfy it, after deducting the amount of his statutory exemptions.

Appeal from circuit court, Huntington county; T. L. Lucas, Special Judge.

Action by Rudolph O. Shaffer and another against John Minnich and others to quiet title to land, and to enjoin a sale thereof under a judgment theretofore rendered against plaintiffs' grantor. There was a judgment in favor of plaintiffs, and defendants appeal. Reversed.

J. M. Hatfield, for appellants. C. W. Watkins, for appellees.

HOWARD, J. From the first paragraph of the amended complaint filed by appellees it appears that on the 19th day of February, 1890, Isabella Jackson, named as defendant in the caption of the complaint, but referred to as plaintiff in the body of the pleading, was the equitable owner of a certain lot in the city of Huntington, described in the complaint, but that the legal title to said land was in her husband, Jeremiah J. Jackson, also named as defendant in the caption, but treated as plaintiff in the body of the complaint; that on the same day the appellants obtained a judgment against the said Jeremiah J. Jackson for \$208, and caused a transcript of the same to be filed at once in the office of the clerk of the Huntington circuit court; that afterwards the Jacksons conveyed said land by warranty deed to appellees, Shaffer and Shaffer. There is also an averment that Jeremiah J. Jackson had no interest in said real estate, but held the same in trust for his wife, Isabella. Prayer to quiet title in Shaffer and Shaffer, and that the sheriff, James M. Bratton, who is made defendant, be enjoined from selling the land on the judgment in favor of appellants. The second paragraph of the complaint is substantially the same as the first, with the additional averment that, at the time of the conveyance of the land by the Jacksons to the Shaffers, Jeremiah J. Jackson did not have \$600 worth of property, and

<sup>1</sup> Rehearing denied.

that he was entitled to an exemption for that amount. Appellants' motion to strike out this complaint for irregularities apparent on its face, and also their demurrer to the complaint, were overruled. Appellants answered: First, by a general denial. Second, that Jeremiah J. Jackson had himself purchased said land on the 29th day of May, 1888, paying \$600 in cash, and assuming incumbrances to the amount of \$825; that he took the deed in his own name, and on the same day had the deed duly recorded; that he took possession of the land, and continued to hold the legal title until the 24th day of February, 1890, when the real estate was conveyed to the appellees; that Isabella Jackson knew that the title was taken in her husband's name, and that she never made any claim to the lot; that credit was extended to Jeremiah J. Jackson by appellants, and their judgment debt incurred, by reason of his ownership of said land, and appellants had no notice or knowledge of the claim of Isabella until long after such credit was given; that appellees took said conveyance on the 24th day of February, 1890, well knowing that appellants had obtained their said judgment on the 19th of February, 1890. In the third paragraph of the answer it is further alleged that in the conveyance by the Jacksons to the Shaffers, the appellees, it was part of the consideration that the Shaffers should pay appellants' judgment, and also alleged that the Shaffers retained for a time a sufficient amount of the purchase price to pay said judgment, of which amount they still retain \$175. The fourth paragraph of the answer avers that said real estate was sold to the appellees as the property of Jeremiah J. Jackson, he warranting the title thereto, and both he and his wife representing that he was the owner. It is also averred that at the date of the sale, and for a long time afterwards, Jeremiah J. Jackson was the owner of personal property in the city of Huntington of the value of \$1,500, and that he did not at any time ask to have said real estate exempt from sale on execution. The fifth paragraph merely states that the Shaffers have since sold the land in controversy, and have no longer any interest in it. The appellees replied in general denial. There was a finding by the court in favor of the appellees, Shaffer and Shaffer, and a judgment and decree quieting their title to the real estate described in their complaint, and enjoining the collection of appellants' judgment against said land, and restraining them from setting up or asserting any right, title, or interest in the same by reason of said judgment. A motion for a new trial as of right, and also a motion for a new trial for the reasons therein stated, were overruled.

Appellants complain of the rulings of the court on the pleadings. We are of opinion, however, that whatever error, if any, there may be in these rulings, has not caused any material harm to appellants. The alleged errors are technical, and will be considered cured on the appeal.

Whether the motion for a new trial as of right should have been sustained we

need not inquire, for we are satisfied that appellants were entitled to a new trial for the reasons given in their motion, namely, that the decision of the court is not sustained by sufficient evidence, and that it is contrary to law. The evidence is properly in the record by bills of exceptions, and the evidence given by the appellees alone is of such a character that, had it been submitted to a jury, it would have been the duty of the court to direct the jury to return a verdict for the appellants. At the time the Jacksons purchased the land in controversy, it appears from the evidence that a part of the purchase money was furnished by Mrs. Jackson, but that the deed was taken in the name of her husband. This was apparently with the wife's consent. She testified that she "did not know whose name it was in." For nearly two years she suffered the deed to remain on the public records in her husband's name, and allowed him to receive credit on the faith of his ownership of the land. Appellants had no notice or knowledge of her claim, but relied fully upon his title as shown upon the records. Isabella Jackson might perhaps have asserted her title against those having knowledge of her alleged interest, or against persons who might claim as heirs or devisees of her husband in case of his death, but she could assert no such title against those who, as appellants, had no notice or knowledge of any such claim or interest on her part, and who had a right to rely upon the public records, and upon her acquiescence for so long a time in the title of her husband. *Meheuer v. Bengel*, 34 N. E. Rep. 664, (decided at this term,) and authorities there cited. It was admitted on the trial that appellants' judgment against Jeremiah J. Jackson was obtained, and a transcript thereof filed in the office of the clerk of the circuit court of Huntington county, before the date of the conveyance made by the Jacksons to appellees. Jeremiah J. Jackson testified that, at the time of the conveyance to appellees, he had filed a schedule. This schedule was for about \$400, but did not include an additional amount of about \$400 worth of goods in a store then owned by him, nor did it include the land in controversy. This land was sold to appellees for \$1,000. Rudolph O. Shaffer, one of the appellees, testified that, of the purchase price of the land, they paid about \$752 to satisfy debts which appear to have been incumbrances upon the land, thus leaving a balance of nearly \$250. Of this balance they applied \$155 on account due themselves, paid Mrs. Jackson \$404, seemingly the equivalent of what was claimed as invested by her in the land, and still retain \$175, leaving a further amount unaccounted for of about \$114. He further testified that the balance was "held back on account of judgment of Minnich & Strouse, [the appellants.] We were to pay \$1,600 for the property. \* \* \* We held back that amount to cover that claim [appellants' judgment] if it had to be paid, and also for the taxes." From the evidence of the appellees, therefore, (and there is no other evidence on the subject,) it appears that, at the date of the



sale of the real estate to appellees, February 24, 1890, Jeremiah J. Jackson owned property to the value, apart from liens other than appellants' judgment, of over \$1,700. As Jeremiah J. Jackson was a householder, if he had less than \$600 worth of property at that date, it may be conceded that appellants' judgment would not be a lien on any of his property; but, as he then owned over the amount allowed for exemption, it is clear that the judgment was a lien on the real estate in controversy at the time it was sold. Indeed, the parties to the sale seem to have been of that view themselves when the sale was made. Both the Jacksons say that the land sold for \$1,600, and that \$175 of said sum was retained by appellees, the purchasers. The appellee Rudolph O. Shaffer gives the same testimony, and, in addition, in accounting for the proceeds of sale, shows that not only \$175 was retained, but fails to account for a further balance of about \$114; and he states expressly, "That left a balance of the claim of Minnich & Strouse;" and, further, that "we held back that amount to cover that claim, if it had to be paid." On the evidence of the appellees, the finding should have been for the appellants. The judgment is reversed, with instructions to grant a new trial.

DAILEY, J., took no part in the decision of this case.

(135 Ind. 225)

STATE ex rel. KILEY et al. v. GAVIN et al.  
(Supreme Court of Indiana. Oct. 11, 1893.)

#### JURISDICTION—PROCEEDINGS TO REVIEW.

Jurisdiction in proceedings to review follows the jurisdiction of the action sought to be reviewed, and the supreme court cannot compel the court of appeals to transfer to it the record on appeal from a review of a judgment in an action of which the latter court had appellate jurisdiction.

Petition by John Kiley and another for mandamus, to compel the court of appeals to transfer to the supreme court the record of proceedings had on a review of a case in which petitioners were parties. Denied.

John A. Kersey, for relators.

HACKNEY, J. The petitioners pray the issuance of the writ of mandamus to enforce the transference to this court of the record and proceedings in cause numbered 814 of the files of the appellate court of Indiana, and entitled "John Kiley and Thomas Slatterly against Reuben Murphy." The petitioners show that in January, 1889, said Murphy instituted an action in the Grant circuit court for the recovery of \$1,103.50, on account for broken stone sold and delivered; that upon the trial he received a special verdict, in which his claim was found to be \$608.80. On motion in that cause the court rendered judgment on the special verdict for these petitioners. In November, 1889, said Murphy sued the petitioners for the review of said judgment, and succeeded in said suit, from the decree in which the petitioners

appealed by the record so numbered 814, now of the files of said appellate court. The record on that appeal was filed with the clerk of this court, who is ex officio clerk of the appellate court, and, presuming that the cause was of the jurisdiction of that court, distributed the record to one of its judges for consideration and opinion. On the 12th day of May, 1893, (84 N. E. Rep. 112,) that court rendered an opinion affirming the judgment of the Grant circuit court, and, on the 23d day of May thereafter, these petitioners moved the appellate court to vacate its opinion and judgment, and transfer the record to this court, upon the alleged ground that said appellate court had no jurisdiction to entertain said appeal. This motion the appellate court refused, (Id. 650,) and its opinion upon the merits of the appeal was certified to the Grant circuit court as in other cases. Pending the issue now before us, we have restrained the enforcement of the judgment against the petitioners.

In very able briefs the petitioners submit to us the question as to the jurisdiction of the appellate court to entertain an appeal from proceedings for the review of the judgment of the lower court. The positions taken by counsel are that, by the act creating the appellate court, jurisdiction is withheld from that court in all suits in equity; that prior to June 18, 1852, the bill of review was an equitable remedy, and had no recognizance in actions at law. To these propositions are cited, with numerous authorities, the following from said act: "Second. The appellate court shall not have jurisdiction of suits in equity, hereby meaning, by the terms 'suits in equity,' such cases as were known and recognized prior to the 18th day of June, 1852, as suits of equitable recognizance, and wherein specific decrees are appropriate and essential." The cases cited are to the point that prior to the 18th day of June, 1852, the proceeding to review was a suit in equity, and known and recognized as suits of equitable recognizance. With these cases we have no dissension; on the contrary, we fully concur with all of them. But when we remember that prior to the 18th day of June, 1852, judgments at law were not the subject of review by the chancellor upon the bill of review, we may not so readily misapply the rule contended for by the petitioners. No case is cited, and our search has been in vain to find a single case, where the courts of chancery, by this remedy, reviewed a judgment at law, such as the judgment brought in review in the Grant circuit court. The bill of review was instituted as a remedy by which the trial court might correct its own errors after the completion of its rolls. One of its essential features was that the remedy should be applied in the same court which had committed the error. In no instance has one court employed the remedy to review the action of a court of an entirely different character, and possessing jurisdiction of an essentially different type. In one or two instances one chancellor has applied this remedy to the decree of another chancellor; but the practice was not accepted

with favor among the courts of chancery, and we have no doubt that it was clearly in violation of the purpose of the remedy. If the remedy by proceedings to review were of such a character that the chancery court had extended it to judgments at law, it is a pertinent inquiry as to whether the proceedings become so far a part of the original cause as to be governed by the character of that cause. It is here insisted by the learned counsel for the petitioners that this court has held, in *Brown v. Keyser*, 53 Ind. 85, *Leech v. Perry*, 77 Ind. 422, and *Keeper v. Force*, 88 Ind. 81, that the bill of review is an independent and original proceeding, and that therefore its character as an equitable remedy is unmixed with, and wholly apart from, that of the original action or suit. The cases cited do hold that, in the review proceedings, no new steps may be taken in the original action. In that sense they are independent. And the same may be said of an appeal from the original judgment. There the record is not to be enlarged by new and distinct proceedings. In both, the alleged errors depend upon the record as made in the original cause, and, in both, new steps affecting the subject-matter of the original cause are taken only in the original suit or action. Bills of review are so far in the nature of petitions for a rehearing that they cannot be independent of the original action in the sense of giving new character to the subject-matter in litigation, and of invoking a jurisdiction forbidden to the original action. If the independence of the bill claimed for it by the petitioners could be maintained, we would have the anomalous practice of permitting the shifting of jurisdiction by seeking a revision of the judgment, and in permitting an appeal to one court for the review of errors which otherwise would be the subject of review in another court of appeals, or would not be the subject of appeal at all. This confusion of jurisdictions cannot be upheld, and upon this question we are supported by the decisions of this court. In *Klebar v. Town of Corydon*, 80 Ind. 95, it was held that in an action originating before a justice of the peace, where the amount in controversy did not exceed \$50, there being no final appeal to this court, proceedings to review the judgment therein would not become the subject of an appeal to this court. In other words, the proceedings to review did not give new character to the subject-matter of the litigation in the original cause, and thereby bring the interests of the parties within the jurisdiction of this court for revision, nor were such proceedings so far independent of the original action as to take on a character different from that of the original cause, and thereby invest them with new elements invoking a different jurisdiction from that attaching to the original action. See, also, *McCurdy v. Love*, 97 Ind. 62. As we have said, the remedy by review is extended to enable the trial court to revise its action where errors are claimed. The rights of the parties upon the merits of the cause as involved in the original action are necessarily involved in the proceeding to review. Where the merits of the cause

necessarily invoke the jurisdiction of one court, and a remedy in effect collateral is sought to be applied for, the reinvestigation of the same cause cannot invoke another and different jurisdiction. This is the effect of the holding in *Klebar v. Town of Corydon* and *McCurdy v. Love*, supra. The appellate court clearly possessed jurisdiction over an appeal from the original judgment, and if the review proceedings were, for the purpose of determining jurisdiction, but collateral and incidental to the original action, as we hold that they were, the jurisdiction on appeal from the review proceedings is also in the appellate court. The quieting of title to real estate is an incident to proceedings for partition, and jurisdiction follows the primary or principal remedy, and merges that extended to the incidental remedy. *Wolcott v. Wigton*, 7 Ind. 44; *Fleming v. Potter*, 14 Ind. 486; *Baker v. Groves*, 126 Ind. 593, 26 N. E. Rep. 1076; *Abernathy v. Allen*, 132 Ind. 84, 31 N. E. Rep. 534. The same may be said as to proceedings supplementary to execution, (*Carpenter v. Vanscoten*, 20 Ind. 50; *Harris v. Howe*, 129 Ind. 72, 27 N. E. Rep. 561;) and it has been held that an application to be relieved from a judgment by default is so far an incident to the proceedings in which the judgment was rendered as to fall within the jurisdiction to which such original proceedings belonged, (*Parker v. Bank*, 126 Ind. 595, 26 N. E. Rep. 881.) Upon these cases, the conclusion is irresistible that the jurisdiction in proceedings to review follow the jurisdiction of the action sought to be reviewed. To the contrary is cited *Cole v. Miller*, 32 Miss. 89, where the court rendering the original decree had, by constitutional amendment, been suspended, and the business depending therein was transferred to another court. The decree having been entered and signed, the proceedings were not regarded as longer depending, and no provision having been made by legislation, or otherwise, for the operation of the bill of review upon such proceedings, it was held that the bill would lie in the court to which the original records had been assigned, and as an original and independent proceeding. It is unnecessary for us to decide that the remedy is not so far independent of the original proceeding as to admit of enforcement in a court having custody of the record of the original proceeding, when such court is created after the original decree, and the court rendering such original decree has been suspended. The important question, under such a state of facts, arises upon the rule requiring the bill of review to be filed in the court rendering the decree. Whether such independence exists as to permit such filing is a question we are not asked to decide. Having concluded that in this state the remedy is applied in the court rendering the decree, that it involves the merits of the original action, and partakes of its jurisdictional features, we must treat it as belonging to the jurisdiction, and as following the jurisdiction of the original action. That far, at least, it is incident to the original action. In either view of the case we find that the jurisdiction upon appeal was in the appel-

late court, and the petition is denied, and the restraining order heretofore issued by this court is dissolved.

(135 Ind. 278)

WEST et al. v. RASSMAN et al.

(Supreme Court of Indiana. Oct. 18, 1893.)

WILLS—CONSTRUCTION—PER STIRPES OR PER CAPITA.

1. Testator directed that his property "be distributed in equal portions amongst the children of the following named persons, [brothers and sisters of testator and his wife.] I mean and intend that the children of these parties above named, without any regard to numbers, shall be counted as one family, and equally divided amongst them all." *Held*, that the distribution was to be per capita, and not per stirpes.

2. An intention that the distribution should be per stirpes is not shown by a direction that there should be charged to the children of each brother and sister the amount which had been advanced to such brother or sister.

3. Nor is an intention that the distribution should be per capita shown by a direction that there should be charged to each child the amount which had been advanced to him individually.

Appeal from circuit court, Marion county; E. A. Brown, Judge.

Suit by Emil C. Rassman, administrator of William Johnson, deceased, against Mary J. West and others for construction of a will. From the judgment, Mary J. West and some of the other defendants appeal. Affirmed.

Thos. Hanna, for appellants. Ayres & Jones, for appellees.

McCABE, C.J. This was a suit brought by appellee, Emil C. Rassman, as the administrator de bonis non of William Johnson, deceased, with the will annexed, against appellant and all the other appellees as defendants, asking for a judicial construction of the last will of said William Johnson, deceased. After hearing the evidence, the court, at the request of John F. Johnson and others, made a special finding of the facts, and stated its conclusions of law thereon, to which some of the parties excepted. The court rendered judgment in accordance with the facts found and conclusions of law, and Mary Jennie West appealed, making all the other parties plaintiff and defendants appellees in this court. Ella Johnson and William H. Meyers, infants, by their guardian ad litem, Smiley N. Chambers, Ann Cook, Henry McJohnson, Emma Skluner, John F. Johnson, John Hackleman, Mary J. Cayton, and James W. Jones, all appellees, and a part of the defendants below, join in the appeal, and the errors assigned by said appellant, namely: (1) That the court erred in its conclusions of law; and (2) that the court erred in overruling the motion for a new trial. The second assignment of error is waived by the failure of appellants to discuss it. The discussion of the first assignment is confined to the conclusions of law affecting the fifth clause of the testator's will. All other objections to the conclusions of

law are therefore waived, rendering it necessary to set out in this opinion so many of the facts found and conclusions of law only as affect said clause in the will. The court found:

"(1) That heretofore, to wit, on the 5th day of June, 1891, William Johnson died testate, in Marion county, Indiana, leaving no widow or children, or their descendants, or father or mother, surviving him, leaving a last will and testament, which has been duly admitted to probate on the 9th day of June, 1891, in said Marion county; and said Emil C. Rassman has been duly and legally appointed and qualified, and is now acting, as administrator de bonis non with the will annexed of the estate of said William Johnson, deceased. That the following is a true and exact copy of said will, to wit: 'This 20th day of November, 1883, I, William Johnson, of sound, disposing mind and memory, do make and publish this, my last will and testament. First. I direct that all my just debts shall be paid. Second. I direct that Phoebe Duncan have a good bed and bedding; also to have the house and the six acres of land in Washington township, Marion county, Indiana, during her lifetime. At her death, I direct that it shall go to her brother, John Henry. Third. I give to my nephew, David R. Johnson, the 160 acres of land on which he lives in Pike township, Marion county, Indiana. Fourth. I give my niece, Fannie M. Gamble, one bed; also three hundred dollars out of her husband's two notes due me if not paid before my death. If they have been paid, then she is to have that amount out of my estate. Fifth. After the above, I will and direct that all of my property, both real and personal, shall be distributed in equal portions amongst the children of the following named persons, viz.: Susanna Mosier, Margaret Jones, Walter Johnson, Elinor C. Parr, Robert Johnson, Jane Hackleman or Goodrich, Benjamin F. Johnson, James Johnson, L. N. Snapp, Samuel R. Snapp, James J. Snapp. Now, I direct that my executor hold one thousand dollars for the support of Polly Ann Johnson in case that she needs it, having no children. Susanna Mosier's children is chargeable with, or rather taken from their respective shares, the following: twenty dollars and support from 1882 until her death, and burial expenses. In case she outlives me, I direct that my executor see that she is decently buried in my lot in Crown Hill Cemetery. Robert Johnson's children is chargeable with twelve hundred dollars, which I paid for them at different times, with interest from the date of the note I paid for Ben, his son, as surety. Walter Johnson's children is chargeable with four thousand dollars for the farm in Virginia, and the interest on our article of agreement from the date of it, as the article will show. Benjamin F. Johnson's children is chargeable with three hundred dollars and int. from October, 1882. Jane Hackleman or Goodrich children is chargeable with two hundred dollars and int. from 1865. L. N. Snapp's children is to be charged two hundred dollars and int. from 1857; also any note or notes that I may hold against

any of the legatees is to be taken out of their respective shares. I constitute and appoint my nephew, David R. Johnson, executor to this, my last will and testament. I mean and intend that the children of these parties above named, without any regard to numbers, shall be counted as one family, and equally divided amongst them all, as my executor, David R. Johnson, will understand; and if any one is dissatisfied and tries to break this will, shall be cut out of any part in it. [Signed] William Johnson.'

"(2) That said William Johnson died seised in fee simple of real estate, mostly in said Marion county, Indiana, particularly described in the finding, of the aggregate value of \$66,875, and at his death was possessed of a large amount of personal property, including cash, notes, and other effects, and that there is now cash in the hands of the administrator, \$18,000, the estate being solvent, and by many thousands of dollars above all debts, and the above sum is ready for an order of distribution to the parties entitled thereto as hereinafter set out.

"(3) That Susanna Mosler, Margaret Jones, Jane Hackleman, Elinor C. Parr, Walter Johnson, Robert Johnson, Benjamin F. Johnson, and James Johnson, mentioned in said will, were all the sisters and brothers of said William Johnson, testator, and the only brothers and sisters of said testator; and that all of them had died prior to the death of said William Johnson, testator, except Susanna Mosler, who died in July, 1891, and Walter Johnson, who is now living. That L. N. Snapp, Samuel R. Snapp, and James J. Snapp, mentioned in said will, were all and the only brothers of the wife of said William Johnson, testator, and that said wife had no sisters, and all of her said brothers died prior to the death of said William Johnson, testator.

"(4) That the following are all the children of said Susanna Mosler, sister of testator, living at the time of the death of said William Johnson, testator, viz. John J. Mosler, James Mosler, Frederick F. Mosler, Margaret Leonard, Nancy Becknell, and Mary Marshall, all of whom are now living. That the following are grandchildren of said Susanna Mosler, who were living at the time of the death of said William Johnson, testator, viz. Cora S. Woolworth and Estella J. Smith, being children of Jennie Ives, who died prior to the death of said William Johnson, testator, and who was a daughter of said Susanna Mosler; and that they are all the grandchildren or other descendants of said Susanna Mosler by her deceased sons and daughters.

"(5) That the following are all the children of said Margaret Jones, sister of testator, living at the time of the death of said William Johnson, testator, viz. Nancy J. Cayton and James W. Jones, both of whom are now living. That said Margaret Jones left no other children, or other descendants, and said named two children are the only living heirs of said Margaret Jones.

"(6) That the following are all the children of Walter Johnson, brother of tes-

tator, living at the time of the death of William Johnson, testator, viz. John F. Johnson, Jacob H. Johnson, David R. Johnson, Margaret E. Stanbus, and Sarah L. Bailey, all of whom are now living. And the following are grandchildren of said Walter Johnson, who were living at the time of the death of said William Johnson, testator, viz. Walter L. Johnson, Isaac Johnson, Victoria Johnson, John Johnson, Katherine Johnson, Charles Johnson, William Johnson, Minnie Johnson, and Sarah E. Snapp, all of whom are children of William J. Johnson, who died prior to the death of said William Johnson, testator, and who was a son of said Walter Johnson, and all of whom are living; and that there are now no other children or other descendants of the deceased sons and daughters of said Walter Johnson living.

"(7) That the following are all the children of said Elinor C. Parr, sister of testator, living at the time of the death of said William Johnson, testator, viz. John C. Parr and Margaret Richardson, both of whom are now living. That the following are grandchildren of said Elinor C. Parr, who were living at the time of the death of said William Johnson, testator, viz. Eva Jackson, Elizabeth Seybold, Laura Couch, Charles Parr, Martha Parr, and Susan Parr, children of William E. Parr, who died prior to the death of William Johnson, testator, and who was a son of said Elinor C. Parr, all of which said grandchildren are now living; and there are no other descendants of the deceased children of said Elinor C. Parr.

"(8) That the following are all the children of said Robert Johnson, brother of testator, living at the time of the death of said William Johnson, testator, viz. Ann Cook, Henry McJohnson, and Caleb Johnson, all of whom are now living. That the following grandchildren of said Robert Johnson were living at the time of the death of said William Johnson, testator, to wit, Ella Johnson, who is now living, and is a child of Jefferson Johnson, who died prior to the death of said William Johnson, testator, and who was a son of said Robert Johnson; and there are no other living descendants of the deceased children of said Robert Johnson.

"(9) That the following is the only child of said Jane Hackleman, sister of testator, living at the time of the death of said William Johnson, testator, viz. John W. Hackleman, and he is now living; and that the following are the grandchildren of said Jane Hackleman living at the time of the death of said William Johnson, testator, viz. Charles Davis, John C. Sargent, and Fred. C. Sargent, all children of Sarah J. Goodrich, who died prior to the time of the death of said William Johnson, testator, and who was a daughter of said Jane Hackleman; and there are no other living descendants of the deceased children of said Jane Hackleman.

"(10) That the following are all the children of said Benjamin F. Johnson, brother of testator, who were living at the time of the death of said William Johnson, testator, viz. Mary Jennie West and Emma J. Skinner, both of whom are now living. That the following is the grandchild of

said Benjamin F. Johnson, who was living at the time of the death of said William Johnson, testator, viz. Blanch Polson, and she is now living; and there are no other living descendants of the deceased children of said Benjamin F. Johnson. Said Blanch Polson is a daughter of Sarah Frances Polson, who died prior to the death of said testator, and who was a daughter of said Benjamin F. Johnson.

"(11) That the following is the only child of said James Johnson, brother of testator, who was living at the time of the death of said William Johnson, testator, viz. John F. Johnson, and that said John F. Johnson is living. That there is no child or other descendant of any deceased child of said James Johnson now living, nor was there at the time of the death of said William Johnson, testator.

"(12) That the following are all the children of said L. N. Snapp, brother of the wife of testator, living at the time of the death of the testator, viz. William B. Snapp, James J. Snapp, Robert B. Snapp, Mary E. Smith, Catherine Virginia Taylor, George A. Snapp, Julia Ann Booher, all of whom are now living except Julia Ann Booher, who died since the death of said William Johnson, testator, leaving surviving her Samuel Booher, her husband, but no children or other descendants, nor father or mother, surviving her. That the following is a grandchild of said L. N. Snapp, living at the time of the death of said William Johnson, testator, viz. Mary E. Barton, daughter of Jonathan V. Snapp, who died prior to the death of said William Johnson, testator, and who was a son of said L. N. Snapp, deceased. The following are the great-grandchildren of said L. N. Snapp, living at the time of the death of said William Johnson, testator, viz. James Snapp, Mitchell Snapp and ——— Snapp, children of William A. Snapp, who died prior to the death of said William Johnson, testator, and who was a son of said Jonathan V. Snapp; all of which said children, grandchildren and great-grandchildren are now living, except as in this finding stated, and said grandchild and great-grandchildren are all the descendants or heirs of the deceased children of said L. N. Snapp.

"(13) That the following are all the children of said Samuel R. Snapp, brother of testator's wife, living at the time of the death of said William Johnson, testator, viz. Henderson Snapp, W. Benjamin Snapp, Mary Elizabeth Benham, Margaret Jett, Sarah Fleenor, Nancy B. Snapp, Cora Snapp, and Samuel G. Snapp. That they are all now living, and that there are no other children, grandchildren, or other descendants of any deceased child of said Samuel R. Snapp.

"(14) That the following are all the children of said James J. Snapp, brother of testator's wife, living at the time of the death of said William Johnson, testator, viz. Robert S. Snapp and Margaret V. Snapp, both of whom are now living. That the following grandchild of said James J. Snapp was living at the time of the death of said William Johnson, testator, and is now living, viz. William H. Myers, and he is the son of Louisa My-

ers, who died prior to the death of said William Johnson, testator, and who was a daughter of said James J. Snapp. That there are no other children or other descendants of the deceased children of said James J. Snapp, deceased.

"The court further finds that the defendant, Julia Booher, daughter of said L. N. Snapp, is indebted to said estate for principal and interest of a note dated March 5, 1891, in the sum of \$1,369. That the defendant John C. Parr, son of said Ellnor C. Parr, is indebted to said estate by note dated September 27, 1882, in the sum of \$2,006.46, and also jointly indebted with another to said estate by note, principal and interest, in the sum of \$358.62. That the defendant Emma Skinner, daughter of said testator's brother Benjamin F. Johnson, is indebted to said estate upon two notes, dated respectively June 5, 1890, and August 5, 1890, in the sum of \$121. That the defendant Margaret Leonard, daughter of testator's sister Susanna Mosier, is indebted to said estate for principal and interest since July 9, 1890, in the sum of \$122; and that it was the intention of testator that each of said amounts thus due the estate should be deducted from any interest said defendant debtors might have in said estate as devisees or legatees under said will."

"(25) That the children of Susanna Mosier, referred to in said will, are chargeable with \$700, allowed by the circuit court upon the claim of Lyman B. Leonard, for the care and support of said Susanna Mosier during her last illness. Said children are also chargeable with her death and burial expenses, \$114.25; also \$20 and interest from 1882, amounting to \$30.80; also with her support by said testator, as provided in item fifth in said will, in the sum of \$1,560; amounting in all to \$2,405.05. That the children of said Robert Johnson, brother of testator, are chargeable with \$1,200 and interest from 1870, amounting in all to the sum of \$2,712."

"(27) The court finds the contract referred to in the will as an article of agreement between testator and said Walter Johnson, his brother, by which the court finds it was agreed on the 5th day of July, 1869, in consideration of \$240 to be paid annually to testator by said Walter Johnson, or, in case of his death first, then to testator's wife, S. E. Johnson, during her natural life, testator let to said Walter Johnson his tract of land in Rich Valley, Scott county, Virginia; the said Walter to pay the taxes and to hold during the natural lives of testator and his wife; the said Walter and his heirs at the death of the testator to have said tract of land as a part of their distributive share of the estate of said testator at the price of \$4,000, and, if the said distributive share should not amount to this sum, they are to have the tract of land without having to contribute anything to the other heirs of said testator and wife. That the said \$4,000 and interest thereon from the date of said contract up to the death of the testator amounted to \$5,260, and the total amount owing from said Walter to testator at the date of the testator's death, June 9, 1891, was \$6,284.25, and that annu-

is chargeable against said Walter's children under the clause in said will reading that 'Walter Johnson's children are chargeable with \$4,000 for the farm in Virginia, and interest on our article of agreement, as the article will show.' That the children of Benjamin F. Johnson referred to in said will are chargeable with \$300 and interest from October, 1882, amounting in all to the sum of \$456. That the children of Jane Hackleman or Goodrich, referred to in the will of said testator, are chargeable with \$200 and interest from 1865, amounting to \$512. That the children of L. N. Snapp, referred to in said will, are chargeable with \$200 and interest from 1857, amounting to \$608."

The only conclusion of law of which complaint is made in the briefs is the second. It is, in substance, as follows: "Second. That the children described in the fifth item of said will of said decedent, who are entitled to take under the same, are such children of Susanna Mosier, Margaret Jones, Walter Johnson, Elinor C. Parr, Robert Johnson, Jane Hackleman or Goodrich, Benjamin F. Johnson, James Johnson, L. N. Snapp, Samuel R. Snapp, and James Snapp as were living at the death of said testator, and none others, and that none of the grandchildren or other descendants of said persons named in the fifth item of the will, take any portion of said estate; and that, therefore, the only persons entitled to take under said will are the following, namely;" and then follows the names of the 40 persons above set out as legatees, being 18 of the children of the three Snapps, brothers of testator's wife, by counting Samuel Booher, sole heir of one of the Snapp children dying since the testator's death, and 22 of the children of the brothers and sisters of the testator named in the will; and the court concludes "that no other persons take any interest in or part of said estate under and by virtue of said fifth item of said will, and that all the persons so entitled take equally, share and share alike; that the amounts in the special finding of facts found chargeable to the children of Susanna Mosier collectively are chargeable to them equally;" and the court states the same conclusion as to the charges made collectively against the children of Walter Johnson, Benjamin F. Johnson, Jane Hackleman or Goodrich, and L. N. Snapp; and, in addition to the collective charges thus divided among the individuals of the several children of the persons named, must be added to each individual charge, respectively, any charge hereinbefore found against any of such individual children on account of any notes or claims held by said testator against such individual children.

It is insisted with much zeal, learning, and ability on the part of the appellants' attorneys that this conclusion of law is erroneous, because it construes the will so as to require a per capita distribution. They contend that the settled rules for the construction of wills require us to hold that the intent and meaning of the testator is and was that the distribution should be per stirpes, or by the family. Both those who represent portions of the children of some of the persons named in

the will and those who represent grandchildren of some of those persons agree in this contention, but the attorneys for the grandchildren insist further that the will should not only be construed so as to require the distribution to be made per stirpes, or by the family, but so as to include the grandchildren as well as the children of the persons named in the will. In this contention the attorneys for the children are sharply against the counsel for the grandchildren, and join the contention of the appellee that no one is entitled to take under the will but the children of the persons named, and no grandchild can take. It is agreed on both sides that the intention of the testator in regard to the distribution must control the decision of the question, and that such intention must be ascertained from the language employed in the will and the surrounding circumstances. Courts, in construing a will, may look to the circumstances of the testator, the state of his property, and of his family, to assist in arriving at the intention. *Jackson v. Hoover*, 28 Ind. 511; *Daugherty v. Rogers*, 119 Ind. 254, 20 N. E. Rep. 779. In determining the question whether a distribution under a will is to be per capita or per stirpes, the fact that there are several separate and distinct classes of legatees often exerts an important influence. *Henry v. Thomas*, 118 Ind. 23, 20 N. E. Rep. 519; *Wood v. Robertson*, 118 Ind. 323, 15 N. E. Rep. 457. It is insisted by appellants that there are 11 classes of the legatees, consisting of that many families of children; and it is asserted by counsel that this classification is made so marked in other provisions of the will than the one in controversy as to evince a purpose and intent that the legatees should take by such classes or families; and those other provisions relate to the advancements or charges made against certain legatees. Most of these charges against all the children of a family were made for and on account of money or property advanced or aid given to the parent of such family of children, and not for money or property advanced to any of such children. How such charges are to exert an influence in manifesting an intent that the distribution is to be per stirpes, and not per capita, is not made quite clear. That an advancement ought to be charged up to the distributees of an estate arises from the dictates of natural justice, as well as law and equity. However, most of these advancements had not been made to the legatees, but to their parents, and presumably resulted in some benefit to the children; if in no other way, in benefiting their parents. Where one of these parents had enjoyed a large part of the estate of the testator before his death, more than others, justice and equity would require that to be taken into consideration in the distribution of the estate. It could not be charged to the person receiving it, because he was not a legatee, but his children are legatees. It could not, in justice and equity, be charged to legatees who were not children of the parent receiving the benefit. Therefore there was only one way it could in equity and jus-

tice be charged, and that was against the children of the parent receiving the benefit, those children being legatees. These charges do not arise out of any purpose or intent to distribute the estate per stirpes, or by the family; because, if we construe the will to mean and intend a distribution per capita, these charges must necessarily have been made just as they are, even though the testator intended such a distribution. Again, there are a number of charges for advancements made to different legatees individually, and they are not charged against the family to which the individual belonged, but are charged individually. Such charges do not militate against appellants' contention, as appellees suppose, because, if the intent to distribute the estate per stirpes be conceded, the dictates of natural justice would require these charges to be made just as they are,—against each individual to whom the advancement was made, and not to the family of which he is a member. So that we are brought back to the naked language of the will to determine the intent of the testator. When the devise is to several persons belonging to different classes, bearing different degrees of relationship to the testator, and the language of the will leaves the question of distribution in doubt, or the language does not exclude a distribution per stirpes, then the will must be construed as intending a distribution per stirpes, and not per capita. *Henry v. Thomas, supra; Wood v. Robertson, supra.*

Strictly speaking, there are two classes of legatees here,—one class the nephews and nieces of the testator related to him by blood; and the other the nephews and nieces of testator's wife, not related to him by blood. In such a case, if the language of the will leaves the manner of distribution in doubt, or does not exclude the thought of a distribution per stirpes, then the will must be construed to intend a distribution per stirpes. The first sentence of the clause in question, namely, "after the above, I will and direct all my property, both real and personal, shall be distributed in equal portions among the children of the following named persons," etc., while consistent with the thought of a distribution per capita, yet alone, under the circumstances, and in view of the two classes of persons referred to as legatees, and the known rules of construction, might leave the matter of distribution in doubt, and by such rules might require a construction compelling a distribution per stirpes. But in the concluding sentence of that item, as if realizing that such doubt might arise, language is used to clear away any such doubt, namely: "I mean and intend that the children of these parties above named, without any regard to numbers, shall be counted as one family, and equally divided amongst them all," etc. If other parts of the will had made two distinct classes devisees, in that it had provided for a distribution to the children of the testator's brothers and sisters on the one hand and the children of the brothers of his wife on the other, this clause destroyed that classification, or evinced an intention to disregard it,

and direct a distribution to all the children of the testator's brothers and sisters, and all the children of his wife's brothers, precisely the same as if all of said children had been one family. Now, had they all been children of one and the same family, without this clause, all must admit that the rules of construction already alluded to would require the distribution to be made per capita, because there would be nothing for a distribution per stirpes to operate upon, there being but one stock, one race or one family, one blood. It is true, as counsel insist, the words "equally divided amongst them all" may apply as well to a division among classes as among individuals. But here the testator, for the purpose of defining his meaning and intention, has made them all one class, one stock, one blood, one family, by language that cannot be harmonized with any other construction or interpretation of the will. Appellants' counsel contend that the language of the concluding clause of item 5 should be construed to mean that the legatees should be counted as eleven families, instead of one family. This would be doing violence to the plain meaning of the words employed in the will. Words employed in a will must be given their ordinary meaning, unless there is other language in the will which indicates clearly that the testator did not use the words in question in their plain and ordinary sense. There is no language in this will indicating a purpose to employ the language in question in any other than its ordinary sense. It has been suggested that the charges collectively made against the children of Susanna Mosler, Robert Johnson, Walter Johnson, Jane Hackleman or Goodrich, and L. N. Snapp, being for money and property advanced, not to their children made legatees, but to their parents, and, if these collective charges are taken from the shares of the respective sets of children as the will directs, there cannot be a distribution per capita, because such children cannot receive as large a share to each as those children against whom no such charge is made in the will, and that therefore, it must be that the testator intended a distribution per stirpes, or by the family. But this contention encounters the same obstacle as that in favor of a distribution per capita in the language of the will, which, stripped of words not necessary to a consideration, reads thus: "I will and direct that all my property, both real and personal, shall be distributed in equal portions among the children of the following named persons: \* \* \* I mean and intend that the children of these parties above named, without any regard to numbers, shall be counted as one family, and equally divided amongst them all." There must, under this language, be an equal division among either persons or classes named in the will. The contention for a division among classes, or per stirpes, or by the family is impossible, for the same reason that an equal division among the individual legatees is rendered impossible, namely, if the charges made against some of the families are to be taken from their respective shares as the



same item of the will directs, then families belonging to the same class will not share equally. And we have seen that the words "in equal portions amongst" and "equally divided amongst" may apply as well to a division among classes as among individuals. *Henry v. Thomas*, supra. We therefore think the testator could not have intended to apply these words to the different families or classes mentioned in his will. It is true that he charges against the proportion devised to a given family sums advanced to a parent of that family, which were not actually received by the children of that parent; but when it is remembered that such parent stands first in relation to the testator, and the children stand in a more remote relation to him, and that it was probably his closer relation to such parent that moved the testator to make the bequest to the children, and that it would not be just, as between the several families, that advancements to a parent thereof should be disregarded, it was the privilege, and we think the manifest intention, of the testator to make the distribution per capita, charging against the children of any family in equal proportions the sums advanced to their parent, to be deducted from their shares respectively. While this is not logically an equal distribution per capita, there is no reason and no rule precluding the testator from making the provision which we find he intended to make. If we treat the sums advanced to the parent of the family as so much advanced to and equally divided among the children of that family, as was evidently the testator's intention, there is no obstacle in the way of declaring the intent to make a per capita distribution among the legatees. The intention of the testator, when it is not inconsistent with the law, and possible to be effectuated, must be followed by the court in construing the will. And though that intention, as we have seen, is not logically and strictly a per capita or a per stirpes distribution, but partakes somewhat of both sorts of distribution, yet the intention of the testator must prevail. We think the court below correctly concluded that the distribution should be made equal among the 40 legatees, deducting from each share the charges the court found against each legatee.

It is insisted on behalf of the grandchildren of the persons named in the will that the word "children," used in the will, ought to be construed to include and embrace the grandchildren of the persons named, and that they shall share in the distribution of the estate as legatees. This court has held that "the technical legal import of the word 'children' accords with its ordinary and popular signification," and that it does not include grandchildren where there are any persons in existence at the date of the will, or when the bequest or legacy takes effect, answering such meaning of the term, and that in such case the word "children" will never denote or signify "grandchildren." *Cummings v. Plummer*, 94 Ind. 403; *Pugh v. Pugh*, 105 Ind. 552, 5 N. E. Rep. 673. 3 Amer. & Eng. Enc. Law, 230, 231, and authorities there cited. Therefore we are of

opinion that the circuit court did not err in its conclusions of law. The judgment is affirmed.

(125 Ind. 168)

JENNINGS et al. v. MOON et al.

(Supreme Court of Indiana. Oct. 20, 1893.)

RIGHT TO JURY TRIAL—ACTION TO QUIET TITLE—JOINDER WITH ACTION TO ENFORCE LIEN—TENANTS IN COMMON—LIEN ON INTEREST OF CO-TENANT—TITLE.

1. In an action to quiet title to an undivided half of a certain lot, defendants filed a cross complaint setting up title to the entire lot under sheriff's deed executed pursuant to a sale to satisfy a mechanic's lien, and also claiming to own a judgment lien against the property; and the relief prayed was that their title be quieted, or, in default of such relief, that they have a lien on the lot for the money paid by them, and that the undivided half be sold to satisfy the same. *Held*, that such cross complaint was an action to quiet title simply, which is triable by jury.

2. Where an action to quiet title, which is triable by jury, was joined in a cross complaint with one to declare a lien, which is triable by the court, it was not error to refuse defendants' demand to have all the issues raised thereby tried by the court.

3. Where the owner of a lot which is liable to certain liens conveys an undivided half of it by warranty deed to two separate grantees, and pledges personal property with one of them until all liens are satisfied, and the grantee receiving the pledge, on the expiration of the time within which the liens are to be paid, fails to convert the property pledged into money, and apply it to the payment of such liens, but converts it to his own use, he cannot acquire title under such liens to the undivided half conveyed to the other grantee.

4. Where the owner of a lot which is subject to certain liens conveys an undivided half of it by warranty deed, and afterwards conveys the other undivided half by warranty deed to a different grantee, the latter can acquire no title to the undivided half first conveyed, under a sheriff's deed made pursuant to a sale to satisfy such liens, nor acquire any lien thereon for money paid to discharge such liens.

Appeal from circuit court, Howard county: L. J. Kirkpatrick, Judge.

Action by Joseph Moon and Rhoda Moon against Margaret E. Jennings and William L. Jennings to quiet title to a certain lot. From a judgment entered on the verdict of a jury in favor of plaintiffs, defendants appeal. Affirmed.

Charlton Bull and C. N. Pollard, for appellants. Blacklidge, Shirley & Moon and Bell & Purdum, for appellees.

HOWARD, J. On the 1st day of January, 1884, one Freeman and his wife, being the owners of lot 8 in Fry's addition to Greentown, Howard county, Ind., conveyed by warranty deed to appellees the undivided one-half of said lot; and on the 23d day of February, 1884, the said Freeman and wife conveyed, also by warranty deed, to appellants, the remaining undivided one-half of said lot. Prior to said sales, and while said Freeman and wife were sole owners of said lot 8, there were certain mechanics' liens on said lot, for the payment of which Freeman and wife were liable. After said sales to appellees and appellants the said liens were fore-

closed, appellees and appellants being made parties to the suits in foreclosure, and the said lot was sold by the sheriff in discharge of the liens. Appellants became the owners of the sheriff's certificate of sale, and on the expiration of the time for redemption received from the sheriff a deed for the whole of lot 8. This action was begun in the court below by the appellees, who filed their complaint to quiet their title to the undivided one-half of said lot. To this complaint the appellants answered by a general denial. Appellants also filed a cross complaint in two paragraphs in the name of Margaret E. Jennings, and also jointly in the name of both appellants. The first paragraph of the cross complaint is an action to quiet title in appellants to the whole of said lot 8. The second paragraph of the cross complaint sets up the following facts: That on the 5th day of May, 1883, and up to the 28th day of July, 1883, one George W. Price was the owner in fee simple of the whole of said lot 8; that while said Price was the owner of said lot 8, and also of 4 by 54 feet of lot 9, adjacent thereto, Henry Hunt and William Hunt acquired a mechanic's lien on all of said real estate; that on the 10th day of March, 1884, said Hunt and Hunt commenced their action in the Howard circuit court to foreclose said lien against said Price, Freeman, and Freeman, and appellees and appellants, all of whom were duly summoned to appear to said action; that said Hunt and Hunt recovered a personal judgment against said Price for \$206.39, a foreclosure of said lien, and an order of sale of said real estate; that on January 10, 1885, said land was duly sold by the sheriff to said Hunt and Hunt for \$253.97, who received a certificate of purchase therefor; that said Hunt and Hunt duly assigned said certificate to appellant William L. Jennings, who, on January 11, 1886, duly assigned the same to his coappellant, Margaret E. Jennings; that after the year for the redemption of said property so sold had expired the said appellant Margaret E. Jennings received from the sheriff a deed for the whole of said real estate; that from the 1st day of January, 1884, up to the date of said sheriff's sale, the appellees were the owners in fee simple of the undivided one-half of said lot 8, except a certain room in a building on said lot 8, which belongs to the appellant Margaret E. Jennings; that appellees became the owners of said undivided one-half of lot 8 by purchase from said Freeman and Freeman; that appellants were the owners by entireties of the undivided one-half of said lot 8, and the whole of said strip 4 by 54 feet of lot 9, from the 23d day of February, 1884, up to the date of said sheriff's sale; that appellants became the owners of said undivided one-half of lot 8, and of said 4 by 54 feet of said lot 9, also by purchase from said Freeman and Freeman; showing also the purchase of a judgment lien in like manner by the appellant Margaret E. Jennings against all of said lot 8 and said strip of lot 9; averring that appellees are claiming title to the undivided half of lot 8 adverse to the title of said appellant, which claim is a cloud on her title; asking that her title

be quieted against appellees to the whole of said lot 8; that, in default of the court giving her a decree quieting her title, she have a lien on said lot 8 for \$400, and that the undivided one-half thereof so claimed by appellees be sold to satisfy such lien, and other relief. The cross complaint by appellants jointly was similar, and need not be set out, as the same questions arise under both, and we shall refer hereafter to but one cross complaint. A sheriff's deed to appellants for all the land is also shown in the joint cross complaint. A demurrer to the second paragraph of the cross complaint was overruled, and an answer to the cross complaint in general denial followed. The cause was submitted to a jury, who returned a general verdict for the appellees that they are the owners of the land described in the complaint, and that neither the appellants, nor either of them, have any lien thereon; also answering certain interrogatories. Over a motion for a new trial, and also a motion for judgment for appellants on the answers to the interrogatories, the court entered judgment for the appellees. The only error assigned is the overruling of the motion for a new trial.

The first reason given for a new trial is that the court refused the request of appellants to submit the issue made in the second paragraph of the cross complaint to the court for trial. The second paragraph of the cross complaint sets up a state of facts upon which appellants based their claim to the land in question, and concludes with a prayer to quiet their title thereto against appellees. There is a further prayer that, if the court should refuse to quiet title, a lien be declared in favor of appellants. We think this paragraph shows an action to quiet title simply, to give to appellants whatever title of interest they may have in the land. Such an action is triable by a jury. We must, as a general rule, look to the facts pleaded, and not to the prayer of the pleader, to determine the character of the pleading. "The court will look to the substantial averments of the complaint or cross complaint, as the case may be, and from the facts so averred determine whether the action is one of equitable or common-law jurisdiction," and whether it is triable by the court or by a jury. *Martin v. Martin*, 118 Ind. 227, 20 N. E. Rep. 763. See, also, *Puterbaugh v. Puterbaugh*, 131 Ind. 288, 30 N. E. Rep. 519. As was well said by the court to the jury in this case: "Our statute providing for the quieting of title does not confine the question to one of ownership, but it embraces all claims affecting the owner's right to enjoy his land. When one is brought into court in such an action to answer as to his interest, he must set forth all the interest he claims. The complaint challenges him to present every claim of every nature that he has against the land. It is the object of the statute to settle all claims to the land in one action." *Green v. Glynn*, 71 Ind. 336; *Farrar v. Clark*, 97 Ind. 447; *Ragsdale v. Mitchell*, Id. 458; *Faught v. Faught*, 98 Ind. 470; *Watkins v. Winings*, 102 Ind. 330, 1 N. E. Rep. 638; *Railway Co. v. Allen*, 113 Ind. 581, 15 N. E. Rep. 446; *Jackson v.*

Smith, 120 Ind. 520, 22 N. E. Rep. 481; Bissel v. Tucker, 121 Ind. 249, 23 N. E. Rep. 81; Davis v. Lennen, 125 Ind. 185, 24 N. E. Rep. 885. Even if there were two actions joined in this paragraph,—one to quiet title and one to declare a lien,—as appellants seem to intimate, still there would be no error in refusing the request "that the issue made in the second paragraph of the cross complaint and the answer thereto be tried by the court." The issue made in that paragraph to quiet title was triable by a jury; and unless all the issues made by the paragraph were triable by the court the motion should be overruled. By section 409, Rev. St. 1881, equitable actions and defenses are triable by the court, and actions at law by a jury, except as provided in that section; and if a party makes his demand for a trial by the court so broad as to include an issue triable only by a jury, there is no error in refusing the demand. *Ross v. Hobson*, 131 Ind. 166, 26 N. E. Rep. 775; *Lindley v. Sullivan*, 32 N. E. Rep. 738, (decided at last term;) and *Ex parte Kiley*, 34 N. E. Rep. 989, (decided at this term.)

It is contended by appellants that the court erred in admitting in evidence a certain written agreement made between appellants and Freeman and wife, February 23, 1884, at the time appellants purchased from said Freeman and wife their undivided one-half of lot 8. The agreement provided, among other things, that a certain planer, being a "6x24 inch surfacer and matcher," with attachments named, should remain in the possession and use of appellants until Freeman and wife "shall pay off and discharge all taxes and incumbrances against said lot eight and said part of said lot nine;" the intent of this provision being stated to be that Freeman and wife should clear and perfect the title to said real estate before delivery should be made of said planer and attachments, and until they did so the use and possession thereof were to remain with appellants. There is no doubt from this agreement that the planer was pledged for the discharge by Freeman and wife of the mechanics' liens and other incumbrances on lot 8 and part of lot 9, for the payment of which Freeman and wife were liable before the making of the warranty deeds to appellees and to appellants. By the warranties in their deeds, Freeman and wife continued liable for the payment of those liens. We think, therefore, that appellees had a direct interest in the property pledged for the payment of the liens, and that the contract was properly admitted in evidence.

Evidence was submitted to the jury that the value of the planer was equal to or greater than the amount of the liens against all the real estate. The court instructed the jury that if the common grantors of appellees and appellants made to appellees a warranty deed of the part of the land sold to them, and afterwards conveyed the remainder of the land to appellants, and at the same time placed in the hands of appellants the planer and attachments to indemnify them against the payment of the mechanics' liens which it was the duty of Freeman and wife to

pay, and which they agreed to pay within six months, then it was the duty of appellants to convert the pledged property into money at the end of the six months, and apply the same to the extinguishment of the liens; that, if appellants neglected to use diligence in the sale of said property, and the same was lost, they are chargeable with the reasonable value thereof at the time when they ought to have sold it; that, if appellants converted said property to their own use, they are likewise chargeable; that if, at the end of said six months, the evidence should show said property was reasonably worth as much as the amount then due on the mechanics' liens paid by appellants, and that appellants had converted said property to their own use, they are not entitled to hold any liens for moneys paid out by them to remove said mechanics' liens, but the same will be considered as satisfied by such conversion of such pledged property; that appellees, as well as appellants, are entitled to the benefit of any indemnity placed by the grantors of both in the hands of appellants to protect them against mechanics' liens which it was the duty of grantors to pay. If this indemnity was not of the full value of the liens, appellees are entitled to their pro rata share of the value thereof. These instructions correctly stated the law to the jury as to the interests of appellants and appellees in the pledged property. On the failure of Freeman and wife to discharge the mechanics' liens according to the agreement, the pledged property injured to the benefit of both grantees of the real estate, and should have been sold, and the proceeds applied to the payment of the liens. *Evans v. Darlington*, 5 Blackf. 320; *Railway Co. v. McKernan*, 24 Ind. 62; *Scott v. Wallick*, Id. 124; *Cox v. Albert*, 78 Ind. 241; *Rosenzweig v. Frazer*, 82 Ind. 342; *Schindler v. Westover*, 99 Ind. 395; *Stearns v. Marsh*, 4 Denio, 227; *Wilson v. Little*, 2 N. Y. 443; *Ping. Chat. Mortg.* § 9; *1 Cobb. Chat. Mortg.* § 456; *Jones, Pledges*, § 403; *Herm. Chat. Mortg.* § 195; *Jones, Chat. Mortg.* §§ 710, 711, 773. The court instructed the jury that under the evidence the appellees were the owners of the property described in their complaint, and that the sheriff's deeds gave no title to appellants, and that the only question for the jury was to say whether appellants had any lien upon the property, and, if any, for how much. This was clearly right. All the evidence, including that of appellants, showed that appellants and appellees were tenants in common, and that appellants' claim of title through the sheriff's deeds was based upon their payment of the mechanics' liens which were due by the common grantors of both parties; and consequently that, at most, appellants would only be entitled to contribution from appellees for their proportion of such liens paid by appellants. All the authorities are to the effect that a cotenant cannot purchase a lien on the common property, and thus acquire title to his cotenants' interest in the land. *McPheeters v. Wright*, 124 Ind. 560, 24 N. E. Rep. 734, and authorities there cited.

But were there any doubt that the judg-

ment in this case should be affirmed, that doubt would be removed by a consideration of the facts shown in the record that Freeman and wife conveyed to appellees, on January 1, 1884, by warranty deed, the land described in the complaint; and that on February 24th thereafter the same grantors conveyed the other undivided one-half of said land to appellants. When Freeman and wife sold the undivided one-half of lot 8 by warranty deed to appellees, the obligation to pay the mechanics' liens on all said lot remained upon Freeman and wife, and any property owned by them was primarily liable for the payment of the liens. When, therefore, on February 23, 1884, Freeman and wife sold the remaining undivided one-half of said lot to appellants, they conveyed to appellants only the title which they then possessed, which title was coupled with a primary liability to pay the liens on the whole lot. Appellees could be called upon to pay any part of such liens only in the event that the part of said lot sold to appellants proved insufficient to pay the whole lien. Where there are several parcels of land, with an incumbrance upon all of them, and the person owning the whole land and liable to pay such incumbrance sells the different parcels to different persons, the purchasers must contribute to the payment of the liens in the inverse order of their purchases. The last parcel sold must be exhausted for the payment of the whole lien before recourse is had to any of the other parcels, and so back in order to the first parcel sold. Appellants were therefore primarily liable for the payment of all the mechanics' liens in this case, and recourse could be made upon appellees only in case the interest purchased by appellants proved insufficient to pay the whole amount due. *Bank v. Black*, 129 Ind. 595, 29 N. E. Rep. 396, and cases there cited. In *Henderson v. Fruitt*, 95 Ind. 309, it is said that "a mortgagor who has sold a portion of the land covered by the mortgage by warranty deed cannot claim contribution of the purchaser, because he is himself liable for the whole debt. Neither can a subsequent purchaser call upon a prior one for contribution, because such subsequent purchaser acquires only the rights the mortgagor then had." 2 Jones, *Mortg.* §§ 1089-1091. See, also, 15 *Amer. & Eng. Enc. Law*, 831, and authorities cited in notes. The judgment is affirmed.

ers to the complaint were overruled, and defendants appeal. Reversed.

Thompson, Marsh & Thompson, for appellants. Watson & Watson and J. L. Engle, for appellees.

DAILEY, J. This was an action instituted in the court below, in two paragraphs, in the first of which appellees allege, in substance, that on and before December 15, 1884, one Lemuel Wiggins was the owner of a certain tract of real estate, therein described, containing 80 acres; that on said day said Lemuel and his wife, Mary, executed and delivered to the appellees a warranty deed, conveying to them the fee simple of said real estate; that at the time of said conveyance the appellees were, ever since have been, and now are, husband and wife; that said deed conveyed to the appellees the title to said real estate, which they took and accepted, ever since have held, and now hold by entireties, and not otherwise; that appellees hold their title to said real estate by said deed of Lemuel Wiggins, and not otherwise; that on the 24th day of April, 1877, Isaac R. Howard and Isaac N. Gaston, who were defendants below, recovered a judgment in the Randolph circuit court for the sum of \$403.70 and costs against one John T. Burroughs and the appellee Daniel S. Wiggins as partners doing business under the firm name of Burroughs & Wiggins; that on May 12, 1886, said Howard and Gaston caused an execution to be issued on said judgment, and placed in the hands of the appellant Thornburg, as sheriff of said county, and directed him to levy the same on said real estate, and that said sheriff did, on the 25th day of May, 1886, levy said execution on said real estate, or on the one-half interest in value thereof taken as the property of said appellee Daniel S. Wiggins, to satisfy said writ; that pursuant to the levy thereof said sheriff proceeded, by the direction of said Howard and Gaston, to advertise said real estate for sale under said execution and levy to make said debt, and did on the 8th day of June advertise the same for sale on the 3d day of July, 1886, and will on said day sell the same unless restrained and enjoined from so doing by the court; that said Daniel S. Wiggins has no interest in said premises subject to sale thereon; that the appellees hold the title thereto as tenants by entireties, and not otherwise; that the sale of said tract on said execution would cast a cloud on the appellees' title, etc. The second paragraph is the same as the first in substantial averments, except that in this paragraph the appellees set out as a part thereof a copy of the deed under which they claim title to said real estate as such tenants by entireties. The granting clause of the deed is as follows: "This indenture witnesseth that Lemuel Wiggins and Mary Wiggins, his wife, of Randolph county, in the state of Indiana, convey and warrant to Daniel S. Wiggins and Laura Belle Wiggins, his wife, in joint tenancy," etc. Appellants separately and severally demurred to each paragraph of the complaint, and their demurrers were overruled

(135 Ind. 178)

THORNBURG et al. v. WIGGINS et ux.  
(Supreme Court of Indiana. Oct. 19, 1893.)  
HUSBAND AND WIFE—ESTATES—ENTIRETIES—  
JOINT TENANCIES.

Though, where a conveyance is made to husband and wife jointly, without limiting words, they take an estate by entireties, yet if the conveyance is to them expressly "in joint tenancy" they take as joint tenants.

Appeal from circuit court, Randolph county; Leander Monks, Judge.

Action by Daniel S. Wiggins and wife against William H. Thornburg and others to enjoin a sale under execution. Demur-

by the court, to which the appellants excepted, and, refusing to answer the complaint, judgment was rendered in favor of appellees on said demurrers. Appellants appeal, assigning as errors the overruling of said demurrers, and urge that the appellees under the deed took as joint tenants, and hence that the husband's interest is subject to levy and sale upon execution.

A joint tenancy is an estate held by two or more persons jointly, so that during the lives of all they are equally entitled to the enjoyment of the land, or its equivalent, in rents and profits; but upon the death of one his share vests in the survivor or survivors until there be but one survivor, when the estate becomes one in severalty in him, and descends to his heirs upon his death. It must always arise by purchase, and cannot be created by descent. Such estates may be created in fee, for life, or years, or even in remainder. But the estate held by each tenant must be alike. Joint tenancy may be destroyed by anything which destroys the unity of title. Our law aims to prevent their creation, and they cannot arise except by the instrument providing for such tenancy. *Griffin v. Lynch*, 16 Ind. 398. 9 Amer. & Eng. Enc. Law, 850, says: "Husband and wife are, at common law, one person, so that when realty vests in them both equally, \* \* \* they take as one person; they take but one estate, as a corporation would take. In the case of realty, they are seised, not per my et per tout, as joint tenants are, but simply per tout; both are seised of the whole, and, each being seised of the entirety, they are called 'tenants by the entirety,' and the estate is an estate by entireties. \* \* \* Estates by entireties may be created by will, by instrument of gift or purchase, and even by inheritance. Each tenant is seised of the whole; the estate is inseverable, cannot be partitioned; neither husband nor wife can alone affect the inheritance; the survivor takes the whole." This tenancy has been spoken of as "that peculiar estate which arises upon the conveyance of lands to two persons who are at the time husband and wife, commonly called 'estates by entirety.'" As to the general features of estates by entireties there is little room for controversy, and there is none between counsel. Our statute re-enacts the common law. *Arnold v. Arnold*, 30 Ind. 305; *Davis v. Clark*, 28 Ind. 424. Strictly speaking, estates by entireties are not joint tenancies, (*Chandler v. Cheney*, 37 Ind. 391; *Hulett v. Inlow*, 57 Ind. 412;) the husband and wife being seised, not of moieties, but both seised of the entirety per tout, and not per my, (*Jones v. Chandler*, 40 Ind. 589; *Davis v. Clark*, supra; *Arnold v. Arnold*, supra.) It has been said by this court in some of the earlier decisions that no particular words are necessary. A conveyance which would make two persons joint tenants will make a husband and wife tenants of the entirety. It is not even necessary that they be described as such, or their marital relation referred to. *Morrison v. Seybold*, 92 Ind. 302; *Hadlock v. Gray*, 104 Ind. 596, 4 N. E. Rep. 167; *Dodge v. Kinzy*, 101 Ind. 102;

*Hulett v. Inlow*, 57 Ind. 414; *Chandler v. Cheney*, 37 Ind. 395. But the court has said that the general rule may be defeated by the expression of conditions, limitations, and stipulations in the conveyance which clearly indicate the creation of a different estate. *Hadlock v. Gray*, supra; *Edwards v. Beall*, 75 Ind. 401. Having its origin in the fiction or common-law unity of husband and wife, the courts of some states have held that married women's acts extending their rights destroyed estates by entirety, but this court holds otherwise, (*Carver v. Smith*, 90 Ind. 226;) and the greater weight of authority is in its favor. Our decisions hold that neither alone can alienate such estate. *Jones v. Chandler*, supra; *Morrison v. Seybold*, supra. There can be no partition. *Chandler v. Cheney*, 37 Ind. 391. A mortgage executed by the husband alone is void, (*Jones v. Chandler*, 40 Ind. 391;) and the same is true of a mortgage executed by both to secure a debt of the husband, (*Dodge v. Kinzy*, 101 Ind. 105;) and the wife cannot validate it by agreement with the purchaser to indemnify in case of loss arising on account of it, (*State v. Kennett*, 114 Ind. 160, 16 N. E. Rep. 173.) A judgment against one of them is no lien upon it. *Ditching Co. v. Beck*, 99 Ind. 230; *McConnell v. Martin*, 52 Ind. 434; *Othwein v. Thomas*, (Ill. Sup.) 13 N. E. Rep. 564. Upon the death of one, the survivor takes the whole in fee. *Arnold v. Arnold*, supra. The deceased leaves no estate to pay debts, (*Simpson v. Pearson*, 31 Ind. 1;) and during their joint lives there can be no sale of any part on execution against either. (*Carver v. Smith*, supra; *Dodge v. Kinzy*, 101 Ind. 105; *Hulett v. Inlow*, 57 Ind. 412; *Chandler v. Cheney*, supra; *Davis v. Clark*, supra; *McConnell v. Martin*, supra; *Cox's Adm'r v. Wood*, 20 Ind. 54.) The statutes extending the rights of married women have no effect whatever upon estates by entirety. *Carver v. Smith*, 90 Ind. 223. Such estate is in no sense either the husband's or the wife's separate property. The husband may make a valid conveyance of his interest to his wife, because it is with her consent. *Enyeart v. Kepler*, 118 Ind. 34, 20 N. E. Rep. 539. The rule that husband and wife take by entireties was enacted in this territory in 1807, nine years before Indiana was vested with statehood, and has been repeated in each succeeding revision of our statutes. It has thus been the law of real property with us for 86 years. Section 2922, Rev. St. 1881, provides that "all conveyances and devises of lands, or of any interest therein, made to two or more persons, except as provided in the next following section, shall be construed to create estates in common, and not in joint tenancy, unless it be expressed therein that the grantees or devisees shall hold the same in joint tenancy and to the survivor of them, or it shall manifestly appear from the tenor of the instrument that it was intended to create an estate in joint tenancy." Section 2923 provides that the preceding section shall not apply to conveyances made to husband and wife. Under a statute of the state of Michigan, similar in all its essential qualities to our own,

he court held that, "where lands are conveyed in fee to husband and wife, they do not take as tenants in common." (Fisher v. Provin, 25 Mich. 847;) they take by entirety. Whatever would defeat the title of one, would defeat the title of the other. *Manwaring v. Powell*, 40 Mich. 371. They hold neither as tenants in common nor as ordinary joint tenants. The survivor takes the whole. During the lives of both, neither has an absolute inheritable interest; neither can be said to own an undivided half. *Insurance Co. v. Resh*, Id. 241; *Allen v. Allen*, 47 Mich. 74, 10 N. W. Rep. 113.

While the rule of entirety was predicated upon a fiction, the legislative intent in this state has always been to preserve this estate, and has continued the peculiar statute for this purpose. Estates by entirety have been preserved as between husband and wife, although joint tenancies between unmarried persons have been abolished, so as to provide a mode by which a safe and suitable provision could be made for married women. *Carver v. Smith*, 90 Ind. 227. "Where a rule of property has existed for seventy years, and is sustained by a strong and uniform line of decisions, there is but little room for the court to exercise its judgment on the reasons on which the rule is founded. Such a rule of property will be overruled only for the most cogent reasons, and upon the strongest convictions of its incorrectness. \* \* \* It is evident that the legislature of 1881 did not intend to repeal the statutes establishing tenancies by entirety. They simply intended to enlarge in some particulars the power of the wife, which existed already under the Acts of 1852 and the years following. \* \* \* It did not abolish estates by entirety as between husband and wife, but provided that when a joint deed was made to husband and wife they should hold by entirety, and not as joint tenants or tenants in common." *Carver v. Smith*, supra. In *Chandler v. Cheney*, 37 Ind., on page 396, the court says: "It was a well-settled rule at common law that the same form of words which, if the grantees were unmarried, would have constituted them joint tenants, will, they being husband and wife, make them tenants by entirety. The rule has been changed by our statute above quoted." The whole trend of authorities, however, is in the direction of preserving such tenancies, where the grantees sustain the relation of husband and wife, unless from the language employed in the deed it is manifest that a different purpose was intended. Where a contrary intention is clearly expressed in the deed, a different rule obtains. "A husband and wife may take real estate as joint tenants or tenants in common, if the instrument creating the title use apt words for the purpose." 1 Prest. Est. 132; 3 Bl. Comm., Sharswood's note; 4 Kent, Comm., side p. 363; 1 Bish. Mar. Wom. § 616 et seq.; Freem. Coten. § 72; *Fladung v. Rose*, 58 Md. 13-24. "And in case of devise and conveyances to husband and wife together, though it has been said that they can take only as tenants by entirety, the prevailing rule is that, if the

instrument expressly so provides, they may take as joint tenants or tenants in common." *Stew. Husb. & Wife*, §§ 307-310; *Tied. Real Prop.* § 244. "And as by common law it was competent to make husband and wife tenants in common by proper words in the deed or devise," etc., (*Hoffman v. Stigers*, 28 Iowa, 310; *Brown v. Brown*, [Ind. Sup.] 32 N. E. Rep. 1128.) "so it seems that husband and wife may by express words be made tenants in common by gift to them during coverture," (*McDermott v. French*, 15 N. J. Eq. 80.) In *Hadlock v. Gray*, 104 Ind. 599, 4 N. E. Rep. 167, a conveyance had been made to Isaac Cannon and Mary Cannon, who were husband and wife, during their natural lives, and the court say: "The language employed in the deed plainly declares that Isaac Cannon and Mary Cannon are not to take as tenants by entirety. The result would follow from the provision destroying the survivorship, for this is the grand and essential characteristic of such a tenancy. \* \* \* The whole force of the language employed is opposed to the theory that the deed creates an estate in fee in the husband and wife." The court further say: "It is true that where real property is conveyed to husband and wife jointly, and there are no limiting words in the deed, they will take the estate as tenants in entirety. \* \* \* But, while the general rule is as we have stated it, there may be conditions, limitations, and stipulations in the deed conveying the property which will defeat the operation of the rule. The denial of this proposition involves the affirmation of the proposition that a grantor is powerless to limit or define the estate which he grants, and this would conflict with the fundamental principle that a grantor may for himself determine what estate he will grant. To deny this right would be to deny to parties the right to make their own contracts. It seems quite clear upon principle that a grantor and his grantees may limit and define the estate granted by the one and accepted by the other, although the grantees be husband and wife." The court then adopts the language of *Washburn* (1 Washb. Real Prop. 674) and *Tiedeman*, supra. In *Edwards v. Beall*, supra, the court hold that when lands are granted husband and wife as tenants in common they will hold by moieties, as other distinct and individual persons would do. If, as contended by appellees, the rule prevail that the same words which, if the grantees were unmarried, would have constituted them joint tenants, will, they being husband and wife, make them tenants by entirety, then it would result as a logical conclusion that husband and wife cannot be joint tenants, because by this rule, words, however apt or appropriate to create a joint tenancy, would, in a conveyance to husband and wife, result in an estate by entirety; joint tenancy would be superseded or put in abeyance by the estate created by law, —tenancy by entirety. The result of such reasoning would be to destroy the contractual power of the parties where this relationship between the grantees is shown to exist. Any other process of rea-

soning would carry the rule too far, and we must hold it modified to the extent here indicated. Husband and wife, notwithstanding tenancies by entirety exist as they did under the common law, may take and hold lands for life, in joint tenancy or in common, if appropriate language be expressed in the deed or will creating it; and we know of no more apt term to create a joint tenancy in the grantees in this estate than the expression "convey and warrant to Daniel S. Wiggins and Laura Belle Wiggins in joint tenancy." These words appear in the granting clause of the deed conveying the land in question, and the estate accepted and held by the grantees is thereby limited, and they hold, not by entireties, but in joint tenancy. A joint tenant's interest in property is subject to execution. *Freem. Ex'ns*, 125. Judgment reversed, with instructions to the circuit court to sustain the demurrer to each paragraph of the complaint.

(135 Ind. 220)

LOUISVILLE, N. A. & O. RY. CO. et al. v. SMOOT.

(Supreme Court of Indiana. Oct. 18, 1893.)

**ASSIGNMENT OF ERROR—JOINDER—WAIVER OF OBJECTIONS.**

A joinder in error by appellee does not waive his right to insist on an affirmance on the ground that the assignment of error, being joint, presents no question for the consideration of the court.

On rehearing. For former report, see 33 N. E. Rep. 905.

DAILEY, J. We have examined appellants' petition and the authorities cited with some degree of care. Appellants urge, in the first place, that the appellee, by his joinder in error, waived the objection that the assignment of errors did not present any question for the decision of the court. The authorities draw a distinction between a motion to dismiss an appeal on the ground of want of proper parties, defects in the clerk's certificate, etc., and insistence on an affirmance because the record does not properly present the questions relied on as error. Such motion to dismiss must precede the joinder in error, or it will be thereby waived. The authorities cited by appellants in their brief on petition for a rehearing go to the point that after joinder in error it is too late to move to dismiss the appeal for informalities which could only be taken advantage of by that motion. By joining in error the appellee does not waive his right to urge any matter apparent upon the face of the record which entitles him to an affirmance of the judgment. He may insist that the judgment should be affirmed because the assignment of errors presents no question for the consideration of the court, and also, even if it shall be found that such questions are presented by the record, there is in fact and in law no error in the record. In such case, if the court find that the alleged errors are not properly presented, it has nothing to do but to affirm the judgment. The appellee's original brief in this case was on file 19 months

before the judgment of this court was rendered affirming the judgment of the court below, in which he contended that the assignment of error presented no question, and cited several authorities fully sustaining his position. The position of appellee was well taken, and, had counsel made proper application before the decision was rendered, the court would have permitted them to amend their assignment of errors. A rehearing cannot be granted to enable them to make such amendment. *Elliott, App. Proc.* § 556. A joinder in error waives only such objections as may be reached by a motion to dismiss. *Elliott, App. Proc.* § 406, and cases there cited. In section 404, *supra*, the learned author says: "The common plea, or, as we call it, and as it is generally called elsewhere, the 'common joinder,' is, 'there is no error in the record or proceedings.' This plea or answer is in the nature of a demurrer. It admits all that is properly part of the record, and presents an issue of law. Under the old rules it did not admit errors that 'were ill assigned.' Some of our decisions hold that errors not accurately assigned are admitted, but certainly what cannot be assigned as error is not confessed in the common joinder. We suppose all that can be said is that under our system the common joinder waives matters of form, but not matters of substance. That it does not confess specifications not well made is settled beyond controversy. This is the doctrine of the long line of cases which hold that the specifications of error must be definite, as well as of the greater number of cases which hold that reasons for a new trial cannot be made specifications in the assignment of errors. There can be little doubt that under our system of procedure matters of substance which render bad the specifications in the assignment of errors are not made unavailing by a common joinder in error. Matters of form cannot be made available upon such a plea or answer, but matters of substance may be. It has never been the practice to specifically object to such specifications as we have named, but it has always been held that the appellee may make objections after joining in error, that is, he may show that the specification is not sufficient to bring in review the rulings of the trial court." In the case at bar, the joinder in error, following immediately after the assignment of errors, is somewhat out of the usual form, and seems to have been drawn with a view of not waiving objections to the assignment of errors. It reads: "The appellee waives notice, and for answer to the foregoing assignment of errors he says there is no error in the record as therein complained of." In this case there is no question that the appellants made a joint assignment of errors. It makes little difference, in view of the record, whether appellants' motion for a new trial was joint or several, because that motion presents no question to this court. All the matters relied upon in the motion for a new trial relate to the evidence, and, as the evidence is not properly in the record, the questions thus sought to be presented cannot be consid-



ered. The evidence is not in the record, because it affirmatively appears from the bill of exceptions that when it was signed by the judge the longhand manuscript of the evidence, made by a shorthand reporter, was not incorporated therein. *Factory Co. v. Brodhecker*, 130 Ind. 389, 28 N. E. Rep. 185, reaffirmed 30 N. E. Rep. 528. Petition for rehearing overruled.

(185 Ind. 201)

**MILLER v. HART et al.**

(Supreme Court of Indiana. Oct. 17, 1893.)

**INSANE PERSONS—GUARDIANS—NECESSARIES—ACTION AGAINST GUARDIAN AND WARD.**

A complaint in an action against a person of unsound mind and his guardian, alleging the furnishing of board to the ward at the request of the guardian with promise of payment, and asking that the amount due be adjudged a valid claim against the ward's estate, and that the guardian be directed to pay it out of the estate of the ward in his hands, is not demurrable on the ground that it does not seek to make the guardian personally liable, as it states a claim good against the estate, and Rev. St. 1881, §§ 2521, 2551, declare it the duty of the guardian to pay all just debts due from the ward out of the estate in his hands.

Appeal from circuit court, Wayne county; J. F. Kibbey, Judge.

Action by Solomon Miller against Samuel Hart, a person of unsound mind, and Alonzo Osborn, his guardian, for necessities furnished the ward. A demurrer was sustained to the complaint, and plaintiff appeals. Reversed.

Thos. J. Study, for appellant. R. A. Jackson, for appellees.

HOWARD, J. On the 8th day of July, 1857, in the common pleas court of Wayne county, the appellee Samuel Hart was found to be a person of unsound mind, and incapable of managing his own estate, and one Isaac Hart was duly appointed his guardian. On the 3d day of April, 1863, said guardian resigned, and on the 5th day of September, 1864, one John Hart was duly appointed guardian of said appellee. John Hart continued to serve as such guardian until September 16, 1889, when he died; and on September 18, 1889, the appellee Alonzo Osborn was by the Wayne circuit court appointed guardian.

The first paragraph of the complaint states that from the 1st day of October, 1864, until the 18th day of September, 1884, the appellant kept, boarded, clothed, did the washing for, and took care of, the said Samuel Hart, at the special instance and request of the guardian of said Samuel Hart, with the understanding and agreement with said guardian that appellant should be paid and compensated for so doing by said guardian out of the estate of said Samuel Hart in the hands of his guardian; that during said time the said Samuel Hart had no home or place to live other than that furnished him by appellant; that said board, care, and other services were reasonably worth \$4 per week, amounting to \$5,000, which is due and wholly unpaid; that the said Samuel Hart has an estate in the hands of said guardian of the value of \$9,000,—

demanding judgment that the amount due is a legal and valid claim against the estate of the appellee Samuel Hart, and that the appellee Alonzo Osborn, as guardian, be ordered to pay the same out of such estate. The second paragraph of the complaint makes the same statement as to the unsoundness of mind of Samuel Hart, and the appointment of his several guardians, and avers that at no time since he has been under guardianship has he had any home of his own; that he has been incapable of performing labor, and unable to earn his own living; and that in March, 1877, at the special instance and request of the said John Hart, then guardian, and upon the express agreement of said guardian that appellant should be paid therefor, the appellant took the said Samuel Hart into his own house, and furnished him all the necessities of life from that time until the 18th day of September, 1889, and asking that the amount due be adjudged a valid claim against the estate of Samuel Hart, and that the guardian, Alonzo Osborn, be directed to pay the same out of the estate in his hands. A demurrer was sustained to each paragraph of the complaint, and this ruling is the only error assigned in the appeal.

Section 2551, Rev. St. 1881, provides that "the same duties are required of, and the same powers granted to, guardians of persons of unsound mind as are required of and granted to guardians of minors, so far as the same may be applicable;" and in section 2521 of the same statutes it is provided that it shall be the duty of every guardian of any minor, among other things, "to pay all just debts due from such ward out of the estate in his hands." The rule is that a guardian is, in general, personally liable upon his contracts made in relation to his ward or his ward's estate. *Clark v. Casler*, 1 Ind. 243, and notes; *Stevenson v. Bruce*, 10 Ind. 397; *Lewis v. Edwards*, 44 Ind. 333; *Elson v. Spraker*, 100 Ind. 374; *State v. Fitch*, 118 Ind. 478, 16 N. E. Rep. 396; *Baker v. Groves*, 1 Ind. App. 522, 27 N. E. Rep. 640. A plea of such personal liability, however, is one to be interposed in favor of the creditor or of the ward, rather than in favor of the guardian himself. The creditor, having contracted directly with the guardian, may look to him personally for the payment of his claim. It may likewise be insisted, in a proper case, in behalf of the ward, that the contracts of the guardian were not in the interests of the estate, and so the creditor may be compelled to look solely to the guardian for the payment of his claim. But in this case the question is not whether, under the facts stated in the complaint, the appellant might not have sought and obtained a personal judgment against John Hart, the guardian, with whom he had entered into contract for the support of the ward, Samuel Hart. The question is rather whether, under such a state of facts as disclosed in the complaint, the appellant has a just claim against the estate of Samuel Hart, which should be paid by the appellee Alonzo Osborn, present guardian, out of the said estate in his hands. It would seem that this question must

be answered in the affirmative. The complaint shows the furnishing of necessities to the ward at the instance and request of the guardian, with promise of payment. In the first paragraph it is averred that payment was to be made out of the estate of the ward, and in the second paragraph it is simply said that the agreement was that the appellant "should be paid therefor." If, without the order of court, without necessity, or against the interests of his ward, the guardian had attempted to contract debts against the ward's estate, we should have a different question before us. But the guardian's first duty was to take proper care of his ward, and furnish him a suitable home, food, clothing, and other necessities, and the value of such supplies is a proper charge against the ward's estate. Whether the amount named in the first paragraph of the complaint is a reasonable and proper charge is a question for the court, after hearing and considering the evidence. A person of unsound mind, even without a guardian's contract, would be liable for such necessities. *Fay v. Burditt*, 81 Ind. 433; *Copenrath v. Kienby*, 83 Ind. 18; *Woods v. Brown*, 93 Ind. 164. We think, therefore, that the suit was properly brought to subject the ward's estate to the payment of whatever sum the court should find due for necessities furnished the ward in pursuance of the agreement made with his guardian, and, consequently, that the demurrer to the complaint by the appellee Alonzo Osborn, guardian, should have been overruled. *Rooker v. Rooker*, 60 Ind. 550; *Kinsey v. State*, 71 Ind. 32; *Stumph v. Goepper*, 76 Ind. 323; *Ray v. McGinnis*, 81 Ind. 451; *Schouler*, Dom. Rel. (4th Ed.) § 337. The appellee Samuel Hart, being of unsound mind, could appear only by his guardian. The demurrer filed in his name should be stricken out, and the ruling thereon disregarded. The judgment is reversed, with instructions to overrule the demurrer to the complaint by the appellee Alonzo Osborn, and for further proceedings not inconsistent with this opinion.

(7 Ind. App. 645)

OYLER et al. v. McMURRAY.

(Appellate Court of Indiana. Oct. 13, 1893.)

NEGOTIABLE INSTRUMENTS—ACTION ON NOTE—INTERPRETATION.

1. A note which gives the holder the option, at any time before as well as after the time of payment stated in the note, to extend to the drawers and indorsers, or either of them, the time of payment, is not negotiable as an inland bill of exchange, within Rev. St. 1881, § 5506, providing that "notes payable to order or bearer in a bank in this state shall be negotiable as inland bills of exchange, and the payees and indorsees thereof may recover as in case of such bills."

2. A person who signs his name across the back of such note, though he does not incur the liability of an indorser of commercial paper, must be deemed a joint maker or drawer of a nonnegotiable note, and he is not released from liability thereon by an extension of time of payment of such note for one year, under an agreement between his comakers and the holder which he had no knowledge of and did not consent to.

3. A second extension in the time of payment, however, releases such person from liability, the term "any extension," as used in the stipulation in the note providing that the "drawers and indorsers severally waive all defenses on the ground of 'any extension' in the time of payment," being used in the singular sense, and not being intended for an indefinite number of extensions.

Appeal from circuit court, Clinton county; S. H. Doyal, Judge.

Action by James S. McMurray against Samuel P. Oyler and others. From a judgment for plaintiff, defendants appeal. Reversed.

F. F. Moore, Joseph Suit, Wm. A. Johnson, and Dan'l Waite Howe, for appellants. W. R. Moore, O. E. Brumbaugh, and J. Claybaugh, for appellee.

DAVIS, J. The appellee instituted this action in the court below against the appellants, Samuel P. Oyler, Allen Sexson, and Greenup Sexson. The complaint was upon a promissory note and the indorsement thereon, of which the following is a copy: "\$1,000.00. Frankfort, Indiana, January 1st, 1887. One year after date, we, or either of us, promise to pay, to the order of James S. McMurray, one thousand dollars, with interest at the rate of eight per cent. from date, and ten per cent. attorney's fees. Value received, without any relief whatever from valuation or appraisal laws. The drawers and indorsers severally waive presentment for payment, protest, and notice of protest and nonpayment of this note, and all defenses on the ground of any extension of the time of its payment that may be given by the holder or holders to them, or either of them. Due January 1st, 1888. [Signed] G. Sexson. Allen Sexson. Indorsed: Samuel P. Oyler." The complaint proceeds on the theory that all of the appellants executed the note as joint promisors. Appellant Oyler filed a separate answer in four paragraphs, but, so far as the questions presented for our consideration are concerned, it is not necessary to notice either the first or fourth paragraph.

The second paragraph alleged that appellant Oyler executed the note sued on as surety only for his codefendants, Greenup Sexson and Allen Sexson, the principals, and that the payee (the appellee) had afterwards, pursuant to an agreement between him and said Greenup Sexson, (the consideration and terms of which are fully set forth,) and without the knowledge or consent of appellant Oyler, extended the time of the payment of said note for one year. The third paragraph alleged that appellant Oyler executed the note sued on as accommodation indorser only for his codefendants, and that the payee had afterwards, pursuant to three several agreements made between him and said Greenup Sexson, (the consideration and terms of which are fully set forth,) and without the knowledge or consent of appellant Oyler, extended the time for the payment of said note three several times: First, from January 1, 1888, to January 1, 1889; second, from January 1, 1889, to January 1, 1890; third, from January 1, 1890, to January 1, 1891. Demurrers alleging insufficiency of

facts were sustained to each of said paragraphs of answer, appellant Oyler excepting. There was trial, resulting in a judgment against all the defendants, from which all prayed an appeal. The errors assigned by Oyler are that the court erred in sustaining demurrers to the second and third paragraphs of his answer. The errors assigned by the other appellants have been waived by failure to discuss them.

The first question to determine is whether the note is negotiable as an inland bill of exchange. The statute provides that "notes payable to order or bearer in a bank in this state shall be negotiable as inland bills of exchange, and the payees and indorsees thereof may recover as in case of such bills." Section 5506, Rev. St. 1881. The statute does not provide what shall constitute a note, but the term, as used in the section quoted, must be understood in the sense it was then used and defined under the law merchant in the commercial world. *Melton v. Gibson*, 97 Ind. 158; *Glidden v. Henry*, 104 Ind. 278, 1 N. E. Rep. 389. One of the essentials of a negotiable promissory note is certainty as to the time when payment is to be made. 1 *Para. Bills & N. 30*; *Glidden v. Henry*, supra. The stipulation in this note is in these words: "The drawers and indorsers severally waive presentment for payment, protest, and notice of protest and nonpayment of this note, and all defenses on the ground of any extension of the time of its payment that may be given by the holder or holders to them, or either of them." This language evidently means that "the holder or holders of this note may before or after January 1, 1883, extend the time of its payment so as to make it payable at a later date, and the drawers and indorsers severally waive \* \* \* all defenses on the ground of any extension of the time of its payment that may be given by the holder or holders to them, or either of them." The stipulation is binding on the parties thereto, and is enforceable, but necessarily, under the authorities, destroys the negotiability of the note as an inland bill of exchange. *Daniel*, Neg. Inst. § 62; *Glidden v. Henry*, supra; *Coffin v. Spencer*, 39 Fed. Rep. 262; *Bank v. Wheeler*, 75 Mich. 546, 42 N. W. Rep. 963; *Woodbury v. Roberts*, 59 Iowa, 348, 13 N. W. Rep. 312; *Smith v. Van Blarcom*, 45 Mich. 371, 8 N. W. Rep. 90; *Hodge v. Bank*, (Ind. App.) 34 N. E. Rep. 123. It is contended, however, by counsel for appellee, on the authority of *Brown v. Bank*, 115 Ind. 572, 18 N. E. Rep. 56, that the stipulation in the note in suit is distinguishable and materially different from that in the note on which the decision in *Glidden v. Henry* is based. It is true the notes are different in form, but they are not, so far as this question is concerned, different in principle. The holder was not bound by the stipulation in either case to extend the time of payment. The material and controlling fact is that the holder had the option, at any time before as well as after the time of payment stated in the note, to extend to the drawers and indorsers, or either of them, the time of payment. The principle which underlies the rule enun-

ciated in the cases cited is well stated by Judge Zollars in *Glidden v. Henry*, supra, as follows: "The condition is not that something may happen or be done that will mature the note before the time named, thus leaving that time as fixed and certain if the thing do not happen or be not done, but the condition is that the time named may be displaced by another, uncertain, and indefinite time, as the parties may agree."

It is earnestly contended by counsel for appellant, inasmuch as the note is not negotiable by the law merchant, that said Oyler cannot be regarded as an indorser, but that he is a surety who has been discharged from liability by the one extension of time pleaded in the second paragraph of his answer. It is true that, strictly speaking, Oyler, under the circumstances disclosed in the present case, does not stand in the relation of an indorser, under the law merchant. *Pool v. Anderson*, 116 Ind. 88, 18 N. E. Rep. 445. The word "drawers" appears to have been used in the note in suit as synonymous with the word "makers." The allegations in the complaint, in connection with the copy of the note and indorsement therewith filed, show that Oyler signed his name across the back of the note, at or before the delivery thereof, as one of the makers. This is not controverted in the answer, wherein he alleges that he executed the note as surety. In *Pool v. Anderson*, supra, Judge Mitchell says: "As has been remarked, it will be assumed that one who signs his name upon the back of a note, whatever its description may be, does so for some purpose, and that he intends to become responsible for its payment in pursuance of some contractual obligation. If, therefore, the law imports into the transaction no contract whatever, and there is no possibility of raising the ordinary obligation of indorser, it must be assumed, until it appears whether any contract different from that written on the paper was entered into, and what the character of the contract was, that all those other than the payee who signed before the execution of the paper, whether upon the face or back, intended to become bound according to the terms of the note as joint promisors." Although his name does not appear on the face of the note, he may properly, under the circumstances, be called a "surety drawer," "surety maker," or "surety promisor." *Daniel*, Neg. Inst. § 95; *And. Law Dict.* 995, 996; 2 *Amer. & Eng. Enc. Law*, 315, 316; *Brandt*, Sur. § 1. In any view, however, which may be taken of this question, it would be an extremely technical construction of the stipulation contained in the note to hold that he was not bound by the terms of the agreement to waive defense on the ground of any extension of the time of payment. He evidently became bound by the terms of the contract which he signed. It is conceded that he became responsible by virtue of having signed the note, and, if he did not incur the liability of an indorser of commercial paper, he must be regarded as a joint maker or drawer of a note not negotiable under the law merchant. If we are

correct in this conclusion, then, for the reasons stated, he was not released, although he was in fact surety, by the extension of time mentioned in the second paragraph of the answer. In other words, the stipulation in question constituted a valid and enforceable agreement, binding on all the parties who joined in the execution of the note. Because the note was not negotiable under the statute, as an inland bill of exchange, does not destroy the force of the agreement as to appellant, by reason of the fact that he signed his name on the back of the note. Without prolonging the discussion, it will suffice to say our conclusion is that the court did not err in sustaining the demurrer to the second paragraph of the answer. The third paragraph, however, in our opinion, states facts sufficient to constitute a defense to the cause of action. The term "any extension" is used in the singular sense. It was not intended for an indefinite number of extensions of the time of payment. When the appellee, at the end of one year from the date of the note, extended the time of payment until January 1, 1889, such extension was in accordance with the agreement of the parties, as we have before stated, and all the parties, including appellant Oyler, were bound by it, and he was not thereby discharged. The agreement, however, contained in the stipulation in the note, was met and satisfied by that extension. The other extensions, or any of them, if made as alleged, had the effect of discharging him. *Bank v. Chick*, 64 N. H. 410, 13 Atl. Rep. 872. In *Rogers v. Warner*, 8 Johns. 92, a letter of credit was given, stating: "Our sons wish to take goods of you on credit. We are willing to lend our names as security for any amount they may wish;" and it was held: "The true construction of the letter of credit is that it is to be confined to the first parcel of goods." In another case a father wrote that he would hold himself accountable for "any sum" that his son might become indebted, not exceeding \$200; and it was held that "the words are evidently satisfied when any one indebtedness is incurred." *White v. Reed*, 15 Conn. 457. In another case the language was, "I will guaranty the payment of any goods you may sell him;" and it was held to refer "to but one transaction, and not to a number of transactions." *Schwartz v. Hyman*, 107 N. Y. 562, 14 N. E. Rep. 447. When the word "any" is used in a plural sense, a different rule applies; as, for instance, "any facts and circumstances." *Heaton v. Wright*, 10 How. Pr. 79-83. "Any creditors" include all creditors." *Livermore v. Swasey*, 7 Mass. 213-227. And see, also, *Tillou v. Britton*, 9 N. J. Law, 120-128. The language of the stipulation, however, in this case, is not "any extensions," in the plural, but simply "any extension," in the singular. While the pleader, in framing the third paragraph of the answer, may not, in view of the conclusion reached by us, have proceeded in all respects upon a strictly correct theory, yet, as the facts pleaded, for the reasons stated, show, if true, that at least two unauthorized extensions of the time of payment have been

made in such manner as to release the surety, the answer is sufficient to constitute a defense to the action, and therefore the judgment of the court below is reversed, with instructions to overrule the demurrer to the third paragraph of the answer, and for further proceedings not inconsistent with this opinion.

(7 Ind. App. 657.)

**FISHER et al. v. JENKINS.**

(Appellate Court of Indiana. Oct. 13, 1893.)

**REVIEW ON APPEAL—CONFLICTING EVIDENCE.**

Where the evidence is conflicting, the finding of the trial court will not be disturbed on appeal.

Appeal from circuit court, Marion county; Livingston Howland, Special Judge.

Action by Abijah Jenkins against William A. Fisher and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Roberts, Stephenson & Fertig, for appellants. Shirts & Kilbourn, for appellee.

ROSS, J. The appellee filed his complaint in the Hamilton circuit court against the appellants to recover possession of personal property. The venue was changed to the Marion circuit court, and, upon a trial of the cause without the intervention of a jury, the court found in favor of the appellee, and rendered judgment accordingly.

Two errors are assigned on this appeal, but one of which has been discussed by counsel, "that the court below erred in overruling appellants' motion for a new trial." The principal question urged under this assignment is as to the sufficiency of the evidence to sustain the finding. The facts disclosed by the evidence are that in October, 1888, the appellant William A. Fisher sold to the appellant William H. Eller a stock of groceries in Noblesville, Ind., and Eller, after running the business for some two or three months, traded the same to the appellee for certain real estate and foundry stock, the balance to be paid in cash. The disputed questions, as disclosed by the evidence, relate to the sale from Fisher to Eller, the appellants claiming it to have been a conditional sale, the title remaining in Fisher until Eller paid the purchase money, which he had not done when he made the trade with the appellee. The evidence is conflicting, relative to the terms and conditions of the sale from Fisher to Eller, and, the court below having decided against the appellants, this court will not disturb the finding. When there is any evidence to sustain a finding of the court below, this court will not weigh the evidence and determine which side has a preponderance. Judgment affirmed.

DAVIS, J., took no part in the decision of this case.

(7 Ind. App. 662.)

**NIPP v. WISEHEART.**

(Appellate Court of Indiana. Oct. 10, 1893.)

**ASSAULT AND BATTERY—EVIDENCE.**

In an action for assault and battery it appeared that defendant, a man weighing 215

pounds, struck plaintiff, weighing only 130 pounds, and a much weaker man physically, because the latter said that he was as loyal as defendant, if not more so, during the late war. There was no evidence that plaintiff attempted to strike defendant, and the majority of the bystanders testified that he did not do so. There was also evidence that plaintiff suffered for some days from the injury received. *Held*, that a judgment for defendant was reversible error.

Appeal from circuit court, Henry county; E. H. Bundy, Judge.

Action by James Nipp against Richard Wiseheart. From a judgment for defendant, plaintiff appeals. Reversed.

D. W. Chambers, for appellant. L. P. Mitchell, for appellee.

REINHARD, J. Nipp sued Wiseheart in the court below for damages for an assault and battery. Upon issue joined there was a jury trial, and a verdict for the defendant below. A motion for a new trial was overruled, and the only question presented to us relates to the sufficiency of the evidence to sustain the verdict. The rule is too well settled to admit of discussion that, where the evidence is at all conflicting, the judgment will not be disturbed on appeal. But it is equally well settled that when the verdict is entirely unsupported by, or contrary to, the evidence, this court is in duty bound to reverse. The evidence shows that Nipp is a man who weighs not exceeding 130 pounds, while Wiseheart's weight is about 215 pounds, and he is a much stronger man than Nipp. Appellant was on his way to Middletown, in Henry county, to attend a public meeting of a political character. He met Wiseheart in the railway depot at Newcastle, a public place, where a number of persons of both sexes had congregated, awaiting the arrival of trains. The parties greeted each other in an apparently friendly spirit, after which Nipp invited Wiseheart to accompany him and some other parties in going to Middletown to the meeting before mentioned. Wiseheart declined to go, giving as his reason the disloyalty to the government during the late war of some of the leaders connected with the party under whose auspices the meeting was to be held. Nipp replied, asserting his own loyalty to be as good or better than that of Wiseheart. The latter said he had served four years in the Union army, and had participated in a large number of battles, and had been wounded in the right arm, and did not like to have his loyalty called in question. Nipp repeated the assertion that he was as good or a better Union man than Wiseheart, when the latter struck him a blow upon the side of his head, either with his fist or his open hand, causing him to stagger; but it seems that he was prevented from falling to the ground by a wall near by, against which he staggered. Nipp stooped to pick up his hat, which had fallen, and Wiseheart struck him a second blow. Some words passed between the parties after the striking, and Wiseheart was taken away by one of the bystanders. He went before a justice of the peace, pleaded guilty to a charge of assault and battery

that had been preferred against him by some one other than Nipp, and was fined two dollars and costs for the offense. The foregoing evidence was practically undisputed, and the only excuse offered by Wiseheart for his act was that Nipp had impugned his loyalty, and was swinging his arms in an excited manner. There was no evidence whatever that Nipp attempted to strike Wiseheart, and the majority of the eyewitnesses testified that he did not do so. There was some testimony to the effect that Nipp had stated that he was not hurt by the blows, while, on the other hand, there was testimony that he was suffering from pains in his head, of which he complained for several days after the difficulty. From these facts we think it must be concluded that the appellee committed an unjustifiable and inexcusable assault and battery upon the person of the appellant. The only argument made by appellee's learned counsel in favor of affirming the judgment is to the effect that in any event the appellant would be entitled to but nominal damages, and that this court will not reverse a cause for a failure to assess such damages. We are not prepared to say, however, that we must presume that nothing but nominal damages can be assessed in any event. When a peaceable citizen, in a public place, where he has a right to be, and in the presence of a number of other citizens, is subjected to the humiliation of an unprovoked assault and battery by a man of superior physical strength and weight, there is no presumption that the assaulted party is entitled to recover nothing beyond mere nominal damages. It may be true that the jury would have the right to so construe the surrounding circumstances, but the presumption is the other way. Nor can we concede the proposition that because no pecuniary loss was proved, no damages can be recovered. The appellant would have the right to recover full compensation for physical suffering, as well as for any mental agony, endured as the result of the blows. We are of the opinion, therefore, that the motion for a new trial should have been sustained. Judgment reversed.

(7 Ind. App. 575)

#### CHAPLIN v. FREELAND.

(Appellate Court of Indiana. Oct. 13, 1893.)

AUTHORITY OF AGENT—FACTORY MANAGER—EMPLOYMENT OF PHYSICIAN.

The general manager of an ordinary manufacturing business has no authority to bind the owner by the employment of a physician or surgeon to attend an injured employee, in the absence of any facts showing an absolute necessity for such action by the employer.

Appeal from circuit court, Lawrence county; R. W. Miers, Judge.

Action by John T. Freeland against William Chaplin. From a judgment for plaintiff, defendant appeals. Reversed.

M. F. Dunn and J. D. Alexander, for appellant. Giles & Zaring, for appellee.

GAVIN, C. J. This was an action by appellee against appellant to recover for

services rendered to a servant of appellant who was injured while in his employ. There are three paragraphs of complaint, each of which was tested by demurrer and its sufficiency properly presented here. The first paragraph is clearly good. It alleges that appellee was a physician and surgeon, and was called and employed by appellant to treat one Fields, who had been injured; that in pursuance of such employment the services were rendered, and the value, etc. The second paragraph alleges that appellant, Chaplin, was a resident of Canada, doing business at Hiltonville, Lawrence county, Ind., manufacturing buggies, hubs, etc., under the name of the Hiltonville Manufacturing Company; that in November, 1891, one Joseph Fields, during his employment by appellee, was personally injured so as to require the immediate attention of a skilled surgeon, by reason whereof appellee was called, and employed to treat him by appellant, by and through one Frank Marvin, its foreman, and Thomas T. Smith, its superintendent and general manager, and in pursuance of such employment appellee did render the services sued for, of the value of \$200, which is due and unpaid. The third paragraph is similar to the second, except it is here directly avowed that Field was, while at work for appellant in the line of duty, badly injured by the machinery of appellant, his wounds being of so serious a nature as to create an emergency for the immediate attention of a physician in order to save such employee's life. It is also alleged that appellee was called by Marvin, the foreman, and then employed by Smith, the sole general manager and agent, of the said defendant, and who had entire charge and control of the business of said appellant.

The question for determination, as presented by counsel for both parties, is whether, under these facts, the agents Marvin and Smith had authority to bind the appellant. The name assumed by appellant, and under which he did business, cannot in any manner affect his liability, nor can he be held, simply by reason of the assumption of an apparently corporate name, to have assumed liabilities such as might pertain to a corporation. Counsel for appellee thus state the proposition: "It is all narrowed down to one question, viz.: Can a sole general manager and agent bind a nonresident principal by his contracts, or can a nonresident principal delegate to another person authority to take charge of and manage his business, and to contract in his name?" The vital question in this case is not, as counsel put it, "Can the principal delegate to another authority?" etc., but "Has the principal delegated such authority in this instance?" It may be conceded that, under the allegations of this complaint, Smith was the general agent of appellant with reference to the manufacturing business at Hiltonville. This, however, does not authorize him to bind his principal by everything he may do. In *Manning v. Gasharie*, 27 Ind. 399, we find the rule correctly laid down on page 411: "A general agency exists whenever there is a delegation to do

all acts connected with a particular business or employment." Story, Ag. § 17, p. 18. A general agent is presumed to be authorized to do all acts connected with and proper in the transaction of the business intrusted to his care. "Whatever acts are usually done by such class of agents, whatever rights are usually exercised by them, and whatever duties are usually attached to them, all such acts, rights, and duties are deemed to be incidents to the authority confided to them in their particular business, employment, or character." Story, Ag. § 106, p. 94. So long as the agent acts within the general scope of his authority, the principal is bound, even though he transcend his actual authority, unless this limitation upon his authority be known to the one dealing with him. But how is this court to know that the employment of a physician is within the general scope of the duties of a general manager of a buggy factory? In order to sustain this pleading, we must, as a matter of law, take judicial notice that such is the case. We are not in any manner given such information by the pleading, which alleges no facts which would enlighten us. No direct authorities have been cited to sustain the proposition, save a reference to the general principle by which railroads are held liable on such employments in certain cases. Railroad companies occupy a peculiar position with reference to such matters, exercising quasi public functions, clothed with extraordinary privileges, carrying their employees necessarily to places remote from their homes, subjecting them to unusual hazards and dangers. The law has, by reason of the dictates of humanity and the necessities of the occasion, imposed upon such companies the duty of providing for the immediate and absolutely essential needs of injured employees when there is a pressing emergency calling for their immediate action. In such cases, even subordinate officers are sometimes, for the time being, clothed with the powers of the corporation itself for the purposes of the immediate emergency, and no longer. *Railroad Co. v. McMurray*, 98 Ind. 358; *Railroad Co. v. Mylott*, (Ind. App.) 83 N. E. Rep. 185. Many authorities cited in these cases recognize the rule to be that the general manager of a railroad has power to employ physicians on behalf of his road. *Railroad Co. v. McVay*, 98 Ind. 391. It is also a matter of common knowledge that railroad companies habitually and regularly employ surgeons and physicians in connection with the conduct of their roads. If there is such a custom, however, among manufacturers, it has certainly not become so general as to justify us in taking judicial knowledge of it. As we have stated, we have been referred to no case holding it to be within the scope of the duties of a manager of a factory for either an individual or a corporation to employ physicians or surgeons for employees. Neither have we been able to find any such case. The case of *Swasey v. Manufacturing Co.*, 42 Conn. 556, is cited as authority for the proposition in 1 Amer. & Eng. Enc. Law, 365, as applied to a corporation; but the learned editors have misconceived the holding of the case,

which is directly to the contrary, deciding that it must be left to the jury, as a question of fact, whether or not he had such power. We are not prepared, therefore, to hold, as a matter of law, that the employment of a physician or surgeon for injured employes comes ordinarily within the scope of the duties of a general manager of an ordinary manufacturing business. Usually, an injured employe procures and pays for his own attendance, and then, if his employer be in the wrong, recovers this sum from his employer, with his other damages. Whether or not such an extreme case might arise as would justify or require the court to impose on individual employers a duty analogous to that imposed on railroad companies it is unnecessary for us to determine. There are here no facts showing any emergency save the necessity for the immediate services of a surgeon. No necessity for action by the employer is shown. It does not appear but that the injured man was possessed of abundant means to provide for himself, nor does it appear that he lacked friends and relatives both able and willing to provide for him. Our conclusion, therefore, is that the court erred in overruling the demurrer to the second and third paragraphs of complaint. The judgment is therefore reversed, with instructions to sustain the demurrer to these paragraphs, with leave to amend.

(8 Ind. App. 606)

**KELLEY v. KELLEY.<sup>1</sup>**

(Appellate Court of Indiana. Oct. 12, 1893.)

**ASSAULT AND BATTERY — EVIDENCE — DAMAGES — NEW TRIAL — SURPRISE — NEWLY-DISCOVERED EVIDENCE — INSTRUCTIONS.**

1. Error in sustaining a demurrer to a paragraph of the answer is harmless when the facts pleaded in such paragraph are admissible under the general denial, which is also pleaded.

2. The fact that a motion for a new trial is granted as to one of two defendants who join therein does not render it necessary to grant it as to the other.

3. In an action for assault by a wife against her husband, defendant contended that the offense was committed by him on finding plaintiff in criminal intercourse with another man, while plaintiff contended, and there was evidence to show, that the man with whom she was found was an agent of defendant, and sent by him in order to aid in obtaining evidence on which to secure a divorce, and that such man approached her against her desires. There was also evidence that the injuries inflicted on plaintiff by defendant were quite severe. *Held*, that a verdict for \$2,500 would not be disturbed.

4. A new trial will not be granted defendant for surprise on the ground that plaintiff had previously testified differently as to the facts in issue, when there is some evidence that she had not testified differently, and defendant fails to show that he could not, by proper diligence, have had the witnesses present at the previous trial, as well as on a new trial.

5. On motion by defendant for a new trial on the ground of newly-discovered evidence, statements by him in his affidavits that he did not know of such evidence before the trial, and that he could not with reasonable diligence have discovered such testimony, do not show such diligence as to entitle him to a new trial.

6. In an action by a wife against her husband for assault, an instruction that the existence of improper relations between plaintiff and a third person would not justify an assault on her is not objectionable as assuming that an assault was committed, when the jury is informed in other instructions as to what plaintiff must prove in order to recover.

7. In an action for assault, the jury, in estimating damages, may consider any humiliation or loss of reputation and social position accruing to plaintiff from the commission of the offense, though such results of the assault are not pleaded, and there is no evidence as to the amount of damage resulting therefrom.

8. Defendant cannot complain that in overruling his motion for a new trial the court required plaintiff to remit part of the verdict in his favor.

Appeal from circuit court, Harrison county; W. T. Zenor, Judge.

Action by Alice Kelley against Henry H. Kelley and another for assault and battery. From a judgment for plaintiff, defendant Kelley appeals. Affirmed.

Kelso & Kelso, for appellant. J. K. Marsh, for appellee.

REINHARD, J. One of the errors relied upon is the sustaining of a demurrer to the appellant's second paragraph of answer. It is conceded that the facts pleaded in this paragraph were admissible under the general denial, which was also pleaded. The error, if any, was therefore harmless. Elliott's App. Proc. § 637, and cases cited.

Another alleged error is the overruling of the joint motion of appellant and his codefendant for a new trial. The appellant was sued jointly by the appellee with another for damages for an alleged assault and battery. The defendants answered separately the general denial, but the jury returned a joint verdict against the two for \$3,200. The defendants jointly moved for a new trial. The court sustained the motion as to the other defendant, but overruled it as to the appellant, on condition that appellee would remit \$700 of the amount found in the verdict, which was done. It is insisted by appellant's counsel, in argument, that the granting of a new trial to Marrs was a decision by the court that there was a failure of proof as to him at least, and, this being so, a new trial should have been granted both, for the reason that, when the evidence fails as to one of the parties against whom a verdict has been rendered, a joint motion for a new trial by all must be sustained. In support of this contention, counsel cite *Sperry v. Dickinson*, 82 Ind. 132, and *Graham v. Henderson*, 85 Ind. 195, and it must be conceded that these cases go far towards sustaining the position assumed. We have reached the conclusion, however, after careful consideration, that the doctrine contended for is in conflict with the rule adhered to in many cases since those above referred to were decided, viz. that a party cannot be heard to complain of the overruling of a joint motion for a new trial as to him, unless the motion is well taken as to all the parties who join in making it; and, where the rights of the parties are separate and distinct, the party seeking a new trial

<sup>1</sup> Rehearing denied, 86 N. E. 165.



should file a separate motion therefor. Elliott's App. Proc. § 839, and cases cited. Our conclusion, therefore, is that there is no available error in the action of the court in sustaining the motion for a new trial as to Marrs, and overruling it as to the appellant.

It is further contended that the damages are excessive. As we have seen, the verdict was for \$3,200, of which \$700 was remitted. The theory of the defense was that the appellant found the appellee, his wife, in bed with, and in the embraces of, another man, and that therefore, even if he inflicted the injuries upon her of which she complains, the provocation was so great that it should naturally and properly palliate the offense so as to make it but little more than a nominal one. Moreover, it is insisted that no witness testified to the striking except the appellee herself, and that her appearance and conduct subsequent to the difficulty was such as to lead to the conclusion that no serious injury was sustained by her. On the other hand, there was evidence tending to show that the man with whom the appellee was found in bed went there at the instance and request of the appellant, without the invitation and against the desires of the appellee, and for the purpose of enabling the appellant to secure evidence upon which to base an action for divorce, and that the appellant inflicted serious injuries upon the appellee. If the theory of the appellee is the true one, and the jury, by the verdict, in effect found that it was, we cannot say that \$2,500 is in excess of what the appellee was entitled to recover. A man who would thus deliberately debauch and bring shame and dishonor upon the wife he engaged to honor and protect deserves no commiseration at the hands of a court or jury. It is true, the gist of the action was not for the alleged misconduct of the appellant in bringing obloquy and disgrace upon his wife, but for an assault and battery, and yet, if the latter was established, we cannot say that the jury had not the right to take into consideration the entire circumstances leading up to the point of the striking, and this would of course include the acts of the appellant in setting the trap into which he intended his wife to fall. It is not our province to determine which of the theories was the correct one, but the jury having adopted the one relied upon by the appellee, and there being some evidence to support it, we would not feel justified in holding that the result reached was an erroneous one. The rule that, where the evidence is at all conflicting upon the material questions in issue, this court will not undertake to weigh or determine it, is too well established to need the citation of authority in its support; and it is likewise settled beyond controversy that, unless the amount of the verdict is so large as to lead to the conclusion that it must have been the result of prejudice, partiality, or corruption, the judgment based upon it will not be disturbed on appeal. *Railroad Co. v. Acres*, 108 Ind. 548, 9 N. E. Rep. 453; *Farman v. Lauman*, 73 Ind. 568; *Railroad Co. v. Pedigo*, 108 Ind. 481, 8 N. E. Rep. 627.

A further ground for a new trial contained in the motion made in the court below was that the defendants were surprised by the testimony of the plaintiff. In this connection it is claimed that it was shown, by affidavits filed in support of the motion, that in a divorce proceeding between the appellant and appellee the latter testified that her husband did not strike, beat, or kick her, and in effect that appellant did not commit any assault and battery upon her whatever. While we find the affidavits substantially as claimed, it is also true that counter affidavits were filed by the appellee tending to show, not only that she was injured, but that she testified to such injuries upon the trial in the action for divorce. Under the third subdivision of the section of the Civil Code defining causes for a new trial, accident or surprise against which ordinary prudence could not have guarded is made a ground upon which a new trial may be granted. Rev. St. 1881, § 559. But inasmuch as the party who claims to be surprised by the testimony of a witness might have procured a continuance on account of the surprise, if he had moved for it and shown proper grounds, a strong and clear case must be made before a reversal will be grounded upon such cause. *Railroad Co. v. Hendricks*, 128 Ind. 462, 28 N. E. Rep. 58; *Schellie v. Slagle*, 89 Ind. 323. We do not think this is such a case. As we have seen, there was some evidence tending to show that the appellee did testify on the divorce trial that the appellant had struck and beaten her. Moreover, we do not think the appellant has brought himself within the rule that he must show that by proper diligence he could not have had the witnesses at the trial as well as on a new trial. *Smith v. Harris*, 76 Ind. 104.

The appellant also insists that a new trial should have been granted him upon the ground of newly-discovered evidence. The affidavits filed in support of the motion are the same as those relied upon to show surprise. We do not think that the appellant shows himself entitled to a new trial for this cause. If the appellant, at the time of the trial, knew, as he says he did, that the appellee had testified to certain facts at the divorce trial, there is no reason shown why he was not prepared to establish this at the trial of this cause. She being a party to the action, her former admissions would have been competent testimony for the appellant and his codefendant at the trial, even though she did not herself go upon the stand as a witness. No sufficient excuse is shown for the appellant's failure to have the testimony at the trial. See *Allen v. Bond*, 112 Ind. 523, 14 N. E. Rep. 492. The proposed testimony of persons who had seen the appellee the next morning after the difficulty, and saw no marks of violence upon her, or heard her make no complaint, does not add any strength to the appellant's position on the subject. The mere fact that appellant did not, before the trial, know that these persons would testify to the facts he now says he can prove by them, is not a showing of any diligence to discover the testimony. Nor is it sufficient for him to state in his affidavit that

he could not, with reasonable diligence, have discovered such testimony. It was incumbent upon him in his affidavits to set out the facts constituting the diligence used by him, so that the court might be enabled to decide whether due diligence was used, and, if he made inquiries, the time, place, and circumstances should be stated. *Kelsling v. Readie*, 1 Ind. App. 240, 27 N. E. Rep. 583; *Elliott's App. Proc.* § 857, and cases cited. This was not done, and the appellant is in no position to complain.

Objection is made to some of the instructions given. Instructions numbered 4%, 5%, and 6% are complained of. In these instructions the court undertook to define a conspiracy. It is urged that there is nothing in the evidence raising any question as to any conspiracy, and, if there was, it was only for the purpose of entering the appellee's house at the time the difficulty occurred. There was evidence tending to show that Marrs, the appellant's codefendant, was approached by the appellant, and requested by him to accompany the appellant to appellee's house during the night of the difficulty, and that appellant said "he had arranged it" with the party found in bed with the appellee. If there was a conspiracy by which such an arrangement was made, it was proper for the jury to consider it, both for the purpose of connecting Marrs with the transaction, and to show the aggravating circumstances under which the appellee was attacked. At all events, we can see no harm in the mere definition of a conspiracy given the jury by the court. It is quite true, as contended, that a conspiracy to enter the appellee's premises under the circumstances claimed would not necessarily tend to prove an assault and battery. But if the assault and battery was otherwise established, we know of no good reason why the jury might not consider all the facts and circumstances leading up to it.

In the fifth instruction the court told the jury that if it had been shown that appellee had occasionally been meeting, at her place of residence, the person found in bed with her, and had had improper relations with him, such fact would not justify an assault and battery upon her. This instruction is assailed upon the ground that it assumes that an assault and battery was committed. We do not so construe the instruction. The court fully informed the jury in other instructions what was necessary for the appellee to prove before she could recover, and it cannot be presumed that the jury was misled by the instruction complained of. Nor is there any force in the objection that the court failed to tell the jury that the appellee's misconduct might be considered by them in mitigation of the damages. If the appellant desired an instruction upon this point, or demed it necessary to have a more explicit statement of the rules of law upon the subject, he should have prepared an instruction such as he desired given, and requested the court to give it. Besides, in a subsequent instruction, the court fully met the point by informing the jury what they might consider in mitigation. We

do not think the court erred in giving the instructions referred to.

It is further urged that error was committed in an instruction to the effect that the jury, in estimating the damages, might consider the shame, humiliation, loss of honor, reputation, or social position, if any was shown. We think these things may be considered as among the natural results of an unlawful assault and battery. Where this is the case, damages may be recovered on account of the results mentioned, without specially pleading the same in the complaint. *Richter v. Meyers*, 5 Ind. App. 33, 31 N. E. Rep. 582; *Morgan v. Kendall*, 124 Ind. 461, 24 N. E. Rep. 143. Nor does the fact that no evidence was introduced as to the extent of the damage for either of these injurious results render the instruction bad. The jury had the right to consider all the elements entering into the damages, without special proof as to amounts, and estimate the latter by all the evidence given at the trial. We think the instruction is fully sustained by the ruling of the supreme court in *Wolf v. Trinkle*, 103 Ind. 335, 8 N. E. Rep. 110.

It is finally urged that the court erred in annexing a condition to its overruling the motion for a new trial as to the appellant, viz. the condition that appellee remit \$700 of the verdict. If there was error in this, it was not such as harmed the appellant. Had the court overruled the motion without the condition, the judgment would have been for \$700 more than it is; but of this the appellant cannot complain.

This disposes of all the questions presented, and we have not been able to discover any reversible error. Judgment affirmed.

(7 Ind. App. 694)

#### BRADLEY v. SPAIN.

(Appellate Court of Indiana. Oct. 10, 1898.)

##### STATUTE OF LIMITATIONS—APPLICATION—CONTRACTS PREVIOUSLY EXECUTED.

Rev. St. 1881, § 293, providing that on written contracts for the payment of money "hereafter executed" suit shall be brought within 10 years, "provided that all such contracts as have been heretofore executed may be enforced under the existing law limiting the commencement of actions," an action on a note executed prior to the taking effect of such section can be brought at any time within 20 years after the accrual of the right of action, that being the time allowed by the pre-existing law.

Appeal from circuit court, Benton county; J. M. Rabb, Judge.

Action by Elmer E. Spain, administrator of Hezekiah W. Spain, against James S. Bradley, administrator of Joseph Miles, on a promissory note. From a judgment for plaintiff, defendant appeals. Affirmed.

Walker & Gray, for appellant. Merrick & Phares, for appellee.

DAVIS, J. On April 8, 1877, Joseph Miles executed to Hezekiah W. Spain his note for \$100, payable two years after date. Miles died October 2, 1891. The administrator of the Spain estate filed the note as a claim against the Miles estate on the 25th day of November, 1892. The

appellant contends that the action was barred by the statute of limitations. It is conceded that under the law as it stood prior to the enactment of the statute of 1881 the note had 20 years to run. The question turns upon the construction of the fifth clause of the last-mentioned act, which reads as follows: "The following actions shall be commenced within the periods herein prescribed after the cause of action has accrued, and not afterward: \* \* \* Fifth. Upon promissory notes, bills of exchange and other written contracts for the payment of money, hereafter executed, within ten years. Provided that all such contracts as have been heretofore executed may be enforced under the existing law limiting the commencement of actions, and not afterward." Section 293, Rev. St. 1881. The note in suit was executed prior to the taking effect of the act of 1881. The existing law gave 20 years in which to enforce payment. The plain reading of the above proviso shows that the legislature did not intend to curtail this right as to contracts previously executed. In fact, it is expressly stated in the first part of the proviso that the 10-years limitation shall only apply to contracts "hereafter executed." Our conclusion is that the action was not barred. Judgment affirmed.

(7 Ind. App. 685)

**FIRST NAT. BANK OF FRANKFORT v. BREMER.**

(Appellate Court of Indiana. Oct. 11, 1893.)

**BANKS—CERTIFICATES OF DEPOSIT—PAYMENT ON FORGED INDORSEMENT.**

A certificate of deposit was stolen from the payee, his indorsement forged thereon, and, after being accepted and paid by several banks, whose indorsements appeared thereon, it was paid by the bank which issued it. *Held*, that the payee, having been free from negligence, and having, immediately on discovery of the theft, notified the bank which issued it, his relation to such bank was not changed, but it was still indebted to him on the certificate.

Appeal from circuit court, Clinton county; S. H. Doyal, Judge.

Action by Theodore Bremer against the First National Bank of Frankfort, Ind., on certificates of deposit. Judgment for plaintiff. Defendant appeals. Affirmed.

Claybaugh & Claybaugh, for appellant. Bayless & Guenther, for appellee.

DAVIS, J. This action was brought in the court below by appellee against appellant to recover judgment on three certificates of deposit issued by appellant to the appellee,—the first dated July 8, 1888, for \$150; the second dated September 4, 1889, for \$50; and the third dated May 18, 1889, for \$60. The complaint contains three paragraphs, each certificate of deposit forming the foundation for one paragraph. The facts set out in each paragraph are substantially the same, stating that appellee deposited with appellant, a duly and legally incorporated bank, the respective sums of money above set out; that on the 10th day of July, 1890, the certificates were, without fault of appellee,

stolen, and his name forged by way of indorsement on each of said certificates by some one to him unknown, and without his knowledge, authority, or consent; that immediately after he ascertained that said certificates had been stolen from him the appellant was notified by the appellee, by telegraph, that the said certificates had been stolen from him, and requested appellant not to pay the same; that said appellant, without the authority or consent of the appellee, paid the amounts evidenced by said several certificates on said forged indorsements after said certificates, in the course of banking business, had passed through the Wayne County Savings Bank of Detroit, Mich., and the First National Bank of Detroit, and that said certificates had never been indorsed by appellee, and that no part of the same had ever been received by or paid to him, and that appellee before suit had demanded payment of said several amounts of appellant, and had been refused payment.

The only errors relied on are that the court erred in overruling demurrer to each paragraph of the complaint. The objections to the complaint, as we understand counsel for appellant, may be summarized as follows: (1) That the complaint does not state that the appellee notified the appellant, or that the appellant had notice from any other source of the fact that the certificates had been stolen before the payment of the certificates by the appellant. Further, that the complaint does not state the date of the notice to the appellant of the fact that the certificates had been stolen, nor how long it was after the certificates had been stolen that the appellee notified the appellant of the fact. (2) That on the facts stated the appellant is not liable, for the reason that, as a matter of law, it had the right to rely upon the indorsement of the bank who first cashed the certificates, and the subsequent indorsements of the other banks through which the certificates passed, that the signature thereon was genuine. (3) That this action should have been brought against the bank that first cashed the certificates on the forged indorsement, and not against appellant. (4) That the complaint does not show due diligence on the part of the appellee in making demand for payment of the certificates after he became cognizant of the fact that they had been stolen from him. On careful examination and mature consideration, we have reached the conclusion that each paragraph of the complaint states facts sufficient to constitute a cause of action. The appellee was a creditor of the appellant bank. The appellant was, under the contract, required to pay to him, or to his order, the several amounts specified on the surrender of the certificates. On the facts pleaded, and which the demurrer admits to be true, appellee was not in any respect in fault. He was in no manner responsible for the action of appellant in paying the amounts evidenced by the certificates on a forged indorsement to some other bank or person. The loss of the certificates was occasioned by no act of negligence on his part. Immediately on the discovery of

the theft he gave appellant notice in the speediest possible manner of the fact. He did nothing, so far as appears, that he ought not to have done, and he did not fail to do anything that he ought to have done. In making the payments on such forged indorsements, appellant parted with its own money, and not with appellee's money; and the loss thereon was its own, and should not be transferred to appellee, under the circumstances. If it appeared reasonably probable that, but for some negligence on the part of appellee, the appellant could have in some manner protected itself, a different question would be presented. It seems to us clear on the plainest principles of justice that, in the absence of any negligence on the part of appellee, the appellant has not in fact discharged its indebtedness to him. As we have stated, the appellant was indebted to appellee. The other banks owed him nothing. He does not seem to have had any dealings with either of them. His transactions were with appellant. The appellant was his debtor to the amount of the several deposits. The appellant could not rightfully debit his account with any payments made to other banks or persons except such as were made by his order or direction. It is true, these amounts were not ordinary deposits, subject to check, but, so far as the questions involved in this appeal are concerned, there is no difference between the cases. *Janin v. Bank*, 92 Cal. 14, 27 Pac. Rep. 1100; 3 Amer. & Eng. Enc. Law, p. 222. If the certificates in question had originated, not with the appellant, but had come to the appellant for the first time for its acceptance, and the appellee stood in the position, not of the original payee of the certificates, but the payee, holder, or presenter of a forged paper, and prior to the payment thereof by the bank had been guilty of negligence contributing to induce such payment, then, under such circumstances, the rule enunciated in the authorities cited by counsel for appellant could properly be invoked. But here the appellee was not guilty of any negligence contributing to induce the appellant to pay on a forged indorsement. He in no manner, either by active or tacit consent, permitted the papers to leave his possession, or to receive the indorsements of the banks, which the appellant insists it had the right to rely upon. In other words, the relation of the parties and the obligation of appellant to appellee could not be changed without some affirmative act or negligent conduct of the appellee. The appellant has been imposed upon. It paid the certificates of deposit in the usual course of banking business, in doing which the bank no doubt acted in good faith, in the honest belief that appellee had indorsed the certificates. But how can this act on the part of appellant affect the rights of appellee under the circumstances stated in the complaint? As we have before stated, the contention that such payment should be charged against the deposit account of appellee is not sustained, either by reason or authority. It may be conceded to be true that this is, as insisted by counsel for appellant, an im-

portant question affecting every bank doing business, but a bank is not authorized, as against a customer and depositor, to pay the money due such depositor or creditor on certificates of deposit duly issued by it, which have been stolen, and bear the forged indorsement of the payee, in reliance solely on the indorsements of other banks that have prior thereto accepted and paid the certificates. What the rights may be as between the respective banks and indorsees in such cases, we are not required to consider or determine. It is sufficient to say that the debt owing the payee of the certificates has not been discharged by such payment. Judgment affirmed, at costs of appellant.

(7 Ind. App. 667)

### THATCHER v. TURNEY.

(Appellate Court of Indiana. Oct. 12, 1893.)

#### APPEAL—OBJECTIONS TO PLEADINGS—REVIEW.

Where the sufficiency of a complaint is questioned for the first time on appeal by an assignment of error, if either paragraph of the complaint states a cause of action, the assignment will be disregarded.

Appeal from circuit court, Clinton county; S. H. Doyal, Judge.

Action by James W. Turney against Amos M. Thatcher. Judgment for plaintiff. Defendant appeals.

Bayless & Guenther, for appellant. O. E. Brumbaugh, for appellee.

ROSS, J. The judgment appealed from was rendered in an action brought by the appellee against the appellant. The complaint is in two paragraphs, the first being an assumpsit on a quantum meruit, and the second upon an express contract. The appellant answered in three paragraphs, as follows: First, general denial; second, a plea of payment; and, third, a set-off. To the second and third paragraphs of the answers a reply of general denial was filed. Upon a trial of the cause before a jury, a verdict was returned in favor of the appellee, assessing his damages at \$94.

The only errors assigned in this court relate to the sufficiency of the facts alleged in the complaint to constitute a cause of action. The complaint was not tested by demurrer, but its sufficiency is challenged for the first time by an assignment in this court. The second and third errors assigned are separate assignments, calling in question the sufficiency of each paragraph. When the sufficiency of a complaint is questioned for the first time by an assignment of error in this court, such assignment must be predicated upon the entire complaint, and not upon separate paragraphs thereof. *Reyman v. Mosher*, 71 Ind. 596; *McCallister v. Mount*, 78 Ind. 559; *Wagner v. Wagner*, Id. 139; *Trammel v. Chipman*, 74 Ind. 474; *Schuff v. Ramsom*, 79 Ind. 458; *Carr v. State*, 81 Ind. 342; *Haymond v. Saucer*, 84 Ind. 3; *Railway Co. v. Peck*, 99 Ind. 68; *Ludlow v. Ludlow*, 109 Ind. 199, 9 N. E. Rep. 769; *Railway Co. v. Ader*, 110 Ind. 376, 11 N. E. Rep. 437; *Ashton v. Shepherd*, 120 Ind. 69, 22 N. E. Rep. 98; *Board of Com'rs v. Tichenor*,

129 Ind. 562, 29 N. E. Rep. 32. The first assignment is addressed to the complaint as an entirety; hence, if either paragraph thereof states a cause of action, the assignment will not prevail. *Kelsey v. Henry*, 48 Ind. 37; *Carew v. Foster*, 62 Ind. 145; *Leedy v. Nash*, 67 Ind. 311; *Buchanan v. Lee*, 69 Ind. 117; *Higgins v. Kendall*, 73 Ind. 522; *School Tp. v. Hay*, 74 Ind. 127; *Iles v. Watson*, 76 Ind. 359; *Elmore v. McCrary*, 80 Ind. 544; *Stout v. Turner*, 102 Ind. 418, 26 N. E. Rep. 85; *Express Co. v. Rawson*, 106 Ind. 215, 6 N. E. Rep. 337; *Branch v. Faust*, 115 Ind. 464, 17 N. E. Rep. 898. The first paragraph of the complaint is admittedly good. Judgment affirmed.

(7 Ind. App. 597)

**KINSER et al. v. DEWITT.**

(Appellate Court of Indiana. Oct. 10, 1893.)

**TRESPASS — ACTION AGAINST NONRESIDENTS OF COUNTY — VENUE — CONSTRUCTION OF SEWER — INJURY TO ABUTTING LAND.**

1. Rev. St. § 307, provides that an action for injuries to real property must be brought in the county where the subject of the action is situated. Section 308 provides that in such actions process may issue to and be served in any county in the state. *Held*, that the circuit court of the county in which land is situated has jurisdiction of the persons of defendants residing in another county of the state in an action for damages for injury to such land, where defendants appear and file a plea to the jurisdiction.

2. Contractors, in constructing a sewer for a city, have no right to go beyond the lines of the street on which the sewer is being constructed, and deposit earth on a lot abutting on such street, without first having the damages assessed and paid or tendered to the owner.

3. The contractors, and not the city, are liable in such case to the abutting owner for the injury to his property.

Appeal from circuit court, Henry county; E. H. Bundy, Judge.

Action by Cynthia A. De Witt against Thomas W. Kinser and others to recover damages for trespass and injury to real property. From a judgment for plaintiff, defendants appeal. Affirmed.

Wm. S. Diven and E. B. McMahan, for appellants. J. C. Shuman, for appellee.

ROSS, J. This appeal is prosecuted from a judgment rendered in an action brought by the appellee against the appellants for trespass in injuring appellee's real estate by wrongfully entering and depositing large quantities of earth thereon. The action was commenced in the Madison circuit court, and the venue changed, on the application of the appellants, to the Henry circuit court. Before making the application for a change of venue the appellants filed their verified answer attacking the jurisdiction of the court over their persons, neither one of whom, it was alleged, was a resident of Madison county, but that they were residents of Delaware and Vigo counties. To this plea a demurrer was sustained by the court, and this ruling presents the first question in the record to be considered on this appeal. Section 339, Rev. St. 1881, provides that "the defendant may

demur to the complaint when it appears upon the face thereof either—First, that the court has no jurisdiction of the person of the defendant or the subject of the action." And section 343, Rev. St. 1881, provides that when any of the matters enumerated in section 339 as cause for demurrer, except for misjoinder of causes, do not appear upon the face of the complaint, the objection may be taken by answer, and all objections not taken, either by demurrer or answer, shall be deemed waived, except only the objection to the jurisdiction of the court over the subject of the action, or that the complaint does not state facts sufficient to constitute a cause of action." "Provided, however, that the objection that the cause was brought in the wrong county, if not taken by answer or demurrer, shall be deemed to have been waived." A personal judgment rendered by a court without having acquired jurisdiction of the persons against whom it is rendered, either by personal service of process or by appearance, is absolutely void, and will be so treated even in a collateral attack. *Mitchell's Adm'r v. Gray*, 18 Ind. 123; *State v. Ennis*, 74 Ind. 17; *Cavanaugh v. Smith*, 84 Ind. 380. "Objections to the jurisdiction over the person must be taken in the first \* \* \* by demurrer, if the want of jurisdiction appears upon the record, and by plea or answer setting up the facts showing the want of jurisdiction, if the facts do not otherwise appear of record." *Newell v. Gaiting*, 7 Ind. 147; *Keiser v. Yandes*, 45 Ind. 174. Jurisdiction over the person, however, is admitted by a full appearance to the action. *Eldridge v. Folwell*, 3 Blackf. 207; *Shirley v. Hagar*, Id. 225; *Lane v. Fox*, 8 Blackf. 58; *Railroad Co. v. Combs*, 13 Ind. 490; *Free v. Hawthorth*, 19 Ind. 404; *Cox v. Pruitt*, 25 Ind. 90; *Smith v. Jeffries*, Id. 376; *Garner's Adm'r v. Board*, 27 Ind. 323; *Street v. Chapman*, 29 Ind. 142; *Hamrick v. Gravel Road Co.*, 32 Ind. 347; *Insurance Co. v. Johnson*, 46 Ind. 315; *Slauter v. Hollowell*, 50 Ind. 286. An action to recover damages for trespass to real estate is local in its nature, and can be brought only in the county in which the premises are situated. *Ham v. Rogers*, 6 Blackf. 559; *Pritchard v. Campbell*, 5 Ind. 494; *Loeb v. Mathis*, 37 Ind. 306; *Du Breuil v. Pennsylvania Co.*, 180 Ind. 137, 29 N. E. Rep. 909. Section 307, Rev. St. 1881, provides that "actions for the following causes must be commenced in the county in which the subject of the action, or some part thereof is situated, first, for the recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property." Jurisdiction over the subject-matter was in the Madison circuit court, and this action could not be brought in any other county and the court have jurisdiction of the subject-matter. The statute having defined the court having jurisdiction over the subject-matter of the action, the action must be brought in that court; and jurisdiction over the persons of the defendants, who were residents of another county, must be obtained in some manner provided by

the statute, if any such provision has been made. In the case of *Ham v. Rogers*, supra, which was an action brought in the Montgomery circuit court against residents of Clinton county for a trespass to real estate situated in Montgomery county, process was issued by the Montgomery circuit court to the sheriff of Clinton county, and was duly served. The defendants, by an attorney, appeared specially, and moved to quash the writ, and the motion was sustained. The supreme court, in reviewing the action of the lower court, says: "The plaintiff contends that this action, being local, could be brought only in Montgomery county, the trespass having been there committed, and that it could only be so brought by sending the writ to Clinton county. It is no doubt true that the suit would lie in the county only in which the trespass was committed, (*Livingston v. Jefferson*, 1 Brock. 203,) but it does not follow that the process can in such case be sent to another county. The process can only be sent, as we have already observed, when there is a statute authorizing it; and there is no statute authorizing it under the circumstances of this case." We have a statute now, however, which specially provides that in cases of this kind process may issue to and be served in any county in the state. Section 308, Rev. St. 1881. It is not contended by the appellants that the process was irregular, or was insufficient, but simply that the action should have been brought in the county in which one or the other of them resided, and not in the county where the trespass was committed. We think their contention untenable, in view of the statute and the many cases already cited. There was no error in sustaining the demurrer to the plea in abatement.

The sufficiency of the complaint is assailed in this court only by an assignment that it does not state facts sufficient. Counsel have not specifically designated wherein the complaint is defective, and we have noticed none which would warrant us in holding it to be insufficient when assailed for the first time in this court.

The error assigned to which our attention has been more particularly called, and upon which the appellants rely for a reversal of the court below, relates to the ruling of the court in sustaining the demurrer to the second paragraph of their answer. In this answer it is averred that the real estate upon which the trespass is alleged to have been committed abuts on a public street in the city of Anderson, along which the common council of said city, prior to the alleged trespass, ordered a sewer to be constructed, the same being located in said street immediately adjoining the appellee's property, the necessary resolutions for the improvement having been passed, and the notice of their passage, of the assessments of damages and benefits, and of the letting of the contract for the work having been given; that the appellants were awarded the contract by said common council for the construction of said sewer according to the plans and specifications adopted by them therefor; that appellants "proceeded to the execu-

tion of said work, and executed the same in all respects according to the plan and specifications therefor, and that the acts complained of were necessarily done in the necessary excavation and completion of said work, and in no other way or manner, and for no other purpose." The contention of appellants is that, if the construction of the sewer necessitated the placing of earth upon appellee's property in making the proper excavations,—and they alleged it was,—whatever injury she might sustain thereby was taken into consideration in assessing her damages and benefits, and that she has no right of action against them therefor. The right of a city to construct sewers on and along its streets and alleys is regarded as incident to its general powers over the same. *Leeds v. City of Richmond*, 102 Ind. 372, 1 N. E. Rep. 711, and cases cited. Under the act of March 8, 1889, (*Elliott's Supp.* §§ 812-821,) special provision has been made for the construction of sewers by cities and incorporated towns along streets and alleys, but no right is conferred by that act, or any other, to the knowledge of this court, to take private property without first having the damages assessed and tendered. From the facts alleged in the answer under consideration, it is shown that the sewer which the appellants undertook to build was to be built on and along a street upon which appellee's property abutted, that notice of the passage of the resolution for said improvement was published at a time and place "when and where all property owners along the line of said proposed improvement could make objection to the necessity for the construction of said work." The power granted to the appellants by the city of Anderson to construct a sewer along one of its streets conferred no authority on them to go beyond the limits of the street and enter upon the premises of the appellee; neither did it authorize them to put dirt upon her lands, either to her inconvenience or the injury of her property. The answer wholly fails to show any right to do the acts complained of; hence there was no error in sustaining the demurrer to it.

It is also urged that if there is any liability for the acts complained of it exists against the city, and not against the appellants. This contention is not tenable. The city of Anderson could not authorize the appellants to do an unlawful act so as to shield them from liability. It granted them the right to construct a sewer along one of its streets, and if they, in the construction thereof, unlawfully entered upon appellee's property, to her injury, they alone are answerable therefor. Judgment affirmed.

(7 Ind. App. 557)

STRINGER et al. v. BREEN.

(Appellate Court of Indiana. Oct. 11, 1893.)

ATTORNEY AND CLIENT—ACTION FOR SERVICES—VALUE—EVIDENCE—REVIEW ON APPEAL.

1. In an action for legal services, where the employment is denied, records and pleadings in the actions for which the services were

rendered are admissible as tending to show an employment.

2. They are also admissible as tending to show the value of the services.

3. Where defendants, on cross-examination of plaintiff, bring out the value of certain legal services other than those sued for, they cannot on appeal complain of the presence of this evidence in the case, though foreign to the issues.

4. Under a general denial defendants cannot show that after the performance of the services it was agreed that plaintiff's compensation should be a certain amount.

5. Though, under the general denial, letters between the parties are not admissible to show that after performance of the services they agreed on an amount which should be paid plaintiff therefor, his letters are proper subjects to cross-examine him on as tending to show the value put on his services by himself.

6. Defendants having cross-examined plaintiff as to certain of his letters, he was properly allowed to give in evidence other letters of his on the same subject to defendants.

Appeal from circuit court, Allen county; C. M. Dawson, Judge.

Action by William P. Breen against Elza T. Stringer and others for legal services. Judgment for plaintiff. Defendants appeal. Affirmed.

T. E. Ellison, for appellants. Breen & Morris, for appellee.

LOTZ, J. The appellee sued the appellants to recover for legal services alleged to have been rendered them in two actions, one in the Allen superior court, and one in the Allen circuit court. His complaint was in one paragraph, being a common count, accompanied by a bill of particulars. The appellants answered separately, (1) the general denial, and (2) payment. Elza T. Stringer also filed an answer of set-off, but, as the court struck out all the evidence relative to this answer, and no complaint is made of such ruling, it will be unnecessary to consider it further in disposing of the question presented on this appeal. The cause was submitted to a jury, and a verdict in the sum of \$180 returned in favor of appellee, and final judgment followed. The only error assigned in this court is the overruling of the motion for a new trial.

It is insisted that the trial court erred first in permitting appellee to introduce in evidence certain records and pleadings in the actions for which the services were rendered. There was no error in this. The employment of the appellee was denied. These proceedings tended to show his employment, and the character of the services rendered, and formed a proper basis from which to determine the value of such services. They also tended to corroborate the testimony of the appellee that he was employed and rendered services.

The appellants, on the cross-examination of the appellee, brought out the fact that he had rendered services in another case for Elza T. Stringer alone, the appellant Ellen R. Stringer not being a party thereto. The appellants then sought to show by such cross-examination that such services were rendered without any employment, and attempted to discredit the appellee before the jury as an attorney, by

such cross-examination. Appellee's counsel, upon a re-examination, went fully into such employment, and the character of the services rendered, but did not attempt to prove the value of such services. On a recross-examination, the appellants brought out the value of such services. This evidence was foreign to the issues: no claim for such services was made in the complaint. This objectionable matter was voluntarily brought into the case by appellants. To permit them now to predicate error upon it, and secure a reversal, would be to allow them to take advantage of their own wrong. This contention cannot prevail.

Complaint is made of several other rulings of the court in the admission of evidence, and of certain remarks of the court in the presence of the jury, and of certain instructions given and refused. As most of these objections relate to the same question, we will not consider them in detail. Appellants' counsel contends that the main question in the case is as to the effect of certain letters which passed between the parties. The matter to which such correspondence relates was also brought into the case by the appellants in the cross-examination of the appellee. It is insisted that such correspondence establishes a contract between the parties to the effect that after the services were rendered it was agreed that appellee's compensation should be a certain amount. If appellants' position be correct, we do not see how it can avail them under the issues. It was conceded on the trial that appellee had rendered some service. The only questions with which the jury then had any concern were for whom the services were rendered,—one or both of appellants,—the value of such services, and whether or not the same had been paid. If the defense for which appellants contend has been proved by the evidence, they cannot avail themselves of it, for they have not pleaded it. Neither settlement, accord and satisfaction, nor account stated, can be established under the general denial or an answer of payment. They are each affirmative defenses. They admit the cause of action declared on in the complaint, but endeavor to avoid it by interposing affirmative new matter. To be available, they must be specially pleaded. 1 Work, Pr. § 598; 3 Work, Pr. pp. 339, 340.

Some of the letters referred to were first brought into the controversy on the cross-examination of the appellee. We think they were proper subjects of cross-examination, as they tended to show the value put upon his services by appellee himself, and what payments had been made. It was also proper for appellee to give in evidence such other letters as he had written to appellants on the same subject, but in the state of the issues such evidence could not be considered for the purpose of establishing a defense not pleaded. The verdict of the jury conclusively shows that no such defense was established, and therefore neither the remarks of the court nor the instructions given did any harm to any one. Under the circumstances, the refusal of the court to give the instructions asked by appellants, or giving the



one as modified, cannot be considered reversible error. Some of those refused were fully covered by other instructions given, and some of them related to an issue not in the case. We have examined the court's charges bearing on the other questions which arise in the case. No particular objection is pointed out to any of them. We think there was no error in giving them. The other questions presented relate to the sufficiency of the evidence to support the verdict against one or both of the appellants, and that the verdict is excessive. Upon these questions the evidence is conflicting. This court will not weigh it. We find no reversible error in the record. Judgment affirmed, at costs of appellants.

(7 Ind. App. 573)

JESSUP v. JESSUP et al.

(Appellate Court of Indiana. Oct. 11, 1893.)

INQUISITION OF LUNACY—PROCEDURE—PRODUCTION OF LUNATIC IN COURT—WHEN NECESSARY.

1. Where a complaint states a cause of action entitling a plaintiff to some relief, though not to all demanded, it is error to sustain a demurrer thereto for want of sufficient facts.

2. Rev. St. 1881, § 2545, providing that whenever any one shall represent to the court having probate jurisdiction that an inhabitant of the county is of unsound mind, and incapable of managing his estate, an issue as to such person's sanity shall be tried by a jury, authorizes any person to institute such proceedings.

3. In such a proceeding it is not necessary to join as a party defendant a person who previously instituted like proceedings, in which a judgment was rendered, appointing one of defendants guardian of the person whose insanity is in issue, but which judgment is claimed to be void because rendered without jurisdiction of such person.

4. In case the production in court, required by Rev. St. 1881, § 2545, of one whose sanity is at issue, is dispensed with under Rev. St. 1881, § 2547, providing that it may be dispensed with if the court is satisfied that the person cannot be produced in court without injury to his health, it is necessary that process be served on him in order to give the court jurisdiction.

Appeal from circuit court, Greene county; George W. Bnff, Judge.

Proceeding by Ella Jessup to determine the sanity of John W. Jessup, one of defendants. From a judgment sustaining a demurrer to the petition, petitioner appeals. Reversed.

Fowler & Pickens and Cavins & Cavins, for appellant. Emerson Short, for appellees.

ROSS, J. The appellant filed her complaint in the court below, alleging, in substance, that she is the wife of the appellee John W. Jessup, who is a resident of said Greene county, and a person of unsound mind, and incapable of managing his own estate, consisting of personal property and real estate of the value of \$10,000. She then avers that the appellees Frederick L. Jessup and Charlotte Jessup have the charge and custody of said John W. Jessup; that said Frederick L. Jessup is pretending to act as guardian of said John W. as an insane person, by virtue of an

appointment from the Greene circuit court, which appointment she avers is illegal and void, because made without summons, notice, or process of any character whatever having been issued by the clerk of the Greene circuit court against said John W. Jessup, or against any person or persons having charge or custody of him; that no summons, notice, or process of any character was ever served upon him, or upon any person having charge or custody of him; that the record fails to show that any summons, notice, or process of any kind was ever served on him, and that he never had any notice of said proceedings; that he was not present in court, and that the record of said proceedings shows that he was not in court, and that he had no notice whatever of said proceedings. It was also averred that said John W. Jessup resided in said county, and within eight miles of the county seat thereof, at the time said proceedings were instituted and had, and that he could have been produced in court without injury to his health, and that the record of said proceedings does not show that he could not be produced in court. It is also disclosed by the allegations of the complaint that the judgment complained of was rendered in September, 1887, and that the appellant did not become the wife of said John W. Jessup until in January, 1889. After alleging that the appellees Frederick L. Jessup and Charlotte Jessup have deprived said John W. Jessup of his property and liberty, she asks that they be required to produce him in court, and that his sanity be inquired into, and, if found to be insane, and incapable of managing his estate, that a guardian be appointed, etc. The complaint is in two paragraphs, the above summary embracing, in substance, all of the material parts of each paragraph. A demurrer, filed by the appellee Frederick L. Jessup, was sustained to each paragraph of the complaint, and upon this ruling is predicated the errors assigned for review.

We have not been favored with a brief by the appellees, hence are not advised upon what theory the court held the complaint to be insufficient. The demurrer was addressed to each paragraph, and contained four reasons, namely: First, "that the plaintiff has not the legal capacity to sue;" second, "that neither of said paragraphs state facts sufficient to constitute a good cause of action;" third, "that in each paragraph of the complaint two causes of action have been improperly joined;" and, fourth, "that there is in each paragraph of said complaint herein a defect of parties defendant in this: that Isaiah D. Myers is not a party." If the complaint stated a cause of action entitling the appellant to some relief, although not all demanded, it was error to sustain the demurrers thereto for want of sufficient facts. *Morgan v. Railway Co.*, 130 Ind. 101, 28 N. E. Rep. 548. The theory of the complaint, judging from its general tenor, is an application under the statute (section 2545, Rev. St. 1881) to have the sanity of said John W. Jessup inquired into, and, if found to be of unsound mind, and incapable of managing his own es-

tate, for the appointment of a guardian. Section 2545, *supra*, is as follows: "Whenever any person shall, by statement in writing, represent to the court having probate jurisdiction in any county that any inhabitant of such county is a person of unsound mind and incapable of managing his own estate, such court shall cause such person to be produced in court, and shall cause an issue to be made by the clerk of such court, denying the facts set forth in such statement; which issue shall be tried by a jury, to be impeached under the direction of said court." It seems clear, therefore, under this statute, that any person may file the petition; hence the first cause for demurrer was not well taken.

The facts alleged concerning the appointment of the appellee Frederick L. Jessup by the Greene circuit court as guardian of said John W. Jessup is simply matter in anticipation of defense. While it is not always good or safe pleading under the Code to anticipate in a complaint the defendant's defense, it is often done, and when pleaded, and properly avoided, will not weaken the complaint. If a plaintiff anticipates and sets up in his complaint a defense which, if pleaded by the defendant, would be a bar to the action, and he does not also allege facts sufficient to avoid such defense, his complaint will not be sufficient to withstand a demurrer for want of facts. *Morgan v. Railway Co.*, *supra*. Should Isaiah D. Myers, who filed the petition in the proceedings set forth in the complaint, under which the appellee Frederick L. Jessup claimed to be acting, have been a party to this action? We think not. While he was the petitioner, he was not a party to the judgment, and would not be affected by its reversal. But, even if he would be affected, he was not a necessary party, for the reason that this action is not to set aside that judgment, but is an independent action, in which that judgment is simply anticipated as a defense. This leads to the consideration of the vital question in the case, *viz.* are the facts pleaded sufficient to avoid the defense anticipated in the complaint? Counsel very earnestly insist that the facts pleaded show that the judgment of the Greene circuit court, appointing Frederick L. Jessup guardian of his coappellee John W. Jessup, is void for want of jurisdiction. It is too well settled to require this court to elaborate on the question that a personal judgment rendered by a court without jurisdiction of the person is an absolute nullity. *Moyer v. Bucks*, 2 Ind. App. 571, 28 N. E. Rep. 992; *Mitchell v. Gray*, 18 Ind. 123; *Nicholson v. Stephens*, 47 Ind. 185, and cases cited; *State v. Ennis*, 74 Ind. 17; *Cavanaugh v. Smith*, 84 Ind. 380. Jurisdiction over the person of a defendant can be acquired either by service of process, as provided by the statute, or by his voluntary appearance and submission to the jurisdiction. *McCormack v. Bank*, 58 Ind. 466; *Paulus v. Latta*, 93 Ind. 34. It is also well settled that a judgment rendered by a court of competent jurisdiction, which judgment on its face appears to be regular, may be voidable, but is not void. *Earle v. Earle*, 91 Ind. 27; *Smith*

*v. Hess*, Id. 424; *Kingman v. Paulson*, 126 Ind. 507, 26 N. E. Rep. 393; *Palmerton v. Hoop*, 131 Ind. 23, 30 N. E. Rep. 874. When a judgment rendered by a court of general jurisdiction is attacked collaterally, and the record is silent upon the subject of jurisdiction of the person of the defendant, it will be presumed that the court had jurisdiction. *Railroad Co. v. Burres*, 82 Ind. 83; *Cavanaugh v. Smith*, 84 Ind. 380; *Cassady v. Miller*, 106 Ind. 69, 5 N. E. Rep. 713; *Nichols v. State*, 127 Ind. 406, 26 N. E. Rep. 839. The complaint under consideration contains a direct averment that the record of the proceedings, adjudging said John W. Jessup to be a person of unsound mind, and appointing the appellee Frederick L. Jessup his guardian, show "that said John W. Jessup was not present in court, and had no notice whatever of said proceedings." Ordinarily, such an affirmative showing by the record itself would be sufficient to overthrow the judgment.

It is true that in proceedings of this kind the statute makes no direct provision for the issuing and service of a summons on the person whose sanity is to be inquired into, but it does provide that such person shall be produced in court. While, in ordinary actions, the issuing of a summons, and its service in some one of the ways prescribed by the statute, is sufficient to give the court jurisdiction over the person of the defendant, in proceedings like these, extraordinary in their nature, because they affect the liberty of the defendant, jurisdiction is acquired only by his production in court, (unless it is established to the satisfaction of the court that his production in court would be injurious to his health,) or by his appearance. In the case of *Fiscus v. Turner*, 125 Ind. 46, 24 N. E. Rep. 662, in construing section 2547, Rev. St. 1881, which is as follows: "If the court shall be satisfied the person alleged to be of unsound mind cannot, without injury to his health, be produced in court, such personal appearance may be dispensed with,"—the court says: "We think the object sought to be attained by the enactment of this section was the prevention of frauds in procuring verdicts and judgments of insanity without an actual opportunity to the defendant of being heard. For this reason the law requires that the party charged with being insane shall, if possible, be produced in open court, in order that he may hear and have actual knowledge of what is being done, and may meet the witnesses face to face. As the party charged in such a case may be deprived of his property and of his liberty, it was doubtless thought by the legislature that it was as important that he should be actually present, as it would be if he were charged with a criminal offense." Proceedings of this nature are not of an *ex parte* character, but are strictly adversary. While it might be contended with some plausibility that the proceedings are for the exclusive benefit of the person whose sanity is to be inquired into, the more sensible view is that it is his liberty and property which he is to be deprived of, and should not be taken from him without an opportunity to be heard. To deprive one of either his property or

his liberty without an opportunity to be heard would be in strict contravention of the principle that the right to be heard and defended is the foundation stone upon which the stability of our free government stands. That one assailed either in his person or concerning his property shall have his day in court, and be given an opportunity to defend, is a principle of natural justice, recognized by all civilized nations of the world, but by none more strictly adhered to than the courts of this country. In fact, the framers of the constitution of the United States, fearing that this right might in some manner be abridged or taken away, ingrafted therein that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Article 14, § 1. Any provision of our statute which would permit one to be deprived of his liberty without due process of law would be in direct conflict with the constitution of the United States, and void. If we are to construe section 2545 as waiving the service of process, which it does, requiring, however, instead thereof, the actual production of the person of the defendant in court, and section 2547 as waiving the production of the person of the defendant without the service of process on him, there would be a vesting of jurisdiction over the person without any process whatever. This we think to be a strained construction, but think rather that it was obviously the intention of the legislature to provide that, in case the defendant could not be produced in court without injury to his health, his production should be dispensed with, provided he had been served with process. In the case of *Martin v. Motsinger*, 130 Ind. 555, 30 N. E. Rep. 523, the court says: "But, while this is true, and while there may be a valid inquest and judgment in such cases without notice, when the party is present, it is otherwise when he is not present, and is not represented by some one authorized to appear for him. While the statute does not in terms provide for notice, the proceedings are of such a character that they cannot be ex parte and be valid. If the statute was to be construed as authorizing proceedings of an ex parte character, it would be, to that extent, in conflict with the constitution of the United States, and void. The proceeding, if successful, results in the deprivation of both liberty and property. The guardian, when appointed, is guardian of both person and estate; and under the constitution no man can be deprived of either liberty or property without due process of law. He is entitled to his day in court." A judgment rendered without jurisdiction is absolutely void, and not merely voidable, and a void judgment may be attacked at any time, and in any manner. We think the facts stated in each paragraph of the complaint were sufficient, and the court erred in overruling the demurrer thereto, for which the judgment must be reversed.

The appellee John W. Jessup having died pending this appeal, the judgment of reversal is entered as of the date of submission.

(7 Ind. App. 563)

INDIANA STONE CO. et al. v. STEWART.  
(Appellate Court of Indiana. Oct. 10, 1893.)  
CONTRIBUTORY NEGLIGENCE — ACTION FOR PERSONAL INJURIES — HARMLESS ERROR — COMPLAINT — SPECIAL VERDICTS.

1. It is error to charge, in an action for personal injuries, that if defendants could, by reasonable care, have prevented the injury, they are liable, notwithstanding plaintiff was guilty of contributory negligence.

2. The error in giving such instruction is not cured by stating in others that the rule is that, without freedom from contributory negligence, there could be no recovery by plaintiff.

3. It is not error to refuse to require an unnecessary allegation of a complaint to be made more specific.

4. A complaint, in an action for personal injuries, which shows that defendants failed to use reasonable care to provide plaintiff a safe place in which to work while in their employ, is sufficient.

5. It is not error to refuse to require the jury to make objectionable answers to certain interrogatories more specific, where no answers which could have been given would have controlled the verdict, when taken in connection with the answers to the remaining interrogatories.

Appeal from circuit court, Lawrence county; R. W. Miers, Judge.

Action by George Stewart against the Indiana Stone Company and others for personal injuries caused by defendants' negligence. From a judgment entered on the verdict of a jury in favor of plaintiff, defendants appeal. Reversed.

J. E. Boruff, Robert N. Palmer, Duncan & Battman, John R. East, and Finch & Finch, for appellants. M. F. Dunn, for appellee.

GAVIN, C. J. The appellee recovered judgment for injuries received by him while working in appellants' quarries. In his complaint he alleges, among other things, that he was employed to scabble stone, and for no other purpose. That while engaged in this work, in a safe place, "the defendants, by their agents and employes, ordered and directed him" to leave the safe place, and go to work in a place which was unsafe, as they well knew, where he was injured without any fault upon his part, and without any knowledge of the danger, but believing the place to be safe and secure. The want of safety was caused by a large box which was insufficiently secured, and fell upon him, by reason of appellants' negligence.

There was no reversible error in the action of the court in overruling appellants' motion to make the complaint more specific. The motion was directed to an allegation which was in itself unnecessary, and which made the complaint no stronger than it would have been without it. It is difficult to perceive how there could be reversible error in refusing to make more specific an unnecessary allegation. *Alleman v. Wheeler*, 101 Ind. 141, *Elliott's App. Proc.* § 665.

Neither is the complaint liable on demurrer to the objection urged against it. Its allegations plainly are that the change of place of working was made by appellants' order. This is the general allegation in the pleading, the effect of which is not limited by the subsequent averments. The law is well settled that it is the duty of the master to use reasonable care to provide his employees with a safe working place, and with safe appliances and machinery. *Matchett v. Railway Co.*, 132 Ind. 334, 31 N. E. Rep. 792; *Rogers v. Leyden*, 127 Ind. 50, 26 N. E. Rep. 210; *Railway Co. v. Roesech*, 126 Ind. 445, 26 N. E. Rep. 171; *Pennsylvania Co. v. Burgett*, (Ind. App.) 33 N. E. Rep. 914. The complaint shows a clear violation of this duty.

Numerous interrogatories were answered by the jury, and returned with their general verdict. As one cause for new trial, appellants present the refusal of the court to require several of the answers to be made more specific. The answers to the 9th, 11th, and 14th questions were fair and complete. The answers to the 10th, 12th, and 13th were more or less objectionable. No answers, however, which could have been given to these interrogatories, would have controlled the verdict, when taken in connection with the answers made to the remaining interrogatories. This being true, there was no harmful error in the court's action. *Railway Co. v. Hedges*, 105 Ind. 398, 7 N. E. Rep. 801; *Railway Co. v. Asbury*, 120 Ind. 289, 22 N. E. Rep. 140.

Another cause for new trial arises from the giving of the sixth instruction asked by plaintiff, which reads as follows: "Although the law is that, if the defendant be shown to be guilty of negligence, the plaintiff cannot recover if he himself be shown to be guilty of contributory negligence which may have had something to do in causing the accident, yet the contributory negligence on plaintiff's part would not, and could not, exonerate the defendants, and prevent the plaintiff from recovering, if it be shown that the defendants, by the exercise of reasonable care and prudence, might have avoided the consequences of plaintiff's negligence, and have prevented the injury to him, should you find he was injured." This instruction we must regard as radically erroneous. To sustain it would be to subvert the whole doctrine of contributory negligence as it has been asserted and enforced in our courts from an early day. The contributory negligence referred to in the latter part of this instruction is plainly that which is ordinarily understood to be intended by the use of this term,—that is, negligence of the plaintiff which contributes as a proximate cause to the accident. That such contributory negligence defeats his right of recovery, notwithstanding the fact that the negligence of the master was also a proximate cause of the accident, is a rule firmly established by many decisions in our state. To say that if the master, by reasonable care, could have prevented the injury, he shall respond in damages, notwithstanding the contributory negligence, would be

to nullify the whole doctrine, for the master would not in any event be liable, unless reasonable care upon his part would have prevented the injury. *President, etc. v. Dnsouchett*, 2 Ind. 586; *Railway Co. v. Graham*, 46 Ind. 239; *Pennsylvania Co. v. Gallentine*, 77 Ind. 322; *Railway Co. v. Hiltzbauer*, 99 Ind. 486; *Stevens v. Road Co.*, Id. 392; *City of Ft. Wayne v. Coombs*, 107 Ind. 75, 7 N. E. Rep. 743; *Evans v. Express Co.*, 122 Ind. 362, 23 N. E. Rep. 1039; *Matchett v. Railway Co.*, 132 Ind. 337, 31 N. E. Rep. 792. In the late case of *Railway Co. v. Gruff*, 132 Ind. 13, 31 N. E. Rep. 460, it is said: "Citation of authority is hardly necessary that in actions of this character in this state the complaint must show a case of unmixed negligence upon the part of the defendant." Also: "It is, however, essential that it be clearly shown that the injured party was free from contributory negligence." There is one class of cases wherein an instruction of this character, properly limited to that case alone, might be sustained, and that is where the injury is proximately caused by the negligence of defendant, committed after he had become aware of plaintiff's danger. *Buaw. Pers. Injur.* § 101; *Railway Co. v. Hiatt*, 17 Ind. 102. This principle is recognized in *Evans v. Express Co.*, supra, where it is said: "The ground upon which a plaintiff may recover, notwithstanding his own negligence, is that the defendant, after becoming aware of the danger, failed to use a proper degree of care to avoid injuring him." There is in the instruction under consideration no such qualification as would limit the principle laid down to such cases as these, but the proposition is broadly asserted that the plaintiff may recover, notwithstanding his own contributory negligence, if the exercise of reasonable care upon the part of the defendant would have prevented the injury. Although the jury were in other instructions, as in this, told that the rule was that without freedom from contributory negligence there could be no recovery, still such statements did not correct the error in this one. An instruction so radically wrong could only be cured by a withdrawal. *Lower v. Franks*, 115 Ind. 340, 17 N. E. Rep. 630; *Binns v. State*, 66 Ind. 428.

Some other errors have been urged, but their consideration is unnecessary. The judgment is reversed, with instructions to sustain the motion for new trial.

(7 Ind. App. 581)

#### DARNELL v. SALLER.

(Appellate Court of Indiana. Oct. 12, 1893.)

MALICIOUS PROSECUTION—WHEN ACTION LIES—PROBABLE CAUSE—EVIDENCE.

1. One good paragraph in a complaint is sufficient, as against assignments of error to the effect that the complaint does not state facts sufficient to constitute a cause of action, and that the court below erred in overruling the demurrer thereto.

2. In an action for malicious prosecution, the fact that plaintiff was bound over by the examining court to await the action of the grand jury is not such evidence of probable cause as to relieve defendant from liability.

3. There is no available error in striking

out of one answer matter admissible under another.

4. Evidence that a charge against plaintiff was referred to the grand jury, that they failed to indict, and that the accused was then discharged by the court, is such a termination of the prosecution as to enable an action for malicious prosecution to be maintained.

5. In an action for malicious prosecution, where plaintiff proved his discharge by the judge's entries on the criminal docket, without producing an entry in the order book, it will be presumed that there was no order book entry, though such entry should have been made.

6. Unless a proper question is asked the witness, an error in refusing an offer to prove is not available on appeal.

Appeal from circuit court, Greene county; J. C. Briggs, Judge.

Action by Logan Sallee against William N. Darnell. From a judgment for plaintiff, defendant appeals. Affirmed.

Alexander & Letsinger, for appellant. Moffett & Davis, for appellee.

GAVIN, C. J. Appellee's complaint was for damages on account of a malicious prosecution. There was a trial, verdict for appellee, and judgment thereon, over appellant's motion for new trial.

The first error assigned is that "the complaint does not state facts sufficient to constitute a cause of action." The second is that "the court below erred in overruling the appellant's demurrer to the complaint." The complaint is in two paragraphs. Neither of these assignments is sufficient to test the sufficiency of the several paragraphs separately. Their effect is simply to assail the complaint as a whole, and one good paragraph will be sufficient to withstand the attack, although the others should be bad. *Buchanan v. Lee*, 69 Ind. 117; *Branch v. Faust*, 115 Ind. 464, 17 N. E. Rep. 898. One paragraph of the complaint charges that appellant maliciously and without probable cause instituted, before a justice of the peace, a criminal proceeding charging appellee with a trespass under section 1961, Rev. St. 1881, the least punishment for which was a fine of \$50. The justice, sitting as an examining court, bound appellee over to court to await the action of the grand jury, to whom the matter was referred. Upon their failure to indict, he was by the order of the court discharged. It is urged by appellant's counsel that the fact that appellee was bound over by the justice is a conclusive adjudication of the existence of probable cause. Appellant's counsel have not referred us to any authority directly sustaining this proposition. Counsel rely upon the case of *Adams v. Ricknell*, 128 Ind. 210, 25 N. E. Rep. 804. In this case it is held that, where a defendant charged with a crime within the jurisdiction of a justice is tried and convicted, this conviction stands, in the absence of fraud, as an authoritative and conclusive adjudication of the existence of probable cause, notwithstanding the defendant may have appealed the cause to the circuit court, and have been there tried and acquitted. The case, however, falls short of maintaining appellant's proposition. There the justice sits as a trial court, with full jurisdiction to finally

adjudicate and determine the merits of the cause. Here he sits as an examining court, merely, with no duty to perform, except to discharge or bind over for further investigation by another tribunal, as he may deem the evidence to warrant. To hold with appellant upon this proposition would be in opposition to the great weight of authority. In the case of *Bauer v. Clay*, 8 Kan. 585, it is held that the order of a justice binding the accused over "is only prima facie, and not conclusive, evidence of probable cause." This holding was expressly approved by the same court in *Ross v. Hixon*, (Kan.) 26 Pac. Rep. 955, where the question is considered at length. In *Spalding v. Lowe*, 56 Mich. 366, 23 N. W. Rep. 46, the court says, concerning a similar claim: "No authority has been produced in support of it, and we think none exists." This holding is also sustained by *Ash v. Marlow*, 20 Ohio, 119; *Ewing v. Sanford*, 19 Ala. 605; *Raleigh v. Cook*, 60 Tex. 488; *Ricord v. Railroad Co.*, 15 Nev. 167; *Hale v. Boylen*, 22 W. Va. 234; *Bacon v. Towne*, 4 Cush. 217; *Ganea v. Railroad Co.*, 51 Cal. 140; *Diemer v. Herber*, 75 Cal. 287, 17 Pac. Rep. 205. Both upon principle and the great preponderance of authority we are led to conclude that appellant's objection to the complaint is not well taken.

The matter struck out of the answer, if admissible for any purpose, was admissible under the general denial, which was also pleaded. There is no available error in striking out from one answer matter admissible under another. *Humphreys v. Stevens*, 49 Ind. 491; *Elliott's App. Proc.* § 639.

As a cause for new trial it is asserted that the evidence is not sufficient. We are of opinion, however, that there is sufficient evidence to sustain every material allegation of the complaint. As we have already held, the finding of the justice was not conclusive evidence of probable cause. He sat simply as an examining court, and not to hear and pass final judgment. When it appeared that the case was referred to the grand jury for investigation, and that it failed to indict, appellee's discharge by the court, after the grand jury's failure to return an indictment, was a termination of the prosecution, so as to enable him to maintain this action. 14 Amer. & Eng. Enc. Law, 29, note 9; *Hower v. Lewton*, 18 Fla. 328; *Lowe v. Wartman*, 47 N. J. Law, 413, 1 Atl. Rep. 489; *Graves v. Dawson*, 130 Mass. 78; *Leever v. Hamill*, 57 Ind. 423; *Richter v. Koster*, 45 Ind. 440; *Chapman v. Woods*, 6 Blackf. 504.

Complaint is made of the court's refusal to permit appellant to prove certain facts by the county surveyor. The record does not show that any questions were asked of the witness. Without a proper question, there is no available error in rejecting an offer to prove. *Higham v. Vanadool*, 101 Ind. 160; *Tobin v. Young*, 124 Ind. 507, 24 N. E. Rep. 121; *City of Evansville v. Thacker*, 2 Ind. App. 370, 28 N. E. Rep. 559. The court permitted the discharge of the appellee to be proved by the judge's entries on his criminal docket. It is insisted that this was erroneous because the

order-book entry was the best evidence. There is nothing in the record to show that there ever was any order-book entry. While it is true that there is a presumption that such a record was made because it ought to have been made, (*Elmore v. Overton*, 104 Ind. 548, 4 N. E. Rep. 197,) still there is also a presumption, and this is the stronger presumption, that the action of the trial court was correct. In *Rapp v. Kester*, 125 Ind. 79, 25 N. E. Rep. 141, Coffey, J., speaking for the court, says: "Every presumption in favor of the correctness of the ruling of the trial court is indulged in by this court, and, unless the record affirmatively discloses an error of which complaint is made, the judgment from which the appeal is prosecuted will be affirmed." *Myers v. Murphy*, 60 Ind. 282; *Carman v. Pultz*, 21 N. Y. 547. Judge Elliott, in his excellent work on Appellate Procedure, says, at section 709: "If the appellate tribunal is compelled to resort to presumptions, it will choose that which sustains the proceedings of the trial court, and reject that which would overthrow them. If the condition of the record is such as to require the higher court to act upon a presumption, it will, without hesitation, adopt the presumption that upholds the judgment from which the appeal is prosecuted."

The principal objections to the instructions have been met by the views of the law already expressed in this opinion. Some other objections are made, but none of them appear to us tenable. The instructions asked were not signed by the appellant nor by his attorneys, so far as the record discloses. For this reason, there was no error in the court's refusal to give them. *State v. Sutton*, 99 Ind. 300; *Board of Com'rs v. Legg*, 110 Ind. 479, 11 N. E. Rep. 612; *Thornt. Juries*, § 159. We have, however, examined these instructions, also, and find that, so far as they state the law, they are fully and fairly covered by those given to the jury. Having failed to find any error in the record for which the cause should be reversed, the judgment is affirmed.

(146 Ill. 399)

**SCHWEIKER et al. v. HUSSEY et al.**<sup>1</sup>  
(Supreme Court of Illinois. March 31, 1893.)<sup>2</sup>  
**RELIGIOUS SOCIETIES—POWERS OF ECCLESIASTICAL TRIBUNAL—CONSTRUCTION OF CHURCH RULES—EQUITY JURISDICTION.**

1. A decision of the lawfully constituted supreme judicial, legislative, and administrative tribunal of a church denomination in regard to ecclesiastical matters is, unless shown to be clearly and manifestly repugnant to the established laws of the denomination, binding and conclusive upon the civil courts.

2. The rules of a church denomination provided that "the time and place of the general conference shall be appointed by the bishops, with the consent of the majority of the conference." *Held*, that such appointment, when made unanimously by the conference, at which all the bishops were present as members, was made in accordance with the rules, although it

did not appear that such action was taken at the suggestion of the bishops. 44 Ill. App. 563, affirmed.

3. Said rules also provided that, if no bishop was present at the general conference, the time and place of holding the next general conference might be appointed by the oldest annual conference. *Held* that, where bishops were present at the general conference, the annual conference had no power to act in the matter, even though the bishops and the general conference failed to make any appointment. 44 Ill. App. 566, affirmed.

4. Where the bishops and the general conference have fixed the time of its next meeting, and no individual church offers to receive the conference at such meeting, it is proper for the conference to delegate the selection of the place of meeting to one of the official boards of the denomination, since the power of such selection is one that may properly be delegated by a legislative body. 44 Ill. App. 566, affirmed.

5. Where the church constitution provides that pastors shall receive adequate salaries, appoints suitable agencies to obtain the necessary funds, and declares that members having ability to pay for the support of their pastor, and refusing to do so, shall be "dealt with as other gross transgressors and sinners," a reasonable compensation is sufficiently assured to a pastor duly appointed by the proper ecclesiastical authority to create in him a property right in the office of pastor which a court of equity will recognize and enforce. 44 Ill. App. 566, affirmed.

Appeal from appellate court, first district.

Bill for injunction brought by George Husser and others against William Schweiker and others. Complainants obtained a decree, which was affirmed by the appellate court. Defendants appeal. Affirmed.

The other facts fully appear in the following statement by BAILEY, C. J.:

This was a bill in chancery, brought by George Husser and others against William Schweiker and others, to restrain the defendants from interfering with complainant Husser in acting as pastor of St. John's Society, known as Noble Street Church, Chicago, of the Evangelical Association of North America. The bill alleges that complainant Husser is the lawful pastor of the society; that defendant Schweiker is now acting as such pastor, but is not legally entitled to do so; and that the other defendants, who are the trustees of the society, support defendant Schweiker in his unlawful occupation of the pulpit, church, and parsonage of the society, and exclude complainant Husser therefrom, and also exclude the other complainants, who are members of the society, and adhere to Husser as the lawful pastor, from worshipping in the church with Husser as their pastor.

The Evangelical Association of North America is a religious denomination originally organized about the year 1800, among the German speaking people of the state of Pennsylvania, by Jacob Albright. Since that time it has extended into various portions of the United States, including the state of Illinois, and to some extent to foreign countries, so that it now embraces 25 annual conferences, and has about 150,000 communicants. Albright had formerly been connected with the Methodist Episcopal church, and the form

<sup>1</sup> Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

<sup>2</sup> Rehearing denied October term, 1893.

of doctrine, discipline, organization, and church government adopted by him and his associates for the religious body formed by them were to a very great degree patterned after those of the denomination of which he was formerly a member. The Evangelical Association, as the bill alleges, and as the evidence tends to show, is organized under the associated or connectional form of church government, having a formulated constitution or code of rules, known as the "Discipline," and having a system of graded ecclesiastical executive, legislative, and judicial bodies and officers, for the administration of its church laws and its internal affairs, in and by which rules and system of government each local society or congregation is a subordinate member of the general organization, and all such bodies, officers, and societies, as well as the individual members of the denomination, are subject to the provisions of the Discipline. The various bodies, supreme and subordinate, which constitute the denominational organization, stated in the order of their priority, are a general conference, annual conference, quarterly conferences, societies or congregations, and classes. The general conference, in which is vested the supreme legislative, judicial, and executive authority of the denomination, is a representative body, convening quadrennially, and being composed, in addition to the bishops and certain other denominational officers who are ex officio members, of delegates selected by and representing the several annual conferences, the basis of representation being one delegate for every fourteen members, and for every fraction of seven or over, of the annual conferences. An annual conference is held each year in each of the several districts into which the territory occupied by the denomination is divided, and is composed of all the itinerant preachers within the respective districts who, by ordination, are in full connection with the ministry. In the selection of pastors for the various societies or congregations, the itinerant system is adopted, and the pastors are appointed each year at the annual conferences, the power of assigning pastors to their respective fields of labor being by the Discipline vested in the bishop and presiding elders. It will thus be seen that the government of the denomination is essentially ecclesiastical, the laity, as such, having no seat or voice, by representation or otherwise, in either the annual conferences or the general conference, and no control of the appointment of their pastors. At each meeting of the general conference, bishops are appointed to serve for the term of four years, their number being fixed each time at the discretion of the conference. The Discipline provides that at the general conference a bishop shall preside, but, if no bishop is present, a presiding officer shall be elected by the conference, and that bishops present who are not in the chair shall be ex officio members, and that two-thirds of the aggregate number of delegates shall constitute a quorum; also, that "at annual conferences a bishop shall act as president.

If there be no bishop present, the conference shall elect one of the elders chairman." Sections 73 and 74 of the Discipline are as follows: "Sec. 73. The general conference shall have power to make rules and arrangements for our church, under the following restrictions: (1) The general conference shall have no power to alter, detract from or add to any of our Articles of Faith, except with regard to the governments of other nations. (2) It shall have no power to alter any rules or forms of our Church Discipline, (the rules of our temporal economy being excepted,) unless such alterations are previously recommended by two-thirds of the members of all the annual conferences who may be present at the sessions of the same, whereupon the general conference shall have power, by a majority of three-fourths of their votes, to alter any of our rules and forms, excepting the Articles of Faith. It shall also have power, by three-fourths of its votes, to recommend to the annual conferences an alteration of any of said rules and forms, and, after such alteration shall have been approved by two-thirds of the members present at the sessions of all the annual conferences, it shall by our bishops be declared a law, and introduced as such into our Church Discipline. Sec. 74. The general conference is the supreme court of law in the church. It shall decide upon the legality of all acts of the annual conferences, and upon all such cases as may arise between the annual conferences, and such as may arise between any incorporated society of the church and its officers or any annual conference; and in its judicial capacity it shall decide, render verdict, and declare judgment only in such cases as are lawfully brought before it for adjudication. It shall have power to make such rules and regulations as will enable it to execute the powers conferred upon it." Section 71 of the Discipline is as follows: "Sec. 71. The time and place of the general conference shall be appointed by the bishops, with a consent of a majority of the conference; and, if there be no bishop present, the general conference shall do it by a majority of votes, or the oldest annual conference, who then shall give the other annual conferences due notice of the time and place." It is further provided by the Discipline that the bishops shall be amenable for their conduct to the general conference, which shall have power, if circumstances require, to depose the bishop from office or expel him from the church; also, that if a bishop shall be accused, during the interval between the sessions of the conference, of immoral conduct, three of the elders shall meet and examine him, and, if they shall actually be of the opinion that he is guilty of the alleged crime, they shall call one or two presiding elders, and as many preachers standing in full connection as they may deem necessary, yet so that they be not less than seven in number, whereof at least one shall be a presiding elder. These are constituted a conference, who shall examine the charge alleged against the bishop, and, if two-thirds of the members thus called shall find him guilty of the charge brought



against him, they shall have power to suspend him from office until the next general conference, which shall then determine the whole matter. But a charge against a bishop must be preferred in writing, and subscribed by those who are willing to substantiate the alleged crime, and the accused bishop is to have a copy of the same.

A meeting of the general conference was held at Buffalo, N. Y., in October, 1887, and no question is made by either party as to the regularity or validity of that body as the lawful general conference. At that time, three bishops had been appointed and were in office, viz. Bishops Esher, Bowman, and Dubbs, and all three were present and took part in the proceedings of the conference, each presiding during portions of the session. It had been usual, on former occasions, for different societies belonging to the denomination who desired to have the next session of the general conference held with them, to present to the conference invitations to that effect, and tendering their hospitalities to its members. These invitations were considered by the bishops and conference in determining the place for the next meeting. At the conference held at Buffalo in October, 1887, but one invitation of that character was received, and, before the place for holding the next meeting was finally selected, that invitation was withdrawn. The conference thereupon, by a unanimous vote, passed the following resolutions: "Resolved, that the next meeting of the general conference shall begin on the first Thursday of October, 1891. Resolved, that the matter of appointing the place of the next general conference be referred to the board of publication." The board of publication named in the second of these resolutions is an official board of the denomination, having charge of its book and publication department, and consisting of the bishops, and eight other members, selected from the members of the annual conferences, one from each of eight districts into which the territory covered by the denomination was for that purpose divided. The adoption of these resolutions received the unanimous assent of all the members of the conference, including the three bishops, and at the close of the session all the members caused their names to be signed to the minutes of the proceedings, in token of their assent to and approval thereof. In October, 1890, the board of publication, in pursuance of the authority vested in them by the above resolution, fixed and appointed the place for the next meeting of the general conference at Indianapolis, Ind., and at once gave notice of their action in the newspapers of the denomination. Bishops Esher and Bowman were present at the meeting of the board at which this action was taken, and both assented thereto. In the mean time, serious controversies had arisen in the denomination, especially involving the three bishops, and two parties were formed, one under the leadership of Bishop Dubbs, and the other under that of Bishops Esher and Bowman. These controversies became quite

bitter, and in the early part of the year 1890 they resulted in the preferring of accusations against each of the bishops, and their trial and suspension from office until the next meeting of the general conference. Bishop Dubbs, upon his suspension, ceased to discharge the duties of his office of bishop, but in the cases of Bishops Esher and Bowman there seem to have been previous examinations by three elders as to the same accusations, and on such examinations the conclusion was reached that the accusations were unfounded, and Esher and Bowman thereupon, assuming the position that there was no authority for a second examination upon the same charges, refused to submit to further examinations, or to obey the summons of the conference organized to try them, and they therefore failed to appear at their trials, and subsequently refused to recognize the validity of the judgments of suspension pronounced against them, and continued to perform the duties of their office. The East Pennsylvania conference, which claims to be the oldest annual conference, met in February, 1891. At that meeting Bishop Bowman appeared and applied for admission, but was forcibly excluded by the majority, whereupon about 40 members, being a minority, protesting against Bishop Bowman's exclusion, and, insisting that no valid conference could be held without a bishop so long as one was present, withdrew to another place, and held a session with Bishop Bowman in the chair. The majority remained and passed resolutions, which set forth that the general conference in 1887 had neglected to fix the place for its next meeting, and that thereby the duty of fixing such place devolved, by the provisions of the Discipline, upon the East Pennsylvania conference, as the oldest annual conference, and fixing and appointing Philadelphia as the place for the next meeting of the general conference. Prior to October 1, 1891, the date fixed for the meeting of the general conference, 18 of the annual conferences had expressed their disapproval of the proceedings against Bishops Esher and Bowman, and had recognized them as being unaffected thereby. In five of the remaining seven annual conferences, the Illinois conference being one, Bishop Esher or Bishop Bowman having presented himself to the conference, and being excluded, a large number of the preachers left the conference, and proceeded to hold sessions elsewhere, under the presidency of one or the other of these bishops. Only two of the conferences adhered without division to the party of Bishop Dubbs. Elections of delegates to the general conference took place at the meetings of the annual conferences held in 1891. Eighteen of the conferences were unanimously of the opinion that Indianapolis was the lawfully appointed place for holding the general conference, and they accordingly elected and sent their delegates to the conference to be held at that place. The total number of delegates elected by those 18 conferences was 68. In the 5 divided conferences, delegates to the Indianapolis meeting were in like manner elected by those members who convened as confer-

ences under the presidency of Bishop Esher or Bishop Bowman. The total number of delegates thus elected was 24, making, in all, 92 delegates elected to Indianapolis, and representing, or claiming to represent, in all, 23 of the 25 annual conferences. Bishops Esher and Bowman, and all the other general officers of the church who, by the Discipline, were ex officio members of the general conference, recognized Indianapolis as the proper and legal place for the meeting, and a sufficient number of them attended the conference held at that place to make the total membership of that conference 100. The 2 conferences which sent no delegates to Indianapolis elected 14 delegates to Philadelphia, and 31 delegates were sent to Philadelphia from the 5 divided conferences, making 45 in all. None were sent to Philadelphia from the 18 other conferences. Bishop Dubbs also attended, thus making a total membership of 46. The two rival conferences met on the same day, and held their sessions. At both, the matter of the proceedings against the three bishops, resulting in their suspension from office, and also the divisions in the five divided districts, came up for adjudication. At Philadelphia, Bishop Dubbs' suspension was declared wrongful, and was set aside, and the proceedings against Bishops Esher and Bowman were approved and affirmed, and they were declared expelled from the church. The preachers in the divided districts who had excluded Bishops Esher and Bowman, and organized the annual conferences with presiding officers of their own selection, were recognized as the legal annual conferences. At Indianapolis, on the other hand, the proceedings against Bishops Esher and Bowman were reviewed at length, and declared to be void ab initio, and the annual conferences, in the divided districts which had convened under the presidency of those bishops were adjudged to constitute the only lawful annual conferences for those districts. The decision of the Indianapolis conference that the proceedings against Bishops Esher and Bowman were not only irregular, but absolutely void ab initio, was based, among other things, upon the ground that the same charges against them had already been examined thoroughly, and in good faith, by a committee of three elders, and that upon such examination the charges were all ascertained to be wholly unfounded, it being declared as a law of the denomination that such examination and finding made it unlawful for any other committee to re-examine them upon the same charges, and also made it their duty to refuse to submit to any further examinations; and as the committee of elders who attempted to make the second examination, as well as the tribunal who assumed to try them, had full knowledge of the former examination and its result, their prosecution was wholly unauthorized and without jurisdiction. The proceeding against Bishop Esher was held to be without jurisdiction and void, for the further reason that the committee of elders who undertook to examine him, instead of going to

Chicago, where the bishop resided, and holding the examination there, as required by the laws and usages of the denomination, summoned him to appear before them at Reading, Pa., some 800 miles from his home, and where he was not bound to go. It was therefore held that, the proceedings against these bishops which resulted in judgments of suspension being void from the beginning, such judgments had in no way disqualified them from performing the duties of their office, and that the annual conference had no power to exclude them from presiding. On this subject the report of a committee to which the matter was referred was adopted by the conference as embodying its views in relation thereto, the material parts of the committee's report being as follows: "In the conferences of Des Moines, Oregon, Illinois, Platte River, East Pennsylvania, Central Pennsylvania, and Pittsburgh, being seven in all, there have been divisions of greater or less magnitude, arising, in each case, from a refusal on the part of certain members of said conferences, respectively, to recognize and treat Bishops Esher and Bowman as lawful bishops of our church. In some cases such refusal has resulted in excluding the bishops from the place appointed for the conference, so as to necessitate their holding a conference elsewhere; in other cases, it has resulted in a withdrawal of the members so refusing to recognize the presiding bishop, and an attempt by such seceding members to hold an annual conference without participation of any bishop. Under our church laws a bishop, if present, is a necessary constituent element of every annual conference, not only, as such, entitled to, but bound by duty to, participate in its proceedings as its chairman. The bishop at the annual conference is the primary authority, with the power of final decision in the matter of appointing and assigning preachers of the conference to their respective fields of labor. For one constituent part of the body, viz. the preachers, to exclude the other part, the bishop, is an act of usurpation. No annual conference in our church has ever had the power to pass upon the personal or official status or qualifications of our bishops. No sentence, nor alleged sentence, against a bishop of our church is, or ever has been, subject to review or reconsideration in any form by an annual conference. The only reason alleged in the cases above referred to for the failure to recognize Bishops Esher and Bowman as lawful bishops, entitled to preside over said conferences, was that they had respectively been suspended from office by proceedings at Chicago, as to Bishop Bowman, and at Reading, as to Bishop Esher. This conference has already, at its present session, pronounced said proceedings, respectively, to have been not only irregular and unjust, but absolutely void. If so, we do not see how any action based thereon can stand. Any one, whether preacher or layman, whether in his personal or official capacity, who may have undertaken to act upon the assumption that said proceedings were valid, did so at his peril, so far

as legal consequences are concerned. Every member and preacher of this church is bound to know that such alleged sentences were of no legal force. Whatever excuse ignorance of the law may afford from a moral standpoint, such ignorance can furnish no ground whatever upon which to base the legality of any act. If these suspensions, so called, were absolutely void, they could not be made valid by any act or declaration of or by any annual conference, or any majority, however considerable, of the members thereof. When we consider, further, that the exclusion of a bishop from an annual conference upon any ground whatever must practically result in putting into the hands of the preachers themselves (or those who are elected by the conference and from the conference, and who are directly under the influence of their constituents) the power of appointing themselves pastors over the laity, it is obvious that to intrust to an annual conference the power, by majority vote or otherwise, of determining the validity of such suspensions, would be subversive of those fundamental principles of our church constitution which put the appointment of pastors in the hands of an agent who is, as far as possible, independent of the annual conference itself. It is plain, therefore, that those of our brethren in the conferences hereinbefore named, who attempted to organize without a bishop, when a bishop was present, and ready and able to act, were proceeding unlawfully from the beginning, and are not, and were not, entitled to recognition by the church, whether clergy or laity, as constituting annual conferences of the Evangelical Association. All the proceedings of such bodies so unlawfully organized, their appointment of pastors, their election of presiding elders, their selection of time and place for any succeeding conferences, etc., necessarily fall to the ground, as having no legal force or effect." On adopting the foregoing report as a correct exposition of the laws and usages of the church, and of the judgment of the general conference in relation to the proceedings against the bishops, and the nullity of the judgment of suspension pronounced against them, a resolution was adopted, in substance, that the annual conferences held in the district of Illinois under the presidency of Bishop Esher in 1890 and 1891, and in the other divided districts under the presidency of Bishops Esher and Bowman, were respectively the lawful and regular, and the only lawful and regular, annual conferences in and for those districts during those years; that the acts and proceedings of those bodies were lawful and regular, as the acts and proceedings of the annual conferences of the church, and that the appointments of preachers made by the conferences so organized under the bishops are and were the only regular and valid appointments in and for those districts. At the meeting of the Illinois conference, held in April, 1890, Bishop Esher presented himself, but was refused admission, whereupon a portion of the preachers present repaired with the bishop to another place, where an

annual conference was organized and held under the presidency of the bishop. Those remaining also organized as an annual conference with a chairman of their own selection. In April, 1891, the same thing, in substance, was repeated, and two annual conferences were held, one presided over by Bishop Esher, and the other organized with a chairman selected from their own number. At the conference thus presided over by Bishop Esher in April, 1891, the complainant Husser was appointed preacher and pastor of St. John's Society, and defendant Schweiker was at the same time appointed preacher and pastor of the same society by the rival annual conference held in the absence of a bishop. The cause being heard on pleadings and proofs, the court found and held that the general conference held in Indianapolis in October, 1891, was the true and only lawful general conference of the Evangelical Association held during that year; that the annual conference held in Illinois in April, 1891, under the presidency of Bishop Esher, was the true and lawful Illinois annual conference of the association for that year, and that the appointment of complainant Husser by that conference, as pastor of St. John's Society, was the true and only lawful pastoral appointment to that society for the year. A decree was thereupon rendered, perpetually enjoining and restraining defendant Schweiker from interfering with complainant Husser in the discharge of his duties as the duly-appointed pastor of that society, or in the occupancy, as such pastor, of the church edifice of the society, and from attempting to act himself as pastor, and perpetually enjoining all the defendants from interfering with the free access of the other complainants to the church edifice. On appeal to the appellate court the decree was affirmed, and this appeal is from the judgment of affirmance.

White & Johnson and A. M. Pence, for appellants. Judd, Ritchie & Esher, for appellees.

BAILEY, C. J., (after stating the facts.) The present suit grows out of the unfortunate controversy which, for the last three or four years, has divided the members of the Evangelical Association of North America into two contending factions. George Husser, one of the complainants, and William Schweiker, one of the defendants, are both itinerant preachers of the Evangelical Association, and both claim to have been regularly appointed by the Illinois annual conference to the position of pastor of St. John's Society, Chicago, one of the congregations belonging to the association. Their appointments, as the evidence shows, were made at the same time, but they were made by the president or chairman and presiding elders of two rival bodies, each claiming to be the regular and lawful Illinois annual conference. Schweiker received his appointment from the body which refused to recognize Bishop Esher as the lawful bishop of the church, and organized with a presiding officer of its own selection, and on receiv-

ing his appointment he was admitted by the trustees of the congregation to the church building and parsonage, and was permitted to enter upon the performance of the duties and the enjoyment of the rights pertaining to the office of pastor, and was in possession thereof at the time the bill was filed. Husser received his appointment from the annual conference composed of those preachers who adhered to Bishop Esher, and was presided over by him, and he claims to be, therefore, the only regular and lawful appointee as pastor, and is seeking by his bill to be admitted to the office, and to have Schweiker and the other defendants restrained from interfering with him in the performance of its duties, and in the enjoyment of the rights and benefits pertaining thereto.

Assuming that, as the Evangelical Association is constituted, there can be but one body lawfully entitled to be recognized as the Illinois annual conference, the title of these two claimants to the office of pastor must obviously depend upon the question as to which of these two rival bodies was in fact the regular and lawful annual conference of the association. In determining this question, recourse must be had to the constitution and laws of the denomination, and especially to the decisions on that subject of the supreme judicial, legislative, and administrative authority of the denomination,—the general conference. If such decisions can be found, unless they are clearly and manifestly repugnant to the established laws of the denomination, they are binding and conclusive upon the civil courts, and must be followed in the determination of such property rights as those courts may be called upon to adjudicate. But unfortunately, at the time fixed for the last quadrennial session of the general conference, viz. in October, 1891, two rival bodies were convened, one at Philadelphia and the other at Indianapolis, both claiming to be the regular and lawful general conference, and both undertook to adjudicate, among other things, upon the regularity and legality of the rival annual conferences in Illinois, and reached precisely opposite conclusions. The decision of the conference held at Philadelphia was in favor of the annual conference by which Schweiker was appointed, and that of the one sitting at Indianapolis sustained the legality of the body from which Husser holds his appointment. The question, then, upon which the decision of the case must ultimately depend, is whether the Philadelphia or the Indianapolis conference was the regular and lawful general conference of the association. The determination of this question depends largely, if not entirely, upon the construction and force to be given to section 71 of the fundamental law of the association, known as the "Discipline," and upon whether, under that section, the general conference, at its quadrennial session at Buffalo in October, 1887, after fixing the time for the next meeting, had the power to delegate to its board of publication the matter of selecting and appointing the place for such meeting. The learned counsel for the defendants, in his brief, says that the con-

struction of this section is substantially the only question involved in the case, and in this admission the counsel for the complainants fully concur. It is upon the theory that this is substantially the only question calling for decision that the case has been argued and submitted on both sides, and, in view of this fact, our consideration of it may be kept within a much narrower range than might otherwise have been deemed necessary. Section 71 is as follows: "The time and place of the general conference shall be appointed by the bishops, with the consent of the majority of the conference; and, if there be no bishop present, the general conference shall do it by a majority of votes, or the oldest annual conference, who shall then give the other annual conferences due notice of the time and place." No question is made as to the validity of the Buffalo conference, that being practically admitted by all parties. All the annual conferences seem to have been represented, and all the bishops were present, and each presided during portions of the session. That body undertook to exercise the power vested in it by section 71, and went so far as to appoint the time for its next meeting, but, for reasons which seemed to the conference to be sufficient, it passed a resolution referring the matter of appointing the place for the meeting to the board of publication. True, it does not appear that this action was taken at the suggestion of the bishops, or that they, as a co-ordinate branch of the conference, formally submitted any appointment of the time or place for the concurrence of the majority of the conference; but the resolutions adopted received the unanimous assent of all the members of the body, and as the bishops were members, and were present, their concurrence in the resolutions will necessarily be implied. The action that was taken then, though not technically the action of the bishops, consented to by a majority of the conference, may be fairly regarded as having been taken under the first clause of section 71, it being shown, presumptively, at least, that it was the joint action of the bishops and conference. In October, 1890, the board of publication met, and, in performance of the duty committed to it by the general conference, selected and appointed Indianapolis as the place of meeting, and gave due notice of their action in that behalf to the several annual conferences. Bishops Esher and Bowman, who were ex officio members of the board, were present, and assented to its action. In the following February, that portion of the members of the East Pennsylvania conference which had forcibly excluded Bishop Bowman, and organized as an annual conference with a chairman of their own selection, ignored what had been done by the board of publication, and, assuming to sit in judgment upon the resolutions of the general conference committing the matter of appointing the place for its meeting to that board, and to hold such resolution to have been adopted without authority, and to be therefore illegal and void, undertook to act, by virtue of the power vested in the oldest annual conference by section 71 of

the Discipline, as though no action had been taken in the premises by the general conference, and appointed Philadelphia as the place of meeting. In attempting to construe section 71, it is scarcely necessary to remark that the language of the section is very brief, and somewhat elliptical, and that the true meaning to be given to it, especially as applied to the questions now under consideration, is not altogether clear. The mode in which the time and place of the next meeting is to be appointed is not specifically defined, except that the appointment is to be made by the bishops, with the concurrence of a majority of the conference, or, in case no bishop is present, then by a majority of the votes of the general conference, or by the oldest annual conference. But there is nothing in the language used, at least when considered apart from the particular nature of the act to be performed, which would seem to forbid the use by the bishops, the general conference, or the oldest annual conference, whichever happened to be called upon to act, of any appropriate agencies or instrumentalities to aid in the performance of the duty thus imposed. The want of power to delegate the performance of the duty to an executive board or committee, if any such want of power existed, would seem to have arisen, not from the language in which the power is conferred, but from the nature of the power itself. But this point will be considered more fully hereafter. It is very manifest, however, that the circumstances under which the power to make the appointment was to devolve upon the oldest annual conference are not clearly indicated, or at least, if the language is to be taken literally, the result is fatal to the right of the East Pennsylvania conference to act. It is not pretended that the oldest annual conference had any inherent power in the premises, or that its power to act could be sustained by any other provision of the Discipline. Remembering, then, that the East Pennsylvania conference must find the warrant for its action in this section alone, it is difficult to see how, under the facts shown in this case, and about which there is no dispute, a case is presented from which its power to act could arise, and this is so, whether the delegation of the power by the general conference to the board of publication is held to be valid or not. If we invoke the same rules of interpretation which are ordinarily applied to statutes and other legal documents, it would seem that the power to fix the time and place of the next meeting of the general conference was not, and was not intended to be, devolved upon the oldest annual conference, except in case no bishop was present at the meeting of the general conference. Such would appear to be the clear reading of the section. But all three of the bishops were present at the Buffalo general conference, and participated in its action, so far as it went. It will scarcely do to say that, assuming that the delegation of the power to the board of publication was void, the power to act devolved upon the oldest annual conference as a matter of necessity, as otherwise the general conference would

have lapsed for want of a duly-appointed place at which to hold its session. The power of the oldest annual conference to act did not, and could not, arise *ex vi necessitate*, but only from the express terms of section 71, and the circumstances upon which the power was given by that section, viz. the absence of all the bishops from the general conference, not having arisen, it would seem to follow that the power itself could not have existed.

It may be further suggested, as a pertinent consideration, that the appointment of the time and place of the next meeting are coupled together in the section as pertaining to the same subject-matter, and as constituting essentially one act, and the power to perform it seems to have been conferred upon the oldest annual conference only in the event of a failure by the bishops and by the general conference to act upon the matter at all. But there was no such failure. The matter was considered and acted upon, both by the bishops and the members of the conference, and such action proceeded to the extent of appointing the time for the next meeting, and the delegation of the matter of selecting the place to the board of publication. But even if it can be held to be the intention of section 71 to authorize the oldest annual conference to interpose when the matter had been partly or imperfectly performed or disposed of by the general conference, and supplement its action, it is plain that in this case, if the action of the general conference was valid, the whole matter was disposed of, and nothing remained to be done. Action by the oldest annual conference, under these circumstances, involved as a necessary prerequisite the power to review the action of the general conference, and pronounce it illegal, inoperative, and void. Power to a subordinate body to sit in judgment upon the action of its superior will not be presumed, nor will it be held to exist, unless it is conferred in terms which are perfectly clear and unmistakable. We find nothing in the terms of section 71 which lends any countenance to the view that such power was intended to be conferred upon the East Pennsylvania conference. It appears, therefore, from these considerations, that, whatever may be said of the Indianapolis conference, it is very difficult, if not impossible, to sustain the legality of the conference held at Philadelphia. To hold that conference legal and valid would necessitate a construction of section 71 which its language does not seem to warrant, or would even require the interpolation of provisions which the section does not contain. But as complainant *Husser* is seeking to enforce a title, the validity of which is dependent upon the legality of the Indianapolis conference, it does not answer the exigencies of his case to show merely that the Philadelphia conference was invalid and illegitimate. His right to have the decree sustained depends upon whether the conference held at Indianapolis was, rather than upon whether the one held at Philadelphia was not, the regular and lawful general conference of the Evangelical Association.

The ground upon which the Indianap-

olls conference is assailed is that Indianapolis was not appointed as the place of meeting by virtue of any lawful authority. This objection is sought to be based upon two propositions: First, that section 71 expressly prescribed the agents by whom, and the manner in which, the time and place of the next meeting should be appointed, and that an appointment by any other agency, or in any other manner, was thereby impliedly prohibited; and, secondly, that the appointment of the time and place of the next meeting was essentially a legislative act, and that such legislative power, being committed to the bishops and a majority of the conference, could be exercised only by them in person, and was incapable of being delegated to any other agency. It will readily seem that these two grounds of objection, though stated and argued separately, involve substantially the same proposition, viz. that the power of appointing the time and place of the next meeting was incapable of delegation; the necessity for its personal exercise by the agencies to whom it was committed by section 71 arising both from the mode in which the power was conferred and from the nature of the power itself. But, as we have already said, there is nothing in the language by which the power is conferred, when considered apart from the nature of the power, which, so far as we can see, is at all decisive of the necessity for its personal exercise. Upon this point we have only to consider the first clause of section 71, viz. that "the time and place of the general conference shall be appointed by the bishops, with the consent of the majority of the conference." The remaining portions of the section, so far as this point is concerned, are unimportant. They were not operative unless there was a failure by the bishops and the majority of the conference to make a valid appointment, and, that being the very question to be determined, those provisions cannot be considered in determining it. Now, it is plain that the clause above quoted merely conferred upon the bishops and a majority of the conference the power, and made it their duty, to appoint the time and place of the next meeting, but there is an absence of any direction as to the mode in which the power should be exercised. That, so far as is indicated by the language alone, was left wholly to their discretion. It cannot be doubted, we think, that if a duty purely administrative, and not involving the exercise of judgment or discretion, had been imposed upon the bishops and conference in precisely the same terms, then their power to employ for its performance any suitable agency would have followed as a necessary incident. Thus, if it had been provided that the bishops, with the consent of a majority of the conference, should proceed to build, at a designated place, a suitable edifice to serve the purpose of an assembly hall in which to hold future sessions of the general conference, no one, we think, would insist that the duty would be one that the bishops and a majority of the conference would have had to perform in person, but all would agree, not only that it might, but

that it necessarily would have had to, be delegated to others. This being so, the only question here would seem to be whether the power to appoint the place for the next meeting was one which, in its nature, was incapable of being delegated. It is a general rule of the law of agency that in the absence of any authority, either express or implied, to employ a sub-agent, the trust committed to the agent is presumed to be exclusively personal, and cannot be delegated to another, so as to affect the rights of the principal. But this general rule is subject to be modified by the peculiar circumstances and necessities of each particular case, from which the power to delegate the authority may be inferred. Thus, where, in the execution of the authority, an act is to be performed which is purely mechanical, ministerial, or executive, involving no elements of judgment, discretion, or skill, the power to delegate the performance of it to a sub-agent may be implied. There are also many cases where, from the very nature of the duty, or the circumstances under which it is to be performed, the employment of subagents is imperatively necessary, since the principal's interests would suffer if they were not so employed. In such cases the power to employ the necessary subagents will be implied. The employment of subagents may also be justified by a known and established usage and course of dealing. Mech. Ag. §§184-195. But these rules, which undoubtedly obtain in case of ordinary agencies, can have only a qualified application to the exercise of its constitutional powers by the governing body of a religious denomination. The general conference of the Evangelical Association cannot be said to have sustained the relation of agent to a principal, or of subordinate to a superior, but was, subject only to the limitations imposed by the Discipline, the supreme executive, legislative, and judicial authority of the denomination. And not only was it vested with the supreme power, but it had a very broad discretion as to the mode in which those powers should be exercised. The Discipline, after vesting it with its jurisdiction in matters executive, legislative, and judicial, the power under consideration being one of those conferred, provided that "it shall have power to make such rules and regulations as will enable it to execute the powers conferred upon it." The relations of the general conference to the denomination, then, must be determined, not so much by those rules which are applicable to the relation of principal and agent as by those which should apply to a governing body vested with the supreme executive, legislative, and judicial authority, and limited only by the terms of a written constitution.

In this view, the main contention is that the power to appoint the place for the meeting of the general conference was legislative, and that legislative power is in its nature a personal trust, which must be exercised by the body upon which it is conferred, and that its delegation is necessarily unlawful. It may be observed that it is not always easy to distinguish between those powers which are legisla-

tive and those which are only executive or administrative. Legislative bodies are often called upon to perform acts which, if not purely administrative, partake of that nature; and it is especially difficult, in cases like the present, where legislative and administrative powers are vested in the same body, to determine whether a particular power belongs to one or the other of those departments. If we attempt to classify the power in question, we think it can hardly be said to be distinctly legislative or administrative, but it seems rather to partake to some extent of the character of both. The mere act of appointing the place of meeting may, perhaps, be regarded as legislative, but the selection of the particular congregation with which to hold the session, if not purely administrative, was largely of that nature. Before such selection could be wisely and judiciously made, various preliminary questions had to be investigated, and various arrangements had to be made. The convenience of the various delegates who were expected to attend had to be ascertained and properly provided for. It will not be presumed that the general conference would have been disposed, in any event, to force itself upon the hospitalities of an unwilling congregation, and it was necessary, therefore, to find a congregation, conveniently located and reasonably accessible, whose house of worship would conveniently accommodate the conference, and whose members were disposed to receive the delegates, and extend to them their hospitalities. No such congregation presented itself during the session at Buffalo, the only one from which an invitation had been received having withdrawn the invitation before the appointment of a place for the next meeting had been considered. Under these circumstances the general conference was not prepared to act intelligently, if at all. Before the place could be judiciously appointed, a suitable one had to be found, and suitable arrangements to secure the proper accommodation of the conference and its members had to be made, and that necessarily involved negotiations, inquiries, and preparations, which clearly were matters of an administrative character. It is, no doubt, the general rule, that legislative powers cannot be delegated. This, however, as will hereafter be shown, is by no means a universal rule. It is not unusual for legislative bodies to delegate to commissions or other similar agencies the details of matters which they cannot conveniently attend to themselves, and which can be more advantageously considered and performed by a commission, and the legality of their doing so cannot be successfully questioned. In determining whether the matter of appointing the place for the meeting of the next general conference was one which could be thus delegated to the board of publication, great deference is due to the decision of the conference itself, to be implied from the very act of making the delegation, that the matter could be properly committed to such board. Being the supreme legislative and administrative, as well as judicial body, it had the power, and it

became its duty, in each instance, to determine its own authority to act, and its conclusions in relation thereto are entitled to great weight, if they are not, indeed, conclusive upon the civil courts. Unless, then, they were manifestly violative of the constitution or laws of the association, or in clear and palpable excess of its own jurisdiction, they are not subject to review by courts of equity, and must be held to be in accordance with the true exposition of the rules established for the regulation and government of its action. As hearing upon the same point, considerable weight is also to be given to the fact that so large a proportion of the members of the denomination concurred in the action of the general conference. Eighteen of the twenty-five annual conferences recognized its validity by sending their delegates to the general conference appointed to be held at Indianapolis, and similar action was taken by the very considerable minority of the members of five of the remaining seven annual conferences which adhered to Bishops Esher and Bowman. In addition to this, two of the three bishops, and all the other general officers of the association who were ex officio members of the general conference, recognized the validity of the action of the board of publication in appointing the place of meeting. These various conferences and members thus concurring were presumably familiar with the laws and usages of the denomination, and their action, thus taken under the sanction of their official responsibility, furnishes strong evidence that, in their judgment at least, the general conference had not transcended its appropriate jurisdiction in committing the selection of the place of meeting to the board of publication.

It is not improper to also notice, in this connection, the fact that, for nearly three years and a half after the action of the general conference committing the matter of selecting the place of meeting to the board of publication, the legality or propriety of such action was not called in question by any one, but, so far as appears, received the general acquiescence of all parties. It was not until a bitter controversy had arisen, dividing the members of the denomination into two hostile factions, that the place of meeting came to be regarded as a matter of serious consequence. Then, for the first time, as it would seem, it became material, in the judgment of those who were opposed to Bishops Esher and Bowman and the board of publication, to have the next session of the general conference held at a point which should be largely dominated by the influence of members of their own party, and they thereupon, some four months after the place of meeting had been fixed at Indianapolis, claimed to have discovered that the power of the board of publication in that behalf was technically, or perhaps substantially, defective, and so caused action to be taken by the body which assumed to be the oldest annual conference, and had Philadelphia selected, instead, as the place of meeting. It may also be observed that the delegation by the Buffalo conference to its



board of publication of the matter of selecting the place for its next meeting finds very considerable support in the practice in that respect which had obtained on former occasions. Thus in 1863, 1867, and 1879 the general conference designated a particular city or town as the place of meeting, leaving it to the local bodies to appoint the particular church with which the session should be held. In like manner, in 1874, a resolution was adopted fixing the place for the next session, but expressly leaving it to the Illinois annual conference to designate the particular church with which the session should be held. In all these cases the conference was held with the particular church thus designated. In 1839 the general conference designated, as the place for its next session, Tabor district, a district within the bounds of the Ohio annual conference, embracing a very considerable extent of territory, and containing many churches and preaching circuits. The annual conference of Ohio, at its last session preceding the time for holding the next general conference, passed a resolution designating a particular church building within the Tabor district as the place for its session, and the general conference was held at the place thus appointed. The evidence shows that a similar practice has prevailed, to a very considerable extent, in the matter of appointing the place of holding the various annual conferences, and that its validity has not been questioned. Substantially the same thing seems to be true in case of other churches acting under a similar organization and polity, and notably in case of the Methodist Episcopal church, whose rules and form of organization are in most respects substantially identical with those of the Evangelical Association. It will thus be seen that the propriety and legality of the action of the general conference in committing the matter of selecting the place for its next meeting to the board of publication is sustained by the judgment and opinion of the conference itself, by the general consensus of opinion among the members of the denomination, and to a certain extent, at least, by a practice, the lawfulness of which had never been questioned. It would not be carrying the rule beyond what seems to be supported by many of the authorities to hold that the judgment of the conference as to the construction of the Discipline and the extent of its own powers in this particular matter was conclusive. It is true the question was not brought before the conference in any case, to be decided by it in its judicial capacity; but, in the exercise of its legislative and ministerial functions, questions were necessarily presented as to the nature and extent of its own powers, and which had to be decided before action could be taken, and it is difficult to see why its decisions thus made should not be regarded as precisely as solemn and authentic as those rendered when acting technically as a judicial body. Whatever may be said of the conclusive effect of the decisions of church authorities or tribunals directly affecting property rights, it seems plain that a decision relating merely to the mode of ap-

pointing the place for the next meeting of the general conference cannot be regarded as properly belonging to that class. The place at which the conference shall hold its next session is purely an ecclesiastical matter, and has to do merely with the internal polity of the denomination, and is one over which the association, through its lawfully constituted authorities, has supreme control. It stands upon substantially the same footing with matters of religious belief, of forms of worship, or of ecclesiastical discipline, and it seems to be the well-settled rule that in matters of that character the decisions of the proper church tribunals are to be accepted as final, and are not subject to review by the civil courts. *Chase v. Cheney*, 58 Ill. 509; *Watson v. Jones*, 13 Wall. 679; *Gaff v. Greer*, 88 Ind. 122; *White Lick Quarterly Meeting v. White Lick Quarterly Meeting*, 89 Ind. 136. It is difficult, then, to see how the construction put by the Buffalo conference upon the provisions of section 71 of the Discipline, or its action based upon such construction, can be properly reviewed in this proceeding.

We are not disposed, however, to rest our decision upon this ground. Let it be conceded that the construction put upon section 71 by the general conference is not conclusive, and that the proper construction to be given to the section is still open for consideration in this court. But even then it must be admitted, as we have already remarked, that great weight should be given to what seems to have been the deliberate and unanimous judgment of the conference, supported, as it was, by precedent, and subsequently concurred in by so large a proportion of the members of the denomination. Whether the power to fix the place for the next meeting of the general conference is to be classed as legislative or administrative, there can be no doubt that it belongs to that class of powers which, by a very common legislative practice in this and other states, has been frequently delegated to commissions and other similar agencies, and that such practice, which doubtless has had its origin in considerations of convenience, has received general acquiescence from all departments of government, and, whenever made a subject of judicial investigation, has been sustained. The case of *Territory v. Scott*, 3 Dak. 357, 20 N. W. Rep. 401, is strongly in point. There the territorial legislature had passed an act providing that the seat of government of the territory be removed from Yankton, and be located and established in the manner therein provided. It then named certain persons as commissioners for the purpose of locating the permanent seat of government and capitol building of the territory, and authorized them to select a suitable site for the seat of government, "due regard being had to its accessibility from all portions of the territory, and its general fitness for a capital." The validity of this act was contested on the ground, among other things, that the power thus attempted to be delegated was distinctly legislative in its character, involving the exercise of discretion in a matter concerning the public, and was

therefore incapable of delegation. The court, in holding that the act was not subject to the objection thus urged, said: "We are of the opinion that, if not wholly administrative, so much, at least, of the act in question, as relates to the selection of a new site, and the erection of suitable buildings and improvements thereon, is clearly of an administrative character. The legislative will that the seat of government be removed, that it be located and established as in the act provided, and that the site selected and determined upon by the commissioners, in pursuance of the provisions of the act, shall be the permanent seat of government of the territory, is definitely expressed in the act itself. The undoubtedly important and responsible duties of selection and preparation for occupancy were delegated to these commissioners. The convenience of such delegation, the obvious difficulties in the way of a direct selection by the legislature, have already been alluded to. What legal principle is contravened by the delegation of this power? The legislature made the law. Every act done under it by these commissioners is done in pursuance and by authority of the law, and derives its sole validity therefrom, and, when done, it is to be regarded as the act of the legislature itself." Reference is made, in one of the opinions filed, to the fact that the state of Nebraska located its capital in a similar way by means of a commission. In *People v. Dunn*, 80 Cal. 211, 22 Pac. Rep. 140, the same objection was made to a statute which delegated to a commission the selection of a permanent site for a certain state charitable institution, and on this point the court said: "Nor do we think there is any force in the objection that, by providing that certain persons should select the site for the building proposed to be constructed, the act attempted to delegate legislative functions and powers. To hold that such powers could not be vested in persons named in the act would be an unreasonably strict application of the rule that legislative functions cannot be delegated. The mere act of selecting a site to be purchased was not a legislative act." In *Rice v. Shay*, 43 Mich. 380, 5 N. W. Rep. 435, the legislature, in organizing a county, provided that the county seat should be located within a certain township, and appointed commissioners to locate the same, and, the validity of the act being questioned on the same ground, it was sustained. In *State v. Chicago, M. & St. P. Ry. Co.*, 38 Minn. 281, 37 N. W. Rep. 782, it was insisted that an act appointing a board of railway commissioners, and authorizing them to establish rates of charges for transportation of property, was a delegation of legislative power, and therefore invalid. The question thus raised was elaborately considered, and in sustaining the validity of the statute the court, among other things, said: "It is not every grant of powers, involving the exercise of discretion and judgment, to executive or administrative officers, that amounts to a delegation of legislative power. The difference between the departments undoubtedly is that the legis-

lature makes, the executive executes, and the judiciary construes, the law; but the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a court will not unnecessarily enter. The principle is repeatedly recognized by all courts that the legislature may authorize others to do things which it might properly, but cannot conveniently or advantageously, do itself." See *People v. Harper*, 91 Ill. 357. A similar discussion arose in *People v. Reynolds*, 5 Gilman, 1. The statute in that case provided for the division of Gallatin county, and the organization of Saline county out of a portion of it. It, however, authorized the people of the county proposed to be divided to vote upon the question of division at an election, and provided that the act should go into effect only in case the majority of the voters at such election should vote in favor of division. It was objected that this was a delegation of legislative power to the voters of the county, and therefore invalid. In overruling this objection the court said: "If the saying is true that the legislature cannot delegate its powers, it is only so in its most general sense. We may well admit that the legislature cannot delegate its general legislative authority; still, it may authorize many things to be done by others which it might properly do itself. All power possessed by the legislature is delegated to it by the people, and yet few will be found to insist that whatever the legislature may do it shall do, or else it shall go undone. To establish such a principle in a large state would be almost to destroy all government. \* \* \* We see, then, that while the legislature may not divest itself of its proper functions, or delegate its general legislative authority, it may still authorize others to do those things which it might properly, yet cannot understandingly or advantageously, do itself. Without this power, legislation would become oppressive, and yet imbecile. Local laws almost universally call into action, to a greater or less extent, the agency and discretion, either of the people or individuals, to accomplish in detail what is authorized or required in general terms. The object to be accomplished, or the thing permitted, may be specified, and the rest left to the agency of others, with better opportunities for accomplishing the object or doing the thing understandingly. In this way have the seats of justice of most of the counties in the state been located." As bearing upon the same general subject, reference may be had to *Kramrath v. City of Albany*, 127 N. Y. 575, 28 N. E. Rep. 400; *Hoyt v. Thompson's Ex'r*, 19 N. Y. 207; *Hitchcock v. Galveston*, 96 U. S. 341.

The legislation of this state abounds with instances where powers similar to the one involved in the present case have been delegated by the legislature to commissions. In that way, as was intimated in the case of *People v. Reynolds*, supra, the county seats of most of the counties of the state have been located. The same is

true in relation to the location of many of our state charitable institutions. Thus, the act establishing the Northern Hospital for the Insane provided for the appointment by the governor, with the advice and consent of the senate, of nine commissioners, and authorized them to select a proper location for the proposed hospital, and such commission subsequently located the hospital at Elgin. Laws 1869, p. 24. In the same way the Southern Illinois Hospital for the Insane was located at Anna. Laws 1869, p. 19. Also, the Home for the Children of Deceased Soldiers at Normal. Laws 1865, p. 76. Also, the Southern Illinois Normal University at Carbondale. Laws 1869, p. 34. Also the Southern Illinois Penitentiary at Chester. Laws 1877, p. 30. Also the Soldiers' and Sailors' Home at Quincy. Laws 1885, p. 16. In these, and in many other similar cases to be found in the legislative history of the state, powers of this character have been delegated to and exercised by commissions, boards, and similar agencies, and the validity of such delegation has never been questioned. Indeed, to question it successfully would invalidate a large part of what has been done in the past history of the state by way of perfecting its political, economic, and social and charitable organization. In view of all these precedents, drawn from legislative action as well as judicial decision, it is impossible to hold that the power to select the place for the next meeting of the general conference was incapable of delegation. It belonged to that class of powers which legislative bodies have always been free to delegate to commissions or executive boards, whenever their exercise involved arrangements, investigations, or details which could be more conveniently or advantageously made or attended to in that way. It follows that the delegation of this power to the board of publication must be held to have been valid and effectual, and that the general conference held in October, 1881, at Indianapolis, the place appointed by the board, was the true and lawful general conference of the Evangelical Association.

This conclusion substantially disposes of the case. The body which convened at Indianapolis being the true and lawful general conference, its decisions as to all ecclesiastical matters must be accepted as final and conclusive. The proceedings against Bishops Esher and Bowman having been held to be wholly without warrant or authority, and absolutely void ab initio, that conclusion must be adopted as the true one, and it follows that the pretended judgments of suspension pronounced against them were never of any validity, and at no time incapacitated them from performing their appropriate functions as bishops, or from presiding at the various annual conferences at which they presented themselves, and sought to exercise their prerogatives as presiding officers of those bodies. The Indianapolis conference having decided it to be the law of the association that a bishop, if present, is "a necessary constituent element of every annual conference," and not only

entitled to, but bound by duty to, participate in its proceedings as its presiding officer, and having held, as a necessary consequence, that the annual conferences in the divided districts presided over by either Bishop Esher or Bishop Bowman were the true and lawful annual conferences in those districts, that decision is conclusive upon the courts, and we must therefore hold that the annual conference by which complainant Husser was appointed pastor of the congregation in question in this case was the true and lawful Illinois annual conference, and that Husser was the only lawful appointee as pastor of that congregation. Such being the case, no reason is apparent why the decree awarding him that office, and protecting him in its enjoyment, should not be sustained.

The point is made by counsel for the defendants that, even if Husser is the lawful pastor, neither he nor his co-complainants have established any property rights which entitle them to the interposition of a court of chancery. The co-complainants are or claim to be members of the congregation who, during these controversies, have adhered to Husser as their pastor, and they complain that they have been deprived of their right to worship, with their pastor, in the church edifice belonging to the congregation. The objection made to the case presented by them is that they have been expelled from membership in the congregation, and therefore have no further rights or interest in the church property. It is not disputed that they were formerly members of the congregation, and, if they have been expelled, the burden of showing that fact is of course upon the defendants. In the answer, which, by stipulation, was read as a deposition, it is alleged, in substance, that, after the difficulties in question arose, they withdrew themselves from the meetings of the congregation, and held religious services in another place, and contributed nothing towards the pastor's salary or other expenses of the church, and that on that account the quarterly conference of the church expelled them from membership. The Discipline contains an elaborate code of rules applicable to cases where members are sought to be subjected to trial for offenses. Among other things, the charges, if practicable, are to be in writing, and the accused and accuser are to be brought face to face, and the trial is to take place before a committee who, if it is at all avoidable, are not to be members of the quarterly conference. The quarterly conference, as such, has no jurisdiction, unless one of the parties, being dissatisfied with the result of the trial, appeals to that body, and, in case of such appeal, a second trial is awarded. There is no pretense that any proceedings were instituted against these members in the forms prescribed by the Discipline, or that any jurisdiction was vested in the quarterly conference in the only way possible, viz. by appeal. In fact, there is an entire absence of any showing of disciplinary measures instituted or carried on under the rules of the association, or that the body which is alleged to have expelled

them had any authority in the premises. We think there is a substantial failure to show that the complainants had lost their membership. It is true that as to Husser himself there was no contract providing for any fixed or definite salary as pastor, but the Discipline clearly contemplates the payment by each congregation to its pastor of an adequate support, and suitable officers and agencies are provided to obtain, by voluntary contributions from the members, the funds necessary for that purpose. Under these circumstances, it does not seem essential that there should be an express contract for a fixed salary. An adequate salary would appear to be secured by the Discipline, and although it is to be raised, in theory, by voluntary contributions, it is provided that those having ability to pay for the support of the pastor, and refusing to do so, shall be "dealt with as other gross transgressors and sinners." We think that under these circumstances a reasonable compensation is sufficiently secured to create in the incumbent a property right in the office of pastor which a court of equity will recognize and protect. After giving to the case the patient and careful consideration which its importance seems to demand, we have reached the conclusion that the decree of the superior court is warranted by the evidence. The judgment of the appellate court affirming the decree will accordingly be affirmed.

(146 Ill. 499)

#### GAGE v. CITY OF CHICAGO.<sup>1</sup>

(Supreme Court of Illinois. May 9, 1893.)<sup>2</sup>

SPECIAL ASSESSMENT—QUESTION FOR JURY—EMINENT DOMAIN—VERDICT.

1. Under Rev. St. c. 24, art. 9, § 31, which declares that if it shall appear in special assessment proceedings "that the premises of the objector are assessed more or less than they will be benefited or more or less than their proportionate share of the cost of the improvement, the jury shall so find and shall also find the amount for which such premises ought to be assessed," objections which raise questions as to the legality of the proceedings to condemn the street to pay for which the assessment is made do not present an issue for the jury. Following *Goodwillie v. City of Lake View*, 27 N. E. Rep. 15, 137 Ill. 51.

2. In proceedings to condemn "lots B and C, (except the east 66 feet of the west 248.95 feet thereof) of" a certain subdivision, a verdict awarding damages "to the owner of (except E. 66 feet W. 248.95 ft.) outlot B of said subdivision" sufficiently describes the part of lot B that is taken.

Appeal from circuit court, Cook county; S. P. McConnell, Judge.

Application of the city of Chicago to confirm a special assessment. Henry H. Gage, a property owner, interposed objections, which were overruled, and he appeals. Affirmed.

Gail E. Deming and Augustus N. Gage, for appellant. John S. Miller and Charles

C. Gilbert, (Edward Maher, of counsel,) for appellee.

BAILEY, C. J. This is an appeal from a judgment of the circuit court of Cook county confirming a special assessment. It appears that on petition of the city of Chicago to condemn certain land for opening Seventy-Fourth street from Wright street to Wallace street, such proceedings were had that the necessary land was condemned, and the compensation to be paid the owners thereof was fixed and ascertained by a jury. A supplemental petition was then filed, asking for the appointment of commissioners to assess the amount of such compensation upon the property deemed to be benefited by the improvement, and, such commissioners having been appointed, and having made and returned their assessment roll, the appellant, whose land, consisting of a tract of 10 acres adjoining the proposed improvement on the north, was assessed \$2,467.55, appeared, and contested the application to the court for a judgment confirming the assessment. The objections interposed, so far as they are material here, are the following: "(1) Said assessment is not levied on the several parcels of land in proportion to the benefits derived from the improvement. (2) Said assessment exceeds the benefits which will accrue from said improvement. (3) Said assessment upon objector's property exceeds a proportionate share of the expense of said improvement. (4) That said objector's property has already been assessed for opening numerous other streets through said property, which are amply sufficient for all needs of said property. (5) Said assessment is void, because the jury in this case in their verdict, in awarding compensation to be paid to the owners of the property taken for said improvement, have described the property by void, illegal, and erroneous descriptions. (6) Said special assessment is void for the reason that said Seventy-Fourth street, from Wright street to Wallace street, long before the filing of said petition for condemnation, was dedicated, platted, opened, and used as a public street and highway." On the hearing of these objections a jury was impaneled, but the court refused to submit to such jury the issues raised by the fifth and sixth objections, but decided them himself, and the refusal to submit those objections to the jury is assigned for error.

Those two objections are obviously in the nature of collateral attacks upon the judgment of condemnation. The fifth objection attempts to set up that the verdict of the jury in the condemnation proceedings wholly failed to describe the land condemned, and was therefore void for uncertainty, and that the judgment based thereon is consequently void; and the sixth objection sets up that the land sought to be condemned had already been dedicated by the owner for the purposes of a street, and could not, therefore, be condemned for the same purpose; and that the condemnation thereof had been improperly and improvidently made. Even if it be conceded that these are proper

<sup>1</sup> Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

<sup>2</sup> Rehearing denied October term, 1893.

matters to be alleged by way of objection to the confirmation of the assessment levied to pay the compensation awarded to the owners of the property taken,—a question which we do not deem it necessary to consider,—we think it plain that neither presented an issue which, under the provisions of section 31 of article 9 of the city and village law, the objector had a right to have submitted to a jury.

The fifth objection raised a mere question of law, which, upon every principle of correct practice, was for the court, and not for the jury. Whether the description of the land sought to be condemned, as it appeared in the verdict of the jury in that proceeding, was so imperfect and uncertain that no valid judgment could be rendered upon it, was a matter for the court to determine. Such determination could be had only by inspection of the records of the condemnation proceedings, and, as the interpretation of those records was purely a matter of law, there certainly was no error in refusing to submit it to the jury. But on examining the verdict as the same was offered in evidence and is preserved in the bill of exceptions in this case, we find that, while the description which it gives of the land condemned is somewhat informal, it is not so imperfect as to make the identity of the land intended to be described at all uncertain. The description of the land as it appears in the condemnation proceedings anterior to the verdict is as follows: "Lots B and C (except the east 66 feet of the west 248 95-100 feet thereof) of Auburn Park, being a subdivision," etc., (describing the tract subdivided.) The verdict was as follows: "We, the jury, find the just compensation to be paid to the owner or owners of the following described pieces and parcels of land and property sought to be taken or damaged for or by the proposed improvement, as follows, to wit: In Auburn Park, a subdivision of [describing the subdivision:] To the owner or owners of (except E. 66 feet W. 248 95-100 ft.) outlot B of said subdivision, \$2,360; to owner or owners of (except east 66 feet of west 248 95-100 ft.) outlot C of said subdivision, \$2,860. And we, the jury, find that no other property will be taken or damaged by the proposed improvement." The only material defect in the description of the property thus given, suggested by counsel for the objector, is that it omits the word "of" before "248 95-100 ft." in that part of the description of outlot B embraced in the parentheses. We are of the opinion that this omission created no material uncertainty as to the land intended to be described. Any one at all familiar with the abbreviated descriptions of land usual in tax and assessment proceedings would readily supply the omitted word, or read and understand the description precisely as though the word had been used. There was no ground, therefore, for holding that the verdict was insufficient to warrant the entry of judgment. In no point of view, then, can it be seen that any error was committed by the court in disposing of this objection as it did. The objection was untrue in fact, and was properly disallowed.

By the sixth objection, as has already been stated, the objector alleges that the land condemned for purposes of a street had been previously dedicated to the public for street purposes, and that its condemnation, and the award to the owners of compensation therefor, were unnecessary, and unauthorized. The propriety of the condemnation, and the power to make it, were matters which were necessarily passed upon by the court in the condemnation proceedings. They were jurisdictional, and the court, by entering the judgment of condemnation, necessarily determined that the property might properly be condemned. It is therefore, to say the least, doubtful whether the propriety of its condemnation can now be questioned collaterally. But, however that may be, it seems very plain that, under the provisions of the statute, an objection attempting to raise a question of that character does not present an issue which the property owner is entitled to have submitted to a jury on application for confirmation of the assessment of benefits upon the property deemed to be benefited by the improvement. Section 31 of article 9 of the city and village act provides that, "if it shall appear that the premises of the objector are assessed more or less than they will be benefited, or more or less than their proportionate share of the cost of the improvement, the jury shall so find, and also find the amount for which such premises ought to be assessed." In *Goodwillie v. City of Lake View*, 137 Ill. 51, 27 N. E. Rep. 15, this provision was under consideration, and we there said: "The matters to be submitted to the jury lie within a narrow compass, and include only the amount of benefits assessed or to be assessed. If it appears that the premises of the objector are assessed more or less than they will be benefited, or more or less than their proportionate share of the cost of the improvement, the jury shall so find, and shall also find the amount the premises should be assessed. No other verdict is required or can be rendered. It is clear, therefore, that only such objections as question the amount of benefits returned against the objector's premises can create the necessity for submission of the assessment to a jury." But the court, although declining to submit the sixth objection to the jury, as, under the decision just cited, it was proper for him to do, permitted the parties to introduce evidence upon the question whether there had been a previous dedication of the land sought to be condemned for street purposes. This evidence was heard by the court in the presence of the jury, and when it was all in he refused the prayer of the objector's counsel to instruct the jury to pass upon it, and find that a dedication had been proved, but passed upon it himself, and found that issue against the objector.

We have examined the evidence submitted, and while there is some evidence tending to show a dedication, yet, when it is all considered together, it comes far short of that clear and satisfactory proof which the law requires in such cases. We are of the opinion, then, that in disposing

of the sixth objection no error was committed of which the objector has a right to complain. No evidence whatever applicable to the other objection was offered. No attempt was made to show that the objector's land was assessed more than it was benefited, or more than its proportionate share of the cost of the improvement. There was nothing, therefore, so far as those objections were concerned, for the jury to pass upon. Such being the case, the objections were properly overruled. After careful consideration of the record, we fail to find any material error. The judgment of the circuit court confirming the assessment will be affirmed.

Judgment affirmed.

(146 Ill. 506)

**BURGESS v. RUGGLES et al.<sup>1</sup>**  
(Supreme Court of Illinois. June 19, 1883.)<sup>2</sup>

APPEAL—DECREE—REDEMPTION.

1. A decree taking from one party the right of redemption given to him by a former decree in the same suit, and conferring such right on another party to the suit, is so far final between them as to be appealable.

2. Upon suit to redeem from a voidable sale under a trust deed a decree was rendered allowing the debtor to redeem within a limited time, and declaring that on failure to redeem within that time the title acquired by the sale should "stand confirmed and unimpeached." The debtor failed to redeem within that time, but more than three years thereafter his title to the land was sold at sheriff's sale. *Held*, that neither the debtor nor the purchaser at sheriff's sale had any further right to redeem.

Appeal from superior court, Cook county; Francis M. Wright, Judge.

Creditors' bill by the Sawyer-Goodman Company against Arthur W. Windett, Anna M. Ruggles, and others. Windett filed a cross bill, to which William T. Burgess and others were made defendants. On this cross bill a decree was rendered, from which William T. Burgess appeals. Reversed.

The other facts fully appear in the following statement by WILKIN, J.:

The facts found in this voluminous record necessary to a determination of the questions involved are as follows: On August 21, 1875, Arthur W. Windett, being the owner of lot 98, in Ellis' East addition to Chicago, together with his wife, Eliza D., conveyed the same by trust deed, waiving and releasing the homestead, to Oliver S. Carter, in trust to secure the note of said Windett to appellee Ruggles for \$12,000, due in five years from date, with 9 per cent. per annum interest. On August 10, 1882, J. Henry Westover, as attorney in fact for said trustee, Carter, published a notice of sale of said premises under the power in said trust deed, to take place on the 16th day of September, 1882. On the 15th day of that month said Windett filed his bill in chancery in the circuit court of Cook county against said Carter, Ruggles, and Westover, setting up that said notice was irregular and insufficient, and praying an injunction to restrain the

sale, and he be allowed to redeem from the trust deed. An injunction issued as prayed, and the writ was served on the defendants prior to the sale. On said 16th day of September a sale was made, notwithstanding said injunction, and the premises struck off to Horace A. Hulbert, and a deed duly executed and delivered to him. Hulbert acted for Mrs. Ruggles, and whatever rights were obtained under the sale accrued to her. On June 1, 1883, Windett filed an amendment to his bill, setting up that the sale was made on an improper notice after the writ of injunction had been served; that no actual sale of the premises was made by the trustee; that the deed to Hulbert was made in fraud and violation of the trust deed, and in fraud of the order for an injunction; and praying that the sale be set aside, and he allowed to redeem. On June 4, 1883, the defendants to that amended bill filed their joint answer thereto, denying all the material allegations thereof, and alleging that the sale was in all things regular, and the title to the premises, by virtue of the trust deed and sale, and the deed executed in pursuance thereof, became and was vested in Hulbert. On January 2, 1884, on a hearing, a decree was entered allowing a redemption of the property upon the payment by Windett to Mrs. Ruggles of the sum of \$11,690.29, with interest, etc., within 90 days from December 10, 1883, it being provided in the decree that if "complainant should not pay the said sum of money within the time limited, that the said sale of the said property and the said deed to said Hulbert should stand confirmed and unimpeached by any matter or thing contained in the said decree, and the complainant's bill should be dismissed, with costs." March 10, 1884, a further decree was entered in said cause as follows: "This cause again coming on for hearing on the petition of the complainant for an extension of the time in which to make payment of the sum of money required to be paid by the complainant within ninety days from the 10th of December, 1883, as provided by the decree of this court heretofore and on the 2d day of January, 1884, entered herein, and the complainant having filed a release of all errors in the proceedings up to this date, and hereby agreeing not to prosecute a writ of error or appeal from said final decree or from this order, and after hearing counsel for the complainant and for the defendants, and the complainant appearing in person and moving for and assenting to this order in open court, it is now ordered and adjudged by the court that the time within which said principal sum of eleven thousand six hundred and ninety dollars and twenty-nine cents, (\$11,690.29,) with interest thereon from the 10th day of December, 1883, until the day of payment, as in said former decree is provided to be paid, be, and the same is hereby, extended until and including the 4th day of June, A. D. 1884. And, if said principal sum and interest is not paid by the said last-mentioned date to the clerk of this court, the said sale of said property in said decree mentioned, to wit, lot 98, in Ellis' East or 2d addition to Chi-

<sup>1</sup> Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

<sup>2</sup> As modified on rehearing, October 12, 1883.

cago, by the defendant J. Henry Westover, as attorney in fact for the defendant Oliver S. Carter, trustees, to the defendant Horace A. Hulbert, on the 6th day of September, 1882, under a trust deed made by the complainant Arthur W. Windett and wife to said Carter, and the title of said Hulbert to said property as derived from and through said sale shall stand confirmed and unimpeached, and the complainant's bill shall stand dismissed, with costs, without further order herein."

It is admitted by all parties that the terms of this decree were never performed by Windett, or any one acting for or in his behalf, at any time. On November 28, 1881, the Sawyer-Goodman Company had obtained a judgment against Windett in said superior court for \$856. On April 1, 1882, Francis Salter also recovered a judgment in the same court against Windett for \$167.39, on which judgments executions were duly issued, and returned "No property found." Thereafter, on December 20, 1882, the Sawyer-Goodman Company filed an ordinary creditors' bill against Windett, describing no particular property, and making no mention whatever of said trust deed or sale. No action seems to have been taken under that bill until September 15, 1887, when appellant, Burgess, appeared in the case under the following circumstances: On the 14th of said September he entered into an agreement with the Sawyer-Goodman Company, through its attorneys, as follows: "In the superior court of Cook county. The Sawyer-Goodman Co. vs. Arthur W. Windett. No. 80,683. Confession. Judgment for \$856 & costs, Nov. 28, 1881. For value received, the Sawyer-Goodman Company, plaintiffs in the above case, doth assign the above judgment to William T. Burgess and his assignees, authorizing and empowering him to have, use, and take all lawful ways and means, in the name of said company, or otherwise, but at his own costs, and charges to collect it. He is to give the said company one-half of whatsoever he may realize on the said judgment, provided that when the said company shall have received one-half full payment of said judgment, with interest and costs, said Burgess is to have all the surplus thereafter. The said Burgess hereby agrees to indemnify and save harmless said company of and from all costs, expenses, and damages arising out of the use of said judgment by him, and may compromise said judgment, but not for a less sum than \$400 without the consent of said company. Dated this 14th day of September, A. D. 1887. W. T. Burgess. [Seal.] Sawyer-Goodman Company. [Seal of Company.] By James B. Goodman, Secretary." It seems that upon the making of this contract the former attorneys of the company agreed to withdraw their appearance in said creditors' bill, and on the 15th day of September, 1887, Burgess appeared ostensibly for it, but, as the facts subsequently showed, for himself, and filed an amendment to the creditors' bill, making Carter, Ruggles, Hulbert, and other parties connected with the trustee's sale parties defendant, settling up substantially the same irregularities in making the sale which had been al-

leged by Windett in his bill to redeem, and praying that said company be allowed to redeem. On May 12, 1888, he (Burgess) paid to the attorneys of the company \$200, informing them that he had compromised said judgment in the company's favor against Windett for \$400, and requesting them to withdraw their appearance from cause, which they afterwards did. On November 9, 1887, the premises in question were sold by the sheriff of Cook county upon executions issued upon the judgments in favor of said company and Salter, and struck off to one E. A. Paul for \$1,441.41, which amount was receipted on the executions by Burgess, and the same returned "Satisfied." The evidence clearly shows that the execution under which that sale was made in favor of the Sawyer-Goodman Company was issued without its knowledge or consent or that of its attorneys, and there is nothing in the record to show how the one in favor of Salter came to be issued, or whether he received anything from the sheriff's sale. After that sale, and before the time of redemption expired, Paul assigned his certificate of purchase to Burgess, and he, on February 11, 1889, took a deed from the sheriff for the premises. On February 12, 1889, Burgess, without the knowledge or consent of the Sawyer-Goodman Company, again amended said creditors' bill, setting up that by reason of the sheriff's sale and deed he had become the owner of lot 98; the allegations as to his ownership being as follows: "And said Burgess claims under the said Salter judgment and execution, levy, and sale thereunder the said land and premises; avers that the facts, matters, and things touching said debt to said Ruggles, trust deed and pretended sale, and trustee's deed thereunder in said original bill of complaint as amended, set forth, and charged, are true as therein stated." By means of the said several premises, etc., "said land and premises have become and are the property of said Burgess, subject only to the title of said trust deed in favor of Anna M. Ruggles for what shall appear to be due her on an account to be taken in the premises, and said Burgess, claiming said land under said Sawyer-Goodman Co. judgment, bill filed in aid thereof, execution, levy, and sale thereunder, is entitled to further prosecute said bill to the relief thereby and therein prayed for, in like plight and condition and to the same extent as the Sawyer-Goodman Co. could prosecute and recover therein and thereby." The prayer is that Burgess be decreed all the rights and relief the Sawyer-Goodman Company could have to the lot under its bill, and he be allowed to redeem upon an account to be taken, making all due and proper allowances, and that the sale to Hulbert be declared a nullity and no bar to his right to redeem. To this bill Arthur W. Windett was also made a defendant with Ruggles, Carter, and other defendants to the bill as formerly amended.

On the 4th of March, 1889, Windett was defaulted, and Hulbert, Carter, Ruggles, and Westover filed their joint answer, insisting upon the regularity of the trustee's sale, and the validity of the title in Hulbert in pursuance thereof, and charging



that the amended bill was filed in the interest of Windett, by collusion between him and Burgess, for the purpose of avoiding the former decree against Windett on his bill to redeem. On April 9, 1889, the default of Windett was set aside, and he filed his answer, alleging that the lot in question was his homestead, and setting up at great length various transactions between himself and Burgess, most of which had no connection whatever with the lot, or the litigation previously had, growing out of the trustee's sale; charging Burgess with a breach of confidence and fraud in and about those matters, and also charging him with gross misconduct in and about procuring said sheriff's sale and deed, concluding as follows: "This defendant insists and charges that each and all the said several steps, proceedings, and actions taken, done, and had by said Burgess in the premises, whether in the name of said Sawyer-Goodman Company or said F. Salter or his own or any whatever other name he may have used, were illegal, fraudulent, null and void and that said pretended levies, sales, and deeds set up in said bill, original, amended, and supplemental, as aforesaid, were and are, all and singular, utterly illegal, null and void; and he insists that the same should be so held and adjudged by this honorable court, and that said bill asserting and claiming title by virtue of said executions, levies, sales, and deeds be dismissed for want of equity." On the coming in of this answer, Burgess again amended his bill, alleging that said trust deed to Carter contained a waiver and release of the homestead by Windett and wife, and averring that "on the 5th day of June, 1884, the said Windett, not having complied with the terms of said order, and paid the money necessary to redeem the said land and premises from said trust deed, his bill of complaint aforesaid was by final decree of said court dismissed out of court for want of equity, and the title of said Hulbert under the trustee's sale and deed to him aforesaid became absolute and irredeemable by him, said Windett, whereby the said Windett became and was barred of all right, title, and interest in said lands and premises, including the right of homestead therein, and said Windett has ever since with his family resided elsewhere than on said land, and abandoned his homestead therein." This amendment is signed by Mr. Burgess for complainants. The answers of the several defendants theretofore filed stood to this amendment, Windett filing a further answer, charging that said sheriff's sale was fraudulently conducted, and the property sold for a grossly inadequate price; that Burgess obtained the Sawyer-Goodman Company claim by fraud and false representations made to the attorneys of the company. On the 21st day of June, 1889, a decree was rendered allowing the prayer of said bill, the concluding part of which is as follows: "From all which the court finds that the said complainant, Burgess, notwithstanding the sale made by said J. Henry Westover as the 'attorney' of said Carter to said Hulbert, and the deed aforesaid thereon

made to said Hulbert by said Carter, through and by said Westover, as the attorney of said Carter, dated the 16th day of September, A. D. 1882, and recorded the same day in the recorder's office of said county in Book 1097 of Records, page 361, conveying said lands and premises to said Hulbert in pursuance of said sale, and notwithstanding the tax titles acquired by him, Hulbert, as aforesaid, is entitled to redeem said lands and premises from the said trust deed and tax titles on the payment of what, on an account being taken, shall appear to be justly due the said Anna M. Ruggles in the premises. And to that end, before entering a final decree herein, it is ordered that it be referred to Penoyer L. Sherman, one of the masters in chancery of this court, to take and state such account, in which the said Ruggles shall be credited with the amount due on said judgment, as shall appear from evidence to be taken before him, and taxes paid, with interest at six per cent. per annum, and charged with the rents, issues, and profits of said lands and premises received, or which by the exercise of ordinary diligence might have been received, and otherwise making all due and proper allowances and charges, and that he report with all convenient speed."

On May 13, 1890, Windett filed a cross bill, making Burgess and others defendants thereto, praying that all the rights so decreed to Burgess be transferred to him; and on November 5, 1891, a decree was entered in his favor, according to the prayer of that cross bill. On July 16, 1892, the cause came on for hearing before the Honorable F. M. Wright, upon the report of the master made under the order of reference by said decree of June 21, 1889, whereupon it was decreed that there was due Anna M. Ruggles the sum of \$16,553.10, and upon the payment to her of that amount within five months from that date "by the party or parties hereinbefore by the interlocutory decrees and orders of the court found entitled to make redemption of said premises, with interest thereon at five per cent. per annum from the 13th day of July, 1891, (the date of said master's report,) until the time of such payment, and the costs of this suit taxed in favor of said Ruggles, that then the said Oliver S. Carter, Anna M. Ruggles, and Horace A. Hulbert do join in and execute, duly acknowledge, and deliver to the parties so making such payment a release deed, releasing to him, her, or them the said lot 98, in Ellis' East or Second addition to Chicago, the land described in the bill of complaint and decree of June 1, 1889, in this cause, from all right, title, estate, or interest acquired or held by them, or any of them, under said trust deed from Arthur W. Windett and Eliza D. Windett, his wife, in trust to said Carter for said Ruggles, or under the trustee's deed from said Carter to said Hulbert, made thereunder, or the tax title or deed obtained thereon by John Carne, Jr., and by him conveyed and transferred to said Horace A. Hulbert, mentioned in the pleadings and evidence in this cause or otherwise, howsoever; and also quit and

surrender upon notice and order of court to be obtained therefor to him or them the quiet and peaceable possession of said premises, or, in case of the failure of them, or any of them, for the space of five days thereafter, to make such deed, then that Alexander F. Stevenson, a master in chancery, be, and he hereby is, appointed special commissioner under the statute to make the same for them and on their behalf." And it was further ordered that in case the said party or parties so adjudged by said interlocutory decree and order as entitled to redeem shall not within the time hereinabove limited for that purpose pay said sum of \$16,553.10, interest and costs, as hereinabove provided, then the original and supplemental bills, the cross bill of Arthur W. Windett, and the cross bill of Eliza D. Windett and Phillips E. Stanley in the case of the Sawyer-Goodman Company against Arthur W. Windett et al., and the bill of said Arthur W. Windett against Horace A. Hulbert et al., consolidated therewith, be dismissed out of court for want of equity, so far as these proceedings relate to the redemption of said premises, at the cost of the respective complainants therein. It is expressly declared by the court that the only adjudication intended to be made by this decree is to fix the basis and terms upon which said premises may be redeemed by the parties or party heretofore by the court in its interlocutory decrees and orders adjudicated to have that right. All other rights and remedies, if any, involved in these proceedings, are to be and remain without prejudice by reason of this decree, the parties respectively having reserved to them all such rights, if any such be involved herein, and the right to pursue the same either by action at law or suits in equity, or, if appropriate, by supplementary proceedings herein. The parties each and separately except.

This appeal is prosecuted by Burgess, who, claiming that the entire record, including said decree in favor of Windett, is before the court, seeks to have the same reversed and set aside. He also questions the correctness of said last decree, fixing the amount to be paid Mrs. Ruggles in order to redeem. Anna M. Ruggles, Oliver S. Carter, and Horace A. Hulbert file their joinder in error, and also file cross errors, by which they seek to have reversed and set aside the decree in favor of both Burgess and Windett. Windett files a motion to dismiss the appeal, and assigns many causes, none of which are of a substantial character, unless it be that no final decree has been rendered in the case. He also insists upon the validity of the decree in his favor, questioning, however, the correctness of the finding in the final decree as to the amount due Mrs. Ruggles.

D. H. Pinney, for appellant. Story, Westover & Story and A. W. Windett, for appellees.

WILKIN, J., (after stating the facts.) The motion to dismiss the appeal is overruled. The decree taking from appellant the benefits of the decree previously ren-

dered in his favor, and transferring them to appellee Windett is so far final between them that an appeal will lie to have it reviewed. It finally fixes the rights of appellant, and the court below so treated it in its order of December 3, 1891. At the instance of appellee Windett the court there held that Burgess, "by reason of the decree entered in this cause on the 5th day of November, 1891, has no standing in court, and refused to hear him, touching the same."

Neither do we think it can be said that the record is brought up piecemeal because the decree by Judge Wright leaves it undetermined which of the parties may redeem. That question had been settled by the former decree in Windett's favor. If this court should affirm the last-named decree, and sustain the finding as to the amount due Mrs. Ruggles, nothing would remain to be done in the superior court. If, on the other hand, that decree should be reversed, and the one in favor of Burgess' right to redeem affirmed under the assignment of cross errors, it would only be necessary to remand the cause, with directions to give effect to that decree. And finally, if both decrees to redeem are found to be erroneous, as they must be, and the cross errors sustained, our judgment will be final, simply remanding the cause with directions to dismiss all bills and cross bills to redeem. Therefore, in any view of the case, no good reason appears for further protracting this litigation by dismissing the appeal, and sending the cause back to the superior court. The motion to dismiss the appeal will be overruled.

On the merits of the case, the first question arising in natural order is, can the decree of June 21, 1860, giving Burgess a right to redeem, be sustained? because, if it cannot, that of November 5, 1891, in Windett's favor, must also fall, the latter being merely a transfer of the benefits of the Burgess decree to Windett. The sale under the trust deed, and the conveyance made in pursuance thereof, vested the legal title to the lot in question in Hulbert, subject only to be avoided by Windett. In other words, conceding all that is claimed against the validity of that sale, it was voidable only, and not void. Windett might abide by the sale or disaffirm it, as he pleased. *Jenkins v. Pierce*, 98 Ill. 653, and cases cited. He chose to avail himself of the right to disaffirm it, and filed his bill accordingly, which was prosecuted to a final decree, giving him the right to redeem within 90 days from December 10, 1883. Failing to exercise that right within the time limited, on March 10, 1884, he obtained an order extending the time to June 4, 1884, and that order expressly providing, if the redemption money was not paid by that date, the sale to Horace A. Hulbert, made on the 16th day of September, 1882, under the trust deed, and the title to Hulbert to said lot, should "stand confirmed and unimpeached," and his bill be dismissed, with costs, without further order. This decree was the proper one to be made in such case, as we held in *Bremer v. Dock Co.*, 127 Ill. 498, 18 N. E.

Rep. 321, citing the authorities. He again failed to make the redemption, but suffered the last-named date, June 4th, to go by without paying the redemption money, and from that time to the present, in all the volume of pleadings filed in the case by himself and Burgess, not the slightest excuse or explanation as to why he did not do so has been offered. What, then, was the condition of the title to the lot after June 4, 1884? Burgess himself answers the question in his last amendment to the Sawyer-Goodman Company bill, which he had previously appropriated to his use. He says: "The said Windett, not having complied with the terms of said order, and paid the money necessary to redeem the said lands and premises from said trust deed, his bill of complaint aforesaid was, by final decree of said court, dismissed out of court for want of equity, and the title of said Hulbert, under the trustee's sale and deed to him aforesaid, became absolute and irredeemable by him, said Windett, whereby the said Windett became and was barred of all right, title, and interest in said lands and premises, including the right of homestead therein." And yet, more than three years after he says all Windett's right and title to said lot had become vested in Hulbert, (on November 9, 1887,) he assumes to sell the same as the property of Windett, and in pursuance of and under that sale set up title in himself as against Hulbert. Nothing, it seems to us, could be clearer than that from and after June 4, 1884, the absolute title to said property was in Hulbert, for Mrs. Ruggles, for whom he acted. The sale being voidable, Windett had still an equitable interest in the property; but after the decree of June 4th all his right, title, and interest, legal and equitable, was gone. "Such a sale can be set aside only at the option of the cestui que trust, and that must be determined in apt time. He has an election to treat the sale as valid if he will." *Hamilton v. Lubukee*, 51 Ill. 415. Neither Francis Salter nor the Sawyer-Goodman Company could, after that time, legally levy on it as the property of Windett, much less could Burgess get a title under them upon which to base a right to redeem. If these parties had filed their bill in due time, asking a court of equity to allow them to redeem as creditors, a very different case would have been presented.

But what is the position of Mr. Burgess in a court of equity, and what does he seek to do? He does not claim, as we understand,—and certainly could not under the evidence in the case,—to occupy the position of a creditor of Windett, asking a court of equity to allow him to redeem. He was never the bona fide owner of the Sawyer-Goodman Company judgment. It was only assigned to him for the purpose of collection. He never claimed the right to control the Salter judgment in any way. Burgess is then driven to the position taken in his bill, that he is entitled to redeem as owner of the property. Unless it can be maintained that an owner of real estate can be divested of his title by a levy and sale of it

as the property of a stranger, Burgess got no more right, title, or interest in lot 98 by the pretended sheriff's sale and deed than he would have received if Windett had never pretended to own it. The very foundation of his claim of right to redeem—viz. his title to the property—failing, it is too clear for argument that he could have no standing upon the bill under which his decree was rendered.

There is another reason why the decree in question cannot be upheld. It is not in the interest of right and justice. There is nothing in the case made by the bill upon which it was rendered appealing to the conscience of the court to grant the relief prayed. On the contrary, when considered in the light of the evidence, the case is purely one of speculation on the part of appellant. Even as to one having a right to redeem, the rule is: "Where the sale is attacked, not as simply void for noncompliance with the power, but as voidable on equitable considerations, having reference to the unfair mode in which the power has been executed, the decision must turn upon a comparison of the equities." *Burr v. Borden*, 61 Ill. 395. No good purpose would be served by reviewing the evidence bearing upon this view of the case. The findings of the court upon which the subsequent decree was based clearly establish the fact that Mr. Burgess could have no standing in a court of equity as against any one having a legal or equitable interest in the property. The decree in his favor was clearly erroneous, and should be reversed. There is, if possible, still less reason for the position that Windett is entitled in equity to the benefit of that decree as against Hulbert. As above shown, he had his day in court, and was allowed the relief he asked. Instead of availing himself of that relief, he elected to allow the title to "stand confirmed and unimpeached" in Hulbert, and suffered his "bill to stand dismissed." What difference could it possibly make to him after that time who got the property, except as he desired to see his honest debts paid? He showed by his answer and proofs that Burgess was not entitled to the decree in his favor, and yet asked a court of equity to give him the benefit of that decree. It is said in the decree under which he now claims that Burgess acted in the premises as his trustee, and that he acquired, and now holds, the legal title, and the benefit of said decree of June 21, 1889, for his sole use and benefit, etc. While the cross bill under which his decree was rendered is pregnant with allegations of bad faith, breaches of confidence, violations of professional duty, and fraud on the part of Burgess towards Windett, as to other parties, other transactions, we have been unable to find, either in the allegations of the cross bill, the evidence, or the findings in the decree, wherein he at any time occupied a trust or confidential relation towards Windett as to this lot 98, or that he in any way or at any time interfered with or obstructed his efforts to redeem the same. We express no opinion as to the merits of the controversy between these parties arising out of the transac-

tions set up in the cross bill, but we think it too clear for argument that such controversy cannot be made the basis of a decree allowing Mr. Windett to retain the property here in question. As before said, his right to redeem was established, and, so far as this record shows, he voluntarily waived that right, and chose to let the title stand in Hulbert. We think the decree, which is set out at length in the foregoing statement, as it appears in the abstract, refutes and condemns itself. It allows Windett to do indirectly that which it is conceded he could not do directly. In our view of the case, the superior court erred in not denying both Burgess and Windett the right to redeem lot 98, and in not dismissing all bills, amended bills, cross bills, and amended cross bills praying that relief, at the costs of the complainants therein. In this view of the case, whether or not the decree of July 16, 1892, correctly fixes the amount due Mrs. Ruggles is unimportant. That and each of the other decrees above mentioned will be reversed, and the cause will be remanded to the superior court, with directions to dismiss the bills and cross bills as above indicated; and it is ordered that the costs in this court be paid by the appellant, William T. Burgess, and the appellee A. W. Windett, each paying one-half thereof. Reversed and remanded.

(146 IH. 555)

HENDERSON et ux. v. HATTERMAN.<sup>1</sup>(Supreme Court of Illinois. June 19, 1893.)<sup>2</sup>

BOUNDARIES—DEED—APPEAL—CROSS ERRORS.

1. The owner of land subdivided that part of it "lying north of Indian boundary line" so that lot 9 of the subdivision abutted on said line. He conveyed a tract of land described in the deed as "commencing on the southwest corner of lot 9" of such subdivision, and "running thence northeasterly along the Indian boundary line, \* \* \* intending hereby to convey one acre of land, without reference to metes and bounds as above described." The Indian boundary line was the center of a highway 66 feet wide. *Held*, that the southwest side of the tract conveyed was the center line of the highway, although that only gave the grantee one acre, including the strip subject to the easement of the highway.

2. An appellee who has failed to assign cross errors by writing them on the record, or attaching them thereto, as required by the rules of court, cannot be heard to complain of the decree appealed from.

Appeal from circuit court, Cook county;  
O. H. Horton, Judge.

Suit by William E. Hatterman against  
Edward Henderson and Sarah E. Hender-

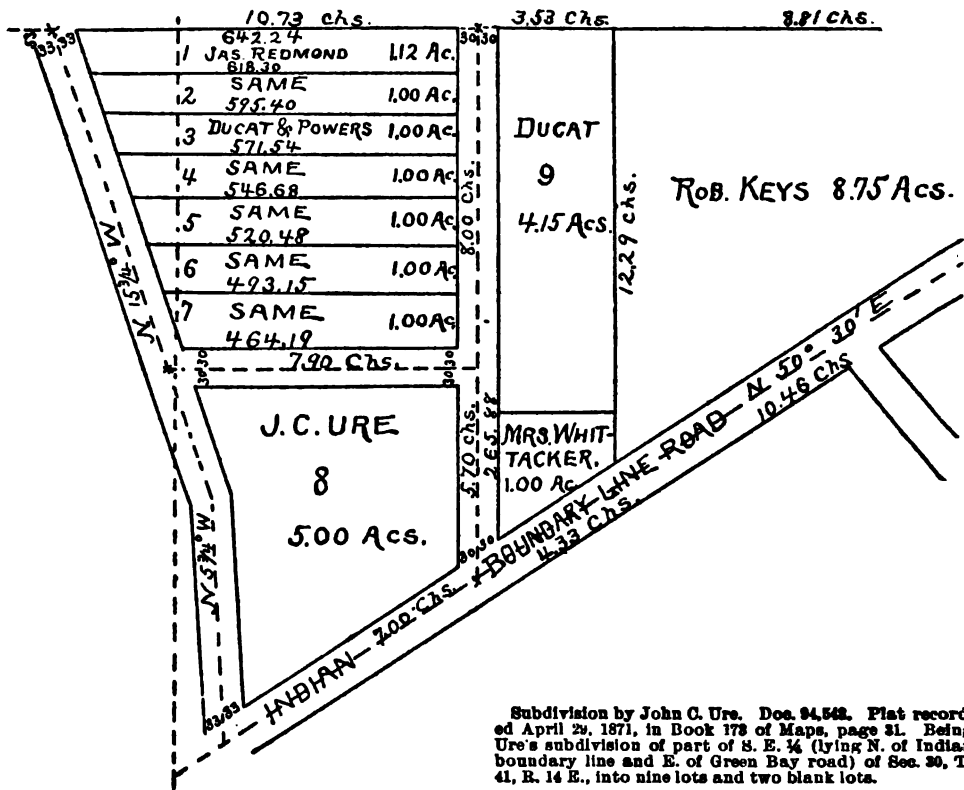
son to establish title. Complainant obtained a decree. Defendants appeal. Affirmed.

The other facts fully appear in the following statement by MAGRUDER, J.:

This is a petition to establish title under the burnt record act, filed on April 26, 1890, in the circuit court of Cook county, by appellee against the appellants, "and all whom it may concern." It is conceded that John C. Ure is the common source of title. The deed under which appellants claim is a deed dated April 27, 1871, and recorded May 16, 1871, executed by John C. Ure to Mary Whittaker and Sarah Ellen Henderson, (said Whittaker having subsequently conveyed her undivided half to Edward Henderson,) and conveying the following premises: "All the following described lot, piece, or parcel of land, situate in the county of Cook and state of Illinois, known and described as follows, to wit, that certain piece or parcel of land commencing on the southwest corner of lot nine (9) of Ure's subdivision of part of the southeast quarter of section thirty, (30,) township forty-one (41) north, of range fourteen (14) east, of the third principal meridian; running thence northeasterly, along the Indian boundary line, four (4) chains and thirty-three (33) links; thence running north one hundred eight and 16-100 (108 16-100) feet; thence running west two hundred and thirty-two and 98-100 (232 98-100) feet; thence running south two hundred and sixty-five and 88-100 (265 88-100) feet to the place of beginning, — meaning and intending hereby to convey one (1) acre of land, without reference to metes and bounds as above described." The deed under which appellee claims is a deed dated May 1, 1871, and recorded May 9, 1871, executed by said Ure to Augusta Mary Ducat, wife of Arthur C. Ducat, (said Augusta having conveyed to a third person, who conveyed to said Arthur, the grantor of appellee,) and conveying the following premises: "The north four and fifteen hundredths (4.15) acres of lot nine (9) of Ure's subdivision of that part of the southeast quarter of section thirty, (30,) township forty-one (41) north, range fourteen (14) east of the third principal meridian, according to plat recorded in Cook county registry of deeds, in Book 173 of Maps, page 31, being the north four and fifteen one-hundredths (4.15) acres of a tract of five and fifteen one-hundredths (5.15) acres lying west and adjoining the east eight (8) acres of said quarter section, and being north of Indian boundary line, the south line of said four and fifteen one-hundredths (4.15) acres being bounded on the south by an east and west line." The following is the plat, dated April 27, 1871, of the subdivision made by said John C. Ure:

<sup>1</sup> Reported by Louis Boiset, Jr., Esq., of the Chicago bar.

<sup>2</sup> Rehearing denied, October term, 1893.



Subdivision by John C. Ure. Doc. 34,542. Plat recorded April 29, 1871, in Book 173 of Maps, page 31. Being Ure's subdivision of part of S. E. ¼ (lying N. of Indian boundary line and E. of Green Bay road) of Sec. 30, T. 41, R. 14 E., into nine lots and two blank lots.

The decree of the court below finds that the petitioner and the defendants held under Ure, as abovestated. That said Ducat obtained title from the government. That the records have been destroyed by fire, etc. That Ducat, although his deed from Ure was recorded before the deed to Whittaker and Henderson, had notice of the latter deed, and his title to that portion of the north 4.15 acres of lot 9 included in the description in the deed to Whittaker and Henderson is subject to the latter deed, and he has no title thereto. That the description in the latter deed is by metes and bounds, and the starting point of said lot is taken on the "Indian boundary line." That the metes and bounds must control, as to petitioner. That the measurement of the land in said latter deed, whether it be more or less than one acre, is and shall be from the "Indian boundary line," on the southeasterly side, and from the center line of the 60-foot street on the west side of lot 9. That petitioner has title to all that part of lot 9, except the portion thereof, in the south end thereof, described as follows: "Commencing at the intersection of the center line of the street running north and south, west of said lot nine (9) and the Indian boundary line, being the center of the Indian Boundary Line road, and running northeasterly, along said Indian boundary line, 4 chains and 33 links; thence running north, along the east line of said lot nine, (9,) 104 and 16-100 feet; thence west 239 32-100 feet, or to the center line of said north and south street; thence south to

the place of beginning." That defendants were in possession of a portion of said premises, and that petitioner was entitled to the possession of all said lot, except the said portion in the south end. That petitioner's title thereto be established, and that the defendants surrender possession, etc. The case is brought to this court by appeal of the defendants below. No cross errors have been assigned upon the record by the appellee.

Richard Prendergast, for appellants.  
H. H. Anderson, for appellee.

MAGRUDER, J., (after stating the facts.) A reference to the plat shows that the land claimed by the appellants abuts, on its southeasterly side, upon a road 66 feet wide, known as the "Indian Boundary Line Road." There is nothing to indicate that this road was anything more than an ordinary highway when Ure's subdivision was made. The center line of this road is what is known as the "Indian Boundary Line." Appellants claim that they own an acre of ground in lot 9, and that the southerly line of the land so owned by them coincides with the northerly line of the Indian Boundary Line road, while appellee contends that the southerly line of the land of appellants coincides with the Indian boundary line, or the center line of said road. Where a deed refers to a plat or subdivision, the particulars shown upon such plat or subdivision are as much a part of the deed as though they were recited in it. Railroad

Co. v. Koelle, 104 Ill. 455; Piper v. Connelly, 103 Ill. 646; 3 Washb. Real Prop. marg. p. 638. Here the deeds under which both parties hold not only refer to lot 9 in Ure's subdivision, but also to the Indian boundary line. When we look at the plat of Ure's subdivision, we find, not only that lot 9 abuts at its south end upon said road, and that the Indian boundary line is the center of said road, but also that Ure's subdivision is a subdivision of that part of the southeast quarter of section 30 "lying north of Indian boundary line." Presumptively, therefore, the land subdivided comes down to that line, and the subdivision embraces the north half of the road, or the strip 33 feet wide which lies north of said line. The deed from Ure to Ducat describes lot 9 as a tract of 5.15 acres, "being north of Indian boundary line;" and, if lot 9 comes down to the Indian boundary line, it must include the north half of the road, to the extent of its width on the south.

It is well settled, as a general rule, that "a grant of land bounded upon a highway \* \* \* carries the fee in the highway to the center of it, provided the grantor at the time owned to the center, and there be no words or specific description to show a contrary intent." 3 Kent, Comm. marg. p. 434; Elliott, Roads & S. p. 549, and cases in note 2. When a deed bounds an estate by or on a public way, the presumption is, if nothing else appears, that the center of the way is the boundary line. Dean v. Lowell, 135 Mass. 55. It will not be supposed that a man would care to keep title to the highway in himself, when he had parted with the land bordering thereon. Salter v. Jonas, 39 N. J. Law, 469; 3 Washb. Real Prop. marg. p. 635. The presumption that the owner of the adjoining land intended to convey his interest in the highway may be overcome, either by the use of express terms excluding it, or by such facts and circumstances as show an intention to exclude it. The intent to exclude the highway must appear from the language of the deed, as explained by surrounding circumstances. Mott v. Mott, 68 N. Y. 246; Elliott, Roads & S. p. 550. It makes no difference, in the application of the rule, whether the land abutting upon the highway is a lot which bears a certain number, or is a farm, called block,—acre, or otherwise. Kimball v. City of Kenosha, 4 Wis. 321; Berridge v. Ward, 10 C. B. (N. S.) 400. Although the measurement set forth in the deed brings the line only to the side of the highway, the title will still be carried to the center of it, unless such words are used, and such inferences and bounds are set forth, as show a contrary intention. 3 Kent, Comm. marg. p. 434, note 37; Elliott, Roads & S. p. 550; Paul v. Carver, 26 Pa. St. 223; Cox v. Freedley, 33 Pa. St. 124; Johnson v. Anderson, 18 Me. 76; Cottle v. Young, 59 Me. 105; Woodman v. Spencer, 54 N. H. 507. Of course, it is understood that the title to the center of the highway, which thus passes by the grant of the adjoining land, is subject to the easement of the public in the highway.

An application of these principles to the

description contained in the deed from Ure to Whittaker and Henderson leads to the conclusion that the southern boundary line of the land thereby conveyed was the center of the Indian Boundary Line road, or, what is the same thing, the Indian boundary line. The deed, construed in the light of such surrounding circumstances as are admissible to explain its meaning, bespeaks no intention on the part of the grantor to exclude his interest in the highway. Ure's subdivision was of the southeast quarter of the section "into nine lots and two blank lots." The only two blank lots on the plat are Mrs. Whittaker's 1 acre and Keys' 8.75 acres. Thus, according to the plat, the nine lots and the two blank lots are distinct and several pieces of property, so that, if it were not for the descriptions used in the deeds, Mrs. Whittaker's one acre would not appear to be a part of lot 9. The deed to her does not specifically describe it as a part of lot 9, but as a parcel of land "commencing on the southwest corner of lot 9 of Ure's subdivision; \* \* \* running thence northeasterly, along the Indian boundary line, 4 chains and 33 links; thence running north 108.16 feet," etc. Where is the starting point in this description? The appellants contend that the "southwest corner of lot 9" is in the north line of the road; that is to say, 33 feet north of the center of the road, or of the Indian boundary line. If this be so, the description is an impossible one, because, after leaving the starting point, the course must be along the Indian boundary line. The words are, "running thence northeasterly, along the Indian boundary line, 4 chains and 33 links." The Indian boundary line is 33 feet south of the "southwest corner of lot 9," if that corner is in the north line of the road. To commence at a starting point thus located, it would be necessary to jump to a point 33 feet south thereof, in order to carry out the succeeding portion of the description. The street west of lot 9 is 60 feet wide. If the starting point is in the north line of the Indian boundary road, and 30 feet east of the center of said street, a line 4 chains and 33 links in length would throw the eastern line of the Whittaker tract upon the land of Keys. According to the description in the Whittaker deed, the east line of the land of appellants starts from the Indian boundary line, "thence running north 108.16 feet." If the starting point be in the north line of the road, then the southern end of the east line of the tract would be 33 feet south of the southern end of the west line thereof, which terminates at the place of beginning. The Whittaker deed does not describe a course from the beginning, either along the Indian boundary line road, or along the north line of that road, or along the south line of lot 9, but along the center of the road; that is to say, along the Indian boundary line. Inasmuch as, under the rules of law above laid down, the boundary is in the center of the highway, where the land conveyed abuts on the highway, there every part of such boundary, including the starting point, as well as every other point therein, must be in the center of the

highway. We therefore think that the southwest corner of lot 9 must be regarded as located in the center of the Indian Boundary Line road, or in the Indian boundary line, at the intersection of that line with the center line extended of the street west of lot 9. 3 Washb. Real Prop. (5th Ed.) marg. p. 635, top p. 448, par. 51, note 9, and cases cited. It is well settled that monuments control courses and distances, and the courses and distances control the quantity of land. *Cottingham v. Parr*, 93 Ill. 233; *Kamphouse v. Gaffner*, 73 Ill. 453; *Lincoln v. McLaughlin*, 74 Ill. 11; *Brown v. Huger*, 21 How. 305. Highways, as well as streams, walls, and fences, are often referred to in deeds as monuments, and are regarded as such when the land conveyed abuts upon them. *Trustees v. Haven*, 11 Ill. 554; 3 Washb. Real Prop. marg. p. 632, top p. 435; 2 Amer. & Eng. Enc. Law, p. 500. In *Newhall v. Ireson*, 8 Cush. 595, where it appeared that the last measurement brought the line to the southerly side of the highway, it was said: "This fact does not rebut the strong presumption that boundary on a highway is *ad flum vñ*. The road is a monument. The thread of the road is that monument or abuttal." In *Paul v. Carver*, 28 Pa. St. 223, where a public highway was called for as a boundary, it was held that the title passed to the center, subject to the right of passage, and it was said: "It is regarded as a single line. The thread of the road is the monument or abuttal." In *Trustees v. Haven*, supra, after announcing the doctrine that at common law a grant of land bordering on a highway carries the exclusive right and title in the highway, to the center thereof, subject to the right of passage in the public, unless the terms of the grant clearly indicate an intention on the part of the grantor to confine the grantee to the edge, we said: "In such case the highway \* \* \* is regarded as the boundary or monument, and the purchaser takes to the middle of the monument, as part and parcel of the grant." In *Helmer v. Castle*, 109 Ill. 664, the language of the *Haven* Case was quoted and applied to the following description in a deed: "Commencing at the northeast corner of that part of section 11 \* \* \* south of the road there running; thence running westerly along the line of said road 141.6 feet," etc.—and it was there said: "It was intended by these words to mean the part of the tract on the south side of the road extending north to the center line of the road. Then the northeast corner, the starting point, must fall on the center line of the road. This is strongly corroborated, also, by the succeeding phraseology, 'thence running westerly along the line of the road,' etc., which would seem to clearly mean center line of the road, for there is no other line of the road. The sides of the road are quite different, and, if the south side of the road had been intended, it is fair to presume the language would have been to that effect." So, here, if the north side of the road had been intended as the south boundary of the tract conveyed to the grantors of appellants, it is fair to presume that the language would

have been to that effect; and the center line or thread of the road, which is the Indian boundary line, must be regarded as a monument which will control the location of the starting point. The Indian boundary line was established in 1816 by "a treaty of peace, friendship, and limits made and concluded between Ninian Edwards, William Clark and August Chouteau, commissioners plenipotentiary of the United States of America on the part and behalf of the said states, of the one part, and the chiefs and warriors of united tribes of Ottawas, Chippewa and Potawatomes residing on the Illinois and Milwaukee and other waters, and on the southwestern parts of Lake Michigan, of the other part." In and by article first of said treaty the said tribes ceded to the United States, among other lands, the land contained in the following bounds, to wit: "Beginning on the left bank of the Fox river of Illinois ten miles above the mouth of said Fox river; thence running so as to cross Sandy creek [now Au Sable river] ten miles above its mouth; thence in a direct line to a point ten miles north of the west end of the portage between Chicago creek, which empties into Lake Michigan, and the river DePleine, a fork of the Illinois; thence in a direct line to a point on Lake Michigan ten miles northward of the mouth of the Chicago creek; thence along the lake to a point ten miles southward of the mouth of the said Chicago creek; thence in a direct line to a point on the Kankakee ten miles above its mouth; thence with the said Kankakee and the Illinois river to the mouth of Fox river, and thence to the beginning." 7 Stat., entitled "Indian Treaties," p. 146. The same line is referred to in a treaty between the United States and the same tribes, made in 1830, wherein said tribes ceded certain lands, one of the boundary lines of which is described as running "along the northwestern boundary line of the cession of 1816, to Lake Michigan." *Id.* p. 320.

It is claimed, however, by counsel for appellants, that the words, "meaning and intending hereby to convey one acre of land, without reference to metes and bounds as above described," which follow the description in the deed from Ure to Whittaker and Henderson, must be regarded as controlling the previous description so as to give the grantees an acre of ground, even though such quantity is not embraced within the specified limits. The general rule is that quantity yields to course and distance, as course and distance yield to monuments. *Cottingham v. Parr*, supra. Unless there is a covenant as to the quantity, it is seldom resorted to for the purpose of determining the boundary, and it is very rarely, if ever, permitted to control courses and distances. 3 Washb. Real Prop. marg. p. 630, top p. 427. To sell a number of acres of land without describing any boundaries to the same would be void. *Id.* marg. p. 632, top p. 435. But, if the words quoted should be construed as having the effect claimed for them, they do not necessarily amount to an express agreement to convey one acre north of the Indian Bound-



ary Line road. They are consistent with the intention to convey one acre north of the Indian boundary line; that is, one acre including the north half of the road, being a strip 33 feet wide and 4 chains and 33 links long. The decree below gives to the appellants one acre of land, including said strip. Such is the testimony of the surveyors, and counsel for appellants admits in his brief that the effect of the decree is "to give to appellants an acre, minus the quantity lying between the north line of the Indian Boundary line road and the Indian boundary line in the center of said road." In view of the fact that the appellants get an acre of land, subject to the easement of the public in the south 33 feet thereof, it is unnecessary to consider what would have been the effect of the words quoted upon the previous description by metes and bounds, if the quantity, including that subject to such easement, had been less than an acre.

We do not think that the appellee can be heard to complain of the decree below, as he has failed to assign cross errors, in accordance with the rule. The assignment of cross errors, as well as of errors, must be written upon or attached to the record. *Bridge Co. v. People*, 128 Ill. 422, 21 N. E. Rep. 428. Upon examining the record, we do not find that this has been done in the present case. The decree of the circuit court is affirmed.

(139 N. Y. 452)

NEWHALL v. WYATT.

CLARK v. WYATT et al.

(Court of Appeals of New York. Oct. 17, 1893.)

## PAYMENT WITH MONEY OF ANOTHER — RIGHTS OF OWNER.

Receipt by a creditor of money in payment of a debt without knowledge or means of knowledge that it did not belong to the debtor does not make him liable therefor to the true owner. 22 N. Y. Supp. 828, reversed.

Appeal from supreme court, general term, first department.

Action by Henry G. Newhall against Christopher A. Wyatt for the dissolution of a partnership existing between them, under the firm name of C. A. Wyatt & Co., for an accounting, a receiver, and distribution. James R. Clark presented to the receiver appointed a claim for \$33,824.49 against the firm. A referee was appointed to take evidence and pass on the claim, and from a judgment of the general term (22 N. Y. Supp. 828) affirming an order of the special term confirming the report of the referee, fixing and adjusting the amount of his claim for the purposes of distribution at \$3,037.68, Clark appeals. Reversed.

William Woodward Baldwin, (James Byrne and Charles A. Boston, of counsel,) for appellant. Kellogg, Rose & Smith, (L. Lafin Kellogg, of counsel,) for respondent. Durnlut Hendricks, for receiver.

FINCH, J. In an action brought by the plaintiff for a dissolution of the partnership of C. A. Wyatt & Co., a receiver was

appointed, who advertised for the presentation of claims against the firm, as preliminary to the winding up of its affairs. James R. Clark appeared as one of the creditors, and presented a claim for something over \$33,000. Upon the application of the receiver, a referee was appointed to take evidence and pass upon this claim, and his report, awarding the creditor only about \$3,000, has been confirmed by the court, and approved by the general term on appeal. The creditor comes to this court complaining of the result, and insisting that his claim has been improperly reduced.

Most of the conclusions reached by the referee seem to us justified by the facts, but one of them, involving a serious amount, we deem erroneous, and an injustice to the creditor. The error consists in charging Clark with the amount of five drafts drawn by him, amounting to nearly \$7,000, on the theory that he was debtor in that amount to the firm, and should allow it by way of set-off against his own demand. The facts underlying the question raised are, in substance, the following: There were two firms bearing the same name of C. A. Wyatt & Co. The first consisted of Wyatt alone, no one else having an interest with him. The second, formed later, was composed of Wyatt and the plaintiff, Newhall, as special partner. Clark was a creditor of each firm, which we may distinguish as the old and the new. Before the formation of the latter, he drew five drafts upon the old firm for sums which were concededly due to him, payable to the order of Conway, Gordon & Garnett, bankers, which were accepted by C. A. Wyatt & Co., and discounted by the bankers, Clark remaining contingently liable as drawer, and receiving the proceeds. All this occurred before the formation of the new firm, and was, in every respect, a regular, usual, and proper business transaction. These acceptances, the referee finds, were paid by Wyatt out of the funds of the new firm. The appellant criticizes the finding, mainly because the bank account of the new firm was a continuation of that of the old, without break or change; but the proof so far warrants the finding as to make it conclusive upon this appeal. The payees of the draft had no reason to suspect the real source from which the money came. They had no knowledge of the existence of the second firm, and necessarily believed, as they had a right to believe, that the payment was made by the real debtors out of their own funds. They accepted the payment, surrendered up the drafts, and of course canceled and extinguished the contingent liability of the drawer; and yet, upon this payment, the referee grounds his conclusion that Clark thus became a debtor to the new firm, and that the amount of the drafts which, through the discount, went to his benefit, should be applied as a set-off against an equal portion of the debt due him from the new firm.

It is undoubtedly the rule that one partner may not appropriate the property or money of the firm to the payment of his own debt without the consent of his co-

partners, and that, if he does so, the property misapplied may be followed and recovered until it reaches the hands of a bona fide purchaser for value. But I think it is equally well settled that the payment of money to a creditor, who receives it in discharge of an existing debt innocently, and without knowledge or means of knowledge that the debtor paying had no rightful ownership of the fund, is good and effectual, and does not subject the recipient to a recovery by the true owner. That doctrine was very explicitly asserted in *Stephens v. Board of Education*, 79 N. Y. 187. In that case one Gill, who was a member of the board of education of the city of Brooklyn, had converted to his own use the money of the board, and so became indebted to it for the amount abstracted. In order to procure the means of payment, Gill forged a mortgage upon the land of another, and sold it to the plaintiff, receiving from him the proceeds, and depositing them to his own credit. He then drew a check for the amount of his debt to the board, and with it paid that debt in full, the board receiving the money, and expending it in its own business. When the plaintiff discovered the forgery and fraud, he sought to follow his own money into the hands of the board, and recover it back, as in this case the new firm seeks to regain its money misappropriated by Wyatt from the hands of Clark, as the beneficial recipient. This court held that there could be no such recovery. In the case cited the plaintiff contended that his money had been virtually stolen, and could be followed and regained until it reached the hands of an innocent party, giving at the time a valuable consideration therefor, and that the discharge of a precedent debt was insufficient to afford protection against the true owner. This court refused to accede to that doctrine, arguing that money has no earmark; that, while the purchaser of a chattel or chose in action may generally ascertain the title of his vendor, that is not so as to money, the title to which in the possessor cannot usually be traced to its source; and that no case had been referred to in which the doctrine that an antecedent debt is not a sufficient consideration to cut off certain equities had been applied to money received in good faith and the ordinary course of business in payment of a debt; and that such a rule would obviously introduce confusion and danger into all commercial dealings. This general doctrine was further illustrated and approved upon another condition of the facts in *Southwick v. Bank*, 84 N. Y. 434, 435, and seems to me well founded both in justice and the necessities of business. We may treat the case, therefore, irrespective of the fact that the money could not have been collected back from the bankers who gave up their drafts, and never fixed the liability of the drawer on the faith of the payment made, and treat the case as if the money had been paid directly to Clark, upon the debt due him from the old firm. His good faith cannot be questioned. He did not even know that a new firm had been formed, or that there could be any possi-

ble question as to the ownership of the moneys paid, and he may hold the payment made. A contrary rule would do him great injustice, and without the excuse of fault or negligence on his part. If his drafts had been unpaid, and his debt against the old firm had remained as desperate and valueless, he would not have extended further credit, and suffered an added debt of a large amount to have accumulated. He cannot be restored to his original position. There is no proof that the new firm was insolvent when the drafts were paid, and we fail to discover any ground on which the set-off can be properly allowed. The order of the general term should be reversed, and the report of the referee and its confirmation by the special term be set aside, and the account restated, with costs of this appeal in this court and the general term. All concur.

(129 N. Y. 620)

HOGAN v. KAVANAUGH et al.

(Court of Appeals of New York. Oct. 10, 1893.)

COSTS—MODIFYING AWARD.

Though the court of appeals may, on modification of a judgment, strike out all allowances for costs, it will leave the question of modifying the award of costs to the court making the allowance, on application for that purpose, where large disbursements have been made by some of the parties.

On motion for reargument. For former report, see 84 N. E. Rep. 292.

Wm. H. Henderson, for appellant. D. E. Powell and J. Record, for respondents.

O'BRIEN, J. The motion for a reargument is denied. The learned counsel for the appellant was understood at the argument of the cause to suggest a modification of the judgment. He now insists that the modification made is in conflict with the statutes authorizing sales of real estate, for the payments of the debts of deceased persons in the surrogates' courts. The decision is that the creditors before entitled to any part of the proceeds of the sale must comply with these statutes. It may be difficult to carry the judgment, as modified, into effect, but we cannot see how it conflicts with any statutory requirement for the sale of real estate in such cases. If it is not complied with within the time embraced in the stay contemplated, then the power to sell in virtue of the legacy becomes operative. The court intended to call attention to certain rules and principles which it was thought were ignored by both sides in this case, leaving it to the parties themselves or the courts below to apply them to the situation, and thus correct the error by stipulation, order, or otherwise, as was deemed most convenient. When the case is remitted to the supreme court to carry the judgment into effect, it is assumed that power exists to adjust the rights of all the parties in accordance with the principles indicated. No other method has been suggested to obviate the difficulties that the parties have placed in their own way.

In regard to the question of costs, we did not intend to interfere with the discretion exercised on that subject by the courts below. It may be that none of the parties should be awarded costs in the light of the decision of this court. But that question should be presented to the court in which the costs were allowed, and, after hearing all parties, it has the power to modify the decision on that subject in such manner as justice may require. This court has the power to strike out all allowances for costs included in the judgments rendered, but, as disbursements to a considerable amount have been paid by some one, we think the question of modifying the award of costs should be disposed of by the courts below, upon an application for that purpose. All concur. Motion denied.

(139 N. Y. 390)

HOLLOWAY v. SOUTHMAYD et al.

(Court of Appeals of New York. Oct. 10, 1893.)

DEED—DESCRIPTION BY ADJUTING STREET—EJECT—IMPLIED GRANT OF EASEMENTS.

When a deed bounds the land conveyed by an existing highway, the fee of which is in the grantor, there is an implied grant of private easements therein, of which the grantor cannot, after the discontinuance of the highway by act of law, deprive the grantees. Earl, Finch, and O'Brien, JJ., dissenting. 18 N. Y. Supp. 707, affirmed.

Appeal from supreme court, general term, first department.

Ejectment by James W. Holloway against Charles F. Southmayd and others. From a judgment and order of the general term (18 N. Y. Supp. 707) reversing a judgment for plaintiff, and granting a new trial, he appeals. Affirmed.

James A. Deering, for appellant. Evarts, Choate & Beaman and Daniel Lord, (Chas. F. Southmayd and Wm. G. Choate, of counsel,) for respondents.

GRAY, J. The land, possession of which is claimed, comprises what was formerly the westerly half of the Bloomingdale road, between Ninety-Fifth and Ninety-Sixth streets in the city of New York. Originally it bounded a parcel of land which was conveyed by Charles Apthorp and others to David M. Clarkson by deed, with full covenants, dated October 15, 1799, by this description of the premises, viz.: "All that certain tract or parcel of land situate at Bloomingdale, in the Seventh ward of said city of New York, and butted and bounded as follows, to wit: Beginning on the north side of the Bloomingdale road, at the corner of the lane leading down to Mr. Striker, and running along the same (the lane leading to Striker) north, fifty-eight (58) degrees west, ten (10) chains sixty (60) links, and thence by various courses to the Bloomingdale road; thence along said road north twenty-eight (28) degrees thirty (30) minutes, thirty-nine (39) chains and seventy-five (75) links, to the place of beginning; containing ten (10) acres, according to a map thereto annexed." The grantors included in their grant all the easements, privileges,

advantages, and appurtenances belonging or in any wise appertaining to the land. The Bloomingdale road was opened as a public highway in 1707, by the public authorities, over the land of Theunis Ideas. On March 8, 1868, the commissioners of the Central park, acting under the authority of an act of the legislature, passed April 24, 1867, filed a map relaying out a district comprehended within Fifty-Ninth and One Hundred and Fifty-Fifth streets, the Eighth avenue, and the Hudson river. Upon this map Bloomingdale road north of Eighty-Sixth street was not retained, and its legal closing as a highway dates from the filing of that map.

By meane conveyances the tract of land of which the premises in question formed a portion came into the possession and ownership of Charles Ward Apthorp, who died intestate in 1797. His heirs made various conveyances of the lands, one of which was to Clarkson. The plaintiff is a descendant of James Apthorp, one of the children of Charles W. Apthorp, and it is his claim that by inheritance he is entitled to and seised in fee of an undivided one twenty-eighth part of the land formerly within the lines of the Bloomingdale road and lying in front of the premises conveyed to Clarkson. That claim rests upon the ground that that conveyance did not take in the road, and therefore, when, by its legal closing in 1868, it was relieved of the public easement, it reverted "in full and unqualified dominion" to the heirs of Charles W. Apthorp. It is argued for the defendants, who have become vested with their rights and titles in the premises through meane conveyances by successive grantees of the land, since the grant to Clarkson by Apthorp's heirs, that that grant included the Bloomingdale road to its center line; or, if that was not its effect, that by virtue of the provisions of the act of 1867 for the closing of that road the defendants acquired the fee of the road to its center; or, if the fee in the soil of the adjoining portion of the road never passed from the original grantors, that their grantee, his heirs and assigns, became vested with private easements in the road for light, air, and access, to the purposes of which the ownership of the plaintiff should be declared perpetually subject. Whatever the individual opinions we might entertain (and they may well differ) respecting the effect of the language in the conveyance to Clarkson to convey to him the fee of the soil to the center line of the Bloomingdale road, we prefer to place our decision upon the broad ground that Clarkson became vested with rights to private easements in the highway, which would perpetually exist as against the grantors and those deriving title from them, although the public easement in the road should become extinguished by its discontinuance as a public highway. There is great difficulty in reconciling the decisions in this state upon the question of when a description in a deed which bounds the premises upon a highway or street shall be deemed to take in the fee to the center line of the roadbed in front of the premises. There is no doubt about the rule being settled that there is a legal

presumption against the grantor's intending to reserve to himself the title to the soil of the highway, and that such presumption is only overcome by language in the conveyance clearly indicating such an intention on his part; but the application of the rule is made uncertain, through the varying opinions of courts, as to the inference which we shall draw as to intention from the words in which the grant is couched. Sufficient evidence of that uncertainty of application will be found from reading the opinions since the early case of *Jackson v. Hathaway*, 15 Johns. 447, down to a very recent date. In the very elaborate briefs, which are submitted, the cases have been diligently investigated and collated on both sides, and by reference to them it can be seen that there has been more or less divergence in views with respect to how boundary lines are to be drawn, with respect to monuments in the highway and in streams, as also with respect to what shall be deemed descriptive monuments.

In the absence of language which will plainly express the intention of a grantor to exclude from the operation of his grant the soil of the adjacent highway, it is just that doubts should be resolved in favor of his grantee; but in the application of the principle, there may be some danger to the stability of property rules. In a case apparently governed by precedents, slight departures from the descriptive language used in the earlier cases might be seized hold of to prevent what seems an unjust result. In the present case, for instance, there were found grounds for distinguishing the description in the grant from that used in *Bank v. Nichols*, 64 N. Y. 65, and *Insurance Co. v. Stevens*, 87 N. Y. 287, and in some later cases, and they are pointed out in the briefs of counsel and in the opinions delivered by Mr. Justice Ingraham at the general term in this case, (18 N. Y. Supp. 707,) and in that of the same plaintiff against *Delano*, (Id. 704.) The distinction may be justified by the conviction that such a claim as the plaintiff makes is unmeritorious; but there is considerable doubt in our minds whether the case is not within the precedents just cited. However that may be, we think that the question can be effectually set at rest. The appearance of shaking the stability of decisions can be avoided, and a property rule established, not only just, but which is logically deducible from legal principles, by holding that in this and like cases, while the grantor may have retained the fee of the soil in the highway, he has but a naked or barren title, and that, in the event of the discontinuance of the public highway by act of law, the grantee, and his successors in interest nevertheless will still be entitled to the perpetual enjoyment of certain easements, which were impliedly granted, in relation to the open way lying in front of the lands granted, and referred to as their boundary. This view is in accord with authority and with reason. That private easements may be appurtenant to the property abutting upon a public highway must be conceded. These easements of the abutting land-

owner are in addition to such as he possesses as one of the public, to whose use the property has been subjected. They are independent of the public easement, and, whether arising through express or implied grant, are as indestructible in their nature by the acts of the public authorities or of the grantor of the premises as is the estate which is the subject of the grant.

The case of *Bank v. Nichols*, 64 N. Y. 65, is instructive upon this proposition. That was in ejectment to recover a strip of land which, by construction of a street under the direction of the public authorities, remained between the new and original street lines. The defendant was the owner of the abutting property, and took possession up to the new street line, and the plaintiff, claiming as the owner of the soil of the street, sought to eject him. It was held that by the original grant of the lot to defendant's predecessor in the title its boundary was confined to the exterior line of the street; but that he had the right to an easement, of which he could not be deprived, and which consisted in the right to have the space of ground left open forever as a street, and to use the way for every purpose that may be usual and reasonable for the accommodation of the granted premises. The plaintiff's recovery, therefore, in the action, it will be seen, was a barren one; for, though it obtained a judgment that the fee was in it, the judgment subjected it to the defendant's easement. In that case the original grant was of premises as shown upon a map of the block, made by the grantors, on which streets were designated, and, while that circumstance entered into the decision of the question of defendant's right to an easement, nevertheless it was laid down by Allen, J., as the general rule that, "when land is granted bounded on a street or highway, there is an implied covenant that there is such a way; that, so far as the grantor is concerned it shall be continued; and that the grantee, his heirs and assigns, shall have the benefit of it." In *Parker v. Framingham*, 8 Metc. (Mass.) 260, which was cited by Judge Allen in support of his statement of the rule, Chief Justice Shaw, who delivered the opinion, after stating the settled rule in the language quoted by Judge Allen, continued: "It seems reasonable, and quite within the principle of equity, on which this rule is founded, to apply it to the discontinuance of a highway, so that, if a man should grant land bounding expressly on the side of a highway, if the grantor own the soil under the highway, and the highway, by competent authority, should be discontinued, such grantor could not so use the soil of the highway as to defeat his grantor's right of way, or render it substantially less beneficial. Whether this should be deemed to operate as an implied grant or as an implied warranty covenant and estoppel, binding on the grantor and his heirs, is immaterial. The right itself would be inferred from that great principle of construction that every grant and covenant shall be so construed as to secure to the grantee the benefits intended

to be conferred by the grant, and that the grantor shall do nothing to defeat, or essentially impair his grant." The question involved in that case related to a claim for damages, upon laying out a town way over land formerly embraced within the limits of a turnpike, which had been discontinued; but the statement of the general rule was relevant to the discussion, to show that an easement was secured to the petitioners, as against the grantor and his assigns, over the soil of the turnpike after it was discontinued.

Prof. Washburn, in his work on Easements, ("170.") says: "Upon the authority of *Parker v. Framingham*, supra, where one sells land bounded upon the highway, and the same is discontinued by act of law, although the same reverts to the owner of the fee of the soil, the grantor, as such, in such a case, would have no right to deprive his grantees of the right to use the discontinued road for the purpose of a way." The Bloomingdale road, it must be remembered, was laid out by the authorities as a public highway over a tract of land owned by Idee, the predecessor in title of the Apthorpes. The effect was to burden their land with an easement of way in favor of the public. As the title to the land in the road remained in them, we think that to bound a parcel of land upon a highway, under conveyances which included all the appurtenant easements and advantages, was to grant easements in the land embraced in the way in favor of their grantees, to the extent that they might be beneficial to the estate conveyed. Although the fee of the soil remained in the grantors, it was incumbered with an easement of their own creation. Washb. Easem. (4th Ed.) 266. In the text-book cited the proposition is rested upon the authority of the case of the Opening of Eleventh Ave., 81 N. Y. 436. The fact in that case was that the owner of the tract made conveyances of portions, bounding them upon intended streets not yet laid out by legal authority, but treating them as located if the map of the public authorities had been extended. The decision of the referee was upheld, as being supported by the authorities, that these conveyances, although not amounting to a dedication of the lands embraced in the supposed streets to the use of the public, or constituting them public highways, created an easement in favor of the grantees of the lots abutting thereon, which, as between them and their grantor, and those deriving title under him, entitled them to have the lands described in the conveyances as streets and avenues left open as such for the benefit of their lots. Is there any satisfactory reason for making a distinction against an application of this rule to a case where the conveyance bounds the premises upon an existing public highway, which has been laid out over the lands of the grantor, or of his predecessor in title, and the fee in the soil of which remained in him with reversionary rights? The argument against it is that to refer to a public highway as a boundary is merely descriptive, but it seems a sufficient answer to that to say that to bound the grant by the way, the

fee of the soil of which is in the grantor, is to warrant its presence and its continuance not as a highway, but as an open way for access or enjoyment, so far as the grantor is concerned, in the absence of words reserving and denying all rights in the highway. In *De Peyster v. Mall*, 92 N. Y. 267, the existence of such an independent private easement of the abutting landowner was distinctly recognized. It is said to be impliedly granted, because necessary for the enjoyment of that which is expressly granted, and upon the principle that, where one grants to another, he thereby grants him the means of enjoying it, whether expressed or not. In that principle easements of access and of light and air find their support. 2 Washb. Real Prop. 25, 27.

The easement which the public acquires in the land upon the laying out of the highway is limited to those uses for which highways have ordinarily been understood to be intended; but the abutting landowner, besides his right as one of the public, may acquire a right to private easements, even if he never owned the fee of the soil in the highway. If a use of the street or highway for public or quasi public purposes has been authorized which is extraordinary in its nature, and interferes with a free access, or the free flow of light and air to the abutting owner's premises, pro tanto, he is deemed to have suffered in the enjoyment of property rights. As to him, such a use is illegal, and will be restrained, until the right to the particular use is acquired by making compensation through agreement, or through condemnation proceedings, under the law of eminent domain. This is the doctrine of the elevated railroad cases, and their litigation well illustrates what rights are possessed by the abutting lot owner on the public street to the enjoyment of those advantages which the open way in front of his premises confers upon his property. If by act of law the public right or easement in the highway has ceased, there is no reason for saying that, as against the grantor of the abutting land, any right to the continuance of private easements has been lost to the grantee; at least the principal argument for the other view is that the possible discontinuance of the highway was a contingency which the parties must or should have considered. But is that quite just? Had the grantee not the right to assume that, with the fee of the highway in the grantor, in conveying lands with boundaries given upon the highway, together with all the appurtenances, easements, advantages, and privileges, he intended to and did, impliedly, if not in express terms, warrant to his grantee, as far as he was concerned, the continuance of the open space in front of the land for all the beneficial purposes which it could subserve, even if the public easement should cease? When it is said that the land of a highway which has been discontinued reverts to primary conditions of ownership, obviously it is to be understood that such ownership is not thereby relieved of burdens created by the original owner.

At the time of the sale of the land to

Clarkson, the open way, by which the grantor bounded it, existed as the visible incident to the enjoyment of the land. Upon what principle may the grantor, or his successors in interest, when the public highway is discontinued by the action of the public authorities, step in and claim that a right to the exclusive possession and dominion of the land embraced in the highway had reverted? The appurtenances in such a grant, which relate to the highway and its uses, are not limited to those which appertain to the general public. That would hardly be contended for. Why, then, the way having ceased to be a public one, should a reversion of ownership, by operation of law, be deemed to free it from a private easement appurtenant to the abutting land? In the sale of a parcel of land which is described as bordering upon a highway we may presume that its existence entered as a factor into the consideration for the purchase, as offering certain advantages; such as would include a free flow of light and air over it, as well as in the freedom of access. Though such private easements have been said to result from implied covenants, in legal effect the covenant operates as a grant, which warrants, as against the grantor, his heirs and assigns, their perpetual enjoyment by the grantee and his successors in interest. The highway, as such, may be discontinued, but, so far as the grantor and his successors in interest are concerned, they shall not derogate from the original grant, and, by resuming possession of the soil, prevent the enjoyment by the abutter of his private easement.

As is suggested by the counsel for the respondents, as to the grantee it is only upon the cessation of the public right in the road that the practical enjoyment of the private easement as such begins. If the fee in the land upon which the highway exists has remained in the grantor, its usefulness, if any, to him must be confined to subsoil properties and uses, which do not interfere with the full enjoyment of the private easements over the land. It is the better rule to hold that to exclude a grantee from the perpetual beneficial use of the open way in front of the premises granted to him the language of the deed should clearly express such an intention. Mr. Justice Story, in *U. S. v. Appleton*, 1 Sum. 492-502, observed that "in truth every grant of a thing naturally and necessarily imports a grant of it as it actually exists, unless the contrary is provided for." It was said by Stroug, J., in *Huttemeler v. Albro*, 18 N. Y. 48, that whether a right of way or other easement is embraced in a deed is always a question of construction of the deed, having reference to its terms, and the practical incidents belonging to the grantor of the land at the time of the conveyance. In that case, in the deed of a lot, a boundary was "southeasterly along said alley way," and that reference to the alley was considered as a circumstance indicative of an intention that the way should continue, and that the easement was conveyed to the grantee as an appurtenance.

Some cases are referred to by the coun-

sel for the appellants, as being opposed to the view expressed. In *Wheeler v. Clark*, 58 N. Y. 287, the question involved was whether a clause contained in a certain deed of lots upon a map of the grantor's lands, which subjected the land forming the streets in front of the lots to the use of all the owners of the lots upon the map, and of the public generally, as public streets, could be construed as perpetually reserving a private right of way over the land of the highway; and the decision was that no private right of way was created which plaintiff, as the owner of one lot, could enforce as against the defendant, who was the owner of other lots, and whose title, (like that of the other lot owners,) upon the discontinuance of the public highway, under his grant, carried him to the center of the highway. The question now before us is quite other than in *Wheeler v. Clark*, or in *Insurance Co. v. Stevens*, 101 N. Y. 411, 5 N. E. Rep. 353. In the latter case the defendant, under implied covenant, claimed to have a right of way over a road, which had been closed by the public authorities, and plaintiff's action was to restrain her from entering upon the strip of land in front of its premises. The question did not relate to the rights of the abutter in the road in front of her premises, but to a distant way. Finch, J., observed in his opinion that "the closing of the street in controversy is in front of the plaintiff's premises, and not of hers, [the defendant's] and does not take from her light, air, or convenience of access." In *King v. City of New York*, 102 N. Y. 175, 6 N. E. Rep. 395, the dispute was with respect to the right to an award of damages for closing Bloomingdale road as a public highway. After the road was legally closed by the filing of the map in 1868, but before the making of the award of damages, the owners of the land fronting upon the road conveyed to Brennan, by a description which bounded the grant by the Bloomingdale road, and which included the right, etc., of the grantors in that road and in other streets as were adjacent to the premises described. The decision was to the effect that the representatives of the Kings, who were the grantors, and not Brennan, were entitled to the award, upon the ground that the right to the damages vested at the time of the filing of the map, which legally closed the Bloomingdale road, and that the deed to Brennan had not transferred to him the personal claim to the damages. The remarks of Judge Finch, cited by appellant's counsel, must be read in view of the proposition decided. He held that Brennan was bound to know, when the grant was made to him, that the public highway no longer existed, and that he must be presumed to have bought in view of that fact. With such knowledge chargeable to Brennan, he could not be heard to claim that by bounding the grant upon the highway his grantors had conveyed any easement in the highway. And see *Utter v. Richmond*, 112 N. Y. 610, 20 N. E. Rep. 554.

These cases, which the appellant's counsel have cited from the reports of this

court, are the only ones we need discuss. In *Fearing v. Irwin*, 55 N. Y. 490, also cited, the question was as to when the Bloomingdale road was closed, and the decision related to the constitutionality of the legislative acts and their effect. In other respects it rested upon a formal admission of record. It is not in point here. The very early case of *Jackson v. Hathaway*, 15 Johns. 447, cannot be regarded as an authority upon the question now under discussion, for the reason that we are not sufficiently informed as to the terms of the conveyance of the land. Nor should we consider ourselves bound by that case, which concerned the ownership of the fee in the highway, as affected by a conveyance of adjoining land, in the decision of this case. As a precedent in the consideration of the question of when the fee of the land in the road passes to a grantee of premises upon it, under the terms of a description, we are not disposed to dispute its authority, but we think it should not be extended.

The appellant further contends that these special easements, if acquired by the abutting owner, were lawfully extinguished and condemned, as the result of the proceedings had under the act of 1867, providing for the closing of the Bloomingdale road. In that he is mistaken. The purpose and the effect of that act, it is plain from its language, were to discontinue the road as a public highway, and in so doing to extinguish the public easement. The legislature was not concerned with private easements and rights in the land covered by the public highway. Its action left these private interests as they were. The public had no interest in their destruction. The award of damages was to compensate property owners who could prove they had been injured by the discontinuance of a public highway. It is obvious that the presence of a public highway in front of one's premises, by reason of the many public and general advantages it offers, confers a distinct value upon them, and that its proposed discontinuance may result in a diminished value to the owner. The situs of a parcel of land enters into the estimate of its value. If upon a public and prominent thoroughfare, it has a value which it would not possess if the thoroughfare were closed or changed. How great the loss in value is, or if any is in fact sustained, may turn upon a consideration of the circumstances surrounding the proposed alteration; but the legislature, in providing for awards of damages, looks at the general fact of a change being made which may affect injuriously landowners, and authorizes compensation in such cases.

The result of our consideration of this plaintiff's demand for the possession of the premises described, of the basis for such a claim, and of the intention to be deduced from the original deed of Apthorp's heirs, from its terms and the circumstances of its making, is that we hold that, though the fee of the soil of the road may not have been transferred to the grantee by the conveyance, and may have remained in the grantors, and those deriving

title from them, yet in bounding the granted premises upon the Bloomingdale road, and by including the easements and appurtenances thereto belonging, the grantors impliedly warranted to the grantee that so much of the road should perpetually exist as an open way as bordered upon the premises granted, and, in legal effect, granted such usual and more or less necessary easements as would be comprehended in the free flow of light and air over and in the free use of the open way as such pro tanto, and which survived the extinguishment of the public easement in the highway by act of law. To those easements the fee in the land embraced in the highway remained perpetually subject. That the ownership of the fee may be barren of profit has nothing to do with the question. In the original sale the owner received, presumably, a value proportioned to the fact that the land sold was upon the Bloomingdale road, which gave to it access and other advantages. To permit the successors in interest of the original grantor, in the face of the grant, to resume dominion over, and to have the beneficial use of, the land in the old highway, would be unjust, as well as without sufficient warrant in the law.

It follows from the views we entertain upon the questions discussed that, while the plaintiff was entitled to maintain the action, and to have judgment adjudging him entitled to recover the fee of the land in dispute, it was error to award judgment for the unqualified possession of the land. He was not entitled to such a judgment against the defendants, but only to a judgment for the possession subject perpetually to the defendants' right to the enjoyment of their easement in and over the land. For the reasons stated the order appealed from should be affirmed, and, under the stipulation of the appellant, judgment absolute should be ordered against him, with costs.

MAYNARD, J. I am in favor of affirmance in the Southmayd case, and in *Holloway v. Delano*, (No. 1,) 34 N. E. Rep. 1052, because the defendant is the owner of the fee of the land to the center of the Bloomingdale road, upon which his premises are bounded. Unless there is something in the description of the property conveyed, or its location or relation to other property of the grantor, indicative of a contrary intent, a grant of land bounded upon a public street or highway, of which the grantor has the fee, must be deemed to convey the fee to the center of the street or highway. The same rule of construction should be applied where the boundary is along the street or highway, and the intersecting lines are described as running to the street or highway. But if it must be conceded that the grant does not convey the fee of the street, I concur in the opinion of GRAY, J. Orders affirmed and judgment accordingly.

ANDREWS, C. J., and PECKHAM, J., concur with GRAY, J. EARL, FINCH, and O'BRIEN, JJ., dissent.



(139 N. Y. 390)

**HOLLOWAY v. DELANO et al. (No. 1.)**  
(Court of Appeals of New York. Oct. 10, 1893.)

Appeal from supreme court, general term, first department.

Ejectment by James W. Holloway against Franklin H. Delano and others. From a judgment and order of the general term (18 N. Y. Supp. 700) reversing a judgment for plaintiff, (16 N. Y. Supp. 543,) and granting a new trial, he appeals. Affirmed.

James A. Deering, for appellant. Wm. G. Choate, for respondents.

GRAY, J. In this action, the claim of the plaintiff to recover the possession of land formerly embraced in the Bloomingdale road, and between Ninetieth and Ninety-First streets, in the city of New York, depends upon the construction to be given to the descriptive words in two grants of land, one made by Charles Apthorp and others to John Shaw, and the other made by the same grantors to William and Mary Jauncey, in 1799. In the deed to Shaw they were the following, viz.: "Beginning at the corner of William Constable's land, on the north side of the Bloomingdale road, and running thence along said road, thirty-eight degrees east, eight chains forty-five links; thence along the south side of a private road in the map hereunto annexed delineated, and forty links wide, and north, fifty-two degrees west, twenty-two chains ten links, crossing the said private road to the North river; thence south-westerly along the side of the said river to the said William Constable's boundary line, and thence along said boundary line south, fifty-three degrees east, twenty-four chains fifty links, to the place of beginning; containing nineteen acres, three roods, and five perches, according to a map hereunto annexed, and made by Benjamin Taylor." In the deed to the Jauncys they are as follows, viz.: "Beginning at the corner of a field at the junction of the Bloomingdale road with the cross road that leads to Harlem; thence running along the Bloomingdale road south, thirty-five degrees west, seven chains fifty links; thence south, thirty-seven degrees west, ten chains and thirty-two links; thence south, fifty-four degrees east, along William Constable's and Richard L. Brown's land, nineteen chains eighteen links; thence north, fifty-four degrees east, nine chains fifty-five links; thence south, fifty-three degrees east, three chains seventeen links; thence north, thirty-six degrees east, eight chains ninety-two links; thence north, fifty-three degrees west, thirty-six chains, to the beginning; containing forty-two acres and five perches, according to a map thereof made by Benjamin Taylor, one of the city surveyors of the said city of New York, and hereunto annexed." The general term were of the opinion that no doubt existed in this case, whatever it may have been in *Holloway v. Southmayd*, 34 N. E. Rep. 1047; but that by the description the grantees took the fee of the Bloomingdale road to its center line. While we concede that, under these descriptions, the doubt as to what was the intention of the grantors to convey might be more readily resolved in favor of the grantees, nevertheless we prefer to place our affirmation of the general term's judgment upon the grounds stated in the opinion in *Holloway v. Southmayd*, decided herewith. In either case, we are inclined to the view that the descriptive monuments or starting points for the boundary lines cannot be fixed in the center of the Bloomingdale road, without straining too much the language used. In Shaw's deed "the corner of Constable's land on the north side of the Bloomingdale road" seems to indicate the side of the road. If we read "on the north side," etc., as referring to the general situs of Con-

stable's land, we should have to assume that Constable owned to the center of the road, which the proofs do not warrant us in doing; while, if we read these words as referring to the "corner," then, of course, we should have the same condition of things as in the *Southmayd Case*. So, in the *Jaunceys' deed*, "the corner of the field at the junction of the Bloomingdale road," etc., are words which, when read according to their natural import, seem to describe the situs of the field, and fix the starting point for the boundary line in the exterior line or side of the road bounding the field, and not within the road itself. For the reasons expressed in the case of this same plaintiff against *Southmayd* and others the order appealed from should be affirmed, and, under the stipulation, judgment absolute should be ordered against the appellant, with costs. All concur, (MAYNARD, J., concurs for reasons stated in memoranda in *Southmayd Case*.) except EARL, FINCH, and O'BRIEN, JJ., dissenting. Order affirmed, and judgment accordingly.

(139 N. Y. 390)

**HOLLOWAY v. DELANO et al. (No. 2.)**  
(Court of Appeals of New York. Oct. 10, 1893.)**DEED—WHEAT LAND PASSES—FEE OF ADJOINING HIGHWAY.**

A deed which describes land on the westerly side of a highway as beginning "at a corner on the westerly side" of said highway at the northern side of a private road, and running thence "along the west side" of the highway, and then by several courses to the starting point, does not convey the fee of the highway. *Earl, Finch, and O'Brien, JJ., dissenting.* 18 N. Y. Supp. 704, affirmed.

Appeal from supreme court, general term, first department.

Ejectment by James W. Holloway against Franklin H. Delano and others. From a judgment and order of the general term (18 N. Y. Supp. 704) reversing a judgment for plaintiff, and granting a new trial, plaintiff appeals. Affirmed.

James A. Deering, for appellant. Wm. G. Choate, for respondents.

GRAY, J. In this case the claim of the plaintiff to recover the possession of land formerly embraced in the Bloomingdale road, and between Ninety-Second and Ninety-Third streets, in the city of New York, depends upon the construction to be given to the descriptive words in two grants of land; one made by Charles Apthorp and others to Oliver Vanderbilt, in 1799, and the other made by the same grantors to William and Mary Jauncey, in 1800. In the deed to Vanderbilt the description is as follows, viz.: "Beginning at a corner on the westerly side of the Bloomingdale road, at the northern side of the private road leading to Hudson's river, and running thence along the west side of Bloomingdale road aforesaid north, thirty-five degrees east, three chains sixty links; thence along the same north, thirty-two degrees east, five chains forty-two links, to a lane on the south side of Mr. Clarkson's land; thence north, thirty-five degrees west, twenty-three chains forty links to the Hudson's river; thence south-westerly along the said course eight chains fifty links to the land sold to Mr. Shaw; thence south, fifty-three degrees

east, one chain thirty links to the private road leading to the Hudson river; thence along the same north, thirty-five degrees east, forty links, being the width of said road; thence south, fifty-three degrees east, twenty chains seventy-three links, to the place of beginning; containing nineteen acres, one rood, fifteen poles, according to a map annexed." In the Jaunceys' deed the description is as follows, viz.: "Beginning at the corner of a field at the junction of the Bloomingdale road with a cross road that leads to Harlem; thence running along the Bloomingdale road south, thirty-five degrees west, seven chains fifty links; thence south, thirty-seven degrees west, ten chains thirty-two links; thence south, fifty-four degrees east, along William Constable's and Robert L. Bowne's land, nineteen chains eighteen links; thence north, fifty-four degrees east, nine chains fifty-five links; thence south, fifty-three degrees east, three chains seventeen links; thence north, thirty-six degrees east, eight chains ninety-two links; thence north, fifty-three degrees west, twenty-six chains to the beginning; containing forty-two acres and five perches, according to a map made by Benjamin Taylor, one of the city surveyors of the city and county of New York, and hereto annexed; and also," etc. Unquestionably, in the Vanderbilt deed, the terms of the description are sufficiently explicit to exclude the roadbed from the grant. As to the Jaunceys' deed, what we have said in *Holloway v. Delano*, (action No. 1,) 34 N. E. Rep. 1052, applies here, inasmuch as the starting point is similarly described. For the reasons expressed in the case of this same plaintiff against Southmayd and others (34 N. E. Rep. 1047) the order appealed from should be affirmed, and under the stipulation judgment absolute should be ordered against the appellant, with costs. All concur, except EARL, FINCH, and O'BRIEN, JJ., dissenting. Order affirmed, and judgment accordingly.

(139 N. Y. 415)

**ROBERTSON v. NATIONAL STEAMSHIP CO., Limited.**

(Court of Appeals of New York. Oct. 10, 1893.)

**SHIPPING—DEVIATION FROM COURSE—USAGE.**

1. A bill of lading issued by defendant acknowledged the receipt at Havre, France, for carriage to New York, of merchandise "to be forwarded by the steamer Wolf to London, and to be there transhipped in and upon the steamship called 'Canada,' \* \* \* bound for New York," and it provided that defendant should be exempt from all perils of "land transit." The steamer Wolf was one of a line running from Havre to Southampton, whence all goods for London were carried by rail. This had been the usage for several years, and it was advertised in the Havre papers. Neither defendant nor the owner of the Wolf carried any goods by water to London. *Held*, that the shipper was chargeable with knowledge of such usage, and therefore the land transit from Southampton to London was not a deviation from the course prescribed by the bill of lading, so as to render defendant liable as an insurer of the goods. 17 N. Y. Supp. 450, reversed.

2. One who seeks to avoid the effect of a

notorious and uniform usage of trade must show that he was ignorant of it.

Gray, J., dissenting.

Appeal from superior court of New York city, general term.

Action by Julius Robertson against the National Steamship Company, Limited, for damages to goods while in transit. Judgment was rendered in favor of plaintiff in the trial court (14 N. Y. Supp. 313) for \$1,000, and both parties appealed to the general term, which affirmed the judgment on defendant's appeal, and reversed it on plaintiff's appeal, (17 N. Y. Supp. 459.) and from such judgment defendant appeals. Reversed.

John Chetwood, for appellant. Lewis Sanders, for respondent.

EARL, J. In June, 1889, the defendant had a line of steamers running between London and New York. It received goods at Havre, in France, for transportation to New York, by way of London. It transported such goods from Havre to Southampton on board of steamers, and from that place to London by railroad, where they were transhipped to its steamships, to be carried to New York. The steamships running between Havre and Southampton and the railroad from Southampton to London were owned and operated by the London & Southwestern Railroad Company. The agents representing the defendant at Havre, on the 8th of June, 1889, received from Isabella and Munster 45 packages of merchandise, and issued to them a bill of lading, in which they acknowledged the receipt of the merchandise "to be forwarded by the steamer Wolf to London, and to be there transhipped in and upon the steamship called 'Canada,' \* \* \* lying in the port of London, and bound for New York, with liberty to sail with or without pilots, to call at Havre, Queenstown, Southampton, Plymouth, or any other port or ports, and to tow and assist vessels in all situations and to all ports, and, failing shipment by said steamer, then by following steamer of this line, for which the goods shall arrive in time." The bill of lading contained stipulations exempting the defendant from various perils, and among them from perils of "land transit of whatsoever nature or kind." Isabella and Munster appeared in the bill of lading as principals, not as agents. The merchandise, having been shipped on board the steamer Wolf, was carried to Southampton, and from thence by rail to London, where it was transhipped to the steamer Canada, and upon its arrival in New York it was found to be damaged. The plaintiff, who was the consignee, and who had become the owner of the merchandise, brought this action to recover against the defendant for the damage done to it, and he recovered on the sole ground that the defendant became an insurer of the merchandise, because it did not transport it from Havre to London on the steamer Wolf, and that thus there was a deviation from the route stipulated by the transportation by rail from Southampton.

It cannot be disputed that, if there was such a deviation as is claimed, the defendant became an insurer, and thus responsible for all loss and damage to the merchandise, even from unavoidable casualty. *Maghee v. Railroad Co.*, 45 N. Y. 514. But we do not think there was any deviation from the mode of transportation prescribed by the contract made between the parties. If we read the shipping bill alone, it is not entirely certain that the merchandise was to be transported from Havre to London all the way by water on board the steamer. The language in the bill of lading is, "to be forwarded by the steamer Wolf to London;" and in a real sense goods received on board the Wolf may be said to have been forwarded by that steamer to London by carrying them to Southampton, and then sending them by rail to London. The bill seems to provide for a carriage upon land, as it exempted the defendant from loss or injury from perils by land transportation of any kind, and the only land transportation upon this route was from Southampton to London. Thus, it appears that the shippers and the defendant, when they made the contract, contemplated, not only a carriage upon water, but upon land also. But, when the circumstances surrounding the making of the contract for the carriage are considered, it becomes entirely plain that the parties contemplated a contract for a carriage by the Wolf to Southampton, and thence by rail to London. The London & Southwestern Railroad Company had a regular line of transportation from Havre to London, by steamer to Southampton, and thence by rail to London, and for that purpose they had three vessels, making three trips weekly between those points, of which the Wolf was one. Those vessels never went further than Southampton, and the London & Southwestern Railroad Company never carried any goods by water to London, and neither did the defendant, and the business had been carried on this way for many years, and the mode of doing it was notorious and well known. It was advertised in the newspapers at Havre, and was specified in way bills used in Havre by the agents of the London & Southwestern Railroad Company in the transaction of its business. The mode of doing the business was such, and so open and notorious, that it must have been known generally at Havre, and particularly by persons there dealing with the agents of the defendant and of the London & Southwestern Railroad Company. It must be assumed that the contract between the parties was made with reference to this well-known usage, and it is binding upon the shippers just as if written in the bill of lading. In this particular case the proof of the usage does not contradict the bill of lading, but is simply explanatory of it. *Hostetter v. Gray*, 11 Fed. Rep. 181; *Lowry v. Russell*, 8 Pick. 360; *Phil. Ins.* (5th Ed.) § 980. In *Lowry v. Russell* it was held that a "bill of lading, like other contracts, is to be construed according to the intention of the

parties. Usage of trade is always presumed to be within the knowledge of the parties, and their contracts are supposed to be made with reference to it."

But it is said that the owner of this merchandise was J. Kalmes, Jr., living at Hamburg; that it does not appear that he made the contract at Havre; that he cannot be supposed to have known the usage; and that he cannot therefore be bound thereby; and that, as to him, it cannot be read into the contract of transportation. There are four complete answers to this position: (1) If Kalmes was the owner and shipper of this merchandise, it was incumbent upon him to show that he was ignorant of this notorious and uniform usage. *Johnson v. De Peyster*, 50 N. Y. 666. (2) It does not appear that he owned this merchandise at the time the contract for transportation was made. In the bill of lading, Isabella and Munster are described as the shippers from whom the merchandise was received, and with whom the contract for its transportation was made. They did not contract as agents, or, so far as the record shows, disclose any agency. After the bill of lading was issued to them, they indorsed it to another party, and that party indorsed it to Kalmes, and it appears by the invoice of the goods obtained from the customhouse, and proved upon the trial, that the plaintiff bought the merchandise of Kalmes, at Hamburg, on the 12th of June, four days after the bill of lading was issued to Isabella and Munster. It appears, therefore, *prima facie*, that Isabella and Munster were the owners of the goods, and that Kalmes became the purchaser from them by indorsement and assignment of the bill of lading. (3) But, if Isabella and Munster were not the owners, they made the contract as principals, disclosing to the defendant no agency, and giving up no principal. Therefore, the defendant has the right to treat them as principals, and the contract, as to its force and effect, must be construed precisely as if they were principals, and not agents. (4) But if we assume (which is the only other alternative) that they were the agents of Kalmes, and made the contract really for his benefit, he being the owner of the merchandise, then he is affected by the same knowledge which they possessed; and, if the law attributes knowledge of this usage to them at the time they made the contract for their principal, then the same knowledge must be attributed to him, and binds him. Therefore, in any view that can be taken of this case, if the parties, when they entered into this contract of carriage, did it with knowledge of this uniform and notorious usage, then the owner or owners of the merchandise, and the plaintiff who claims under him or them, are bound by it, and there was no deviation from the contract which makes the defendant liable as insurer for the damage to the goods. The judgment should therefore be reversed, and a new trial granted; costs to abide the event. All concur, except GRAY, J., dissenting.

(139 N. Y. 432)

**FRIEDLAND v. MYERS.**

(Court of Appeals of New York. Oct. 10, 1893.)

**CONTRACTS — ACTION FOR BREACH — MEASURE OF DAMAGES — REVIEW ON APPEAL.**

1. Where a covenant for quiet enjoyment is broken through the lessor's failure to give possession of the leased premises, losses incurred by the lessee in the construction of fixtures necessary to render the premises tenantable for the purpose for which they were leased are recoverable.

2. But such lessee cannot recover for a loss occasioned by his purchase of a quantity of perishable goods for use in the business to be conducted on the premises shortly in advance of the commencement of his term, where the market was in the same city, and he would have sustained no special loss by deferring their purchase until he had acquired possession. 19 N. Y. Supp. 741, reversed.

3. Where, on appeal by defendant from a judgment in an action to recover such loss, the record shows that evidence of the purchase and depreciation in the value of the goods was objected to, and exceptions taken to its admission, and that the court was requested to charge that the difference between the purchase price of the drugs and that realized on their sale was not the measure of plaintiff's damages, and exception taken to its refusal to so charge, the question of plaintiff's right to recover such loss is fully presented for review.

Appeal from supreme court, general term, first department.

Action by Abraham S. Friedland against Lewis Myers for damages alleged to be the result of defendant's breach of a covenant for quiet enjoyment in a lease. From a judgment of the general term (19 N. Y. Supp. 741) affirming a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed, unless plaintiff stipulates to remit damages.

Wm. Bernard, (Lewis Sanders, of counsel,) for appellant. Benjamin N. Cardozo, for respondent.

MAYNARD, J. By a written instrument dated August 26, 1889, the defendant leased to the plaintiff the ground door of No. 26 Canal street, New York city, for five years, commencing May 1, 1890. The plaintiff was a druggist, then doing business in the vicinity, which he intended to dispose of, and to re-establish himself in the same business upon the premises leased of the defendant. It was expressly stated that the building was to be occupied by the plaintiff as a drug store, and there was the usual covenant for quiet enjoyment. When the plaintiff sought to take possession on May 1st, he was kept out by the tenant in possession, who claimed that his term had not expired, and that he was entitled to remain another year, under an agreement with defendant which antedated the lease to plaintiff. The defendant immediately began summary proceedings in the district court to dispossess the occupant, and the plaintiff awaited their result. They were unsuccessful, and on May 27th it was adjudged that the occupant was rightfully in possession, because of the former lease to him. The plaintiff then rented another building for a store, into which he removed on June 10th. He has recovered in this action, as

damages for a breach of the covenant of quiet enjoyment, a judgment for \$1,328. The material facts are not disputed, and the only error assigned upon this appeal relates to the rule of damages applied by the trial court. Measured by the difference between the rent reserved and the actual value of the lease, no damages were proven, and there could have been but a nominal recovery on that account. But the plaintiff was permitted to prove, and the jury to consider, the expenditures and losses incurred in preparing to occupy the property and conduct his business there. A short time before the commencement of the stipulated term the plaintiff began preparations to fit the premises for use as a drug store. With the knowledge and assent of the defendant he employed an architect to make the drawings for the cases, counters, and other necessary fixtures required in that business, and a cabinetmaker to construct them. The store which he subsequently rented was already furnished, and the only use which he could make of the fixtures was to sell them at public auction, at a net loss of \$831. He purchased a stock of drugs to put in the store, and was, as he claims, compelled to sell such as were perishable at a depreciation from the cost of \$397, not including the proportional part of the auctioneer's fees and commissions upon the sale, which may be fairly estimated at the sum of \$10. He had advanced \$100 on account of rent, and these three matters make up the damages allowed.

Anciently, the rule was that, where the lessor was sued for a breach of a contract to give possession, the lessee could, ordinarily, recover only nominal damages and incidental expenses, but nothing for the value of the lease; but this rule was not made applicable to a case like the present, where he had covenanted to give possession, when he must be deemed to have known that he had no authority to do so; and the lessor would then be held liable to the lessee for the loss of the bargain, under rules analogous to those applied in the sale of personal property, (Mack v. Patchin, 42 N. Y. 171;) and the damages in such cases are now usually measured by the difference between the rent reserved and the actual rental value of the premises for the stipulated term, (Dodds v. Hakes, 114 N. Y. 260, 21 N. E. Rep. 398.) But other damages may also be recovered, provided they are proximate in effect, and are not speculative or uncertain in character, and were fairly within the contemplation of the parties when the lease was made, or might have been foreseen as a consequence of a breach of its covenants. If the property is leased for a special purpose, which is known to the lessor, and possession is refused because of a prior lease to another party, or of other fault of the lessor, the lessee may recover as damages his actual and necessary expenses incurred in preparing for the occupation of the property in the manner contemplated by the parties. *Driggs v. Dwight*, 17 Wend. 71; *Giles v. O'Toole*, 4 Barb. 261; *Lawrence v. Wardwell*, 6 Barb. 423; *Academy v. Hackett*, 2 Hilt. 217; *Adair v. Bogle*, 20 Iowa, 238; *Hall v. Horton*,

(Iowa,) 44 N. W. Rep. 569; *Poposkey v. Munkwitz*, 68 Wis. 322, 32 N. W. Rep. 35; *Jaques v. Millar*, 6 Ch. Div. 153; *Hexter v. Knox*, 63 N. Y. 563; *Bernstein v. Meech*, 130 N. Y. 354, 29 N. E. Rep. 255. Under this rule, we think the actual expenses paid or incurred by the plaintiff in the construction of the necessary fixtures to render the premises tenantable for the purposes for which they had been leased were properly proven and submitted to the jury for their consideration in estimating the quantum of damages recoverable. The loss of these expenditures may fairly be considered as naturally arising from the default of the defendant according to the usual course of things. The plaintiff was restricted by the lease in the use of the premises, and he could not underlet without the written consent of the defendant. If the plaintiff had deferred the work of preparation for the occupancy of the property until possession had been obtained, some portion of the term would have been practically lost before the necessary equipment for his business could have been furnished and made available. The lessor must have known that a prudent business man would, so far as practicable, cause the necessary fixtures to be constructed and in readiness for use at the commencement of the term, so that he might then promptly enter upon the successful prosecution of the business, which it was the object of the lease to secure to him. But the evidence discloses that the defendant had actual knowledge that these expenditures were contemplated, and encouraged the plaintiff to make them. An architect was employed by plaintiff to furnish the drawings and specifications of the fixtures, and the occupant of the store refused to allow him to make the required measurements for that purpose. The plaintiff informed the defendant of the situation, and requested to know what he should do, saying that he did not wish to lose time after May 1st in procuring this work to be done, and stating the amount which he intended in this way to expend. The defendant then went with the plaintiff to his own architect, who had the plans of the store, and directed him to furnish plaintiff's architect with these plans, in order that he might make the plans for the fixtures, which was done. If the plaintiff had then been notified by his lessor that possession of the demised premises could not be given as covenanted in the lease, or that it was even doubtful whether it might be, it is not probable that these expenditures would have been incurred, or, if they had been, the loss could not have been imputed to the lessor's broken covenant. The defendant must then have known that, if he failed to give possession, as agreed, the plaintiff might suffer damage to the extent of the cost of the fixtures. As late as April 14th the defendant made another written lease with the plaintiff to rent him for the same term the second floor of the building, to be used in connection with the drug store, and agreed to construct an iron stairway between the floors in the rear of the store. The conduct of the defendant throughout was such as to invite these expenditures.

and was equivalent to an assurance to the plaintiff that they might be incurred with safety. It need not be questioned that the defendant acted in good faith. He evidently misjudged as to the legal effect of the transaction with the occupant, and did not understand that it created a tenancy for another year; but it was so adjudged in the proceedings brought to dispossess him, and the consequence of the defendant's mistake must be borne by him, and cannot justly be visited upon the plaintiff.

But we fail to discover any sound principle upon which the defendant can be made responsible for the plaintiff's loss upon the sale of his stock of drugs. The defendant could not have anticipated the purchase of a large invoice of perishable drugs by the plaintiff before the commencement of the term of the lease. This purchase in advance was not necessary in order that plaintiff might have the benefit of the full term in his business. The market, or place of purchase, was in the same city, and the plaintiff would have sustained no special loss if he had deferred their purchase until he had acquired possession. They could have been delivered on the same day when ordered, or the following day, in the usual course of the trade, and no material delay would have resulted. It would seem to have been the part of ordinary business prudence to have waited until he had obtained control of a place where they could be stored and offered for sale. The plaintiff unquestionably had the right to purchase his stock of goods before he was entitled to the occupation of the store. But if he did, we think he assumed the risk of their depreciation in value, in case the defendant failed to give him possession. The rule might be different if he had been compelled to send to a distant market to make his purchases, and a long time must intervene before they could be delivered. The defendant's exceptions are sufficient to present this question upon appeal. The evidence showing the purchase and depreciation in value of the drugs was duly objected to when offered, and an exception taken. The court was requested to charge the jury that the difference between the purchase price and that realized upon the sale was not the measure of plaintiff's damages. This was refused, except as already charged, and the defendant excepted. The court had previously charged upon this point that, if they found there was a breach of the covenant in the lease, it was their duty to consider the item of loss upon the sale of the drugs, and if they considered that the loss was really sustained by the plaintiff they might award him that amount as compensation. Both by the exception to the evidence and by the exception to the charge we think the question is fairly presented for review. The judgment and order must be reversed, and a new trial granted, costs to abide the event, unless plaintiff stipulates, within 30 days after the filing of the remittitur in the court below, to deduct from the judgment entered the sum of \$407.48, and interest from December 18, 1891, and 5 per cent. extra allowance thereon; and, if the

plaintiff so stipulates, then the judgment, as so modified, is affirmed, without costs to either party in this court. All concur. Judgment accordingly.

(139 N. Y. 440)

**NORTHPORT REAL-ESTATE & IMP. CO.  
v. HENDRICKSON.**

(Court of Appeals of New York. Oct. 10,  
1893.)

**ADVERSE POSSESSION—OCCUPATION OF PART OF  
PREMISES—EVIDENCE.**

1. The owner of a farm conveyed the piece in dispute off the south side thereof to defendant's predecessor in title, and then conveyed the whole farm to plaintiff's predecessor, who recorded his deed first. The piece in dispute, together with a lot adjoining it on the south, known as "No. 10," was afterwards conveyed as a single tract, by mesne conveyances, to defendant, and it was always occupied and managed as a single tract. On the north side of the disputed piece, and for some distance on the east and west sides, was a fence dividing it from the farm. *Held*, that the whole tract conveyed to defendant constituted "a single lot," within the meaning of Code Civil Proc. § 370, making the use and occupation of a part of "a single lot" extend to the whole for the purpose of constituting adverse possession.

2. Where, for 30 years before plaintiff took his title to the farm of which the piece in dispute was originally a part, this piece had been held, occupied, and managed as constituting, with other property owned by defendant and his grantors, a single lot, and during that time the owners of the farm had never exercised any acts of ownership thereover, it being separated from the farm to a great extent by a fence, the constructive possession of such piece by the owners of the farm cannot be held to have overlapped and destroyed the constructive possession thereof by defendant and his predecessors in title.

Appeal from supreme court, general term, second department.

Action by the Northport Real-Estate & Improvement Company against Jeremiah Hendrickson. From a judgment of the general term (19 N. Y. Supp. 942) affirming a judgment for defendant, plaintiff appeals. Affirmed.

N. S. Ackerly, (John L. Hill, of counsel,) for appellant. Thomas Young, for respondent.

**EARL, J.** This is an action of trespass commenced in April, 1891, to recover damages against the defendant for entering upon land claimed by the plaintiff, and cutting down and removing therefrom certain trees. Both parties claim title to the land on which the alleged trespass was committed. In 1839, Jesse Bunce owned a farm of about 80 acres of land, and he executed to Fannie and Amelia Bryan a deed of a piece from the southerly end of the farm, consisting of about one acre and a quarter, which deed was dated May 25, 1839, acknowledged November 7, 1839, and recorded January 31, 1853. The defendant has a chain of title to this piece, by written conveyances under the Bryans, the deed to him having been executed and recorded in June, 1872. Subsequently to the deed to the Bryans, Bunce gave a deed of the whole farm, including the parcel above mentioned, to

Samuel P. Hart, which deed was dated November 2, and acknowledged and recorded December 27, 1839, and the plaintiff claims the land described in that deed under Hart by sundry mesne conveyances, the deed to it having been executed and recorded in March, 1890. It thus appears that while the deed to the Bryans was dated before the deed to Hart, it was not acknowledged until four days after the deed to Hart was dated, and was not recorded until many years after Hart's deed was recorded. It is therefore conceded that the plaintiff has a perfect record title to the piece of land in dispute, which must prevail over the claim of the defendant, but for the title of adverse possession which he claims to have established.

The sections of the Code applicable to this claim of adverse possession are as follows: Section 369: "Where the occupant, or those under whom he claims, entered into the possession of the premises under claim of title exclusive of any other right, founding the claim upon a written instrument, as being a conveyance of the premises in question \* \* \*; and there has been a continued occupation and possession of the premises included in the instrument \* \* \* or of some part thereof, for twenty years under the same claim, the premises so included are deemed to have been held adversely; except that where they consist of a tract divided into lots, the possession of one lot is not deemed the possession of any other lot." Section 370: "For the purpose of constituting an adverse possession by a person claiming a title, founded upon a written instrument, or a judgment or decree, land is deemed to have been possessed and occupied in either of the following cases: 1. Where it has been usually cultivated or improved. 2. Where it has been protected by a substantial inclosure. 3. Where, though not inclosed, it has been used for the supply of fuel, or of fencing timber, either for the purposes of husbandry or for the ordinary use of the occupant. Where a known farm or a single lot has been partly improved, the portion of the farm or lot that has been left not cleared, or not inclosed, according to the usual course and custom of the adjoining country, is deemed to have been occupied for the same length of time as the part improved and cultivated."

The facts about the adverse possession are as follows: Before any of the dates above given, the farm of 80 acres extended southerly to Main street, and the owner of the farm had sold off lots bounded southerly on that street, which lots were 150 feet deep and 50 feet wide on the street, and those lots commencing on the westerly line of the farm were numbered 10, 11, 12, and 13. The first three lots and half of lot No. 13 are southerly of and adjoining to the piece in dispute. In 1854 the owners of lot 10 and the disputed piece conveyed both lots to the same person, and that person owned the two lots as one parcel of land until January 8, 1862, when lot No. 10 was conveyed by the owner of both lots to one Shadbolt, and the lots were thereafter owned separately

until July 15, 1862, when both lots had been conveyed to John Seaton. After that both lots were continuously owned together, and were from time to time conveyed as a single tract of land, until the conveyance to the defendant in 1872, and were always occupied and managed as a single tract. During all the time there was a dwelling house upon lot No. 10, which was occupied by the owner of the whole tract, and there was no fence separating lot No. 10 from the disputed piece. At least 40 years ago an orchard of about 12 apple trees was set out upon the southerly end of the disputed piece, which the owners of lot 10 have improved and cared for, and they have had the fruit thereof. They also had a chicken coop and hog-pen on the southerly end of the piece, and for a short time a small garden in the northeasterly corner thereof. A fence was maintained on the northerly side of the piece, separating it from the balance of the 80 acres, and there was a fence at one time running the whole distance on the easterly line of the piece, and a fence for a small distance at the southerly end of the westerly line, and about 100 feet of fence remained at the southerly end of the easterly line, the residue having rotted down and disappeared. The northerly part of the piece—that part northerly of the orchard—was woodland, generally covered with small forest trees. The owners of lot 10 annually cut wood from the woodland for use at the house, and also cut some trees for sale. The owners of the farm never entered upon or cut any wood or timber from the disputed piece during more than 20 years prior to the deed to the defendant, and never exercised any dominion over the same during that time. Upon these facts, which are not substantially disputed in the evidence, the defendant bases his claim to adverse possession of the disputed piece.

We think the whole tract covered by the deed to the defendant must, in considering the adverse possession, be taken as one single lot. It had, for nearly 30 years prior to the commencement of the action, been conveyed, held, and treated as one lot. There was no division of the tract into lots, and it was described as a single tract or lot in the deeds of conveyance. The disputed piece and lot 10 were originally part of the farm, and were separated therefrom by different conveyances. Must they forever, within the provisions of sections 369 and 370, above set out, be treated as separate lots, or may they again become united? Suppose a farmer buys a lot of 100 acres for a farm, and subsequently adds to his farm 100 acres by purchases from adjoining lots, and then for long years holds, occupies, and uses the 200 acres as one farm; and suppose further that it is conveyed from time to time as one farm, describing it as such,—can it be doubted that, within the meaning of those sections, it is to be treated as a known farm, and single lot, so that the possession of a part under a deed will give the claimant the possession of the whole? In the case at bar, the farm has ceased to be divided into lots, and lot divisions no

longer exist. Suppose the owner of a large tract divides it into lots, and sells the lots, and subsequently repurchases all the lots, and then manages and controls it as one lot, and conveys it as one lot, is it one lot or many lots, within the meaning of those sections? We do not undertake to define the precise scope and meaning of the words "a known farm or a single lot," found in section 370, but we are satisfied that the whole tract described in the deeds constituting the defendant's chain of title is a single lot. This construction of the statute is different from that given in the court below, where it was held that the disputed piece must be recognized as a separate lot. But the case was submitted to the jury and disposed of in the court below upon a construction of the statute less favorable to the defendant than he was entitled to have adopted, and nothing stands in the way of now giving the statute its proper meaning and effect. Therefore the actual possession of that portion of the tract upon which the house stood, and of the grounds about it, with the improvement of the orchard, and the use of the woodland, gave the defendant and those under whom he claimed the constructive possession of the remainder of the tract. The part not actually possessed was used with, and was subservient to, that so possessed; and thus the terms of the statute and the rules of law on the subject were satisfied. *Miller v. Railroad Co.*, 71 N. Y. 380; *Thompson v. Burhans*, 79 N. Y. 93.

But the plaintiff contends that it and its predecessors in the title of the farm were also in the constructive possession of the woodland when the alleged trespass was committed, and, as it and they at the same time had the true title, this constructive possession must prevail over that of the defendant and his predecessors, who had no valid paper title; and his counsel cites, to uphold this contention, *Jackson v. Vermilyea*, 6 Cow. 678; *Simpson v. Downing*, 23 Wend. 319; *Finlay v. Cook*, 54 Barb. 9; *Hall v. Powell*, 4 Serg. & R. 465; and other cases. But we think the principles laid down in these cases are not fully applicable to this case. Here, for nearly 30 years before the plaintiff took its title to the farm, the tract claimed by the defendant had been held, occupied, and managed, as above stated, as a separate tract. During all that time the owners of the farm never exercised any dominion over, or any acts of ownership upon, the tract. It was separated from the farm by a fence on the northerly side thereof, and also to some extent on the easterly and westerly sides thereof. The rights of the defendant and his predecessors in the title seem to have been acquiesced in, and they alone exercised dominion and acts of ownership over the tract. Under such circumstances, we cannot say that the constructive possession of the owners of the farm overlapped and destroyed the constructive possession by the defendant and his predecessors of the piece in fact separated from the farm; and we therefore think that the latter must be held to have been in the constructive possession of the whole of that piece, and that the



former were dissipated thereof. This case is not free from doubt, but we think the best reasons can be assigned for the affirmation of the judgment, and it should therefore be affirmed. All concur.

(139 N. Y. 453)

**OGLEY v. MILES et al.**

(Court of Appeals of New York. Oct. 17, 1893.)

**INJURY TO EMPLOYEE—LIABILITY OF MASTER—  
NEGLIGENCE.**

In an action for personal injuries it appeared that plaintiff, when 16 years old, was injured in defendants' factory by a buzz saw at which he was working, and at which he had been placed by defendants without any instructions as to its use. It appeared, however, that he had had sufficient experience at other factories to know the nature of the machine, and the care necessary to avoid accidents, having previously operated such a machine for a short time. *Held*, that defendants were entitled to a nonsuit.

Appeal from supreme court, general term, fifth department.

Action by Albert E. Ogle against William E. Miles and others for personal injuries. The cause has been twice tried at circuit. At the first trial plaintiff was nonsuited, and a new trial was granted by the general term. 8 N. Y. Supp. 270. The second trial resulted in a verdict in favor of plaintiff for \$1,000, which was affirmed by the general term, without opinion, and from the judgment of affirmation defendants appeal. Reversed.

Bacon, Briggs & Beckley, (Theodore Bacon, of counsel,) for appellants. George W. Lamb, (Thomas Ruines, of counsel,) for respondent.

**PER CURIAM.** In this case we think the motion of the defendants for a nonsuit should have been granted. At the time of the accident the plaintiff was nearly 16 years of age. He was injured by a buzz saw which came in contact with his hand and cut off several of his fingers. He was engaged in sawing certain pieces of wood at defendants' sash and blind factory, by means of that saw, and had been at that particular work at that place for a couple of days only. The claim is that he was placed at this work by defendants without any information having been given him, and while he was ignorant of the dangers to be apprehended from the machine, if not carefully and properly used. It is unnecessary, and would not be profitable, to here recite the evidence in the case, but after a careful perusal of it we think it appears without contradiction, and from the plaintiff's own evidence, that he knew the operations of the machine; that he had had sufficient experience at other factories to enable him to, and that he did fully, understand its practical working, and he knew that he had to be careful in regard to his hands coming in contact with the saw, for if they did he knew they would be badly cut. He had operated buzz saws before he did this one; not for any length of time, but obviously, and from his own testimony, long enough to know the na-

ture of the machine, and the dangers attending its use. He was thus in the same position as to knowledge that he would have been in had the defendants imparted to him oral information of the dangerous character of a buzz saw. Within the cases decided in this court, the plaintiff should have been nonsuited. *Hickey v. Taaffe*, 105 N. Y. 28, 12 N. E. Rep. 286; *Buckley v. Manufacturing Co.*, 118 N. Y. 540, 21 N. E. Rep. 717, and cases cited. There is nothing in the evidence as to the size of the plaintiff at the time of the accident, which we regard as material to the case. We think he failed to make out a cause of action against defendants, and the judgment in his favor must therefore be reversed, and a new trial granted, with costs to abide the event. All concur.

(139 N. Y. 625)

**PEOPLE v. DELFINO.**

(Court of Appeals of New York. Oct. 17, 1893.)

**HOMICIDE—EVIDENCE—SUFFICIENCY.**

On a prosecution for murder it appeared that defendant induced a friend to go with him to the house of deceased, a married woman, between whose family and his own there was some intimacy, and that the killing occurred while no third person was present other than such friend. This friend testified that defendant was received coldly by deceased and her husband, as if there had been trouble between them, and though they stayed some time, and all drank together, there was considerable quarreling; that finally, the husband of deceased having gone out for some beer, defendant got up and walked towards deceased, and asked her if she was going to comply with his wishes, not stating what they were, to which she replied that she would not, and that she was not that kind of woman, telling him to go home to his wife and children; that witness then heard several shots fired, and defendant escaped, leaving his pistol, the five chambers of which had all been fired. Defendant, who was found the next day in hiding and disguised, claimed that the shooting was accidental. Both he and his wife testified that he had carried the pistol for some years. *Held*, that a verdict of murder in the first degree was justified.

Appeal from court of oyer and terminer, Kings county.

John Delfino was convicted of murder in the first degree, and appeals. Affirmed.

Mirabeau L. Townsend and Edward Moran, for appellant. James W. Ridgway, Dist. Atty., and John F. Clarke, Asst. Dist. Atty., for the People.

**ANDREWS, C. J.** This is an appeal from a conviction of murder in the first degree at the oyer and terminer of Kings county, April 25, 1893, Hon. Edgar M. Cullen presiding. The defendant was indicted and tried for the killing of Caroline Geasell by shooting, on the 27th day of December, 1892, at her residence in De Graw street, Brooklyn, which resulted in her death on the 12th of January, 1893. The record is voluminous, but no claim is made that any legal error was committed on the trial, or in any of the prior or subsequent proceedings. The only claim here made is that, upon the evidence presented, justice requires a new trial. It is conceded

that the deceased died from a pistol shot discharged from a pistol owned by the defendant, while in his hands, on the evening of December 27, 1892. It was and is claimed by the defendant that the shooting was accidental, and not deliberate and intentional, and this was the sole issue tried. The only evidence tending to establish the defense of accidental shooting was that given by the defendant in his own behalf. A brief reference to the evidence given in behalf of the people will show whether the verdict is justified. The defendant is an Italian, about 27 years of age, living, at the time of the homicide, with his wife and children in rooms in Brooklyn, a few blocks distant from 467 De Graw street, where the deceased, Caroline Gessell, a young German woman about 22 years old, resided with her husband and child. The two families had known each other for some time prior to the homicide, and seem to have visited together. The defendant, immediately prior to the homicide, called frequently in the evening at the Gessell house. He was something of a musician, and owned an accordion. He took this with him to Gessell's, and played on it there, and occasionally there was dancing. The wife of the defendant was confined about 10 days before the homicide. The defendant had been in the country about 12 years. At first he was a shoeblack, afterwards a barber, and finally he dealt in birds, which he bought from Italian vessels arriving in New York. He had a friend in New York named Pegar, also an Italian, who, with his wife, resided in Elizabeth street. Mrs. Pegar had stood as godmother to one of the defendant's children. The families of Pegar and the defendant visited together, and through the defendant the Pegars became acquainted also with the Gessells. About 2 o'clock on the afternoon of December 27, 1892, the defendant went to the house of Pegar, and invited Pegar and his wife to go to his house in Brooklyn to see the defendant's wife and baby. Mrs. Pegar could not go, and the defendant was invited to sit down to dinner, which he did, and he remained at Pegar's house till about 5 o'clock, during which time he drank wine several times. While at the table he exhibited a pistol. It was claimed by the defendant on the trial, and in this his wife corroborated him, that he had owned the pistol several years, and carried it for protection while on the docks engaged in his business. The pistol was examined by Pegar and other persons at the time it was exhibited at Pegar's house, and Pegar thought it was not then loaded. The defendant urged Pegar to go with him to his house in Brooklyn, although Pegar's wife could not go. He consented, and when the car reached a point near De Graw street the defendant wanted Pegar to go with him first to the Gessell house. Pegar told him he did not want to go there, but upon being urged by the defendant he consented, the defendant saying: "Well, we go there. We go right away there. Then we go to my house." When they came to the house, the testimony of Pegar as to what occurred before entering it and immediately

thereafter is as follows: "Question. He said, 'Maybe she is all alone,' is that right? Answer. Yes, sir. Q. Who said that to you? A. Delfino. 'She has the door locked; maybe she had the door locked.' Q. Go slowly, because we want to understand. 'Maybe she has the door locked?' A. The door locked; yes, sir. Q. Well, what else—what next—was said? A. Well, I told him, 'What is the matter with you, because she has got the door locked?' and he says, 'Well, we had a little trouble last night, or the night before,' something like that, he said, 'and they don't want me to go in the house no more;' that is what he said. So, when I heard that, I didn't want to go up at all. He said, 'Well, it don't take long. Maybe the husband is home.' So I went up with him, and I was in the front of the door, and he knocked on the door behind my back. Q. Describe that to the jury; how was that done? A. When we went up, and I was in front, he was behind me, and he knocked on the door behind my back. Q. What did he say to you before you did that? A. Well, he says, 'You give your name, and say who you are. Then she open the door for you.' So I didn't knock on the door; he knocked on the door behind my back. Q. Over your shoulder? A. Over my shoulder, knocked on the door; and she said, 'Who is there?' I said, 'Mr. Pegar.' She said, 'You are Mr. Pegar?' I said, 'Yes, sir.' Then she opened the door. She had the door locked. Q. Was the door locked inside? A. Yes, sir. Q. Bolted or locked? A. Bolted; I heard the— Q. When the door was opened what occurred? A. And when the door was opened, she said, 'Hello, Mr. Pegar. Where is Mrs. Pegar?' She looked for my wife; she thought my wife was along; and when she seen him in the door she began to scold. Q. Did she see Delfino behind you? A. Yes, sir. Q. When she saw him what did she say? A. Well, she began to scold. She says, 'I don't want you to come in my house any more,' she says, and he began to laugh. Q. He began to laugh? A. Yes, sir. Q. What did she next say? A. Well, so she says, 'Well, come on in.' 'Well, I think I will go home,' I said. She says, 'Come on in, Mr. Pegar. My husband will be in in about five minutes. He will be back, because he went to get his pay. He didn't work to-day.' So I stepped in there for five minutes. So the husband come in after that. Q. During the time he was in there, was there any talk between Mrs. Gessell and Delfino? A. No; she didn't say a word any more. By the Court: Q. Did Delfino go in with you? A. Delfino go in with me; yes, sir." It was between 6 and 7 o'clock that the defendant and Pegar arrived at Gessell's. The shooting occurred between 8 and 9 o'clock. Meanwhile beer was sent for several times, and all the parties drank, there being present during the evening only Gessell and his wife, Pegar and the defendant, and a small child of the Gessell's. After a time Mrs. Gessell prepared supper, and Pegar and the defendant were invited to partake. The defendant declined, and the evidence discloses that the hospitality extended by the Gessells that evening to

the defendant was not cordial, and that the defendant assumed a somewhat unfriendly attitude towards the family. During the evening, according to Pegar's testimony, the defendant took the pistol from his overcoat pocket and laid it on the table. Mr. Gessell said to him: "You think because you have got a pistol in your pocket that you could do something; but I could catch you by the neck and throw you out of the window before you could use that pistol." On one occasion Mrs. Gessell went for beer, and on another Pegar went for it. The defendant went out with Pegar, saying he wanted to get a pipe. They both returned in a short time. After supper was through, Pegar wanted to go, but proposed to treat, and Gessell, the husband of the deceased, went for the beer, Pegar insisting upon paying for it, which he did. While Gessell was gone for the beer the homicide occurred. Pegar was the only witness as to what occurred. He states that he was sitting on one side of the table, and the defendant on the other, and the deceased was sitting in a rocking-chair near the door; that the defendant got up, having his overcoat under his arm, and advanced till he came in front of Mrs. Gessell, and said to her. "Mrs. Gessell, what do you think; what are you going to do? Are you going to do what I told you?" She replied: "No;" and further said: "Don't bother me. Go to your wife and children. I ain't that kind. I am not the one you are looking for." Thereupon Pegar heard two or three shots fired, and he got up and had a struggle with the defendant. The defendant soon left the house, leaving his pistol, hat, and overcoat in the room. The pistol was a five barreled .38-caliber "American Bulldog," and the shells therein were found to have been discharged. The defendant did not go to his home that night, but the next morning was found in a bed with his clothes on in a room two or three miles distant from his home, which had no furniture except a bed. He pretended to the officer who arrested him that he could not understand English, but afterwards, on being asked if he was the man who shot the woman on De Graw street, he said: "No, it was Pegar who shot the woman." When arrested, his mustache, which he wore the day before, had been shaved off. The woman Gessell was found to be wounded in three places; a ball had entered the left side near the tenth rib, one had penetrated the left thigh, and the back of her left hand had been furrowed by a bullet. None of the wounds were necessarily fatal, but blood poisoning supervened, of which she died. The evidence given on the part of the people justified the jury in convicting the defendant of murder in the first degree. The shots were discharged while the pistol was in his hands. His advances towards Mrs. Gessell had been repulsed. He entered the house after he had been requested not to go there again. Even if no murderous intent was then in his mind, the inference is very strong from Pegar's evidence that it was formed at least when he approached the deceased, and she for a second time, as may be inferred, declined to entertain

his proposals. He doubtless was to some extent influenced by drink, but not so as to deprive him of responsibility for his actions. The defendant, as before stated, testified that the shooting was accidental. His story was incredible, and was disbelieved by the jury, and they accepted the testimony of Pegar, which was corroborated in many respects by other facts and by the conduct of the defendant. We perceive no reasons for interfering with the verdict of the jury. The judgment should therefore be affirmed. All concur.

(129 N. Y. 471)

## CRONER v. COWDREY.

(Court of Appeals of New York. Oct. 17, 1893.)

ESCHEAT SUBJECT TO MORTGAGE—FORECLOSURE—OMISSION OF STATE AS PARTY—SALE FOR TAXES.

1. Where, after land subject to a mortgage has escheated to the state, the mortgage is foreclosed by action to which the state is not a party, and a mortgage given by the purchaser is likewise foreclosed, the persons entering into possession under the foreclosure of the first mortgage are mortgagees in possession, and the person entering under the foreclosure of the second mortgage has the rights of a mortgagee in possession under the first mortgage, so that the state's only right is to redeem therefrom.

2. Where taxes are assessed on the land against the mortgagee in possession claiming title and the right of possession, and the land is subsequently sold for nonpayment thereof, the purchaser at the sale gets good title as against the person in possession, and all claiming through him, they not being in a position to assert that the land was state land, and, therefore, not taxable.

19 N. Y. Supp. 908, reversed.

Appeal from city court of Brooklyn, general term.

Action by Benjamin Croner against Samuel F. Cowdrey and others to recover a lot in the city of Brooklyn, known as "No. 116 Prospect Street." From a judgment of the general term (19 N. Y. Supp. 908) affirming a judgment of the special term for defendant Cowdrey, plaintiff appeals. Reversed.

Ira Leo Bamberger, (Wm. J. Gaynor, of counsel,) for appellant. S. F., F. H. & H. Cowdrey, (F. H. Cowdrey, of counsel,) for respondent.

EARL, J. This is an action of ejectment to recover a lot of land situate in the city of Brooklyn, known as "No. 116 Prospect Street." The facts of the case are quite complicated, and we must first endeavor to set them forth with accuracy. Paul Pontau, being the owner in fee of the lot, on April 27, 1854, executed a mortgage thereon to George B. Meade and Halsey R. Meade to secure the payment of \$3,300, with interest, on the 28th day of April, 1857, and that mortgage was duly recorded. Pontau died without heirs about the year 1865, seised of the lot. He left a will, by which he devised the lot to his wife Nannette, for life, with remainder to his adopted son, Anthony N. Pontau, in fee. Anthony died before the testator, unmarried, and without issue. Nannette, the widow, about 1867, married James E.

Johnson. In 1871, by chapter 558 of the Laws of that year, the legislature released to her all the interest of the state in the lot, and thus she became seised of the lot in fee. Her husband, Johnson, died in January, 1871, and in September, 1871, being at the time a widow, she made a will, devising the lot to James M. Johnson, the son of her second husband. In March, 1878, she married James Harrison. He died before his wife, and she died in 1878, without heirs. The Meades assigned the mortgage executed to them by Paul Pontau to James M. Johnson in November, 1869, and he assigned it to Henry W. Bates in November, 1879. In 1880, Bates foreclosed the mortgage by action, making parties defendant "Ann Le Court, John Doe, Richard Roe, Jane Styles, Thomas Nookes, Rebecca Johnson, Edward Styles, and Mary I. Blackwell, whose names are unknown to the plaintiff, unknown heirs at law and next of kin of Paul Pontau, late of the city and county of New York, deceased." Neither the state nor the heirs or devisees of Nannette, Pontau's widow, were made parties to that action. The referee, in pursuance of the judgment of foreclosure, sold the lot, and conveyed it to Alexander B. Crane and Louise E. Bates, by deed bearing date July 23, 1880. Subsequently, in May, 1881, Crane conveyed his interest in the lot to Mrs. Bates. In February, 1885, Mr. and Mrs. Bates united in a mortgage of the lot to Emily Golder for \$2,500, and in the same month Mrs. Bates executed and delivered a deed of the lot to Frances A. Denike. Thereafter, Emily Golder commenced an action for the foreclosure of her mortgage, and under the judgment in that action the defendant Samuel F. Cowdrey became the purchaser of the lot, and received a deed thereof on the 14th day of October, 1889. Neither James M. Johnson nor the state was made a party defendant in the last foreclosure action. During all these years the lot was possessed as follows: By Paul Pontau from April 27, 1854, to April 12, 1855; then by Nannette, his widow, to June 6, 1878; then by James M. Johnson to July 23, 1880; then by Alexander B. Crane and Louise E. Bates to May 10, 1881; then by Mrs. Bates to February 11, 1885; then by Frances A. Denike to October 14, 1889; and then by the defendant Samuel F. Cowdrey to the present time. All the persons thus successively in the possession of the lot claimed title thereto.

Nannette's will was made prior to her marriage with Harrison, and by that marriage the will was revoked, and thus she died intestate. 2 Rev. St. p. 64, § 44; *Brown v. Clark*, 77 N. Y. 369. As she died without heirs, whatever interest in real estate she possessed at her death at once escheated to the state, and the title thereto immediately vested in the state by operation of law. 1 Rev. St. p. 718; 4 Kent, Comm. 425; *McCaughal v. Ryan*, 27 Barb. 376; *Ettenheimer v. Heffernan*, 66 Barb. 374. But the mortgage executed by Paul Pontau in his lifetime being valid, the title of the state by escheat was subject thereto, and if the state had been made a party to the foreclosure of that mortgage the title acquired under the foreclosure sale

would have been perfect. But the persons who entered into possession under the foreclosure, defective as to the state because it was not made a party, became mortgagees in possession, and we think this defendant is in the position to claim the rights of a mortgagee in possession under the Pontau mortgage. *Townshend v. Thompson*, 139 N. Y. 152, 34 N. E. Rep. 891. Therefore the state could not maintain an action of ejectment based upon its title by escheat against the defendant to recover the possession of the lot, and the only right it has is to enforce its equity of redemption by an equitable action to redeem from the mortgage. It has never yet asserted its right of redemption, or taken any steps whatever to redeem from the Pontau mortgage. The facts thus far stated show the title and relation of the defendant to the lot.

In 1885 and 1886 the lot was assessed for general taxation, and it is not questioned that the assessment was regular and legal in form against the parties then in possession of the lot. The taxes imposed under those assessments not having been paid, the lot was sold at public auction in the year 1888 by the registrar of arrears for the nonpayment of the taxes to the plaintiff, and he claims title to the lot by virtue of a conveyance to him in pursuance of that sale. He was defeated in the courts below on the sole ground that, upon the death of Nannette Harrison in 1878, intestate, and without heirs, the title to the lot became vested in the state, and that the lot was, therefore, not legally taxable. So we have the defendant in the possession of the land, and claiming title thereto, setting up title in the state by escheat to defeat the title of the plaintiff, based upon a sale for the nonpayment of taxes regularly imposed upon this lot, unless they were illegal and void for the reason stated. We do not think this defense is available to the defendant. Where taxes are regularly assessed against parties in the possession of land and claiming title thereto, and the right of possession, and the land is subsequently sold for the nonpayment of the taxes thus imposed, the purchaser at the sale gets a good title as against such persons in possession and all persons claiming under them. The plaintiff's title may not be perfect as against the state, but the defendant is not in a position to dispute it. The state may never enforce the escheat and may never redeem the land from the Pontau mortgage. The amount due upon that mortgage may be more than the value of the land, and we know of no rule of law which will permit the defendant, under such circumstances, to retain possession of the land, and refuse to pay any taxes thereon upon the ground that it is state land, and therefore not taxable. We have assumed that the defendant could establish the escheat in this action, and that his evidence was sufficient for that purpose. But it may well be doubted whether an escheat of land can be enforced or established by any one but the state, through its attorney general, in the mode prescribed in statutes carefully framed to protect the rights of heirs

at the time unknown or undisclosed. Code, § 1977 et seq. It would be quite extraordinary to allow a party to establish an escheat in an action where there are no allegations or issues as to the escheat by methods not allowed to the state for the purpose of defeating a title good as against the whole world, except the possible right of the state to enforce the escheat. The learned counsel for the defendant also claims that the deed executed to the plaintiff by the registrar of arrears under section 6 of chapter 405 of the Laws of 1885 is invalid because he had not given the notice of sale required by that section. A careful scrutiny of the notice served shows that it is in substantial compliance with the statute, and its service was properly proved. This objection is therefore unfounded. The judgment should be reversed, and a new trial granted, costs to abide event. All concur.

(139 N. Y. 637)

DOYLE v. PENNSYLVANIA & N. Y.  
CANAL & RAILROAD CO.

(Court of Appeals of New York. Oct. 17,  
1893.)

INJURIES AT RAILROAD CROSSING — NEGLIGENCE —  
QUESTION FOR JURY.

1. In an action to recover for injuries at a railroad crossing, the questions whether signals were given, and whether the employees of the company were negligent, were for the jury.

2. Plaintiff, on a dark night, had crossed the main tracks of defendant, and was struck by a train on an isolated track 250 feet from the main track, of which she had no knowledge, the existence of which was not indicated by any sign whatever. *Held*, that the question of plaintiff's contributory negligence was for the jury.

Appeal from superior court of Buffalo, general term.

Action by Margaret J. Doyle against the Pennsylvania & New York Canal & Railroad Company for personal injuries. Verdict for plaintiff for \$5,000. From an order of the general term affirming, without opinion, an order of the special term setting aside the verdict, and granting a new trial, plaintiff appeals. Reversed.

Laughlin, Ewell & Hout, (John Laughlin, of counsel,) for appellant. Bissell, Stead, Brundage & Bissell, (Frank Brundage, of counsel,) for respondent.

**PER CURIAM.** A careful perusal of the record leads us to the conclusion that the trial judge did not err in submitting the questions of negligence on the part of the defendant, and of contributory negligence on the part of the plaintiff, to the jury. The defendant's negligence, if any negligence on its part existed, consisted in a want of due caution in the management of its train while crossing Perry street. Its main track was on the north side of Perry street, and passed westerly on an embankment on that side of the street towards the city. But it had constructed a single track across Perry street, which left its main line a short distance west of Peabody street, and, curving southeasterly and crossing the street obliquely, reached the south side of Perry street

about 339 feet west of Peabody street. The track across Perry street was substantially on the grade of the street. The company maintained no flagman, and there was no sign indicating a railroad track at that point. The evidence tends to show that a person going easterly from Selkirk street on the south side of Perry street would not discover the existence of this track before reaching it, and, also, that seeing a train coming from the east on the main tracks, on the north side of Perry street, on a dark night, might be misled and not perceive that it diverged from the main track to cross Perry street until it had nearly reached the south side. This would be especially true of a person unacquainted with the locality, and who did not know of the existence of the track crossing Perry street, and who could follow the course of the main line along the embankment on the north side of Perry street. The situation imposed upon the defendant the duty of using care and moving with caution in crossing Perry street. The evidence on the part of the plaintiff is that the train, the movement of which she observed after she was thrown down, was going very fast, and there is evidence on the part of witnesses for the defendant, other than the employees, from which the jury might reasonably infer that the train was moving much faster than four or four and a half miles an hour, which was the rate of speed fixed by the employees on the train. The plaintiff testified that no bell was rung, or whistle sounded, or other signal given from the train of its approach. She was somewhat corroborated on this point; but the engineer and fireman, and perhaps other employees, testified to the continuous ringing of the bell. This was a question for the jury. It further appears from the testimony of the fireman and engineer that they did not see the plaintiff, and did not know until the following day that any one had been struck, although it appeared that a person on the track could have been seen from the engine by a lookout.

We think there was sufficient shown to require the submission of the question of the defendant's negligence to the jury. The contributory negligence of the plaintiff is claimed principally on the ground that, from a distance of several hundred feet west of the point where the track of the defendant's road crossed Perry street, a train coming on the main line of the defendant's road from the east could be seen by a person going easterly on the south side of Perry street, and that, in fact, the plaintiff did see the train and the headlight before it reached the point where the train diverged to cross Perry street, and that it continued in her sight all the time until she was struck. But the circumstances are to be considered. She was rightfully on a public street, walking on the south sidewalk in the direction of the coming train. She had just crossed a large number of tracks of other roads in safety, and supposed that there was no other track crossing Perry street west of Peabody street. She did not know of the existence of this isolated track of the defendant, located about 250 feet east of the

body of tracks just crossed by her. Its existence was not indicated by the conformation of the ground, nor by any flagman or flaghouse or other sign. She knew of the location of the main tracks of the defendant's road running along the north side of Perry street, and when she saw the headlight of the approaching train she supposed, as she testified, that it was going along the embankment on the north side of the street. She said: "I didn't see the train come across the street where I was. Didn't know it was coming across the street. I thought it was going to keep on the bank." If her attention had been challenged by bell or whistle, this deception might have been corrected in time to have prevented any injury. We think it was for the jury to say, under all the circumstances, whether the plaintiff exercised ordinary prudence and care. The time occupied by the train in crossing the street was, in any view of the speed, very short. The plaintiff had no knowledge of the existence of the track, and nothing to put her upon her guard in the way of affirmative acts on the part of the defendant. The night was very dark, and it is quite possible to conceive that, under the circumstances, she did not realize that the headlight was approaching her until it was too late to escape the contact of the locomotive. The case was fairly submitted to the jury on the facts, and their finding was not contrary to law because unsupported by evidence.

The case recites that no question was made that the damages were excessive. The trial judge denied the motion for a new trial on the facts, but granted it "solely upon questions of law raised by the exceptions," and the order was affirmed by the general term on the same ground, but no opinion was written either at special or general term. We have looked into the exceptions other than those arising on the motion for a nonsuit taken by the defendant, and we think none of them are well taken. (1) For reasons indicated, the question as to the speed of the train was properly submitted to the jury. (2) There was no error in charging that the jury, in considering the question whether the train was managed carefully and prudently, might consider the fact that no flagman was maintained at the crossing. (3) There was no error in refusing to charge that the omission of the defendant to give warning by bell or whistle was immaterial, in view of the fact that the plaintiff saw the train. It was for the jury to say whether a sharp signal of danger might not have prevented the accident. (4) The exception to the charge, "that if the plaintiff watched the engine, and knew that it was approaching, and knowingly went in front of it, she was guilty of negligence, but that it was for the jury to say whether any further warning than such as was given by the headlight ought to have been given," is sought to be supported on the ground that it leaves out the element of negligence on the part of the plaintiff. This charge was given in reply to a request to charge that the omission to ring the bell or sound the whistle was, under the cir-

cumstances, immaterial. But, taking it in connection with the main charge on the subject of the care required to be exercised by the plaintiff, the jury could not have been misled.

We think no error of law was committed on the trial, and the orders of the special and general terms should be reversed, and judgment on the verdict ordered for the plaintiff, with costs. All concur. Orders reversed, and judgment accordingly.

(139 N. Y. 478)

MAY v. TRAPHAGEN.

(Court of Appeals of New York. Oct. 17, 1893.)

TAXATION—GROSS ASSESSMENT OF CITY LOTS—VALIDITY—SUBSEQUENT APPORTIONMENT—DUTY OF OWNER.

1. The charter of the city of Brooklyn (Laws 1873, c. 963, tit. 10) prescribes the power and duty of the assessors, and requires that all assessments shall refer to ward maps kept by them; and it directs them to follow the provisions of the general law, which requires a separate statement of the value of each parcel of land assessed. *Held*, that where certain land, which had formerly comprised one lot appeared on the ward map, after a change thereof, as two lots, an assessment of such lots in gross as one lot was void.

2. Consolidation act of 1888, providing for the apportionment of gross assessments where more than one person is interested in the piece taxed, and which went into effect after the sale of one of the lots under such illegal assessment, has no application in such case, and an apportionment made by the collector before such sale was ineffectual to validate the previous proceedings.

3. The owner of the lot sold, on finding on the annual record no valuation thereof, was under no obligation to make application to the taxing officers for correction, since there could be nothing to correct when there was no valuation for assessment.

Appeal from city court of Brooklyn, general term.

Action by Moses May against Henry Traphagen to recover possession of a certain lot in the city of Brooklyn. From a judgment of the general term (19 N. Y. Supp. 679) affirming a judgment for plaintiff, defendant appeals. Reversed.

Gratz Nathan, for appellant. Ira Leo Bamberger, for respondent.

GRAY, J. The action was brought to recover possession of certain premises in the city of Brooklyn. The plaintiff's title comes through a sale made to him on February 23, 1887, by the registrar, for the nonpayment of the taxes for the years 1882, 1883, and 1884. The defendant was the owner of the property at the time of the tax sale, and, among other objections to the plaintiff's title, asserts that the taxes for the year 1883 were not legally assessed, and hence the sale was ineffectual. It was shown that the premises formed originally part of one plot of land, which, in 1882, was designated upon the ward map by the number "19" in block 222. In February, 1883, the ward map was altered by the assessors by subdividing the plot No. 19 into two lots or parcels, which received new ward map numbers, the premises in question being desig-

nated as "No. 21," and the remaining lot being designated as "No. 20." In making the assessments for 1883, and the "annual record of real and personal property subject to taxation" for that year, the taxing officers included in one valuation and assessment the two lots 20 and 21, instead of stating in the record the valuation of lot No. 21, here in question, and the amount of the assessment thereon; that is, the two lots together were set down in the assessment roll at a valuation of \$4,500, and a gross tax was assessed of \$107.30. The record so remained during the period when the books were kept open for examination and correction, and they so came into the collector's hands. On November 20, 1883, an apportionment was made in his office, and by erasures and entries in red ink separate statements of a valuation and of the assessed tax were made upon the books. The circumstances under which this apportionment was made are not disclosed exactly.

We think that there was a fundamental defect in the proceedings for assessment and taxation. The charter of the city (Laws 1873, c. 863, tit. 10,) prescribed the power and the duty of the assessors, and required that all assessments shall refer to the ward maps, which were to be made and to be kept by them. They were directed to follow the provisions of the general law, and that required a separate statement of the value of the land to be assessed. In the opinion at the general term it was held that the gross assessment of the two lots did not render it void, on the ground that there was a reference to the ward map; and, if the defendant had objected to the assessment in gross, the assessors would have changed it by making separate assessments upon each lot. Reference is made in the opinion to section 11 of the consolidation act of 1888, providing for the apportionment of gross assessments, where more than one person is interested in the piece taxed. That act went into effect after this sale, and is inapplicable. The provision in the charter of 1873 differs in its language, and, if we had to consider the provision, we might say that it has no applicability to such a case as this, where the lots were already shown on the ward map as divided and numbered. That all the proceedings prescribed by the law for the assessment of land for the purposes of taxation must be substantially, if not strictly, complied with, is a well-settled and a familiar rule. The purchaser takes at his peril the title offered to him, and depends upon the strict right of the public officer to sell. That right rests upon a succession of steps which must have been substantially taken to reach the result. The failure in the present case to separately state the value for assessment of the premises in question amounted in law to a failure to impose any tax which the owner could be held for. There was, in such respect, an absence of a specific requirement of the statute with respect to the annual record. That which the legislature has directed courts cannot declare immaterial. *Meritt v. Village of Portchester*, 71 N. Y. 309; *Stebbins v. Kay*, 123 N. Y. 31, 25 N. E. Rep.

207. During the period when, by law, property was to be valued for taxation purposes, and a tax assessed, these steps were not taken as to the lot, which, on the ward map in the assessors' custody, and to which they were obliged by law to refer in making up their rolls, appeared with its ward number, 21. The defendant, upon finding upon the annual record no valuation of his lot, was under no obligation to make any application to the taxing officers. It was not a case for correction, for there could be nothing to correct when there was no valuation for assessment. The subsequent apportionment, in November, 1883, of values and taxes, however done, was ineffectual to validate previous proceedings, or to supply the defects, by which defendant's lot escaped assessment. The only conclusion to be reached is that there was a failure to impose any tax for the year 1883, and therefore the proceedings for the sale of the land were void. The judgment should be reversed, and judgment ordered dismissing the complaint, with costs to the defendant in all the courts. All concur. Judgment accordingly.

(139 N. Y. 631)

# CENTRAL NAT. BANK OF CITY OF NEW YORK v. WHITE et al.

(Court of Appeals of New York. Oct. 17,  
1893.)

## APPEAL—REVIEW OF EVIDENCE.

In an action by a bank against certain stockbrokers to recover from them certain money fraudulently paid by the cashier of the bank with cashier's checks in settlement of his stock speculations, a judgment in favor of defendants is not without evidence to support it, where defendants testify that they always supposed their dealings were with the bank in behalf of its customers, which the evidence shows was the fact when the dealings first commenced, though defendants' books showed accounts sometimes in the name of the bank, sometimes in the name of the cashier individually, and sometimes in his name as "cashier." 19 N. Y. Supp. 820, affirmed.

Appeal from superior court of New York city, general term.

Action by the Central National Bank of the city of New York against Leonard D. White, Frederick White, and Charles O. Morris. From a judgment of the general term (19 N. Y. Supp. 820) affirming a judgment of the special term in favor of defendants, plaintiff appeals. Affirmed.

Martin & Smith, (George A. Strong, of counsel,) for appellant. Edwards & Odell, (Walter Edwards, of counsel,) for respondents.

FINCH, J. The learned counsel for the appellant states the question of fact involved in this case, and which he claims has become a question of law, in these words, viz.: "Did defendants know that Sanford was using cashier's checks in his private transactions, or had they a right to believe that the transactions were for the bank?" Of course, this inquiry is primarily a question of fact, upon which the finding of the referee against the plaintiff is beyond our review, unless it proves



to have been made without any evidence tending to its support. The appellant, therefore, has undertaken the difficult task of demonstrating that there is no such evidence, so that the finding of the referee is an error of law for which we may reverse the judgment rendered. The learned counsel who took upon themselves this difficult duty do not at all disguise their consciousness of its character, but have made the effort with great care and ability, with a close analysis of the facts, and with a confidence that we on our part will examine the whole testimony, and patiently consider the argument founded upon it, before coming to a final conclusion. We have endeavored to do so, and have carefully studied the confused and somewhat singular accounts of the defendants, upon the form of which the plaintiff mainly relies. The defendants testify positively that they never knew or suspected that Sanford was dealing for himself, but always supposed and believed that the whole current of the account was with the plaintiff bank, through Sanford as its agent and representative. This evidence tends to raise an issue of fact, but is met by a reference to the admissions of the defendants that they personally conducted none of the dealings; that they had never examined the accounts until after Sanford absconded, and did not know the form in which they appeared upon their own books; and, therefore, that their clerks who conducted the dealings may have known that Sanford was acting for himself, in which event the defendants would be chargeable with their knowledge. But it is admitted that in the beginning of the transactions Sanford was acting for the bank, and it is not at all certain that the change which gradually marked the character of the account was such as to involve a necessary knowledge, either on the part of defendants or their subordinates, of a change in the principal with whom they were dealing. While it is true that the bank could not lawfully speculate for itself, and risk capital and deposits in that sort of stock gambling which ruins so many both in character and fortune, yet it is equally true that its customers could do so if they pleased, and it was possible to believe that they bought upon margin through the agency of the bank, without a disclosure of their names, and that the defendants assumed and believed such to be the fact is an inference more or less supported by two considerations. If they believed or suspected that Sanford was using the money of the bank upon his own personal ventures, they knew him to be morally, if not legally, a thief, and consciously aided and abetted him in his deliberate and persistent robbery of those who trusted him, and we should not charge upon the defendants so grave a wrong unless upon evidence not capable of any other reasonable explanation. And, again, there is an item of proof which quite plainly indicates what the understanding of the brokers was. It is the letter of June 26, 1869, addressed to Sanford without adding his official title,—a circumstance in other instances used to strengthen an inference that defendants were con-

sciously dealing with Sanford personally. That letter tends to rebut such an inference. It reads: "Please send us a check for \$10,000. We should like to keep a margin of 2% at least on your sales, as this seems to be the figure which your customers calculate to lose on their operations. We hope they will do better on this lot." The letter assumes as a fact well understood that the bank, through Sanford, was acting for its customers, and that the losses, if any, would fall upon them, and is all the more significant because addressed in form to Sanford personally. But the appellant contends that any such explanation is precluded by the form of the accounts as they appear upon defendant's books, and that these show conclusively the guilty knowledge charged. They certainly tend in that direction, but the natural inference to which they point is made more or less doubtful and uncertain by an examination of their items. The first account was headed, "W. H. Sanford, Cashier;" but, after one or more pages had been filled, the heading changed by the omission of the word "Cashier." Then there came accounts headed, "W. H. Sanford, Stock a/c," "W. H. Sanford, Gold Account," and "Central National Bank." Why these separate accounts were kept if all the dealings were with the bank we cannot accurately know, since Austin, the bookkeeper, who made the separation, for some reason influencing him, is dead, and we are left to inference and supposition. It is very forcibly argued on behalf of the plaintiff that the necessary and inevitable inference must be that while some of the dealings were with the bank, and substantially those which represented cash purchases and sales, and so respected investments made or ended, yet those which were of a speculative character and were dealings on margins are significantly posted to Sanford personally, or in the stock or gold account. If that was invariably true, the inference asserted would be quite difficult to avoid, but the details of the account so unsettle and weaken the inference as to leave it doubtful whether it should be drawn at all.

The facts are, and the referee has so found, that purchases and sales which appear upon the book of original entry, and were entered at the moment of the transaction as for and on account of "Sanford, Cashier," are quite commonly posted in the seemingly personal account of W. H. Sanford. The referee says in his tenth requested finding: "In these various accounts were entered and posted items which, on the books of original entry, stood to the credit of or charged against 'W. H. Sanford,' or 'W. H. Sanford, Cashier,' or the 'Central National Bank,' such names being used interchangeably, and as of identical meaning, and representing one and the same account." Perhaps a better view of the situation will follow a few actual instances taken from the books. Thus, in the account headed "Central National Bank," very many of the debits and credits appear on the purchase and sales book as being the purchases and sales by W. H. Sanford. In the account headed "W. H. Sanford, Cash-

ler," appear credits which stood on the purchase and sales book, and even on the cash book, in the name of W. H. Sanford; and, in the account of W. H. Sanford, items which on the purchase and sales book, and sometimes on the cash book, appeared as transactions of "Sanford, Cashier," are quite numerous. Many specific examples of this sort of confusion are given in the testimony of one of the defendants. A single one will suffice. On the cash book, under date of April 17, 1868, is a debit to William H. Sanford of over \$27,000, made up of several specific items, and there appears on the purchase and sales book an entry corresponding and identical, both in description and amount, showing the transaction to have been with "William H. Sanford, Cashier." While these things are true of the accounts to which I have referred, they do not seem to characterize the W. H. Sanford stock account. An abstract of that was put in evidence, and all the original, as well as posted, entries appear in the name of Sanford, without an official title. That fact weighs heavily in favor of the plaintiff, but is to some extent weakened and rendered ambiguous by the further fact that the first item in it is the exact footing of the preceding account, which was at first "Sanford, Cashier," and then simply "Sanford." No certain and necessary inference, sufficient to support a conclusion of law, can be based upon such ambiguous and indecisive facts. Now, I do not say what my own judgment would have been as a referee on these facts, but I am convinced that we are not at all justified in reversing the finding made, and its affirmance by the general term. There is very much more about the case, any adequate discussion of which would unduly prolong an opinion busy with facts only,—such as the rendition of accounts to Sanford in his personal name, which might happen without special intention, and the suit for a balance against Sanford personally, which, however, was after he had absconded, and the bank officers had notified the defendants of the real nature of Sanford's action,—but enough has been said to indicate in a general way the reasons why we deem the question debated essentially one of fact, which we are not at liberty to review. The judgment should be affirmed, with costs. All concur.

(139 N. Y. 461)

# ZEBLEY v. FARMERS' LOAN & TRUST CO.

(Court of Appeals of New York. Oct. 17, 1893.)

EQUITY — BILL FOR ACCOUNTING — WHEN MAINTAINED — STALE DEMAND — DEMURRER — TRUSTEE — SALE OF TRUST PROPERTY — REMEDY OF CESTUI QUE TRUST — PARTIES.

1. In an equitable action against a trustee for an accounting the question of stale demand cannot be determined on demurrer.

2. Where an action against a trustee for an accounting is brought within a few months after a denial or repudiation of the trust, by defendant, the demand is not stale.

3. Mortgaged railroad property was purchased by the trustee at foreclosure sale under

a provision in the decree allowing such purchase, and providing that on payment by any bondholder of his proportionate share of the moneys paid by the trustee as expenses of the action, and other moneys directed by the decree to be paid in cash, the purchase should inure to the benefit of any such bondholder. The trustee afterwards sold the property to a new corporation, without the knowledge of a certain bondholder, and refused to account to him for his share of the proceeds. *Held*, that such stockholder's remedy was not limited to intervention in the foreclosure suit, which it was in the discretion of the court to allow, but he could sue the trustee for an accounting.

4. The payment or tender of his proportionate share of the expenses of foreclosure, and other moneys directed by such decree to be paid in cash, is not a condition precedent to his right to maintain such action, but it is sufficient if he offers in his bill to pay it, especially where it appears that defendant repudiated the trust before the action was brought. 18 N. Y. Supp. 526, reversed.

5. The new corporation to which the trustee transferred the trust property is not a necessary party to such action where its title under the sale is not questioned, and no relief is asked against it, nor any facts stated which would warrant any relief.

Appeal from supreme court, general term, first department.

Action by John F. Zebley against the Farmers' Loan & Trust Company for an accounting. From a judgment of the general term (18 N. Y. Supp. 526) affirming a judgment sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

William Wirt Hewett, for appellant. Turner, McClure & Rolston, (Herbert B. Turner, of counsel,) for respondent.

O'BRIEN, J. The courts below have sustained a demurrer to the plaintiff's complaint. The actual merits of the plaintiff's claim are not involved in this appeal, but only the question whether he has stated enough in his complaint to call for an answer from the defendant and an examination of the facts by the court. If he has, then the case must be disposed of upon the facts as they may appear. The action was commenced in April, 1888. The allegations of the complaint are quite broad and general. It states that prior to the commencement of the action the plaintiff became and is the owner of 11 bonds, issued by the New York & Boston Railroad Company, a domestic corporation, upon which there is due and unpaid the sum of \$11,000, with interest from November 1, 1872. That such bonds were a part of an issue of \$2,500,000, duly issued by said corporation, for the purpose of borrowing money to be used in completing and operating its road, under date of November 1, 1869, payable with semiannual interest November 1, 1889. That at the same time the railroad duly executed, sealed, and delivered to the defendant a mortgage or deed of trust, conveying to the defendant, as security for the redemption and payment of said bonds, and the interest thereon, all of its property and franchises, the mortgage being referred to and made a part of the complaint. That the defendant became a party to the mortgage, and accepted the trust, and the bonds were thereupon issued in form payable to the defendant, trustee or bearer, in the sum of \$1,000

each; and the defendant did thereafter, in accordance with the terms of the mortgage, certify in writing that the bonds were secured by the mortgage, which the complaint averred was duly recorded in the proper office. That about May 1, 1873, the railroad company made default in the payment of the interest on the bonds, which default continued for more than 60 days, whereupon the defendant, as trustee, by the terms of the mortgage, did elect that the principal of all the bonds should become and be immediately due and payable. That thereafter, and on or about April 23, 1875, the defendant brought suit for the foreclosure of the mortgage, and procured a judgment in foreclosure, directing a sale of the property for the purposes of the trust. It is alleged that the decree in the action contained a direction in pursuance of the terms of the mortgage that upon the sale, in case there should be no bona fide bid in cash to an amount equal to that of all the bonds ascertained and reported to be outstanding and secured by the mortgage, the trustee might bid for and purchase the property in behalf of all the bondholders in proportion to their respective interests, not exceeding the whole amount of the outstanding bonds, but of the purchase price only so much should be payable in cash as should be necessary to meet and defray the expenses of the action and the other expenses therein directed to be paid in cash, and thereupon, and upon the payment by each bondholder of his share of such cash payments, the purchase inure to their benefit in proportion to their respective holdings, such sale, however, to be subject to certain liens or claims as should thereafter be determined. That thereafter, and on June 5, 1876, no cash bid having been made, the property was sold to the defendant in conformity with the terms of the mortgage and decree, in behalf of all the bondholders, and conveyed to the defendant. That about this time certain persons associated themselves together and formed a new corporation with a new name, to which the defendant conveyed the property held by it in trust, upon some consideration to the plaintiff unknown, with knowledge that the plaintiff's bonds were still outstanding, due and unpaid. That the transfer was made without the knowledge or consent of the plaintiff or the holder of the bonds in suit, and they have never received any of the benefits or advantages of the reorganization, but, on the contrary, have at all times elected to have their distributive share of the proceeds of the mortgaged property, and that the corporation, maker of the bonds, is insolvent. It is then averred that though the plaintiff has at all times been ready and willing to pay his share of the expenses of the defendant, and has at divers times, and particularly on or about December 16, 1887, demanded that the defendant account with him of and concerning the premises, and pay him his share of the proceeds or value of the property and any other moneys that have come to its possession or under its control as such trustee; but the defendant has refused and still refuses to so account or pay, and denies

that the plaintiff has any right or interest in the proceeds of the sale or in any wise under said trust, and has wrongfully, and in violation of the trust, converted to its own use the share of the property or its proceeds to which the plaintiff is entitled under the trust. Judgment is prayed that the defendant be required to account and pay over any sum in its hands applicable upon the plaintiff's bonds. There were three defects or grounds of demurrer specified by the defendant: (1) That the complaint did not state facts sufficient to constitute a cause of action; (2) that the court has not jurisdiction of the subject of the action; (3) that there was a defect of parties, in that the new corporation, to which the property was transferred by the defendant upon the reorganization, had not been made a party defendant.

It will be seen that the facts stated show that the defendant was a trustee for the bondholders under the mortgage, and then under the decree of foreclosure; that it sold the trust property, and has not accounted therefor to the plaintiff, who owns part of the bonds, for the payment of which the defendant held the property. The complaint will be deemed to allege every fact which can by reasonable and fair intendment be implied from the statements. *Marie v. Garrison*, 83 N. Y. 14; *Sanders v. Soutter*, 128 N. Y. 193, 27 N. E. Rep. 263. Whatever may in the end prove to be the merits of the controversy, the pleading must be held sufficient to require an answer, unless two objections suggested upon the argument, and sustained by the courts below, appear to be tenable. These are: (1) That the complaint shows that the claim is a stale one, which a court of equity will not entertain; and (2) that, upon the facts appearing on its face, the plaintiff's remedy, if any, must be had in the action brought to foreclose the mortgage. The learned counsel for the defendant relies upon the case of *Speidel v. Henrich*, 120 U. S. 377, 7 Sup. Ct. Rep. 610, to sustain the first proposition. In that case the court sustained a demurrer to a claim for accounting, based upon an uncertain and indefinite trust, not arising by deed, in regard to which the plaintiff had been silent for nearly 50 years. The conclusion was sustained by authority found in the decisions of the federal courts, and based upon the rules and practice of equity as administered there. In this state, however, it has long been settled that such circumstances are only evidence upon an issue of fact with respect to the existence of the claim, the ownership of the party setting it up, or its subsequent payment, settlement, or extinguishment in some way. *Macaulay v. Palmer*, 125 N. Y. 742, 26 N. E. Rep. 912; *Jackson v. Sackett*, 7 Wend. 94; *Bean v. Tonnele*, 94 N. Y. 381; *Parker v. Foote*, 19 Wend. 309; *Miller v. Smith's Ex'rs*, 16 Wend. 443; *Jackson v. Hotchkiss*, 6 Cow. 401. The inference, with respect to the existence of a claim in fact, to be drawn from such facts and circumstances may be strong or otherwise, depending upon the peculiar features of each particular case; but generally it cannot be said, as matter of law, that a claim or cause of action, not barred by the stat-

ute of limitations, is defeated by mere lapse of time alone. Under our system of procedure, even where the complaint upon its face discloses a cause of action barred by the statute of limitations, the question cannot be raised by demurrer, but by answer; and certainly a party ought not to be permitted to avail himself of the objection that the demand is stale in consequence of facts not constituting a statutory bar, on easier terms than he could avail himself of the statute of limitations. A court of equity undoubtedly may, under proper circumstances, in the exercise of discretion, decline to aid a party in the enforcement of a stale demand, but it is believed that such a result can seldom, if ever, be reached upon a demurrer to the bill, and without full examination of all the facts and circumstances of the case. Generally, the obligation of a trustee to account is not affected by the statute of limitations until a denial or repudiation of the trust. 2 Perry, Trusts, § 863; Ang. Lim. §§ 186, 468, 472; Decouche v. Savetier, 3 Johns. Ch. 190, 216; Flint v. Bell, 27 Hun, 158; Shannon v. Howell, 86 Hun, 47. According to the allegations of the complaint, admitted by the demurrer, this transpired but a few months before the commencement of the action, so that, in any aspect of the case, the defendant is not in a position upon the pleadings as they stand to insist that the plaintiff's claim is, as matter of law, defeated by the lapse of time.

Nor can it be held that the plaintiff's sole remedy was by intervention in the action to foreclose the mortgage. He had no absolute right to intervene, but could do so only on application to the court, which was subject to the exercise of discretion. The demurrer cannot be sustained upon this ground unless it appears upon the face of the complaint either that another suit was pending between the same parties for the same cause of action, or that the rights of the plaintiff were adjudicated by the decree so as to operate as a bar. It is plain that neither of these facts appear. The former judgment settled nothing inconsistent with the plaintiff's present claim. Indeed the facts upon which the plaintiff claims relief did not exist until after the entry of that judgment. It is the sale of the property, the receipt by defendant of the proceeds and the refusal to account, that constitute the most important elements of the cause of action, and all these facts transpired subsequent to the entry of the decree. That judgment fixed the defendant's relations to the bondholders as trustee under it for the purpose of executing its provisions, but whether it ever did in fact perform the trust imposed could not, in the nature of things, have been determined, but was left open for future inquiry. The pendency of another action for the same purpose, or where the relief could be obtained, is not specified as a ground of demurrer, and therefore the defendant cannot urge that objection now, even if it appeared upon the face of the complaint that such was the fact. It is obvious, however, that the former suit was not one between the same parties upon the same cause of action,

though it may be true that the plaintiff might have been made a party thereto by permission of the court, and by amended or supplemental pleading or in some other way obtained the relief now sought; but it does not follow, as matter of law, that he was bound to do so. The obligation of the trustee to account to the plaintiff did not arise until it had received the proceeds of the trust property, and the complaint discloses no obstacle to the enforcement of that right, when it accrued, by an independent action.

The plaintiff was bound by the terms of the mortgage and decree to pay his share of the expenses in order to share in the distribution of the proceeds of the property, and it is quite true that the complaint does not show that he had paid or tendered the amount. If such payment or tender was a condition precedent to the maintenance of such an action, it would be necessary to show that it had been performed. But it has long been the rule in actions for equitable relief, such as is sought to be obtained here, where it appears that the party seeking the relief was bound to pay some unascertained amount before the relief could be granted, that it is not necessary to pay or tender the amount before bringing the suit. It is enough if he offers in his bill to pay or to perform whatever obligations rested upon him in that regard. (Cassery v. Withersbee, 119 N. Y. 522, 23 N. E. Rep. 1000; Quin v. Brittain, Hoff. Ch. 358; Beach v. Cooke, 28 N. Y. 508; Kley v. Healy, 127 N. Y. 555, 28 N. E. Rep. 593;) and the plaintiff has complied with that rule. In actions to compel an accounting by a trustee concerning the disposition made of the trust fund or property this principle applies, and this is especially true in a case where he has repudiated the trust before the commencement of the action, and the tender would be a mere idle ceremony. It is true that under certain circumstances a failure to pay or tender performance before suit may be a good reason for denying costs to the plaintiff, or for imposing costs upon him, even when the action is otherwise sustained, but it cannot be held that a complaint in an action of this character is for that reason bad upon demurrer. The new corporation created under the reorganization proceedings was not a necessary party. The defendant, as trustee, transferred to it the trust property, but its title under that transfer is not questioned, and no relief of any kind is asked against it, nor are any facts stated which would warrant any relief. The judgment should therefore be reversed, and the demurrer overruled, with costs to the plaintiff in all courts, and with leave to the defendant to answer within 20 days after service of the order, upon payment of costs. All concur.

(159 Mass. 503)

HOLDEN v. STARKS.

(Supreme Judicial Court of Massachusetts.  
Hampden. Oct. 19, 1893.)

REAL-ESTATE AGENT—COMMISSIONERS.

1. A real-estate agent, who procures a purchaser able, ready, and willing to take the

property, and pay for it at the price agreed, and who is prevented from doing so by his principal's refusal to carry out the contract, is entitled to compensation, though the purchaser could not have been compelled to carry out his contract if he had chosen to set up the statute of frauds.

2. In an action by a real-estate agent for commissions, plaintiff's evidence showed that, two or three years before the sale, defendant had verbally authorized him to sell the land for a named price; that, a year later, defendant had written plaintiff a letter authorizing him to make a sale for \$1,800; that, just before the sale, plaintiff telegraphed defendant asking if he would sell for \$1,700, to which defendant replied that \$1,800 was the lowest price; and that plaintiff immediately made a contract of sale for \$1,800, which defendant refused to carry out. *Held*, that the proof was sufficient to warrant a finding by the jury that plaintiff had been employed to make the sale.

Report from supreme judicial court, Hampden county; Justin Dewey, Judge.

Action by Daniel F. Holden against George H. Starks to recover \$50 alleged by plaintiff to be due him under a contract with defendant relating to the sale of a house and lot owned by defendant. At the close of the evidence the court ordered a verdict for plaintiff, and, by consent of the parties, the case was reported to the supreme judicial court. Judgment on the verdict.

S. S. Taft, for plaintiff. C. L. Gardner, for defendant.

**KNOWLTON, J.** By the terms of the report, if the verdict for the plaintiff was warranted by any evidence which was properly admitted, it is to stand; otherwise, it is to be set aside, and judgment entered for the defendant. It was proved, and not disputed, that the plaintiff made a contract of sale of the defendant's house and lot to one who for a long time afterwards was able, ready, and willing to take the property, and pay for it the price agreed, and who was prevented from doing so by the defendant's refusal to carry out the contract. A payment of part of the purchase money was made to the plaintiff, with the intention of thereby rendering the contract irrevocable. If the plaintiff was authorized to make the sale as an agent employed by the defendant, he is, under these circumstances, entitled to compensation, notwithstanding that the purchaser could not have been compelled to carry out his contract if he had chosen to set up the statute of frauds. It was the defendant's own fault that the sale was not consummated. *Cook v. Fiske*, 12 Gray, 491; *Desmond v. Stebbins*, 140 Mass. 339, 5 N. E. Rep. 150; *Witherell v. Murphy*, 147 Mass. 417, 18 N. E. Rep. 215; *Loud v. Hall*, 106 Mass. 404-407; *McGavock v. Woodlief*, 20 How. 221; *Kock v. Emmerling*, 22 How. 69; *Duclos v. Cunningham*, 102 N. Y. 678, 6 N. E. Rep. 790; *Edwards v. Goldsmith*, 16 Pa. St. 48; *Prickett v. Badger*, 1 C. B. (N. S.) 296.

It remains to inquire whether there was evidence from which the jury might find that the plaintiff made a sale as the agent of the defendant under an employment by him. The evidence on this point is indefinite and unsatisfactory, but there

was uncontradicted testimony from the plaintiff that, two or three years before the sale, the defendant, being informed that he was a real-estate broker, told him to sell the property, if he could, at a price which was named, and that the plaintiff thereupon made some effort to sell it. That afterwards, nearly a year before the sale, the defendant wrote him a letter, which was put in evidence, giving \$1,800 as the price of the property, and offering to pay him \$50 if he would sell it. And that, just before the sale, he telegraphed to the defendant, asking if he would sell the property for \$1,700, and received in reply a dispatch, which was put in evidence, as follows: "Portland, Me., April 12, 1883. To D. F. Holden: No; eighteen is the lowest I will sell for." And that thereupon he immediately made a contract of sale for \$1,800, which the defendant refused to carry out. There is evidence in the case which tends to show that there was not a continuous employment of the plaintiff, but it would serve no useful purpose to review the testimony. In our opinion, the jury might well find that the plaintiff was acting under the authority of the defendant in making the contract of sale, and that he was entitled to compensation. Judgment on the verdict.

(159 N. Y. 532)

**DAVIS v. NEW YORK, N. H. & H. R. CO.**

(Supreme Judicial Court of Massachusetts.  
Hampden. Oct. 19, 1893.)

**INJURY TO RAILROAD EMPLOYEE — NEGLIGENCE OF VICE PRINCIPAL — ASSUMPTION OF RISK.**

1. Plaintiff, a section hand, was at work on the track, leaning over, and relying on the foreman of the gang for warning of any train, and was struck by one and injured. The foreman testified as to warnings given by him. Plaintiff testified that he heard none, "and I am not hard of hearing." *Held* sufficient evidence to justify a finding that no sufficient warning was given.

2. A foreman of a section gang, who does no work, but only looks on to see how it is done, is a person exercising superintendence, within the employer's liability act.

3. An engineer has control of a train, so far as giving signals and slackening speed are concerned, in cases of running down or collisions, within the employer's liability act, (section 1, cl. 3.)

4. Plaintiff was justified, when put to work, in relying on receiving from the foreman a warning of the approach of any train.

5. Plaintiff could not rely on the fact that under the statute an approaching train should have whistled when nearing the place where he was at work, and therefore he failed to use his eyes and ears, but the failure to whistle may be considered in connection with the negligence of the foreman in determining defendant's liability.

6. Plaintiff did not assume the risk of the foreman's negligence.

Exceptions from superior court, Hampden county; Justin Dewey, Judge.

Action by Patrick Davis against the New York, New Haven & Hartford Railroad Company under the employer's liability act. Judgment for plaintiff. Defendant excepts. Overruled.

J. B. Carroll, for plaintiff. G. M. Hearn, for defendant.

HOLMES, J. This is an action for personal injuries. The plaintiff was run down by a train while he was repairing a track for the defendant, doing work which required him to bend over. He was facing north, and the train came from the south, so that, as he contended, he had to rely on others to warn him of their approach. It was the duty of the foreman of his gang, or "section boss," as he was called, to warn him. The plaintiff went to trial on two counts, under the employer's liability act, (St. 1887, c. 270,) the second count alleging that the foreman, being a person intrusted with and exercising superintendence, etc., negligently failed to give warning, and the first, that the engineer of the train negligently failed to give any warning. The case is here on exceptions to the judge's refusal to take the case from the jury, on the usual grounds that there was no evidence of the negligence alleged, or of the plaintiff's due care.

The question whether there was any neglect on the part of the foreman is the point most argued. It depends on the interpretation of the plaintiff's testimony. The foreman and the section hand agreed that the foreman gave the usual warning. The plaintiff testified as follows: "I cannot tell about signals at the time I was struck, because I was knocked senseless. So far as I know, there was no signal of the approaching engine given up to the time I was struck. There was no warning that I know of, in any manner, shape, or form, by anybody, given to me of the approach of this engine. I did not see Glynn, [the foreman,] or I do not know where he was at the time. I did not hear any warning of any kind, and I am not hard of hearing, either."

The last words mean a good deal more than that this witness' memory is a blank. They mean that the witness remembers that his mind was not reached by a warning which he was prepared for, and which, if it was given, was directed towards him, and had the reaching of his mind as its very purpose. Under some circumstances, testimony that a witness did not hear a sound is not sufficient evidence that it was not made, for it may appear that his attention was occupied with other things, and that he had no interest which would pick out and bring forward such a sign from the confused background of semiconsciousness. *Hubbard v. Railroad Co.*, (Mass.) 34 N. E. Rep. 459. But where, as here, if the sound was made, the witness, for outward or inward reasons, would have been likely to be aware of it, his testimony that he did not hear it is evidence that it was not given. *Menard v. Railroad Co.*, 150 Mass. 386, 387, 23 N. E. Rep. 214; *Johanson v. Railroad Co.*, 153 Mass. 58, 59, 26 N. E. Rep. 426; *Hendricksen v. Meadows*, 154 Mass. 508, 28 N. E. Rep. 1054. In the present case the plaintiff meant to be understood by the words "and I am not hard of hearing, either," as politely, but definitely, taking issue with testimony which he anticipated,

that the foreman gave the warning. We have nothing to do with the credibility of the story, of course, but in our opinion this evidence was categorically in favor of the plaintiff. Indeed, the plaintiff's case can be sustained on a narrower ground. Even if the foreman's testimony was believed, the jury well might find that his warning was not effectual, and that he had no sufficient reason to believe that it was effectual, and was negligent for that reason.

The judge was not asked to rule that there was no evidence that the section foreman was a person intrusted with and exercising superintendence. The point seems to have received no attention, but the question was put to the jury incidentally. There is no doubt that they were warranted in finding as they did. The foreman himself testified that he just looked on, and saw that the work was done. It seems to have been admitted that he was not at work himself with pick and shovel, and that at least one purpose of his being there was to give warning. Thus the nature of his occupation was shown to be different from what a majority of the court has thought proper to be assumed with regard to a section foreman on a hand car, in the absence of other evidence than that he was engaged with one of the hands in inspecting the track. *Shepard v. Railroad Co.*, 158 Mass. 174, 177, 33 N. E. Rep. 508.

No serious complaint is made of the instructions of the court as to negligence on the part of the engineer. The jury were told that the plaintiff could not rely on the failure, if there was one, to give the statutory signals at a whistling post in the plaintiff's rear, as a distinct ground of action, and that the duty to do so was imposed with reference to another class of people. This seems to have been nearly all that was said with regard to the alleged omission of the train to give warning as a ground of liability. The charge probably was understood to mean that there could be no recovery on that ground, apart from the alleged failure of the foreman to do his duty.

If the jury were allowed to find against the defendant on the first count, the judge did not go further than to allow them to consider the evidence that the track was straight for two miles or more, and that no precautions were taken on the train, as some evidence of negligence on part of the defendant. *Lonsville & N. R. Co. v. Com.*, 13 Bush, 388, 389; *Railway Co. v. Slattery*, 3 App. Cas. 1155, 1164; *Byrne v. Railroad Co.*, 104 N. Y. 362, 10 N. E. Rep. 539; *Funston v. Railway Co.*, 61 Iowa, 452, 459, 16 N. W. Rep. 518; *June v. Railroad Co.*, 153 Mass. 79, 82, 83, 26 N. E. Rep. 238; *Taylor v. Canal Co.*, 118 Pa. St. 162, 176, 8 Atl. Rep. 43. No question was raised or argued as to the engineer being a person who had charge or control of the train within section 1, cl. 3, of the act. No doubt, for many purposes, the conductor has the control, (*Donahoe v. Railroad Co.*, 153 Mass. 356, 26 N. E. Rep. 365;) but, if the statute is to be of any use in cases of running down or collision, the engineer must be regarded as the person in charge, so far

as giving signals or slackening speed at the approach of danger are concerned, (see *Steffe v. Railroad Co.*, 156 Mass. 262, 264, 30 N. E. Rep. 117; *Cox v. Railway Co.*, 9 Q. B. Div. 106, 109, 110; *Hayler v. Railway Co.*, 72 Law T. 120.)

With reference to the plaintiff's case, this case might be found not to be governed by the decisions cited in *Tyler v. Railroad Co.*, 157 Mass. 336, 340, 32 N. E. Rep. 227, asserting the obligation to use eyes as well as ears, even where there is a duty to give warning by sound. The defendant had put the plaintiff in a position in which the more closely he attended to his duty the less he was able to be on the watch, and had put a foreman there for the express purpose of warning him. Under such circumstances the jury well might say that the plaintiff was justified in relying on the foreman's doing what the defendant admitted that he was bound to do, and said that he did. A man alongside another in this way can make sure of his warning being understood. The case is not like one where the only warning relied on must come from the train. See *Maher v. Railroad Co.*, 158 Mass. 36, 32 N. E. Rep. 950; *Steffe v. Railroad Co.*, 156 Mass. 262, 264, 30 N. E. Rep. 1137; *Anderson v. Mill Co.*, 42 Minn. 424, 426, 44 N. W. Rep. 315; *Wallace v. Railroad Co.*, (N. Y. App.) 33 N. E. Rep. 1069.

As we have intimated, we do not understand the instructions to have meant that the jury were at liberty to find against the defendant on the ground of the failure of the train to signal, and of the plaintiff's having relied on a warning from that source, without more. No special attention was called to that possible view of the facts. The questions as to the plaintiff's care were whether his reliance on the foreman excused him from keeping watch, and whether the foreman did not do his admitted duty. If because of the statute, or for any other reason, the defendant's train was in the habit of giving a signal at the whistling post, and the plaintiff knew it, that would not have been enough, by itself alone, to excuse him from the general duty of using his eyes. See *Shea v. Railroad Co.*, 154 Mass. 81, 27 N. E. Rep. 672; *Aerkfetz v. Humphreys*, 145 U. S. 418, 421, 12 Sup. Ct. Rep. 835. But the jury properly were instructed that the plaintiff had a right to depend upon his knowledge to some extent, and that they might take the fact into account, in connection with the evidence that on this occasion no signal was given, as bearing on his case. *Little v. Railway Co.*, 40 Minn. 273, 279, 280, 41 N. W. Rep. 1040; *Anderson v. Mill Co.*, 42 Minn. 424, 44 N. W. Rep. 315; *Hawley v. Railway Co.*, 71 Iowa, 717, 29 N. W. Rep. 787.

It is suggested that the plaintiff took the risk of the danger. In general, it is not negligent not to anticipate wrongful negligence on the part of a defendant, (*Hayes v. Hyde Park*, 153 Mass. 514, 27 N. E. Rep. 522;) and, assuming that there is a difference in the proposition, a workman does not take the risk that a person entrusted by his employer with, and exercising, superintendence, will be negligent in the exercise of that duty. If he were held

to do so, the statute would be made of no avail. *Malcolm v. Fuller*, 152 Mass. 160, 167, 25 N. E. Rep. 83. See *Smith v. Baker*, [1891] App. Cas. 325.

It is not argued that the notice was insufficient. We see no trouble with it.

Exceptions overruled.

(159 Mass. 536)

### LYNCH v. BOSTON & A. R. CO.

(Supreme Judicial Court of Massachusetts.  
Hampden. Oct. 19, 1893.)

#### INJURY TO EMPLOYE—CONTRIBUTORY NEGLIGENCE.

Where deceased was engaged in cleaning under a switch bar in a railroad yard, and was killed by a shunted car, of the approach of which he had no reason to expect a warning with certainty, his failure to look and listen relieves defendant railroad company from liability.

Report from superior court, Hampden county; Justin Dewey, Judge.

Action by Mary Lynch, administratrix of Patrick Lynch, against the Boston & Albany Railroad Company, to recover damages for his death. Verdict ordered for defendant, and case reported. Judgment on the verdict.

James B. Carroll, for plaintiff. W. H. Brooks, for defendant.

HOLMES, J. This case bears some resemblance to *Davis v. Railroad Co.*, 34 N. E. Rep. 1070. The plaintiff's intestate was killed while engaged in cleaning under a switch bar in the defendant's yard, the work being of a kind which naturally withdrew attention from approaching trains. The difference is that in this case there is no sufficient evidence that the defendant had given the deceased the right to rely upon being warned, when a train or car approached, in such a way as to excuse him from using his eyes. The strongest testimony bearing upon the matter is that of the section foreman. He says that he generally looked out for the men the best way he could, and warned them, but that, even if the men were together, they had to look out for themselves, and, of course, that they had to look out for themselves when they were in different parts of the yard. At the time of the accident the men were separated, and the deceased must be taken to have known that he was not relieved from the necessity of keeping watch for himself. If so, he was not free from negligence in failing to do so. The case is distinguished in like manner from *Maher v. Railroad Co.*, 158 Mass. 36, 32 N. E. Rep. 950, where the deceased had a right to rely on being warned by a telltale of the approach to a bridge, and from *Maguire v. Railroad Co.*, 146 Mass. 379, 382, 15 N. E. Rep. 904, where there was an implied assurance that the use of the track was suspended. See, also, *Railway Co. v. Levalley*, 36 Ohio St. 221; *Vose v. Railway Co.*, 2 Hurl. & N. 728.

What we have said with reference to a warning from the foreman applies also, in our opinion, to a warning from the car. Although we fear that on this point we are at variance with *Railway Co. v. Murphy*, (Ohio,) 33 N. E. Rep. 403, we are



compelled to think that the deceased had no right to abandon the use of his own eyes, and to rely upon being warned from every car that might be shunted or kicked upon the track where he was working. We do not perceive that he had reason to expect any such warning with certainty; but, if he had, the only warning that he could expect was a shout as the car drew near, and this would not have been sufficient to warrant his not using his eyes, and relying on his ears alone. Still less could he rely upon the car being stopped in time after it should be discovered that he was not going to get out of the way. The case is not so strong for the plaintiff as if the deceased had been run down by an engine, which ordinarily would have a man on the lookout. See *Shea v. Railroad Co.*, 154 Mass. 31, 27 N. E. Rep. 672; *Aerkfetz v. Humphreys*, 145 U. S. 418, 421, 12 Sup. Ct. Rep. 835. It is not necessary to consider whether any evidence can be discovered of negligence on the part of a person who had charge or control of a train, (see *Devine v. Railroad Co.*, [Mass.] 34 N. E. Rep. 539,) or of other neglect on the part of, or imputable to, the defendant. If the deceased was negligent, of course no action can be maintained, either under St. 1887, c. 270, §§ 1, 2, or under Pub. St. c. 112, § 212, as amended by St. 1888, c. 243.

**Judgment on the verdict.**

(159 Mass. 527)

**MCCARTHY v. PROVIDENT INSTITUTION FOR SAVINGS.**

(Supreme Judicial Court of Massachusetts. Suffolk. Oct. 19, 1893.)

**BANK DEPOSITS — PAYMENT TO WRONG PERSON — KNOWLEDGE OF TRUST — LIABILITIES.**

D. assigned her deposit in a savings bank to plaintiff, in trust for certain purposes, at the same time giving him her deposit book. The bank objected to the form of this assignment, and it was agreed between it and plaintiff that it should pay no attention thereto till it heard from him further. Subsequently D. obtained the book from plaintiff, under the pretext that she wished to examine it, and then delivered it, together with an assignment of the fund, to B., who collected the fund from the bank, and immediately redeposited it by itself in her own name as "trustee for D." Plaintiff then notified the bank that he claimed the fund under his earlier assignment, but the bank paid it to B. *Held*, that the bank was liable to plaintiff for the fund so paid to B. with knowledge of the former's claim thereto.

Appeal from superior court, Suffolk county; John W. Hammond, Judge.

Action by Daniel McCarthy against the Provident Institution for Savings, a corporation, and others. From a decree in favor of plaintiff, said corporation appeals. Affirmed.

F. C. Welch and Charles H. Tyler, for appellant. Maxwell & Hudson, for appellee.

**BARKER, J.** The defendants do not object to the form of the action, and the superior court has treated it as a suit in equity, brought by a trustee to reach and preserve for his trust property which is

part of the corpus of his trust fund, and which has been diverted from it by the defendant Barron while held by the defendant bank, with notice that it belonged to the trust, and was claimed by the plaintiff as trustee. The bank contends that the case is merely an attempt to collect from it a second time a deposit which, in accordance with rules assented to by the depositor, it has once paid in good faith upon presentation and surrender of the deposit book. The case is here upon the appeal of the bank from a final decree adjudging it to pay to the plaintiff a certain sum with costs, and there is a report of facts, made in accordance with the provisions of St. 1883, c. 223, § 7. As no requests for rulings and no rulings of law are reported, the question for decision is whether the decree is justified by the pleadings and the facts reported.

The property now in controversy was on February 8, 1890, a deposit in the defendant bank in the name of Sarah Donovan, she having the deposit book. By an instrument of that date she assigned the deposit of which the book was the evidence and the deposit book to the plaintiff in trust, and delivered to him the book. He gave notice to the bank of the assignment and of the trust, and requested it to transfer the deposit to himself, but the bank refused to make the transfer without an order in the usual form, alleging as a ground for the refusal that by making the transfer upon the authority of the instrument of February 8, 1890, it might itself be charged with the execution of the trusts. This was early in March, 1890, and the result of the interview at that time between the plaintiff and the officers of the bank was that it need pay no attention to the assignment until it heard further from the plaintiff. About the 18th or 19th of the following May the plaintiff, at Sarah Donovan's request, let her take the bank book to look it over; and on May 21st she left his house without returning the book to him, and, taking the book with her, went to live with the defendant Mrs. Barron. On May 26th she signed an order directing the bank to pay the sum of \$980 to Mrs. Barron, and to charge the same to the account of the book, and delivered the order and the book to Mrs. Barron. On June 2d Mrs. Barron presented the order and the book to the bank, and was paid the \$980, and redeposited that sum in the bank in the name of "Annie C. Barron, trustee for Sarah Donovan," receiving a new deposit book therefor. On the next day, upon another order, dated June 3, 1890, and signed by Sarah Donovan, Mrs. Barron drew the balance of the original deposit, and surrendered the original book. Afterwards, on the same day, the plaintiff, having been informed of the transfer of the \$980, went again to the bank with the instrument of February 8th, and left a copy thereof, and gave notice that he claimed under it, and was told that the account had been closed, and that his claim could not be recognized. After June 3, 1890, the bank, not heeding the claim of the plaintiff, paid to Mrs. Barron the \$980 which she had deposited on June 2d in her name as trustee.

tee for Sarah Donovan. Before this suit was brought, Sarah Donovan died, and Mrs. Barron was appointed executrix of her will. We are not informed when the suit was begun, but no defense of laches is claimed. It does not appear when Mrs. Barron withdrew the sum of \$980, nor what disposition she has made of it. Personally, and as executrix, she files an answer, disclaiming any interest in the controversy. The facts found are not stated with entire clearness, but our interpretation of the last two paragraphs of the report is that the bank was in fact notified on June 3, 1890, that the \$980 deposited on June 2, 1890, in the name of Annie C. Barron, trustee for Sarah Donovan, by a transfer under her order of May 26, 1890, was part of the plaintiff's trust fund, and that it was claimed by him as trustee; and that, after such notice, and disregarding it, the bank paid the money to Mrs. Barron. While it is true that the interest which Sarah Donovan had in the original deposit was not an interest in any particular money or fund, as held in *Kimball v. Leland*, 110 Mass. 327, (see, also, *Lewis v. Institution*, 148 Mass. 235, 19 N. E. Rep. 365,) it is plain that such deposits, with the bank books by which they are represented, may be conveyed in trust, and become part of a trust estate. Upon the facts found in the report, the delivery of the book by Mrs. Donovan, and the assignment from her to the plaintiff, gave to him in trust a complete title to the book and to the fund represented by it. See *Foss v. Bank*, 111 Mass. 285; *Davis v. Ney*, 125 Mass. 590. But as he did not keep possession of the deposit book, but gave Mrs. Donovan an opportunity to deliver it to Mrs. Barron, with an order for payment to her, it may be conceded that the plaintiff would have no claim against the bank were it not for the redeposit of the \$980 on June 2, 1890, in the name of Annie C. Barron, trustee for Sarah Donovan, and for the notice, given to the bank on the next day, that the plaintiff claimed the money as a part of his trust under the instrument of February 8, 1890. If the transaction of Mrs. Barron with the bank had closed with the withdrawal of the original deposit, the bank would have been protected from any claim on the part of the plaintiff, both by its by-laws and by the fact that the plaintiff had given its officers to understand that it need pay no attention to the assignment to him until it heard further from him. He had given the bank no further notice, and until his second notice, given on June 3, 1890, it was justified in allowing Mrs. Barron to withdraw the money upon presentation of the book, accompanied by Mrs. Donovan's order. See *Levy v. Bank*, 117 Mass. 448; *Goldrick v. Bank*, 123 Mass. 320; *Doulan v. Institution*, 127 Mass. 183; *Kimmins v. Bank*, 141 Mass. 33, 6 N. E. Rep. 242.

The right of the plaintiff rests upon the transactions subsequent to the withdrawal of the \$980. It is the right which a trustee has in equity to follow trust property into the hands of one who takes or holds it with knowledge of the trust, and who, notwithstanding such knowledge, and in denial of the trustee's right,

participates in diverting the property from the purposes of the trust. The doctrine is thus stated in Story's Equity Jurisprudence, (13th Ed., p. 549:) "Trusts are enforced not only against those persons who are rightfully possessed of trust property as trustees, but also against all persons who come into possession of the property bound by the trust, with notice of the trust; and whoever so comes into possession is considered as bound, with respect to that special property, to the execution of the trust;" reference being made to *Thorndike v. Hunt*, 3 De Gex & J. 563; *Hopper v. Conyers*, 12 Jur. (N. S.) 328; *Hill v. Curtis*, L. R. 1 Eq. 90; *Rayner v. Koehler*, L. R. 14 Eq. 264. That one, upon receiving a deposit, has contracted to redeliver it to the depositor, does not justify such a redelivery after notice that the deposit is the property of a third person; and the true owner may, by taking proper measures, compel delivery or payment to himself. The right to maintain replevin is often thus founded, and, if the property deposited was money, an action of contract may be maintained by the true owner against the depository. *McCluskey v. Institution*, 103 Mass. 300. In case of a deposit in a savings bank by one person in trust for another, a specific contract between the depositor and the bank that the latter shall hold the fund for the benefit of the person of whom the depositor is said to be trustee does not preclude the depositor from recovering the deposit for his own use if he is in fact the real owner. *Parkman v. Bank*, 151 Mass. 218, 24 N. E. Rep. 43, and cases cited. In this case, after the notice of June 3, 1890, the bank stood in the same position, with reference to the plaintiff and to the property represented by the new deposit book, and to Mrs. Barron, in which any person would have stood who, having received money on deposit from Mrs. Barron, was notified that it was in fact a portion of the plaintiff's trust property, and that he claimed it as such. If the plaintiff might have sued Mrs. Barron at law, and "trusted" the bank, that was not his only remedy. Mrs. Barron, in her transactions with the bank, purported to act as a trustee for Sarah Donovan; and the question whether she or the plaintiff should hold the fund is plainly one of which the court has jurisdiction in equity. The bank had knowledge from the transaction itself that it was receiving from Mrs. Barron funds held in trust for Mrs. Donovan. When it received the notice of June 3d from the plaintiff, it already knew that the \$980 redeposited by Mrs. Barron as trustee for Sarah Donovan was the identical money which she had on the previous day drawn upon the order; and that it was a trust fund; and the plaintiff's notice must be taken to have informed it that the possession of the fund had been wrongfully obtained by Mrs. Barron, and that its ownership was in the plaintiff as the true trustee. Nothing occurred to deprive the fund of its identity. If it then belonged to the plaintiff as trustee, it remained his property; and by the notice of June 3d the bank was fully charged with knowledge of that fact.

It is not necessary to consider what would have been the effect if the money had been mingled by Mrs. Barrow with other funds. The plaintiff's notice of June 8d was a sufficient demand for property then in the possession of the bank, and clearly identified and distinguished; and the bank is answerable to him for having, in disregard of his notice, subsequently paid over to Mrs. Barron the money which the plaintiff claimed, and to which the decree has established his title. To this aspect of the case the by-laws concerning lost books do not apply. Decree affirmed.

(159 Mass. 488)

**BLISS v. CROSIER et al.**

(Supreme Judicial Court of Massachusetts.  
Hampden. Oct. 19, 1893.)

**FRAUDULENT CONVEYANCES — KNOWLEDGE OF GRANTEE—MORTGAGE ON AFTER-ACQUIRED CHATTELS.**

1. Under Pub. St. c. 157, § 98, which provides that a sale, assignment, or conveyance by an insolvent, "not in the usual and ordinary course of business of the debtor," is prima facie evidence that the purchaser, assignee, or transferee had ground to believe him insolvent, it must appear that the transaction was not according to the usual and ordinary course of business of the particular person whose conveyance is the subject of investigation; not that such transactions are unusual in the general conduct of business throughout the community.

2. The fact that a mortgagee of after-acquired chattels had reasonable grounds to believe the mortgagor insolvent when he took possession does not affect his rights, as against other creditors, where he had no grounds for such belief when the mortgage was executed.

Report from superior court, Hampden county.

Action of tort by Henry C. Bliss, assignee in insolvency of Isaac Faulkner, against Charles E. Crosier and others, for the conversion of certain personal property described in a certain mortgage given by said Faulkner to defendants. The court found for defendants, and plaintiff appealed, and at the request of the parties the case was reported to the supreme judicial court. Judgment on the finding.

The report is as follows:

"It appeared in evidence that said Faulkner, between the 20th day of October, 1891, and the 19th day of May, 1892, executed four chattel mortgages covering substantially all his property, including his household effects. On said 19th day of May said Faulkner purchased of the defendants, and took a bill of sale therefor, 'the entire stock of goods and fixtures in the store on the corner of School and Summit streets, in West Springfield, and lot of ice,' according to an inventory to be annexed to said bill of sale; and also 'one bay horse, six years old, and one express wagon.' This bill of sale also contained a lease of the premises from the defendants to said Faulkner for one year at a rental of \$25 per month. Said Faulkner paid no money to the defendants, but gave them a chattel mortgage to secure the payment of the purchase money (\$1,383.63) 'in weekly installments of \$25 each, beginning May 23,

1892, without interest, provided installments are paid at maturity of each installment,' covering all the property described in the bill of sale, and substantially all the property described in the other four mortgages, except his household effects. It also contains this clause: 'This mortgage is also to cover goods, wares, and merchandise which I may hereafter purchase and place in said store during the continuance of this mortgage. Permission is given to sell said stock of goods in the ordinary course of retail trade, provided the stock is kept fairly up to present inventory.' This mortgage and the bill of sale were executed at the same time, and bear the same date, and the mortgage was duly recorded. At the same time, as additional security for the payment of said purchase money, and as a part of the same transaction, said Faulkner executed an assignment as follows: 'In consideration of one dollar and other valuable consideration to me paid by Crosier Brothers, of West Springfield, Mass., I hereby transfer and assign to said Crosier Brothers all my right, title, and interest in and to all accounts due me and pertaining to the meat business lately carried on by me, and also to any and all accounts which may hereafter become due me in my meat and grocery business as now carried on by me, with full power and authority to collect the same in my name, by suit or otherwise, until my indebtedness to said Crosier Brothers is fully paid. Witness my hand and seal this 19th day of May, 1892. I. N. Faulkner. [Seal.] Charles House.' After the payment of six weekly installments, (\$150,) said Faulkner defaulted, and ran away. July 8, 1892, the defendants duly served a notice of their intention to foreclose their mortgage under the provisions of sections 7 and 9 of chapter 192 of the Public Statutes, and said notice was recorded in the town clerk's office of West Springfield, July 9, 1892. The defendants then took possession of the property described in their mortgage, (except such part of it as was claimed by the owners of the four prior mortgages,) and also of the books of account used by Faulkner in his business. On the 29th day of July, 1892, said Faulkner was declared insolvent, and thereupon the plaintiff was duly appointed assignee of his estate. It was agreed that after the date of the defendants' mortgage, and before the notice of foreclosure, said Faulkner purchased and added to his stock goods to the value of \$75. The defendants testified that they did not examine the town clerk's record of mortgages as to Faulkner's property, either before or at the time of sale to him by them, and, as a matter of fact, they had no knowledge of any outstanding mortgages upon his property, and at the time of the transaction he told them there were no mortgages on his property. At the trial of the case, evidence was introduced by the plaintiff and defendants, upon which I found as facts that said Faulkner was insolvent on the 19th day of May, 1892, being the day when said sale took place; that the mortgage and assignment referred to were given by the mortgagor in the usual and ordinary course of his

business; that he had at the time of giving the same no intention of going into insolvency, or any purpose of violating any of the provisions of law relating to insolvency in giving the said mortgage and assignment, but expected to continue in the prosecution of his business; that he gave the same for a present valuable consideration, and that the defendants, when they received the same, did not know or have reason to believe that the mortgagor was insolvent, or in contemplation of insolvency, or that the same was made in violation of the insolvency laws.

"The plaintiff requested me to find and rule as follows: (1) Plaintiff asks the court to rule as a judicial question that the assignment and mortgage to Crosier Brothers amounted to prima facie evidence of grounds of belief in Crosier that Faulkner was at the time insolvent, or in contemplation of insolvency, and that the conveyance was void, under sections 96, 98, c. 157, Pub. St. (2) That as a question of fact said mortgage and assignment as made amounted to such prima facie evidence. (3) That the facts were such that Crosier was put upon his inquiry, and is chargeable with what an inquiry would have developed. (4) That the record of the mortgage was notice to Crosier of the import of the mortgages. (5) That the mortgage and assignment were not in the usual and ordinary course of the business of the debtor, and that they put the burden upon the defendant to show that Faulkner was not insolvent, or in contemplation of insolvency at the time, and that Crosier had not grounds of belief of such insolvency. (6) That, if the mortgage and transfer were out of the ordinary course of Faulkner's business, that fact is prima facie evidence, and, if uncontrolled, sufficient that the defendants had reasonable cause to believe that Faulkner was insolvent, or in contemplation of insolvency, and that the transaction was void, under sections 96, 98, c. 157. (7) That, independent of the evidence offered by the defendant as to the insolvency of Faulkner, if the court find that the transfer in mortgage of property was not in the usual and ordinary course of business of the debtor, the prima facie ground of belief assumed by the statute, if uncontrolled, carries with it a presumption that Faulkner was insolvent, or in contemplation of insolvency, and that the transaction was void. (8) That if it appear that Faulkner was insolvent at the time Crosier took possession, and that Crosier then had reasonable grounds to believe him insolvent, the property acquired subsequent to the date of the mortgage can only be held by Crosier as a pledge could be held if taken at the time in security for the debt, and that the defendants were subject to any disability arising from the insolvency of Faulkner at the time of the taking possession. (9) That under the clause in the original mortgage engaging or providing that Faulkner should turn over after-acquired property to Crosier, there cannot be justified a payment of the debt in property, (insolvency having intervened,) any more than a payment of the debt in money. (10) That after ac-

tual insolvency the execution of an executory contract to pay a debt by after-acquired property is equally as void as the performance of the debtor's promise to pay the debt in money. (11) That on the facts the plaintiff is entitled to recover the value of the property. (12) The assignment to Crosier amounted to a preference. The 4th, 6th, and 7th requests were given by me, and the others denied."

H. C. Bliss, for plaintiff. T. M. Brown and J. G. Dunning, for defendants.

ALLEN, J. 1. The first question arises upon the refusal of the court to rule "that the mortgage and assignment were not in the usual and ordinary course of business of the debtor, and that they put the burden on the defendant to show that Faulkner was not insolvent, or in contemplation of insolvency, at the time, and that Crosier had not grounds of belief of such insolvency." The request for this ruling rested upon the provision in Pub. St. c. 157, § 98, that "if such sale, assignment, transfer or conveyance is not made in the usual and ordinary course of business of the debtor, that fact shall be prima facie evidence of such cause of belief." In order to avail himself of this provision, it was incumbent on the plaintiff to make it appear that the transaction was not according to the usual and ordinary course of business of the particular person whose conveyance was the subject of investigation,—that is, of Faulkner; not that such transactions were unusual in the general conduct of business throughout the community. *Nary v. Merrill*, 8 Allen, 451. This obviously presented a question of fact. There may be cases where a court can say that upon all the evidence no other conclusion is warranted except that the sale or conveyance was manifestly out of the debtor's usual course of business. See *Nary v. Merrill*, supra; *Walbrun v. Babbitt*, 16 Wall. 577; *Buffum v. Jones*, 144 Mass. 29, 10 N. E. Rep. 471. In the present case, upon the facts disclosed, it was not the duty of the judge to rule as matter of law that the mortgage and assignment were outside of the usual and ordinary course of Faulkner's business. Not enough facts are reported to take the case out of the general rule, which is that the question should be treated as a question of fact, and determined accordingly. *Leighton v. Morrill*, 158 Mass. —, 34 N. E. Rep. 256; *Killam v. Peirce*, 153 Mass. 502, 27 N. E. Rep. 520; *Bridges v. Miles*, 152 Mass. 249, 25 N. E. Rep. 461; *Stevens v. Pierce*, 147 Mass. 510, 514, 18 N. E. Rep. 411; *Buffum v. Jones*, 144 Mass. 29, 10 N. E. Rep. 471; *Alden v. Marsh*, 97 Mass. 160. The report of the facts in evidence is rather meager. It is not even stated what Faulkner's previous business had been, nor have we before us copies of his prior chattel mortgages. It is obvious that the report does not contain all of the evidence which was introduced at the trial, and upon which the findings of facts by the presiding justice were based. The argument of the plaintiff rests chiefly upon the inferences which he contends should be drawn from the fact of Faulkner's insol-

vency, and the character of the papers which he executed; but these are not sufficient to require the giving of the ruling requested, especially as we do not know what other evidence was in the case.

2. The other question arises upon the request for a ruling that, "if it appear that Faulkner was insolvent at the time Crosier took possession, and that Crosier then had reasonable grounds to believe him insolvent, the property acquired subsequent to the date of the mortgage can only be held by Crosier as a pledge could be held if taken at the time in security for the debt, and that the defendants were subject to any disability arising from the insolvency of Faulkner at the time of taking possession." This request was properly refused. *Bennett v. Bailey*, 150 Mass. 257, 22 N. E. Rep. 916; *Blanchard v. Cooke*, 144 Mass. 207, 222, 226, 11 N. E. Rep. 83; *Chase v. Denny*, 130 Mass. 566. Judgment for the defendants on the finding.

(159 Mass. 497)

### MATTESON v. STRONG.

(Supreme Judicial Court of Massachusetts.  
Hampden. Oct., 1893.)

#### VICIOUS DOG—CONTRIBUTORY NEGLIGENCE.

The fact that plaintiff put his hand on the neck of a dog in his custody, to fetch him along, and prevent a fight with defendant's dog, lying under a wagon, four or five feet away, does not, as matter of law, show a failure on plaintiff's part to exercise due care, which will prevent his recovering for a bite, inflicted by defendant's dog, which immediately thereafter sprang on plaintiff's dog, and in so doing struck plaintiff's finger.

Exceptions from superior court, Hampden county; Justin Dewey, Judge.

Action of tort by Daniel B. Matteson against Homer C. Strong to recover double the damages alleged to have been sustained by plaintiff as the result of a bite of defendant's dog. There was a verdict for plaintiff, and defendant excepted to the court's refusal to rule as requested by him. Exceptions overruled.

S. S. Taft, for plaintiff. C. L. Gardner and H. C. Strong, for defendant.

KNOWLTON, J. The only defense relied on at the trial was the alleged negligence of the plaintiff. The questions were raised by two requests for rulings, which were refused. The first was that there was no evidence that the plaintiff was in the exercise of due care. The second was as follows: "If the plaintiff was attempting to prevent a fight between two dogs, or to terminate a fight already begun, and for this purpose put his hand on either dog, and as the result, and while his hand was on one of the dogs, was bitten by the defendant's dog, he is not entitled to recover." The evidence tended to show that a dog which was rightfully in the plaintiff's custody was attacked by the defendant's dog, and that the plaintiff's finger was bitten while he was attempting to prevent or terminate a fight between the dogs. On the plaintiff's testimony the jury may have found that after the dogs had begun growling, but before they had

come together, and while the defendant's dog was lying under a wagon, four or five feet away, he told the dog which was in his custody to come along, and put his hand on the dog's collar and neck to fetch him along, and that the defendant's dog then sprang on the other dog, and in so doing struck the plaintiff's finger. We cannot say as a matter of law that the plaintiff was not in the exercise of due care in putting his hand on the collar or neck of the dog which was in his custody, in order to bring him along, and prevent a fight. Under the circumstances, it may have been a very proper thing for him to do, and at the time it may not have seemed to expose him to much, if any, danger. In cases of this kind a great deal depends on the size, the apparent disposition, the conduct, and the situation of the two dogs, and upon other circumstances which are usually proper for the consideration of a jury. There was other testimony which would have warranted the jury in finding that the plaintiff was negligent, but neither the undisputed evidence in the case nor the hypothetical statement embodied in the defendant's second request for a ruling was enough to justify the court in directing a verdict for the defendant. Exceptions overruled.

(159 Mass. 538)

### FOSTER-BLACK CO., Limited, v. FENNESSEY et al.

(Supreme Judicial Court of Massachusetts.  
Hampden. Oct. 19, 1893.)

#### CONTRACT OF GUARANTY—CONSTRUCTION—SCOPE.

Defendant held notes made by S., and, as collateral thereto, certain goods. The notes not being paid at maturity, defendant drew on plaintiff, S.'s commission merchant, for the amount. Plaintiff honored the draft, after taking an assignment of the goods under a contract wherein defendant guaranteed plaintiff against loss "arising from advances, disbursements, or charges." Plaintiff disposed of the goods, rendering an account of the sales to defendant. *Held*, that plaintiff was entitled to charge defendant the usual commissions for making the sales, and interest on the advancement and disbursements.

Exceptions from superior court, Hampden county; Elisha B. Maynard, Judge.

Action on a contract by the Foster-Black Company, Limited, against Andrew L. Fennessey and others. Plaintiff had judgment, and defendants bring exceptions. Exceptions overruled.

The contract in suit is as follows: "In consideration of the sum of one dollar to us in hand paid by the Foster-Black Co., Limited, of the city and county of New York, the receipt of which is hereby acknowledged, we, Fennessey, Armstrong & Co., of the city of Springfield, state of Massachusetts, do hereby covenant, promise, and agree that we will save and hold them, the said The Foster-Black Co., Limited, free, clear, and harmless, and will pay to and reimburse them, the said The Foster-Black Co., Limited, for any loss or losses now or hereafter growing out of or arising from advances, disbursements, or charges made by the said The Foster-Black Co., Limited, to the said Fennessey, Arm-

strong & Co., to take up certain notes, amounting to \$29,109.00, made by E. B. Skinner & Co., of Stillwater, New York, and which were discounted by the said Fennessey, Armstrong & Co. The said E. B. Skinner & Co. placed with the said Fennessey, Armstrong & Co. three hundred and thirteen cases of knit underwear as collateral security for said notes, said collateral security having been transferred to the said The Foster-Black Co., Limited. This guaranty is given to protect the said The Foster-Black Co., Limited, in case said collateral security should prove insufficient to reimburse the said The Foster-Black Co., Limited, as above. In witness whereof, we have hereto set our hands and seal this 20th day of November, A. D. one thousand eight hundred and eighty nine. Fennessey, Armstrong & Co. In presence of Wm. H. Brayton."

E. H. Lathrop, for plaintiff. Gillett & McClench, for defendants.

**KNOWLTON, J.** The defendants were bankers, and they had discounted for third parties certain notes made by E. B. Skinner & Co., and they held as collateral 312 cases of knit goods manufactured by the makers of the notes. The plaintiff corporation was doing business as a commission merchant, and was the selling agent of E. B. Skinner & Co. The notes not having been paid at maturity, the defendants drew on the plaintiff for the amount due on them. Before the drafts were honored, the defendants transferred to the plaintiff the goods which they held as collateral, and executed the contract, a copy of which is annexed to the plaintiff's declaration. The plaintiff then disposed of the goods, and rendered an account of sales to the defendants, and afterwards brought suit for the balance alleged to be due it under the contract. The single question presented by this bill of exceptions is whether the plaintiff, in making up its account, had a right to charge the usual commissions for making the sales, and interest on their advancements and disbursements. We are of opinion that it had. The contract guarantied it against loss "arising from advances, disbursements, or charges made by the said The Foster-Black Company, Limited." The evident purpose of the defendants was to give perfect indemnity to the corporation if the collateral should prove insufficient to reimburse it. Interest on advances and disbursements was a proper charge under the contract; and, in determining the sufficiency of the collateral, only the net proceeds of the property disposed of are to be accounted for. It can hardly be questioned that the ordinary expenses of turning the collateral into money were intended to be allowed, and such expenses would naturally include the reasonable charges and commissions of selling agents. The defendants knew that the plaintiff was a commission merchant, and was the selling agent of the makers of the notes, who manufactured the goods. The contract is to be construed in reference to the situation and circumstances of the parties to it when it was made, and we

are of opinion that they contemplated that the goods should be sold by the plaintiff, with a right to commissions at the usual rate, and not that other commission merchants should be employed and paid to do the business. See *Turnbull v. Pomeroy*, 140 Mass. 117, 3. N. E. Rep. 15. Exceptions overruled.

(159 Mass. 541)

#### COMMONWEALTH v. NEYLON.

(Supreme Judicial Court of Massachusetts.  
Worcester. Oct. 19, 1893.)

#### INTOXICATING LIQUORS—CRIMINAL PROSECUTION— EVIDENCE.

1. On a prosecution for unlawfully keeping liquor for sale, evidence of the finding of whisky in defendant's house and place of business 22 days after the latest date specified in the indictment is admissible.

2. On a prosecution for illegally keeping liquor for sale, a clerk in a wholesale liquor firm identified a bill sent by him on July 1st to defendant, and found on his premises, and testified that since May 1st defendant had been in the place of business of said firm several times, and had made no reference to the bill. *Held*, that such evidence was admissible, provided the jury were cautioned that they could draw no inference from the existence of the bill unless they should find that by his silence after receiving it, under circumstances when he naturally would have spoken, defendant impliedly acknowledged that he had bought the liquors mentioned therein.

Exceptions from superior court, Worcester county; Justin Dewey, Judge.

John Neylon was convicted of unlawfully keeping intoxicating liquors for sale, and excepts. Exceptions overruled.

Defendant's exceptions were as follows: "This was an indictment charging the defendant with keeping intoxicating liquors with intent to sell the same, contrary to law, at Leicester in said county, between July 18 and August 8, 1892. The indictment is made a part of this bill of exceptions. There was evidence tending to show that the defendant lived on a small place in Leicester, on which was a dwelling house, a barn, and a building, the first floor of which was used as a pool room, and the upper part finished in sleeping rooms. That officers were at the place four times between the dates alleged in the indictment. That at the first time, July 28th, they saw several sales of intoxicating liquor made by one John F. Neylon, a grown-up son of the defendant, who lived on the premises, and he appeared to be the only one having charge of the premises, although the defendant was there a short time before the sales. That they watched the place about two hours, and did not see the defendant. That on the following night they watched the pool room again for an hour and a half, and saw several men come in, and saw the same John F. Neylon in charge and dispensing liquors, and that they did not see the defendant during this time. That on the same night some of the officers entered the pool room, when a struggle occurred, during which the defendant ran in from the outside, partially dressed, and took part. One of the officers testified that he said to the defendant,

'We are officers,' to which the defendant replied, 'Then furnish your own lights,' and he snatched the lamp from the hands of one of the officers, and threw it at another; and that, when a bottle of lager which an officer had obtained was got away from him, he told the crowd, 'That's Frank; let him up.' That the officers were there again that night, saw the defendant in the billiard room, and three other men drinking lager beer. That on August 3d they were again at the place, and saw the defendant sitting in the yard in a wagon. That he said they could search, but wouldn't find anything; that he had a trap, which would hold a thousand gallons of liquor, but they could not find it. That the premises were searched, and in the barn were found some bottles which smelled of liquor, and a whisky glass and a rubber hose which smelled of whisky. That on August 4th, they again searched the premises, did not see the defendant there, and did not find anything additional to what was there the day before. That at no time were any seizures of liquor made, although a search was made at each visit except the first. That the defendant introduced in evidence a deed of the premises in question to John F. Neylon and five others, children of the defendant. Defendant had no title thereto. An assessor of Leicester testified that about May 15, 1892, defendant told him to tax all real estate above referred to to him. That the said John F. Neylon had paid the United States internal revenue tax on this business of retail liquor dealer on the premises in question. There was also introduced the record of the defendant's acquittal upon an indictment charging him with keeping intoxicating liquor with intent to sell the same contrary to law, between June 1 and July 16, 1892, and of his acquittal upon a complaint charging him with having committed the same offense on July 17, 1892, general verdicts of not guilty having been rendered in both cases. The commonwealth offered to show that officers visited the premises August 30, 1892; that the defendant was not there; that in the house was found a bottle of whisky, and that another bottle was broken; that they visited again on October 19, 1892, and found a trap in the barn, operated by a string, which, upon being pulled, removed a board, which disclosed a room about 7 or 8 feet square which contained no liquor, but contained a pump smelling very strong of whisky, and a large number of empty bottles; and that the defendant was not there. The defendant objected to all this evidence, but the court admitted it only as tending to show the intent with which liquor was kept between July 18th and August 8th. The defendant duly excepted. The commonwealth called one Garvey, a bookkeeper for E. S. Pierce & Co., wholesale liquor dealers, who had a place of business on Mechanic street, in Worcester, where books were kept and bills paid, and he was shown a bill of parcels, a copy of which is hereto annexed, marked 'A.' He testified that no liquor was sold at the Worcester office of the firm; that all liquors

were sold and delivered from its place of business in Woonsocket, R. I.; that he had never received orders for liquor from the defendant, and knew nothing about any deliveries of liquor made by the firm for which he worked, to John Neylon or any other person, that he made out the bill of parcels, and supposed he mailed it to the defendant at Cherry Valley, which he knew was defendant's post office address; that he made out about a thousand each month, and he supposed he made out this one; that he had sent similar statements to defendant; that since May 1, 1892, the defendant had been in Pierce's place of business in Worcester perhaps five times; that he had never had any talk nor overheard any talk by him about the bill. All the above testimony from Garvey was admitted against the defendant's objection, who duly excepted to its admission. The commonwealth called one Bacon, when testified that he was at the premises in question on August 30, 1892; that he found blowing about the yard several pieces of paper which he gathered, pasted together, and produced the bill of parcels shown to the witness Garvey. All this testimony of Bacon was admitted against the objection of the defendant, who duly objected. The bill of parcels itself was then admitted in evidence against the defendant's objection, who duly excepted. It consisted of the fragments found on the premises, as before stated, by the witness Bacon, and by him pasted together. There was no other evidence in regard to the liquor mentioned in the said bill of parcels except that Garvey testified that 'Rohre' meant a brand of whisky. The court gave full and careful instruction in regard to said evidence, to which no exception was taken. The jury returned a verdict of guilty. The defendant respectfully asks that his exceptions be allowed."

Copy A.  
Statement.

Worcester, July 1, 1892.

John Neylon, in account with E. S. Pierce,  
68-73 Mechanic street.  
To mdse. as per bill.

June 7.	½ Sh. wine.....	\$	75
14.	1 bbl. Rohre		
	47-10-\$38.48 .....	\$1	65
21.	10 whisky.....		18 50
	1 10 keg.....		1 25

\$79 90

The indictment was as follows: "Commonwealth of Massachusetts, Worcester—ss.: At the superior court begun and holden at Worcester, within and for the county of Worcester, on the third Monday of October in the year of our Lord one thousand eight hundred and ninety-two. The jurors for the commonwealth aforesaid on their oath present that John Neylon, of Leicester, in said county, on the eighteenth day of July in the year eighteen hundred and ninety-two, and on divers other days and times between that day and the eighth day of August in the year eighteen hundred and ninety-two, at Leicester, in said county, without any authority, license, or appointment thereof,



unlawfully did expose and keep for sale intoxicating liquors. A true bill."

F. A. Gaskill, for the Commonwealth.  
Frank P. Goulding and Arthur P. Rugg,  
for defendant.

ALLEN, J. Though the record title to the premises was not in the defendant, but in his six children, and though one of the defendant's sons paid the United States internal revenue tax on the business of retail liquor dealer on the premises, there was other evidence tending to show that the defendant had the responsible charge of the premises, and that he lived there, and had given directions that the real estate should be taxed to him. There was also some evidence tending to show that he kept intoxicating liquors there, with intent to sell the same, within the time specified in the indictment; especially the evidence of a declaration by him to searching officers that he had a trap which would hold a thousand gallons of liquor, but they could not find it. The evidence of finding whisky in the house on August 30th, which was 22 days after the latest date specified in the indictment, was not too remote in point of time to be competent. *Com. v. Finnerty*, 148 Mass. 162, 19 N. E. Rep. 215; *Com. v. Hurley*, 159 Mass. —, 33 N. E. Rep. 342; *Com. v. Cotton*, 138 Mass. 500; *Com. v. Kelley*, 116 Mass. 341. It would be open to argument whether the evidence pointed to a keeping of the whisky by the defendant, rather than by his son, but upon this point, no doubt, the instructions of the presiding justice were full and distinct. We are not informed in what part of the house the bottle of whisky was found, but the jury may have been. The evidence of finding a trap in the barn on October 19th, though somewhat remote in point of time, was significant in view of the evidence of the defendant's declaration that he had a concealed trap which would hold a large quantity of liquor. The jury might infer that the trap found was the same one referred to by the defendant on August 3d as a trap which he then had, and that on August 3d he had liquors concealed therein which he intended to sell. The evidence as to the bill of parcels was sufficient to warrant a finding that it had been received by the defendant. This alone might have no tendency to incriminate him, but the witness Garvey, who had made out the bill of parcels, and probably sent it to the defendant, testified that since May 1, 1892, the defendant had been in Pierce's place of business in Worcester perhaps five times, and that he (the witness) had never had any talk with the defendant nor overheard any talk by the defendant about the bill. If any one of these visits to Pierce's place of business was after the reception of the bill, (and this was not disputed at the argument,) the defendant's omission to speak of the bill would have some tendency to show an assent to its correctness. It must now be assumed that the charge to the jury, which contained "full and careful instruction in regard to said evidence," included all proper cautions not to draw any inference against the defend-

ant, from the existence of the bill, unless they should find that he by his silence, after receiving it under circumstances when naturally he would have spoken, acknowledged by implication that the liquors therein mentioned had been bought by himself; and in the opinion of a majority of the court no exception can be maintained to the admission of the evidence. Exceptions overruled.

(159 Mass. 546)

#### MURPHY v. CITY OF WORCESTER.

(Supreme Judicial Court of Massachusetts.  
Worcester. Oct. 19, 1893.)

##### HIGHWAYS—ICY SIDEWALKS.

1. Under St. 1877, c. 234, providing that towns and cities shall be liable for defective highways if the defect might have been remedied by reasonable care on their part, the burden of proof is on plaintiff to show negligence in this respect.

2. Where plaintiff was injured by an alleged defect in a sidewalk, caused by snow and ice, an instruction that, if plaintiff selected the pathway as safe, then accumulations of snow and ice on either side of it are not to be considered, but if such accumulations made walking on the side of the pathway dangerous, and, in getting from that danger, she went on the pathway, which was defective, then such conditions were to be considered, is proper.

Exceptions from superior court, Worcester county; John Hopkins, Judge.

Action by Mary Murphy against the city of Worcester for damages caused by an alleged defect in a sidewalk. Judgment for defendant. Plaintiff excepts. Exceptions overruled.

The plaintiff asked the court to give the following instructions to the jury: "(1) If you find that the condition of the sidewalk was defective at the time of the accident, and had existed in such defective condition after the city had notice thereof, or might have had notice by the exercise of reasonable care and diligence, then it is incumbent upon the defendant to show that it made reasonable efforts to remove or remedy the defect, but was unable to do so prior to the accident. (2) If you find that the accumulation of the ice and snow on either side of the pathway had assumed such shape as to force the plaintiff to walk in the pathway, or if it contributed in any way to the accident, then the character and shape of the snow and ice on either side of the pathway may be considered as a part of the defect complained of." The court declined to give the first of the above requests, but instead thereof gave the following instructions: "The burden of proof is always upon the plaintiff to satisfy you, by a fair preponderance of the evidence, that the city was negligent in the respect charged; and it is not upon the defendant city to show that it was not, but it must meet the evidence offered, if it can; but it is upon the plaintiff to show that it was negligence on the part of the city that resulted in this accumulation of snow and ice, and her right to recover depends upon her satisfying you that the city was negligent in that respect." The court read the second request

in the hearing of the jury, and said: "I do not give you that instruction in precisely that form, but you are entitled to take into consideration the whole situation as the evidence finds it, and if she of her own voluntary motion selected the pathway, believing that was the line of safety, then the character of the ice and snow upon the side of that pathway are of no consequence whatever. But if, in passing over that sidewalk, generally, she found, as she was passing over it, this accumulation of snow and ice upon either side of the pathway, that was dangerous for travel, and, in getting from that dangerous position, she then stepped into the pathway, which was a defective one, then you are entitled, of course, to take into consideration the fact that she was upon a dangerous pathway, upon either side of which there was a dangerous accumulation; and if she, in getting out of that, exercised due care, and received an injury, then she would be entitled to recover."

B. W. Potter and H. W. Aiken, for plaintiff. W. S. B. Hopkins and Frank B. Smith, for defendant.

KNOWLTON, J. By the statute of 1877, c. 234, § 2, (Pub. St. c. 52, § 18,) a qualification was introduced into the law creating a liability for an injury or damage to property caused by defects in a highway, by adding to the conditions precedent to the right to recover the requirement that the defect or want of repair in the way should be such as might have been remedied, or the damage or injury such as might have been prevented, "by reasonable care and diligence on the part of the county, town, place, or persons by law obliged to repair the same." In order to show negligence or fault on the part of the city or town, it is as necessary to establish this proposition as to prove that the way is defective. Usually, it is not necessary to prove it by direct evidence, for ordinarily it may be a matter of legitimate inference from the existence of the defect for a certain length of time, but the burden of proof is on the plaintiff to establish it in some way as one of the facts mentioned in the statute on which the right of recovery depends. The ruling on this part of the case was correct.

The presiding justice was not called upon to give the second ruling requested without qualification, and in the form in which it was asked. He thought it proper to direct the attention of the jury to "the whole situation," and to point out to them the alternative of the plaintiff's having chosen her pathway along the sidewalk without reference to the condition of the walk on each side of her line of travel, and to tell them, if she selected her pathway voluntarily as a safe place in which to walk, it was immaterial what the condition of the snow and ice on either side was. There was evidence in the case which made it proper to instruct the jury on this point. He then presented to them the other alternative, of her finding, on passing over the sidewalk, a dangerous accumulation of snow and ice on either side, and of her taking on that account the

pathway where she was hurt, which proved to be defective, and told them that, if they found the facts in that way, they might take into account the dangerous accumulation on either side. Although the language of a part of this instruction is not entirely clear, we are of opinion that, in view of the form of presenting the alternative propositions, the jury, in their consideration of the snow and ice on either side, as bearing upon the plaintiff's conduct and the defendant's liability, were not limited to an accident occurring at the point where she stepped into the pathway, but that the instruction was intended to apply equally if the injury occurred after she had begun walking in the path which she had taken in part because of the danger on each side of it. It does not appear that the rights of the plaintiff were prejudiced by the form in which the instruction was given. Exceptions overruled.

(159 Mass. 522)

PICKERING et al. v. WELD et al.

(Supreme Judicial Court of Massachusetts.  
Suffolk. Oct. 19, 1893.)

CUSTOM AND USAGE—EVIDENCE—CONTROL OF  
CARGO DURING DISCHARGE.

In an action against a consignee for freight money under a charter party, wherein defendant seeks to recoup for the value of a portion of the cargo lost in the discharge, evidence is admissible of a custom at the port of delivery that, "after a vessel arrives at the port, and goes to a wharf designated by the consignee, after due notice of arrival had been given, and the cargo is taken off, and distributed on the wharf according to the marks and numbers, the care of the goods devolves on the consignee;" such custom not being contrary to the terms of the contract nor any established rule of law.

Exceptions from superior court, Suffolk county; James R. Dunbar, Judge.

Action by M. J. Pickering and others against A. Davis Weld and others to recover a balance of freight money claimed to be due under a charter party. Defendants sought to recoup the value of a portion of the cargo which they claimed was lost in the discharge of the vessel. Plaintiffs had judgment, and defendants bring exceptions. Exceptions overruled.

Eugene P. Carver and Edward E. Blodgett, for plaintiffs. Melville M. Weston, for defendants.

ALLEN, J. The defendant's first exception was to the admission of the evidence of the custom. They contend that the custom, if it existed, was an illegal custom, because it was in violation of the rules of law. The presiding justice ruled substantially in accordance with the contention of the defendants upon the question as to what facts would in law constitute a constructive delivery of the hemp, and instructed the jury that, if only a constructive delivery had been shown, the duty would still rest upon the plaintiffs to exercise ordinary care and diligence in preserving the property and keeping it safely; and he left it to the jury to find whether the alleged custom existed, and instructed them that, if they should find

that the custom did exist, then the rights and duties of the parties would be governed thereby, and the plaintiffs would be under no duty in reference to the safety of the hemp after a constructive delivery of it had been made. We are not called upon to determine whether in any respect this instruction was too favorable to the defendants. The question of the admissibility of the custom is directly presented, and this forms the principal question in the case.

A usage cannot override an express contract, neither can a usage be valid which is in contravention of an established rule of law. But it has often been held to be within the legitimate and proper scope of a usage of trade to regulate the time, place, and manner of the delivery of a cargo, when there is no express contract upon the subject; and, under such circumstances, the usage is deemed to enter into and form a part of the contract. *Miller v. Mansfield*, 112 Mass. 260; *Robinson v. U. S.*, 13 Wall. 363, 366; *Hostetter v. Park*, 137 U. S. 30, 11 Sup. Ct. Rep. 1; *The Boskenna Bay*, 40 Fed. Rep. 91, 95. According to all the decisions, the rules of law which would otherwise exist as to the beginning or end of the liability of a carrier may be modified to some extent by the course and usages of trade and business, though there may be a difficulty in defining by a general statement how far such modification may go. See *Judson v. Railroad Corp.*, 4 Allen, 520, 521; *Munsur v. Insurance Co.*, 12 Gray, 520, 526; *Huskins v. Warren*, 115 Mass. 514, 535, 536; *Reed v. Richardson*, 98 Mass. 216; *Richardson v. Goddard*, 23 How 28; *The Norway*, 2 Marit. Law Cas. 168. In the present case the jury have found that there was a general custom of the port of Boston that "after a vessel arrives at the port, and goes to a wharf designated by the consignee, and due notice has been given to the consignee, and the cargo is taken off and distributed upon the wharf according to the marks and numbers, the care of the goods devolves upon the consignee." The parties must be deemed to have contracted with reference to this custom. There is no such well-established and general rule of law to the contrary that the usage can be said to be in contravention of it. Indeed, various decisions go far to show that such would be the rule of law in the absence of a custom. But we do not need to go so far as that. It seems to us quite plain that the custom was not open to objection on the ground of illegality. We cannot accede to the contention of the defendants that the plaintiffs had the right, under the circumstances of this case, to place the goods in the custody of a warehouseman, at the defendants' expense; it being stated as a fact that a clerk of the defendants came to the wharf daily, generally twice a day, and examined the quality of the different lots of hemp, bearing different marks, made inquiries as to the progress of the delivery of the cargo, and kept the run of the amount which was coming out of the ship, and one of the defendants also came to the wharf once or twice during said period to examine the quality of the hemp.

The case does not resemble those of absent consignees.

The defendants further criticize the custom as not showing a course of dealing, but as being merely the adoption of a peculiar doctrine or rule of law; and they contend that the plaintiffs' witnesses merely testified to their opinion as to the rule of law. This criticism rests on the phraseology used to describe the custom, which was that, under the circumstances stated, "the care of the goods devolves upon the consignee." But the word "devolves," as used at the trial, obviously did not mean that the care of the goods rests upon the consignee as a matter of legal duty, but rather that such care passes as a matter of usage from the carrier to the consignee. An actual usage or practice of trade and business was contemplated and understood, and is plainly shown by a reference to the instructions given to the jury.

The defendants also contend that the existence of the alleged custom could not affect the rights of the parties, because it is plain, upon the undisputed facts of the case, that the plaintiffs did not act in reliance upon the custom, and therefore the ruling of the court giving to it the effect stated in the bill of exceptions was erroneous. This point is not distinctly stated in the bill of exceptions, and it does not appear that the attention of the presiding justice was called to it at the trial. It rests upon the effect which should be given to the appointment and acts of the delivery clerk. The bill of exceptions says that "there was evidence tending to show that from the time said hemp touched the wharf it was in the custody and control of the said delivery clerk, and that it was his duty to make actual delivery of the hemp to the persons who came for it, and to take receipts from such persons for the hemp so delivered, and that no one had the right to take any of said hemp from said wharf, after it had been placed thereon, without his permission." The bill of exceptions distinguishes with care between facts which appeared—that is, facts which were conceded—and facts which there was evidence tending to prove. The delivery clerk was employed by the agents of the ship, and the bales of hemp, when they reached the wharf, were distributed in different piles or parcels in different places under the shed, according to his direction. It does not, however, appear as a fact that the plaintiffs, either through the delivery clerk or otherwise, undertook the duty of watching the hemp by night, or gave to the defendants any assurance that they would exercise over it any supervision in addition to their legal obligations. It may be that the delivery clerk, in the daytime, performed some services beneficial to the defendants, in addition to those which rested upon the plaintiffs as a matter of duty. No question of fact in relation to this was presented to the jury, and no instruction as to the legal effect of his acts was requested. There is nothing in the case to enable us to say, on the bill of exceptions, that the plaintiffs assumed to perform a part of the duty resting upon the defend-

ants, under such circumstances that they were bound to the exercise of due care in so performing it, and that the defendants relied on such due care on the part of the plaintiffs. Exceptions overruled.

(160 Mass. 20)

### TURNER v. PATTERSON.

(Supreme Judicial Court of Massachusetts.  
Worcester. Oct. 20, 1893.)

#### ASSUMPSIT — ACTION FOR SERVICES RENDERED — MONEY HAD AND RECEIVED.

Where plaintiff sues on a special contract for services rendered, and there is no count for money had and received, plaintiff cannot recover on evidence that the services rendered were to be paid for by those for whom they were rendered, and that defendant was to, and did, collect the money therefor.

Exceptions from superior court, Worcester county; Henry K. Braley, Judge.

Action by Ellen E. Turner against Richard J. Patterson for specific services rendered. Verdict for plaintiff. Defendant excepts. Overruled.

Plaintiff was organist in the church of which defendant was pastor. She had been paid for her regular services, but claimed \$502 for certain extra services rendered. Defendant claimed that they had been expended on decorating the church at her request. The auditor reported that \$502 had been collected by defendant for the extra services, but had been expended as directed by plaintiff. At the close of the evidence, the defendant asked the court to instruct the jury that—"First. There is no evidence that any contract ever existed between the plaintiff and defendant under which he was to pay her for her services at the special ceremonies referred to in the evidence. Second. There is no evidence to warrant a finding that the plaintiff can recover anything against the defendant for services rendered. Third. If the jury find that the special services referred to were rendered, to be paid for by the persons procuring such services, and that the defendant was to collect such payments, and to give to the plaintiff a certain portion of the sums when so collected, then the plaintiff cannot recover against the defendant in this action on the pleadings. Fourth. If the jury find that any sum of money on account of the special services performed by the plaintiff were deposited or left by her with the defendant, to be applied by him for any purpose, the plaintiff cannot recover in this action on the pleadings. Fifth. If the jury find that the plaintiff instructed the defendant to retain the sums of money collected by him from the persons procuring the special services referred to in the evidence, and to apply such sums of money to a specific purpose, the defendant is not accountable to the plaintiff for the disposition of such sums of money in this action on the pleadings. Sixth. If the jury find that the plaintiff stated to the defendant that she should not receive or accept any sums of money to be collected for the special services referred to, and directed that such sums of money should be ap-

plied to the purposes of the church, then the plaintiff cannot recover in this action on the pleadings." The court refused to give any of said instructions as asked for by the defendant, and the defendant duly excepted thereto.

Jonathan Smith and W. S. B. Hopkins, for plaintiff. Charles F. Baker and Herbert Parker, for defendant.

BARKER, J. The auditor's report was some evidence that the \$502 which it was agreed at the trial the plaintiff was entitled to recover, if she was entitled to recover anything, was for moneys which the defendant had collected for the plaintiff, in contradistinction from moneys due her for services rendered to him. There is no count for money had and received, and the items under the count on an account annexed are for services. The defendant's third request was directed to this state of the evidence and pleadings, and was not given in terms. But the jury were told, in substance, that the plaintiff could not recover unless they found a contract between the parties that the plaintiff should render the services to the defendant, and that if they were left in doubt, or the plaintiff had not so satisfied them, they should return a verdict for the defendant. This was, in substance, giving the ruling requested. The fourth, fifth, and sixth requests also were substantially given in that portion of the charge which instructed the jury that if the money coming to the plaintiff was to be turned over by the defendant for general or charitable work, or for memorial windows, the plaintiff could not recover. Exceptions overruled.

(159 Mass. 505)

### MERCHANTS' NAT. BANK OF GARDINER v. CITIZENS' GASLIGHT CO. OF QUINCY et al.

(Supreme Judicial Court of Massachusetts.  
Norfolk. Oct. 19, 1893.)

#### GASLIGHT COMPANIES — POWER TO ISSUE NOTES— AUTHORITY OF TREASURER.

1. St. 1886, c. 346, § 3, which forbids gaslight companies from issuing bonds in an amount exceeding their capital stock, does not affect the right of such a company to issue notes when necessary in its business.

2. A corporation is liable on one of its notes, in the hands of a bona fide purchaser before maturity, where it is signed by an officer authorized generally to give notes in its behalf, though such officer, in signing the particular note in question, exceeded his authority or the powers of the corporation.

3. The rule that the treasurer of a trading or manufacturing corporation is clothed, by virtue of his office, with the power to execute notes in behalf of the corporation, so as to make them binding on it when in the hands of innocent purchasers before maturity, applies to gaslight companies, the business of which requires the use of credit at certain seasons of the year. Field, C. J., and Allen, J., dissenting.

4. A corporation which has permitted a person to act as its treasurer for several months, without objection by it or its stockholders, cannot, when sued on a note executed by him in its behalf, set up the defense that his election was invalid, because the annual stock-

holders' meeting at which he was chosen was not called in accordance with the by-laws.

Exceptions from superior court, Norfolk county; James R. Dunbar, Judge.

Action of contract by the Merchants' National Bank of Gardiner, Me., against the Citizens' Gaslight Company of Quincy and others, on a note executed in its behalf by C. S. J. Ruggler, as its treasurer. There was a verdict in plaintiff's favor, and defendant the Citizens' Gaslight Company excepted to the court's refusal to rule as requested. Exceptions overruled.

Hollis B. Bailey and William G. Waitt, for plaintiff. William L. Putnam, for defendants.

**BARKER, J.** 1. The defendant's first request for instructions relates to the effect of St. 1886, c. 346, upon the powers of the defendant corporation to issue promissory notes. The third section of that statute relates to the issue of bonds by a gas company, and gives a company the right to secure bonds issued in accordance with the provisions of the section by a mortgage of the franchise and property of the company; but we find nothing in the chapter which affects the right of such a company to issue promissory notes when convenient or necessary in the prosecution of its business.

2. As the plaintiff discounted this note before maturity, "in the usual course of its business, without notice or knowledge of any defect or infirmity," and as its good faith is not questioned, if the note were signed by an officer authorized generally to give notes in its behalf the defendant company would be liable, although the agent in signing this particular note exceeded his authority, or the powers of the corporation. *Monument Nat. Bank v. Globe Works*, 101 Mass. 57. It is not necessary that the authority of an officer or agent to sign notes in behalf of a corporation should appear in the by-laws, or should have been expressly given by a vote of the directors or of the stockholders. In *Lester v. Webb*, 1 Allen, 34, it was said. "The rule is well settled that if a corporation permit their treasurer to act as their general fiscal agent, and hold him out to the public as having the general authority implied from his official name and character, and by their silence and acquiescence suffer him to draw and accept drafts, and to indorse notes payable to the corporation, they are bound by his acts done within the scope of such implied authority. *Fay v. Noble*, 12 Cush. 1; *Williams v. Cheney*, 3 Gray, 215; *Conover v. Insurance Co.*, 1 N. Y. 290. On the facts proved at the trial the plaintiff might well claim, if the jury believed the evidence, that the treasurer had authority to indorse the notes in suit, derived, not from any express direction, but from the course of conduct and dealing of the treasurer with the knowledge and implied assent of the directors of the corporation." See, also, *McNeill v. Chamber of Commerce*, 154 Mass. 285, 23 N. E. Rep. 245; *Mining Co. v. Anglo-Californian Bank*, 104 U. S. 192.

3. But cases where the actual authority of an officer is inferred from a course of business known to and permitted by the stockholders or the directors of a corporation do not touch the question whether authority is to be implied as matter of law from the name and nature of the office itself. In the present case the jury were instructed that the treasurer of such a corporation as the defendant company has by virtue of his office authority to sign a note which shall bind the corporation, and the defendant contends that this instruction was incorrect. The incidental powers of some officers or agents have become so well known and defined, and have been so frequently recognized by courts of justice, that certain powers are implied as matters of law in favor of third persons who deal with them on the assumption that they possess these powers, unless such persons are informed to the contrary. The officers and agents usually mentioned in this category are auctioneers, brokers, factors, cashiers of banks, and masters of ships. See *Merchants' Bank v. State Bank*, 10 Wall. 604; *Case v. Bank*, 100 U. S. 446. Treasurers of towns or cities in this commonwealth are well-known officers, and their powers are very limited. They are in general to receive, keep, and pay out money on the warrant of the proper officers of the towns and cities. Treasurers of business corporations usually have much more extensive powers, and the decisions of this court hold that the treasurer of a manufacturing and trading corporation is clothed by virtue of his office with power to act for the corporation in making, accepting, indorsing, issuing, and negotiating promissory notes and bills of exchange, and that such negotiable paper in the hands of an innocent holder for value, who has taken it without notice of any want of authority on the part of the treasurer, is binding on the corporation, although with reference to the corporation it is accommodation paper. *Narragansett Bank v. Atlantic Silk Co.*, 3 Metc. (Mass.) 382; *Bates v. Iron Co.*, 7 Metc. (Mass.) 224; *Fay v. Noble*, 12 Cush. 1, *Lester v. Webb*, 1 Allen, 34; *Bank v. Winchester*, 8 Allen, 109; *Bird v. Daggett*, 97 Mass. 494; *Monument Nat. Bank v. Globe Works*, *ubi supra*; *Corcoran v. Cattle Co.*, 151 Mass. 74, 23 N. E. Rep. 727. While it is possible that most, if not all, of the cases in which this rule has been stated as law have some special circumstances from which the treasurer's authority could be inferred, and that the court was influenced in the decisions by the well-known fact that in many of the manufacturing corporations of this commonwealth the treasurer not only has the custody of the money, but is the general financial manager, and often the general business manager, of the corporation, the rule itself has been frequently and broadly stated in our decisions, and is well known both to the officers of manufacturing and trading corporations and to those of banks and financial institutions. It could not now be abrogated or unsettled without disturbing commercial transactions. There are, however, many corporations which

transact more or less business to which the rule has been held not to apply. Thus it does not apply to a college, (*Webber v. College*, 23 Pick. 302;) nor to a parish, (*Packard v. Society*, 10 Mete. [Mass.] 427;) nor to a monument association, (*Torrey v. Association*, 5 Allen, 327;) nor to a municipality, (*Bank v. Winchester*, 8 Allen, 109;) nor to a savings bank, (*Tappan v. Bank*, 127 Mass. 107;) nor to a horse-railroad company, (*Craft v. Railroad Co.*, 150 Mass. 207, 22 N. E. Rep. 920.) Upon consideration of the decisions cited, we think it fair to say that the making and indorsing of negotiable paper is to be presumed to be within the power of the treasurer of a manufacturing and trading corporation whenever from the nature of its ordinary business as usually conducted the corporation is naturally to be expected to use its credit in carrying on commercial transactions. Such paper is the usual and ordinary instrument of utilizing credit in commercial transactions, and it is for the interest of the corporation and of the community that the best instrument should be employed. It is no less for the interest of all that, if negotiable paper is to be employed, its validity should not be open to objections which would impair its usefulness by requiring at every step an inquiry into the authority by which it is issued. There are matters of common knowledge pertinent to the present question. Gaslight companies like the defendant are chartered for the purpose of making and selling gas. They are located in every city of the commonwealth, and in most of the larger towns and villages. In the recent development of the use of electricity many electric light or light and power companies have been established where gaslight companies are in operation. The powers, obligations, and business of these electric companies are so similar to those of gaslight companies that they are classed with them in the minds of business men, and are under the supervision of the same state board. We see no reason why, in respect to the present question, all of this general class of corporations should not be governed by one rule. They are all in fact "manufacturing and trading corporations" in the same sense that companies whose business it is to manufacture and sell cottons, woollens, shoes, or paper are manufacturing and trading corporations. None of these companies are traders in the strict sense contended for by the defendant, since none of them make it their "business to buy merchandise or goods and sell the same." All of them, and the gaslight companies equally with the others named, buy merchandise and goods in large amounts, expend large sums in transforming by their processes of manufacture the articles purchased into other commodities which they sell for the purpose of making a profit. Neither the fact that pipes which a gaslight company uses only to deliver to its customers one of the commodities which it sells, nor that its price for that commodity may be regulated by civil authority, nor that the municipality in which its plant is located may purchase or take its franchise and prop-

erty, makes it less advantageous or necessary that the gaslight company shall be able to use its credit in its commercial dealings. Although such companies manufacture only as they deliver, and so have no occasion to hold large quantities of manufactured goods for a market, there are features of their business which make it necessary for them to have control of large amounts of money at certain seasons. Coal, their chief raw material, is uniformly at its lowest price in the summer, and away from the seaboard is usually taken in in large quantities at that season. Gas is uniformly sold upon time, and the bills collected monthly or quarterly. The work of extending and repairing street mains and other work upon the manufacturing plant can be done to the best advantage during only a portion of the year. A business so conducted affords abundant scope for the advantageous use of the credit of the corporations engaged in it, and they would naturally be expected to use their credit in the transaction of their ordinary business. Their published returns made to the board of gas commissioners show that the companies do in fact issue large amounts of promissory notes. It is true that these notes may possibly have been issued under special votes or by-laws or other explicit authority. Upon this point we have no evidence or means of certain knowledge. But it is also true, and is a consideration entitled to weight, that the practice of gaslight companies to issue promissory notes has grown up since the announcement by the court of the rule that treasurers of manufacturing and trading corporations are presumed to have authority to issue such notes; and again, that gaslight companies are in fact manufacturing and trading corporations. The strong inference is that the gaslight companies and their officers, and those who have received in payment or bought or discounted their promissory notes, have in so doing acted upon the assumption that the rule as to the implied authority of treasurers of manufacturing and trading corporations to issue negotiable paper applied to the treasurers of gaslight companies. Those who have occasion to deal directly with such companies, or to purchase or discount their notes in the money market, would naturally assume that the rule so long applied by the court to other manufacturing and trading corporations would be applied to these. In our opinion, the same reasons which required the making of the rule referred to are operative here, and require us to hold that it is to be applied in the case of gaslight companies. We do not disregard the fact that such companies have peculiar duties to the public, and peculiar privileges, and that their operations may be regulated by public authority, and their franchises and property taken over by the municipalities in which their works are located. But the situation of such a company with reference to this class of rights and obligations is the same irrespective of the question whether its treasurer is or is not to be presumed to have power by virtue of his office to issue prom-

issory notes. Such notes do not bind the franchises or the property of the company any more than debts upon open account. A majority of the court is therefore of opinion that the jury was rightly instructed that the treasurer of the defendant corporation, by virtue of his office, had authority to sign a note which would bind the corporation.

4. It is not necessary to consider in detail the numerous questions argued by the defendant as to the admission and the exclusion of evidence and the rulings given and refused, bearing upon the status of Mr. Ruggles as the treasurer *de jure* or *de facto* of the corporation, or upon the answers to the special questions propounded by the court and answered by the jury in addition to the general verdict for the plaintiff. Upon the uncontroverted evidence, certain persons claiming to act as the stockholders of the corporation, all of whom were interested in its stock, assembled at its office on the day fixed in its by-laws as the date of its annual stockholders' meeting, and went through the forms of holding its annual meeting and of electing him treasurer of the company. The former incumbent of the office resigned it into the hands of Mr. Ruggles, and he has since filled the position of treasurer under a claim of a right to the office, and without dispute on the part of any stockholder or member of the corporation, and no proceedings have been brought by the corporation itself to test his title to the office. The note in suit was issued when he had thus been in the unquestioned discharge of the functions of the office for nearly three months, and immediately thereafter, at a meeting of which public notice was given, his election was ratified and confirmed. No person in any way interested in the stock, either as a stockholder of record or as a purchaser or pledgee of untransferred certificates, has contested in any way his right to the office. The contention that he is not the lawfully elected treasurer has been made only by the corporation itself, and only as a technical defense to the present suit. Whatever might be the rule to be applied if a stockholder or member of the corporation or the corporation itself had contested the right of Mr. Ruggles in proceedings brought to test the validity of his original election, or of the subsequent ratification, and without holding that the rules which apply to defacto officers of government or of public or quasi public corporations apply to officers of all corporations, we are of opinion that under such circumstances the corporation itself cannot be permitted to contend in defense of an action like the present that the acts of a person who, under color of an election to the office, has, without protest or opposition from any source, acted as its treasurer for so long a time, are invalid merely because the annual meeting at which he was chosen was not called in accordance with the by-laws. None of the exceptions relating to this branch of the case are, in view of the uncontroverted facts, material to the question whether the note in suit is a valid cause of action against the corporation, and they are overruled as immaterial. Exceptions overruled.

FIELD, C. J., (dissenting.) The most important question in this case is whether the instruction of the court is correct that the treasurer of such a corporation as the defendant has authority to sign a promissory note for the corporation by virtue of his office, although the by-laws confer no such authority on him, and he has not been held out by either the stockholders or the directors of the corporation as having any such authority, and has not been knowingly permitted to exercise any such power. The ground on which certain officers and agents are held, as matter of law, to possess certain implied powers by virtue of the office or employment, is that by a well-known general usage certain powers attach to the office or employment, and the appointment is presumed to have been made with reference to this usage, unless there is notice or knowledge to the contrary. The grounds on which this court has decided that the treasurer of a manufacturing and trading corporation must be taken to have authority to sign promissory notes in behalf of the corporation, unless there is notice or knowledge to the contrary, are stated in the opinion of the majority of the court, but these decisions have been confined to corporations which sell merchandise in the market, although they manufacture the merchandise which they sell, and the doctrine has never been extended to such quasi public corporations as gaslight companies. In a street-railway corporation, which perhaps affords the nearest analogy, an implied power in the treasurer to sign promissory notes for the corporation has been denied, and treasurers of municipal corporations, and of corporations generally, have no such implied power. Gaslight companies are not commonly known as "trading companies." They do not sell goods, wares, and merchandise in the market. Indeed, they are not commonly called "manufacturing companies." They manufacture and deliver gas to the inhabitants of defined localities, at prices fixed either by public authority or by the companies themselves, subject to public supervision. They may be invested with the right of eminent domain, and subjected to municipal control, and the business may be carried on by towns and cities as well as by private corporations. Their property is mainly in real estate. The income is received at regular times, and, although small in proportion to the value of the plant, is not subject to unforeseen variations in kind or amount. These companies may issue bonds at not less than par, but, unless specially authorized by the legislature, the amount of bonds must not exceed the capital actually paid in, (St. 1886, c. 346, § 3;) and the property which constitutes the plant is or should be paid for by the capital stock and the proceeds of the bonds. Such companies may sometimes have occasion to borrow money and to give promissory notes, but, if well conducted, the occasions cannot be frequent. The word "treasurer," in and of itself, does not import that the person holding that office is the general business manager of the corporation, but only that he is the person to receive, keep, and



disburse the money of the corporation. It was not shown in the present case that treasurers of similar corporations customarily exercise the power of giving promissory notes in behalf of the corporations. Such a power may be given by the by-laws to a treasurer, either alone or jointly with some other officer or officers; but in this case the defendant offered to show that by the by-laws the treasurer "had no power as treasurer to sign notes in behalf of the company," and this evidence was excluded. We know of no custom or usage of which we can judicially take notice that treasurers of such corporations usually have such authority, or usually exercise such a power. We know of no principle of public policy which requires us to hold that the treasurer of such a corporation has impliedly such a power, when he in fact has it not, and has not been held out by the corporation or its directors as having it, and when it does not appear that treasurers of similar corporations have customarily exercised such a power so publicly and uniformly that courts can take judicial notice of it. It is important that corporations should retain the power of controlling their officers. The general rule is that when one person signs the name of another to any contract, whether the other be a natural or artificial person, the authority to do so should be shown, unless the principal has held out such person as having such authority. The instances must be rare when the law will necessarily imply from the name of an office in a corporation authority to sign the name of the corporation to any contract when no such authority has in fact been given or has ever before been exercised with the knowledge of the stockholders or directors of the corporation. There is, generally speaking, no hardship in compelling persons who take promissory notes signed by one person in the name of another to ascertain the authority of the person signing, unless they are content to rely upon an indorser or guarantor. I think the instruction given on this subject was wrong.

ALLEN, J., concurs in this opinion.

(159 Mass. 517)

# JEWETT PUB. CO. v. BUTLER.

(Supreme Judicial Court of Massachusetts.  
Suffolk. Oct. 19, 1893.)

## ILLEGAL CONTRACT—BETWEEN AUTHOR AND PUBLISHER—FAILURE TO PERFORM.

1. A contract between an author, intending to write an autobiography, and a publisher, whereby the author agrees "to accept full responsibility for all matter contained in said work, and to defend at his own cost any suits which may be brought against the publisher for publishing any statement contained in said work, and to pay all costs and damages arising from said suits," does not show on its face that the parties contemplated the publication of scandalous or libelous matter, so as to prevent the publisher from recovering for the author's refusal to permit it to publish the work after it was written. Lathrop, J., dissenting.

2. An author is not justified in his refusal to permit a publisher to publish his book, as he had contracted to do, because of his doubts

as to the publisher's solvency. *Hobbs v. Brick Co.*, (Mass.) 31 N. E. Rep. 766, followed.

3. The fact that the person whose name a corporation bears has been guilty of criminal misconduct, and compelled to flee to avoid a prosecution, is no excuse for an author's refusal to permit it to publish one of his works, as he had contracted to do.

Report from supreme judicial court, Suffolk county; Oliver W. Holmes, Jr., Judge.

Action by C. F. Jewett Publishing Company against Benjamin F. Butler for breach of contract. The court reported the case to the supreme judicial court. Judgment for plaintiff.

The contract between the parties recited that the defendant "is minded and intending to write and have published two volumes in the nature of autobiography or reminiscences of his life, and the acts and doings of other public men, so far as they may seem to him to elucidate the history of the country or public affairs," and it was stipulated that the plaintiff should do the publishing. The declaration alleged that, after plaintiff had written the work, he permitted it to be published by other parties, and that plaintiff had suffered damages in having prepared for the publication, and in the loss of profits which it would have made from the sale.

E. C. Bumpus, Samuel J. Elder, and William Cushing, Wait, for plaintiff. John Lowell and E. M. Johnson, for defendant.

MORTON, J. The first question is whether the contract is, as the defendant contends, illegal on its face. The words relied on to show that it is are as follows: "The party of the first part agrees to accept full responsibility of all matter contained in said work, and to defend at his own cost any suits which may be brought against the party of the second part for publishing any statements contained in said work, and to pay all costs and damages arising from said suit." The presiding justice found that "the contract was made without illegal intent, unless and except so far as the words used import one as matter of law." Do the words used, as quoted above, import one as matter of law? We think not. The parties were contracting respecting a book which was not in existence, but was to be written. There was nothing in the character of the proposed work which naturally or necessarily involved the publication of scandalous or libelous matter, as was the case, for instance, in *Shackell v. Rosler*, 2 Bing. N. C. 634, referred to by the defendant. At the same time it was not impossible that, in spite of due care and good faith on the part of the author and publisher, the proposed book might contain matter which others perhaps would deem libelous. In such a case it would be no more unlawful for the parties to provide that the author should save the publisher harmless from all costs and damages to which he might be subjected by reason of the publication of the book than it would be for a patentee to agree with his licensee that he would protect him against all costs and damages to which he might be subjected in consequence of using the patent to which the

license applied. The case stands on grounds entirely different from those on which it would stand if it appeared that the parties intended to publish or contemplated the publication of libelous matter. There is nothing in the agreement fairly to show that such was their purpose. The most that can be said is that, though there was no intention to write or publish, nor any contemplation of writing or publishing, libelous matter on the part of the author or publisher, it might turn out, after the book was published, that it did contain libelous matter. But that is very far from saying that the parties had in view an illegal purpose in publishing the book. We see nothing unlawful in a contract which provides, without anything more, that the author shall indemnify the publisher for costs and damages to which he may be subjected by reason of the publication of a book to be written by the author. Moreover, it was possible in this case that the book might not contain libelous matter, although libel suits against the publisher might grow out of it. It would be hard to say, in such event, that the publisher, who might have published the book without any libelous purpose, and in the full belief that it contained nothing libelous, could not recover of the author under this clause in the contract the costs and damages to which he had been put by such suits. In order, we think, to render the contract unlawful, it should appear that there was an intention on the part of the author and publisher to write and publish libelous matter, or that the author proposed, with the knowledge and acquiescence of the publisher, to write libelous matter, or that the contract on its face provided for or promoted an illegal act. We do not think the clause in question is fairly susceptible of either construction. *Fletcher v. Harcot*, Hut. 55; *Battersey's Case*, Winch, 49; *Betts v. Gibbins*, 2 Adol. & E. 57; *Adamson v. Jarvis*, 4 Bing. 66; *Waugh v. Morris*, L. R. 8 Q. B. 202; *Pearce v. Brooks*, L. R. 1 Exch. 213; *Cannan v. Bryce*, 3 Barn. & Ald. 179; *Graves v. Johnson*, 156 Mass. 211, 30 N. E. Rep. 818.

The defendant contends, in the next place, that he was justified in his refusal to go on with the contract because of his doubts as to the solvency of the plaintiff corporation, and because of the disgrace attaching to its name in consequence of the conduct of Jewett. The first ground thus taken would seem to be disposed of by the recent case of *Hobbs v. Brick Co.*, (Mass.) 31 N. E. Rep. 756, and need not, therefore, be further considered. As to the second ground, it is to be observed that the contract was not made with Jewett personally, but with the corporation which bore his name. Moreover, Jewett has fled, and it fairly may be presumed that his place as president and manager has been filled by the election of another person, so that the defendant cannot and will not be obliged to come into further association with him. It is well known that corporations are frequently organized which bear as part of their corporate name the name of some individual. The contention of the defendant would re-

quire us to hold that in all such cases a party making a contract with such a corporation would be justified in refusing to go on with it if the person whose name the corporation bore committed an act rendering him liable to punishment as a criminal, or bringing him into disgrace and rendering further association with him unprofitable and injurious to the other party to the contract. But a corporation does not in such a case impliedly guaranty as an element of the contract entered into with it that the person whose name it bears shall continue to be a reputable member of society. The corporation is distinct from the person whose name it bears. Its interests and those of its stockholders in contracts made by it with other parties are not to be affected by the disgraceful or criminal conduct of the person whose name it bears, and for which it is in no way responsible. A majority of the court think the entry should be, judgment for plaintiff for \$2,500 and interest from June 9, 1890, and it is so ordered.

LATHROP, J., (dissenting) I am unable to concur in the opinion of the majority of the court that the contract sought to be enforced is a valid contract. The contract provides for the publication of a work to contain the author's autobiography, "or reminiscences of his life, and the acts and doings of other public men, so far as they may seem to him to elucidate the history of the country or public affairs." It is in reference to a work of this character that the defendant agrees to do three things: First, "to accept full responsibility of all matters contained in said work;" secondly, "to defend at his own cost any suits which may be brought against the party of the second part for publishing any statements contained in said work;" thirdly, "to pay all costs and damages arising from such suits." The obligation of the defendant is not limited to paying legal expenses, but includes costs and damages recovered against the publisher "for publishing any statements contained in said work." While it is found that the parties acted without illegal intent, yet if the legal effect of the language used is to make the contract against the policy of the law, this court ought not to enforce it. It seems to me to be impossible to say that the language used applies only to groundless suits, and that it should so be construed. What the parties contemplated, and what they intended to provide for, was that actions might be brought against the publisher for libelous matter contained in the work; that these actions might be successfully maintained against the publisher, who would then be compelled to pay damages and costs. In this event the writer agreed to indemnify the publisher. Could such an agreement have been enforced? In my opinion, it could not, and this view is sustained by the authorities. *Shackell v. Rosier*, 2 Bing. N. C. 634; *Colburn v. Patmore*, 1 Crompt. M. & R. 73; *Gale v. Leckie*, 2 Starkie, 107; *Clay v. Yates*, 1 Hurl. & N. 73; *Arnold v. Clifford*, 2 Sum. 238; *Odgers, Sland. & L.* (2d Ed.) 8. See, also, *Bradlaugh v. Newdegate*, 11 Q. B. Div. 1, 12;

Babcock v. Terry, 97 Mass. 482. It follows that the whole contract was tainted with illegality, and neither party was bound to go on with it. Robinson v. Green, 3 Metc. (Mass.) 159, 161; Perkins v. Cummings, 2 Gray, 258; Woodruff v. Wentworth, 183 Mass. 309; Bishop v. Palmer, 146 Mass. 469, 16 N. E. Rep. 299; Lound v. Grimwade, 39 Ch. Div. 605, 613.

(50 Ohio St. 589)

LAKESIDE & M. H. R. CO. et al. v. BRENNAN.

(Supreme Court of Ohio. Oct. 31, 1893.)

EXEMPTIONS—PROPERTY IN CUSTODIA LEGIS.

Held, that no injunction was necessary to prevent the railroad company from paying the money over to the husband. The company, having been made a party defendant to the action, was bound to hold the money to abide the final disposition of the case, the money being regarded as in the custody of the law.

(Syllabus by the Court.)

Error to circuit court, Erie county.

Action by Minnie Brennan against Edgar H. Brennan and the Lakeside & Marble Head Railroad Company. From the judgment rendered, defendant railroad company brings error. Affirmed.

E. J. Blandin and T. Alvord, for plaintiff in error. Homer Goodwin, for defendant in error.

PER CURIAM. Minnie Brennan brought her action against her husband, Edgar H. Brennan, for divorce and alimony, in the court of common pleas of Erie county, and made the Lakeside & Marble Head Railroad Company a defendant, alleging in her petition that the railroad company was indebted to her husband in the sum of \$1,126.37, for which the husband had recovered a judgment against the railroad company in the court of common pleas of Ottawa county; and she asked and obtained a temporary injunction, enjoining the railroad company from paying over to her husband the amount of said judgment, or any part thereof. The railroad company answered, and denied having any money in its hands, belonging to the husband, and averred that the judgment had been set aside and vacated. The case was tried upon its merits, and a divorce granted, and alimony adjudged to her in the sum of \$20,000, but her petition, as against the railroad company, was dismissed at her costs on the 13th day of April, 1889. On the same day she gave notice of her intention to appeal to the circuit court from this judgment of dismissal, and the bond was fixed at \$50, which was given the same day. About April 25, 1889, the railroad company allowed the husband to take judgment against the company for the sum of \$852 in the same case in which the judgment had been set aside by the court. On April 25, 1889, the railroad company paid the amount of the judgment, \$852, to the sheriff of Ottawa county, upon an execution held by the sheriff against the husband in favor of a creditor, as provided in

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section 5482, Rev. St. Ohio. In the circuit court, the railroad company filed an amended answer, in which the payment to the sheriff was fully set out. The cause was heard upon the merits in the circuit court, and a judgment rendered in favor of the plaintiff below, and the railroad company was ordered to pay over to her said sum of \$852, to all of which the railroad company excepted, and filed its petition in error in this court to reverse the judgment of the circuit court. Judgment affirmed.

(50 Ohio St. 591)

LEAVANS v. OHIO NAT. BANK et al.

(Supreme Court of Ohio. Oct. 31, 1893.)

MORTGAGE—ATTORNEY'S FEE ON FORECLOSURE.

A stipulation in a mortgage to the effect that, in case an action should be brought to foreclose it, a reasonable attorney fee, to be fixed by the court, for the services of the plaintiff's attorney in the foreclosure action, should be included in the decree, and paid out of the proceeds arising from the sale of mortgaged property, is against public policy and void.

(Syllabus by the Court.)

Error to circuit court, Cuyahoga county.

Action by Harriet B. Leavans against George F. Eberhard and the Ohio National Bank to foreclose a mortgage. From the decree disallowing the attorney fee provided for by the mortgage, plaintiff brings error. Affirmed.

Sherman, Hoyt & Dustin, for plaintiff in error.

PER CURIAM. On the 11th day of April, 1887, George F. Eberhard executed and delivered to the plaintiff in error a mortgage on certain real estate owned by him to secure the payment of \$3,500 on April 1, 1890, with interest at 6% per cent., payable semiannually. The mortgage contained a provision that, in case an action should be brought to foreclose it, a reasonable sum as an attorney fee, the amount to be fixed by the court, should be included in the decree, and paid from the proceeds of the mortgaged property. Afterwards, a second mortgage executed by the mortgagor, was taken upon the same property for the benefit of the defendant in error. On October 10, 1889, the mortgagor being in default for the non-payment of interest, an action was brought by the plaintiff in error to foreclose the mortgage. The mortgage was foreclosed, and the court of common pleas in the decree found the sum of \$100 to be a reasonable fee for the plaintiff's attorney for his services in the foreclosure proceeding, and ordered the same to be paid out of the proceeds of the sale of the mortgaged property. The defendant in error, having been made a party to the action, excepted to that part of the decree which provides for the payment of an attorney fee, and instituted proceedings in error in the circuit court to modify the decree in this respect, which was accordingly done; whereupon the plaintiff in error commenced proceedings in this court to reverse the modifying judgment. Judgment affirmed.

(139 N. Y. 538)

**COMPTON v. THE CHELSEA.**

(Court of Appeals of New York. Oct. 27, 1893.)

**EJECTMENT—TREBLE DAMAGES—NEW TRIAL.**

Code Civil Proc. §§ 484, 1496, provide that in an action for possession of realty plaintiff may recover damages for the withholding. Section 1669 provides that if a person is disseised and kept out of possession by force he may have treble damages in an action therefor against the wrongdoer. *Held* that, while plaintiff might have a separate action under the latter section, he could as well recover said treble damages in an ordinary ejectment suit, by adding proper allegations of force; nor did such allegations change the nature of the action so as to deprive plaintiff of his new trial as of right in ejectment, under section 1525. 24 N. Y. Supp. 241, reversed.

Appeal from supreme court, general term, first department.

Action by Alexander T. Compton against "The Chelsea," an apartment house corporation, for possession of a suit of rooms, and for treble damages. Judgment for defendant. 13 N. Y. Supp. 722, affirmed 28 N. E. Rep. 682. Plaintiff demanded his new trial as of right in ejectment, under Code Civil Proc. § 1525. From a judgment of the general term (24 N. Y. Supp. 241) reversing an order granting a new trial, plaintiff appeals. Reversed.

A. T. Compton, in pro. per. Shepard & Prentiss, (William H. Shepard, of counsel,) for respondent.

**PER CURIAM.** In an action to recover real property, or the possession thereof, the plaintiff may demand in his complaint, and in a proper case recover, damages for withholding the property. Code, §§ 484, 1496, subd. 5. Under section 1669, if the plaintiff was disseised and kept out of possession by force he may have treble damages in an action therefor against the wrongdoer. Where the plaintiff has title, ejectment will lie for a forcible entry and detainer, and in such a case treble damages may be demanded and recovered if he establishes that the disseisin was actually effected *vi et armis*. It is true that by sections 2233-2236 a summary remedy is given, where the unlawful entry and detention is the result of physical force, by a proceeding in a district court, but the plaintiff is not restricted to such a course any more than in a case where a tenant in possession refuses to surrender upon the expiration of his tenancy. He may, if he so elects, resort to his action of ejectment, and in the same suit recover his damages, which may be trebled if the wrongful entry and withholding are shown to be of the character described in section 1669. We are therefore of the opinion that there are not two inconsistent causes of action stated in the complaint. It is true that the plaintiff alleges that the defendant's unlawful entry was by force, but that does not change the nature of the action; it merely characterizes one element of it, and supports the plaintiff's claim for increased damages on account of it; but the plaintiff may still insist upon the recovery of the possession, if his pleading is supported by proofs, and of

such damages as he may be shown to be entitled to. It is also true that he might have brought a separate action simply for the recovery of the treble damages which are authorized by section 1669, and that in such an action he need not prove his right to possession, but only that he was peaceably in possession, and had been forcibly ejected. But he is not precluded from recovering such damages in case he has the right to the possession, and seeks to recover the property itself. If he establishes his title, he may have such damages for the wrongful entry and detainer of the defendant as the law permits upon the facts which may be proven and found at the trial. The complaint, we think, contains all the necessary averments of a cause of action in ejectment. It has been regarded as an action of that character upon both of the former trials, and the case was thus brought within the provisions of section 1525, which does not permit of the exercise of any discretion when application is made for a new trial, and the statutory conditions have been complied with. The order of the general term must be reversed, and that of the special term affirmed, with costs in this court and at general term. All concur, except PECKHAM and GRAY, JJ., dissenting. Ordered accordingly.

(139 N. Y. 496)

**HILL v. MAYOR, ETC., OF CITY OF NEW YORK.**

(Court of Appeals of New York. Oct. 24, 1893.)

**MUNICIPAL CORPORATIONS—POWERS—USE OF PIER AS DUMPING GROUND—NUISANCE—SPECIAL INJURY.**

1. Section 723 of the consolidated act, relating to New York city, (Laws 1882, c. 410,) provides that the department or authorities having the management of the public docks, piers, or slips of the city shall designate or set apart for the use of the street-cleaning commissioner suitable slips, piers, and berths in slips, located as he may require, and such as may be convenient and necessary for his use in executing the duties imposed on him by the act; and that the commissioner may, with the approval of the board of estimate and apportionment, lease piers, slips, and wharves for the necessary purpose of his duties, whenever suitable piers, slips, or wharves under the control of or owned by the city cannot be obtained or are not so set apart or designated. *Held*, that this section, read in connection with the rest of the chapter as to the duties of the street-cleaning department, only authorizes the use of a pier for the shipment of refuse from the streets, and does not contemplate the selection of half a pier, so as to expose the owner of the other half to injury from such selection. 18 N. Y. Supp. 399, reversed.

2. The authority in the act to use a public pier for such shipments does not authorize the building of a dumping board on the pier, so as to exclude the public from the use thereof.

3. The building of a dumping board by the street-cleaning department of a city on the half of a public pier used by the city for the purpose of loading on vessels the refuse of the city, where it obstructs the loading and unloading of vessels on the other half of the pier, and reduces the amount of wharfage, inflicts on the owner of such other half a special injury different from that suffered by the public in general. 18 N. Y. Supp. 399, reversed.

4. A city, sheltering itself under authority

of law from liability for acts which between individuals would be a nuisance, must show an express or clearly implied authority from the powers conferred.

Appeal from supreme court, general term, first department.

Action by William Hill against the mayor, aldermen, and commonalty of the city of New York to restrain the use of a pier as a dumping ground. From a judgment of the general term (18 N. Y. Supp. 399) affirming a judgment at special term (15 N. Y. Supp. 393) dismissing the complaint, plaintiff appeals. Reversed.

Shearman & Sterling, (Thomas G. Shearman and John A. Garver, of counsel,) for appellant. William H. Clark, (D. J. Dean, of counsel,) for respondent.

FINCH, J. We may concede almost every proposition urged by the defendant without reaching the question upon which the judgment rendered finally depends. I shall assume, therefore, without so deciding, that the plaintiff owns the east side of pier No. 12, and the defendant the west side; that each holds his specific half in severalty, and not as joint tenant, or tenant in common with the adjacent owner; that neither has any private easement in the half adjoining his own, but only such right as flows from the public character of the pier; that what the defendant has done does not amount to a taking of the plaintiff's property, but merely inflicts upon him more or less of special damage which he suffers beyond that borne by the public; that the law of 1881, which authorizes the setting apart of piers owned by or under the control of the city for the use of its street-cleaning department, has not been repealed, but has survived the confusion and complications of the legislation relating to the city, and remains in full force and operation; and that the question presented is solely and alone whether by that enactment the city is protected from a recovery for the damage it has done. All of the defendant's propositions are debatable, and about some of them we have disagreed among ourselves, but we choose to leave them open, so far as the present opinion is concerned, since, conceding them to the respondent, we nevertheless do not see how the judgment against the plaintiff can be sustained.

There is practically no dispute about what the city has done and the plaintiff has suffered. The pier is 454 feet long and nearly 35 feet wide, and for many years had been used by sailing vessels drawing 18 feet of water and more, coming from all parts of the world. On the west half of this pier the city has built what is called a "dumping board," for convenience in loading upon scows the sweepings and refuse of the city streets. This structure is 10 feet high and a little more than 301 feet in length, and with the girder and string piece along its easterly line occupies a width of 17 feet and 5 inches, or fully one-half of the entire breadth of the pier. It is inclosed on the sides facing the plaintiff's ownership, except that there are doors through which persons can enter beneath the cartway above. To get upon

it there is an inclined approach beginning about 75 feet from South street, up which the dust carts pass to the platform, and ranging along it their contents are transferred into scows to be towed out to sea. This structure totally excludes the public and the east side dock owners from any possible use of the west half of the pier, except for a short distance at each end. It does more than that. It so narrows and limits the unobstructed half of the pier owned by plaintiff and his associates that trucks coming upon it cannot pass each other, and many of them cannot turn around at any point opposite the dumping board. The consequence is that vessels are no longer unloaded at this pier, because there is no sufficient room for the landing of cargo, and the handling of trucks to remove it, and as a necessary result the wharfrage on the east side has seriously diminished, and has come almost entirely from vessels mooring at the pier to be loaded which had unloaded elsewhere. But beyond the effect of the structure itself, there are proved to exist injurious consequences flowing from the manner of its use. The refuse thrown upon the scows, and piled up much higher than its sides, is sorted over by Italian scavengers, who pick out bones and bottles and cans, and whatever they can turn into use, and throw the ill-smelling and filthy collection upon the surface of the pier, where it remains sometimes for days until it is taken away by its owners through the doors which have been described, and by the use for that purpose of the half of the pier belonging to the plaintiff. The stench arising from these collections and from the sweepings and garbage loaded upon the scows, and often waiting for favorable weather in which to be towed away, is described on one side with a vigor scarcely to be repeated on pages which should be clean, and on the other with a moderation equally remarkable in its way. The witnesses tell us how the ashes and refuse fall off from the scows into the water, and nearly double the amount of dredging necessary to be done on the plaintiff's side of the pier, and how they are borne by the wind in clouds, thick, and not quite fragrant, over all the vicinity. It is apparent and beyond reasonable question that what the city has done and is doing on its half of the pier is something far removed from its proper and normal use, which, as between individuals, would be an undoubted nuisance, and which inflicts upon this plaintiff a special damage beyond that suffered by the public. But to this the city answers that what it has done has been under the authority of law; that, as a municipal corporation, engaged in the performance of a public duty, upon which the public health and comfort depends, and acting by express authority of the legislature, it is not liable for consequential injuries resulting to others, even though its acts would amount to a nuisance as between individuals. It cites abundance of authority for the general doctrine, running from *Radeliff v. Mayor*, 4 N. Y. 195, and *Bellinger v. Railroad*, 23 N. Y. 42, down to *Atwater v. Trustees*, 124 N. Y.

602, 27 N. E. Rep. 385. We need not discuss the cases, or consider how broadly the doctrine should be permitted to operate, since one condition or limitation has been firmly grafted upon it, which raises the final and ultimate question in the case before us. That limitation is that the authority which will thus shelter an actual nuisance must be express, or a clear and unquestionable implication from powers conferred, should be certain and unambiguous, and such as to show that the legislature must have contemplated the doing of the very act in question. For, consider what the proposition is. It upholds a positive damage to the citizen, and denies him any remedy; it infringes his normal and recognized rights with absolute impunity; it sets a nuisance at his door, utterly unbearable, and requires him to bear it. Surely, an authority which so results should be remarkably strong and clear. In *U. S. v. Fisher*, 2 Cranch, 390, Chief Justice Marshall said: "Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness to suppose a design to effect such objects." In *Cogswell v. Railroad Co.*, 103 N. Y. 10, 8 N. E. Rep. 537, Judge Andrews said: "But the statutory sanction which will justify an injury to private property must be express, or must be given by clear and unquestionable implication from the powers expressly conferred, so that it can fairly be said that the legislature contemplated the doing of the very act which occasioned the injury." And in *Bohan v. Gaslight Co.*, 122 N. Y. 18, 25 N. E. Rep. 246, the same rule was asserted and applied.

We must now examine the authority which the city sets up as a shield, and see if it is adequate, within the limitation stated, to warrant the acts done. It is the act of 1881 (chapter 367, § 4) which was transplanted into the consolidation act as section 728.<sup>1</sup> It forms a part of the general scheme organizing the street-cleaning department of the city, and reads thus: "The department, bureau or city officer, authority or authorities, which shall, from time to time, have the management and control of the public docks, piers and slips of the city, shall designate and set apart for the use of said commissioner, suitable and sufficient slips, piers and berths in slips, located as the said commissioner may require, and such as shall be convenient and necessary for his use in executing the duty hereby imposed upon him, excepting slips, docks and piers on the East river set apart for the use of canal boats. The said commissioner may, with the approval in writing of the board of estimate and apportionment, lease piers, slips and wharves for the necessary purpose of the duties by this chapter conferred, whenever suitable piers, slips or wharves owned by or under the control of the city cannot be obtained, or are not set apart and designated as in this section provided." Undoubtedly we ought to read this authority in connection

with the duties imposed upon the department by the rest of the chapter. The commissioner was to clean the streets and remove ashes and garbage and snow. Section 704. What he should do with them is not dictated, except by inference. He is authorized to contract for their final disposition, (section 709;) to provide for burning the refuse, and obtain land for such purpose, (section 710;) and hire or buy steam tugs, scows, boats, and vessels necessary for his work, (section 705.) It is a reasonable inference from the latter provision and from section 728, which I have quoted at length, that the legislature contemplated a shipment of the refuse by water, and the use of piers or slips for that purpose; but that is all. Nothing else beyond such use of a pier or piers for the shipment of refuse was authorized or contemplated. It was a pier, not part of a pier, that was to be designated. I admit that the greater includes the less, and that half of a pier might be designated and set apart. What I mean to say is that the legislature, using the word "pier," cannot be said to have contemplated the selection of half of a pier, and so exposing private owners of the other half to the inevitable injury of such a selection. No such purpose is involved in the words used. Beyond that, there is no language anywhere which can fairly stretch the legislative purpose further than to permit the ordinary, usual, and well-understood use of a pier, to which boats could be moored, upon which things could be landed, and from which they could be loaded and shipped. Let us remember that the pier to be designated was by the law itself described as a public pier, and that there is not a word in the whole chapter which indicates in any manner that it should cease to be a public pier, or that the public should be permanently and absolutely excluded from any part of it. It cannot be said, and would be an abuse of language to say, that an authority to use a public pier for the shipment of street sweepings is an authority to build upon it such a structure as exists, which permanently excludes the public use, and then to make it a storehouse for the collection of a scavenger's refuse. Argument can scarcely make the point any plainer. Put the authority conferred and the acts done side by side, and it is perfectly obvious from the comparison that no express or implied authority was given for the latter, and that the legislature never contemplated such a nuisance as is shown to exist. The law went no further than to allow the use of a pier for the shipment of the street sweepings, if such disposition of them should prove to be necessary or convenient. The use authorized could only have been such as belonged to and characterized that of a public pier. If the commissioner had moored his barges to the west side, and driven his dust carts along the surface, and unloaded them into the scows he would have done all that the law can be said to have authorized or contemplated. That would not have permanently obstructed the west half of the pier and excluded the public therefrom, or pre-

<sup>1</sup> Laws 1882, c. 410.

vented trucks from passing each other, or vessels from unloading, or made the dock a place of deposit for the findings of scavengers. There might have been dust, and possibly unpleasant odors, which the plaintiff would perhaps have been compelled to bear; but the main and substantial evils of which he complains are not within the express scope of the authority, or of any just inference from the powers conferred.

The parallel between the Cogswell Case and the one at bar is worth noting. In the former the authority was to run cars over an existing road into New York city, which made necessary an engine house at the terminal point; in the latter it is to remove refuse by water, which makes necessary the use of slips and piers. In the one the engine house was built adjacent to the plaintiff's dwelling, and so filled it with smoke and cinders and noxious gases as to render it practically uninhabitable; in the other the public pier used was the half adjacent to the plaintiff, and was so obstructed as to permanently exclude the public and seriously damage the adjoining ownership. In the earlier case we refused to stretch the authority given so as to legalize the engine house; in the one before us we similarly refuse to stretch the authority so as to cover a destruction of the public character and public use of the pier, and a transformation of it into a nuisance destructive of adjoining interests. Obviously, the general doctrine which lies upon individuals forced contributions for the benefit of the public, and denies compensation for the injury done, is vulnerable at two points. It is defeated sometimes by construing the harm inflicted into a taking of private property for which compensation must be made, and sometimes by a rigid construction of the authority claimed. Both methods indicate a lurking doubt of the equity of the general doctrine, and a disposition to narrow the field of its operation. But we need not discuss it in this case since it is very clear that it can furnish no protection to the city against the redress sought by the plaintiff. The judgment should be reversed, and a new trial granted, costs to abide the event. All concur.

(139 N. Y. 506)

#### CURTIN v. BARTON.

(Court of Appeals of New York. Oct. 24, 1893.)

#### CONSTITUTIONAL LAW — CREATION OF COURTS — DE FACTO JUDGE — STATUTES — MUNICIPAL COURT OF SYRACUSE.

1. The court of appeals will not determine the power of the legislature to enact a law which is attacked as unconstitutional, unless it is necessary in order to determine questions appearing on the record.

2. Where the legislature has constitutionally established a court, the judges thereof, being in possession of the offices and engaged in discharging the duties thereof under color of appointment by the governor, are de facto judges, though the legislature may not have had the power to provide for their appointment by the governor, and their title cannot be collaterally attacked on appeal from their judgments.

3. The fact that, in a statute establishing

a court, the section providing for appointment of the first judges is unconstitutional, does not invalidate the creation of the court, where such section is separate from all the other provisions, and they are sufficient to establish the court.

4. Laws 1892, c. 342, entitled "An act to establish a local court of civil jurisdiction in the city of Syracuse," etc., when the whole act is read together, clearly shows an intention to create a court, the jurisdiction of which should be confined to the city.

5. Laws 1892, c. 342, creating the municipal court of the city of Syracuse, the general purpose of which was to establish a local court, in place of that held before by justices of the peace, does not, in abolishing justices' courts, and the office of justice of the peace, embrace more than one subject, in violation of the constitution.

6. Laws 1892, c. 342, establishing the municipal court of the city of Syracuse, does not, in providing that the provisions of the Code shall apply to the court, and that it shall have the same jurisdiction over the person of the defendant as justices' courts, violate the constitutional provision that no act shall be passed which shall provide that any existing law, or any part thereof, shall be applicable, except by inserting it in such act.

23 N. Y. Supp. 1151, mem., affirmed.

Appeal from supreme court, general term, fourth department.

Action by William A. Curtin against William E. Barton. From a judgment of the general term (23 N. Y. Supp. 1151, mem.) affirming a judgment of the Onondaga county court, which affirmed a judgment of the municipal court of the city of Syracuse, in favor of plaintiff, defendant appeals. Affirmed.

Charles H. Peck, for appellant. J. J. Kennelly, (W. S. Andrews, of counsel,) for respondent.

O'BRIEN, J. The judgment in this case was rendered in the municipal court of Syracuse, and the only ground upon which it is questioned here is the want of jurisdiction in that court to render it. The defendant's counsel insists that the court has no legal existence or organization, as the statute upon which its powers and functions must rest is in conflict with certain provisions of the state constitution, and therefore void. This presents a question of the gravest character, as it not only brings in question the power of the legislature, but the jurisdiction and very existence, in point of law, of at least one, and possibly many, of the local courts constituting a part of the judicial system of the state. The court in which this judgment was given has no powers except such as the legislature could and did confer upon it by the act passed for the purpose of its creation. That statute is chapter 342 of the Laws of 1892, entitled "An act to establish a local court of civil jurisdiction in the city of Syracuse, to be called the 'Municipal Court of the City of Syracuse,' and to amend the charter of said city." By the first section of the act it is declared that such a court, with such jurisdiction and power as thereafter enumerated, is thereby established, and it is made the duty of the governor, as soon as the act took effect, to appoint two judges of the court, whose duty it should be to organize and hold the court as provided in the act. By



the second section the judges were to enter upon their duties on the 1st day of January, 1893, one of whom was to hold office for five years and the others six years, the term of each to be designated by the governor when making the appointment, and they were required to take and file the constitutional oath of office before entering upon their duties. The third section provides for the election of the judges at the annual charter election to be held in the city next preceding the close of the term of the governor's appointees, and thereafter as the term, which was fixed at six years, should expire. The next section provides for vacancies, and, in several sections following, the powers and duties of the judges and the several subjects to which the jurisdiction of the court was to extend are specified and enumerated. None of the provisions are material to the question involved in the appeal, except the twelfth section, which provides that "said court shall have the same jurisdiction over the persons of defendants as is now possessed by justices' courts of towns, pursuant to the provisions of section twenty-eight hundred and sixty-nine of the Code of Civil Procedure, and for the purpose of conferring jurisdiction of the person the said city of Syracuse shall be deemed a town, and said court a justice's court thereof." The most serious objection to this act grows out of the provision authorizing the governor to appoint the first judges. The court was so organized when the judgment under review was given, and it is claimed that the legislature had no power to appoint or provide for the appointment of the judges. The solution of the question depends upon the construction to be given to section 19, and the last clause of section 18, art. 6, of the constitution. If the words "all other judicial officers in cities," contained in the last clause of section 18, are applicable only to officers and courts existing when the constitution went into effect, and if it can be held that this court could have been legally constituted and the judges clothed with their official character under section 19, then the legislature clearly had the power to provide for the appointment of the judges by the governor and senate. It may be difficult to construe these provisions in such a way as to give both full effect, and in a manner that would exclude any doubt that the intention of the framers of the constitution had been ascertained and enforced. There is no doubt, however, in regard to the power of the legislature to establish an inferior local court of civil and criminal jurisdiction in a city under section 19, the only question here being as to the power to appoint the judges and confer this power upon the governor. We do not deem it necessary to decide that question in this case. This court will not enter upon an examination of the powers of the legislature to enact a given law unless it be necessary in order to determine questions appearing upon the record. If there are other questions in this case decisive of the rights of the parties, without questioning the power of the legislature to enact a statute, we will postpone the inquiry until the necessity

for the examination is imperative. *Doyle v. Railway Co.*, 136 N. Y. 505, 32 N. E. Rep. 1004; *People v. Rosenberg*, 138 N. Y. 410, 34 N. E. Rep. 285. Whatever may be said with respect to the power of the legislature to provide for the appointment of the judges, nothing can be urged against its power to establish the court. Nor can it be doubted that the statute in question does in part establish such court if the objections which are based upon other provisions of the constitution, hereafter noticed, are not good. The judges were in part appointed by the governor, were in possession of the office, engaged in discharging the duties, under color of such appointment. They were, therefore, officers de facto, discharging judicial duties under color of legal title, and such title can be questioned only by the state under whose authority they were invested with the character at least of de facto officers. This principle is founded on considerations of public policy, and its maintenance is essential to the preservation of order, the security of private rights, and the due enforcement of the laws. Moreover, it is sanctioned by abundant authority. *Carpenter v. People*, 64 N. Y. 493; *State v. Carroll*, 38 Conn. 449; *Read v. City of Buffalo*, 42 N. Y. 447; *People v. Petrea*, 30 Hun, 110. The incumbent of the office is not a party to this action. His title to the office is not in question directly, as in the cases where an action in the nature of a quo warranto is brought by the attorney general, or where he brings the suit himself to recover the salary. When a court with competent jurisdiction is duly established, a suitor who resorts to it for the administration of justice and the protection of private rights should not be defeated or embarrassed by questions relating to the title of the judge, who presides in the court, to his office. If the court exists under the constitution and laws, and it had jurisdiction of the case, any defect in the election or mode of appointing the judge is not available to litigants. Such questions must be raised by some action or proceeding to which the judge himself is a party, and where the issue as to the validity of his election or appointment is directly involved. It would be an unseemly proceeding, derogatory to the dignity of the court, and subversive of all respect for the orderly administration of justice, to permit private litigants to enter upon an inquiry as to the title of the judge, before whom the action is pending, to his office. Of course, if such an inquiry is permissible, the very judge whose official existence is in question must, in the first instance at least, determine it, and thus he is compelled to violate a fundamental principle in all proceedings of a judicial nature, which precludes a person from acting as a judge in his own case, or in respect to a question in the result of which he has a personal interest. If this judgment is void for the reason that the legislature had no power under the constitution to provide for the appointment of the judge by the governor and senate, so are all other judgments rendered since the court was organized. The principle of permitting private litigants to raise such questions would thus

be productive of intolerable confusion and mischief, and cannot be sanctioned. The defendant was summoned to appear in a court which had been established by law, whether the method of selecting the judge was valid or not. The judge was in possession of the office, and engaged in the discharge of its duties and in the exercise of its power, under the authority of a commission from the governor and an act of the legislature. So long as the government permits him to hold the office and to discharge its functions, the constitutional validity of his appointment is a question that does not concern the defendant.

The section of the statute which provides for the appointment of the judges is separate from all the other provisions, and hence, even if invalid, there would still remain distinct enactments for the creation and existence of the court, and defining its powers and jurisdiction. There was therefore a court legally constituted, and a judge acting under color of authority, whose official acts were valid and binding as to the public and third parties until by some direct proceeding by the sovereign power he was ousted, or his commission adjudged to be void.

The further point is made against the validity of the court that the court is not local, but its jurisdiction is extended by section 12 over adjoining towns into which process may be sent by the terms of the act. Without inquiring whether that objection would affect the jurisdiction of the court in this case, even if the language of the section was not open to any other construction, it is sufficient to say that, reading the whole act together, the intention to create a court, the jurisdiction of which should be confined to the limits of the city of Syracuse, is manifest. That construction being reasonable and in favor of the validity of the statute, it should be adopted, rather than the contrary. The words of section 12 are descriptive of the character, rather than the territorial extent, of the jurisdiction. That was fixed by the general words clearly indicating the purpose to create nothing more than a local city court. Words of the same import are to be found in other acts creating local courts, and this court has given to them the same construction. *Brandon v. Avery*, 22 N. Y. 469; *Geraty v. Reid*, 78 N. Y. 64; *People v. Terry*, 108 N. Y. 1, 14 N. E. Rep. 815.

The objection that the act contains more than one subject, and therefore violates article 3, § 16, of the constitution, is also untenable. The only ground upon which this point is based is that whereas the general purpose of the act was to establish a local court, section 25 abolishes the office of justice of the peace in the city, and repeals certain provisions in relation to justices' courts. The general purpose of the act was to establish a local court in place of that held before by justices of the peace, with somewhat more extensive jurisdiction. The abolition of the office of justice of the peace and of the inferior tribunal called a "justice's court" was so connected with and pertinent to the whole scheme that it did not, within settled rules, constitute another or different subject. *Harris v. People*,

59 N. Y. 599; *Wenaler v. People*, 58 N. Y. 516; *Astor v. Railroad Co.*, 113 N. Y. 92, 20 N. E. Rep. 594; *Sweet v. City of Syracuse*, 120 N. Y. 331, 27 N. E. Rep. 1081, 29 N. E. Rep. 289.

In regard to the objection that as sections 14 and 15 provide that the provisions of the Code shall apply to the court, and that it shall have the same jurisdiction over the person of the defendant as justices' courts, the act is in conflict with article 3, § 17, of the constitution, which provides that "no act shall be passed which shall provide that any existing law, or any part thereof, shall be applicable, except by inserting it in such act." All that is necessary to say is that the current of authority in this court has settled the question the other way. *People v. Banks*, 67 N. Y. 568; *People v. Squire*, 107 N. Y. 593, 14 N. E. Rep. 820; *People v. Lorillard*, 135 N. Y. 285, 31 N. E. Rep. 1011. The conclusion, therefore, is that the court was legally constituted, and the judgment should be affirmed. All concur.

(139 N. Y. 514)

#### McLOGHLIN et al. v. NATIONAL MOHAWK VAL. BANK.

(Court of Appeals of New York. Oct. 24, 1893.)

#### BANKS AND BANKING—DEPOSITS—RIGHT TO INTEREST—EVIDENCE.

1. The fact that there are several entries in the books of a bank and in the pass book of a depositor of allowance of interest on his account, is not sufficient to prove a contract by the bank to pay interest while the deposit should remain, where it is proven that after the entries were made the officers of the bank on several occasions told the depositor that it was against their rules to pay interest, and that they would not pay it, and that he apparently acquiesced. 20 N. Y. Supp. 171, reversed.

2. On the question whether a bank agreed to pay a depositor interest, evidence that he had accounts in other banks on which he was paid interest is inadmissible. 20 N. Y. Supp. 171, reversed.

Appeal from supreme court, general term, fourth department.

Action by Thomas McLoghlin and John J. McLoghlin, as executors of the will of B. F. McLoghlin, deceased, against the National Mohawk Valley Bank. From a judgment of the general term (20 N. Y. Supp. 171) affirming a judgment entered on the report of a referee, defendant appeals. Reversed.

J. B. Rafter, for appellant. John Courtney, Jr., (Wm. P. Goodelle, of counsel,) for respondents.

EARL, J. This action was brought by the plaintiffs to recover money deposited by their testator with the defendant. The amount of the principal sum claimed is \$2,511.81. The testator opened an account with the defendant in August, 1853, and from time to time made deposits in the bank, and drew checks against his account until May, 1865, when the amount now claimed was the balance due him. The testator died in November, 1888, and from May, 1865, until that time, there was

no entry of debit or credit in his account. Before the commencement of this action the plaintiffs demanded of the defendant the balance of principal due them, with interest thereon from May 25, 1885, to the date of the demand. The defendant offered to pay the principal, but refused to pay interest, and the controversy between these parties is whether, upon the facts proved, it was bound to pay interest upon the balance claimed.

The sole evidence given by the plaintiffs to prove any agreement to pay interest upon the money deposited by the testator was the entries in his account kept in the books of the bank and in the pass book held by him of credits, from time to time, of interest. It appears from the account that interest was credited upon the balances for a portion of the time at the rate of 5 per cent., for another portion at the rate of 3½ per cent., and for another portion at the rate of 2½ per cent. The referee held that these credits were sufficient to show that the account was an interest-bearing account, and he reported in favor of the plaintiffs, giving them judgment for the principal sum, with interest thereon from the 25th of May, 1885, to the date of his report, at the rate of 3 per cent. When the account was opened, and until 1867, Mr. Pomeroy was cashier of the bank, and for many years before and after 1867, Dean Burgess was its president; and after the death of Pomeroy, in 1867, Henry D. Alexander was its cashier. The referee found that in the latter part of the year 1867 the testator had an interview with Burgess, at which two of the directors of the bank were present, at its banking house, during the usual business hours of the day. That Burgess, speaking to the testator concerning his deposit, said in substance, "You must draw your money; we can pay no interest;" to which the testator replied, in substance, "that the bank would be crippled by the defalcation, [having reference, probably, to the defalcation of the previous cashier,] and they could not afford to pay him interest; that it was not necessary for him to have the money." That Burgess answered "that it was contrary to the rules of the bank to pay interest; that the bank did not pay interest on deposits, and he must withdraw his money; that they could pay no interest." That afterwards, in the year 1869, the testator had an interview with the cashier, Alexander, at the defendant's banking house, during the usual hours of business. That the testator said to Alexander that "he had called there some time ago, and had talked about his deposits with the old gentleman, [meaning Burgess,] in the back room, who said they could not pay him interest." That Alexander replied: "That is so. We don't pay anybody interest now. If you desire to deposit your money where they pay interest you had better take it to a savings bank;" and the testator said that "he would leave his money there until he could get some other place to put it." That Alexander answered: "All right. You can have your money any time you want it." That some years afterwards the testator met the cashier, Alexander,

in the village of Mohawk, after business hours, and asked him if they had concluded to pay him any interest on his account, and Alexander replied "they had not; that they could not do it." Notwithstanding these facts, proved to the satisfaction of the referee, and found by him, he held that there was a continued obligation on the part of the bank to pay interest on the balance of this account.

While it is true that the entries of interest in the bank's account with the testator furnished prima facie evidence that the interest was allowed in pursuance of some arrangement or agreement, they furnished no evidence as to the precise character of that agreement. They did not show what the rate of interest was to be, nor for what length of time, nor under what circumstances, interest was to be paid. They certainly furnished no evidence that interest was to be paid to the testator on the balance of his account so long as he chose to leave his money on deposit there. It is perfectly consistent with the entries of interest in the account that the arrangement for the deposit and for the payment of interest was terminable at the option of either party. In 1867, when the testator had the interview with the president of the bank, it is clear that there was no subsisting arrangement for the payment of interest. He was then at the bank, seeking for a promise from the bank to allow him interest, and it positively refused. In the subsequent conversation with the cashier it again clearly appears that there was no subsisting arrangement for the payment of interest, as the testator was seeking to make one. So that, upon the facts found by the referee, it seems to us that, if some kind of arrangement for the payment of interest prior to May 25, 1885, could be found to have existed, that arrangement was not in force at the time of these conversations. But, even if it was in force prior to these conversations, it is quite clear that it was then abrogated. We must assume that the president of the bank, with two directors engaged in the business of the bank, in the banking office, to whom the testator applied in reference to the allowance of interest, had authority to act for the bank. He was there informed that the bank would pay him no interest; that it was contrary to its rules to allow interest, and that he must draw his money. If the matter had rested there, and nothing more had been said, he could not after that have claimed interest on his account. He went away, apparently acquiescing in what was said to him, and after that he had no arrangement for the continued allowance of interest to him, and there was no binding contract to compel the bank to pay interest. The subsequent conversation with the cashier is still more explicit and significant. In that conversation the testator alluded to the conversation he had had with the president, and he was informed that the bank did not pay interest on deposits, and that, if he desired to deposit his money where he would be paid interest, he had better take it to a savings bank; and he replied that he would leave it there until he could get

some other place to put it. The cashier assented to this, and told him he could have his money any time he wanted it. The testator went away apparently satisfied with that arrangement, and it is impossible to perceive how he could claim interest after that. Whatever the prior arrangement may have been, there was then a distinct agreement that he should leave his money without interest until he could get some other place to put it, and the prior arrangement, if one existed, was superseded. Under such circumstances, we think there is no authority, and we know of no principle of law, which would authorize the allowance of interest on the testator's account.

The case of *Read v. City of Buffalo*, 74 N. Y. 463, relied upon by the plaintiffs, bears no analogy to this. There the defendant issued interest-bearing obligations, payable when the money should be collected or realized from taxes for local improvements, with interest, three months from date. The necessary funds for paying the obligations were collected, and subsequently the defendant's common council passed a resolution that after a certain date interest on the obligations should cease, and the treasurer published notices thereof in the official city papers; and it was held that that resolution and the published notices thereof did not stop the running of interest. There the defendant by its own acts, not communicated to the plaintiff, claimed to have absolved itself from the payment of interest, and it was held that the notices published of the resolution of the common council did not affect the rights of the plaintiff in the absence of proof that such notices ever came to his knowledge. Here the testator was distinctly notified that interest would no longer be paid, and the money was really left in the bank under a new arrangement, distinctly understood by both parties, that the account should not draw interest. It may be true, as claimed by the plaintiffs, that if a bank should issue certificates of deposit bearing interest until paid, it could not stop the running of interest by a simple notice to the depositor that it would no longer pay it. But if it should say to him that it could no longer pay him interest, and request him to present his certificate and draw his money, the money being presently due, and say to him that if he left his money thereafter it would be without interest, and he, making no objection, should leave his money there, we know of no principle of law which would enable him to recover interest upon it. We are therefore of opinion that upon the facts found by the referee the judgment should have been in favor of the defendant, dismissing the complaint.

But, as there must be a new trial of the action, we ought further to notice some evidence given by the plaintiffs upon the trial, which the learned counsel for the defendant claims was erroneously received and considered by the referee. The plaintiffs were permitted to show that the testator had deposits in various other banks, upon which he was allowed interest; one bank being in New York, one in Little Falls, one in Syracuse, and another in Cortland.

This evidence, as we understand it, was offered to show that the account with the defendant was an interest-bearing account. The testator's transactions with the other banks had no relation whatever with his transactions with the defendant, and it does not appear that the defendant had any knowledge whatever of them. His transactions with those banks were offered as independent evidence to show that, while he was receiving interest upon all his money deposited with other banks, it was wholly improbable that he would make deposits with the defendant without any interest, or that he would leave his money there without interest. While this evidence may be what it is called "moral evidence," more or less convincing, we are satisfied that it was illegal. The fact that he had contracts with other banks for interest has no legal tendency to show that he had such a contract with this bank, and we know of no well-adjudicated case which holds such evidence, under such circumstances, to be competent. As a general rule it is inadmissible for the purpose of showing that A. did a particular thing at one time to prove that he did a similar thing at another time. Evidence must legitimately tend to prove the issues between the parties. In 1 Greenl. Ev. § 52, it is said: "This rule excludes all evidence of collateral facts, or those which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute; and the reason is that such evidence tends to draw away the minds of the jurors from the point in issue, and to excite prejudice, and mislead them; and, moreover, the adverse party, having had no notice of such a course of evidence, is not prepared to rebut it." If this evidence was competent, then it would be difficult to limit the evidence which the plaintiffs could give of the conduct of their testator, although unknown to the defendant, showing that it was improbable that he would leave his money with the defendant, without interest; and the defendant might show that he did deposit money with other banks and loan money to individuals without interest, or even that he kept on hand large amounts of idle money, and it might show that other banks in the vicinity did not allow interest on open running accounts, and that it did not allow interest upon such accounts to other depositors; and thus many unexpected issues would be brought into the trial of the action, and the real issues be obscured, and the minds of the jurors diverted therefrom and confused. Such evidence is too remote, inconclusive, and uncertain in its bearing; and evidence of a similar character was condemned in the following cases: *Carter v. Pryke*, Peake, 95; *Wood v. Insurance Co.*, 32 N. Y. 619; *Green v. Disbrow*, 56 N. Y. 334; *Carroll v. Deimal*, 95 N. Y. 252. Where one is charged with carelessness it would be incompetent to prove that he was habitually careless; or, if charged with assault and battery, that he was in the habit of committing assaults upon other people; and so many illustrations might be put, showing that facts which constitute moral evidence, quite convincing,

may yet be irrelevant when tested by legal rules. We are therefore of opinion that the judgment should be reversed, and a new trial granted, costs to abide event. All concur.

(139 N. Y. 531)

**UNITED STATES TRUST CO. v. STANTON.**

(Court of Appeals of New York. Oct. 24, 1893.)

**TRUSTEES—LIABILITY—COUNTERCLAIM.**

1. In an action by a substituted testamentary trustee to foreclose a mortgage executed to his predecessor, plaintiff is not liable to a personal judgment on a counterclaim for the excess of fees over the amount of the mortgage due defendant as attorney under retainer by his predecessor, as the contract bound the latter individually, and plaintiff did not assume any responsibility.

2. The fact that equitable grounds exist for charging the trust estate for the value of the services rendered by defendant is no reason for charging plaintiff personally.

3. Under the express provisions of Code Civil Proc. § 502, subd. 3, in an action by a trustee as such, a personal demand against plaintiff cannot be set up as a counterclaim.

4. Under the express provisions of Code Civil Proc. § 502, subd. 3, in an action by a trustee as such, only so much of a demand existing against the person whom plaintiff represents as will satisfy plaintiff's demand can be allowed as a counterclaim.

Appeal from supreme court, general term, second department.

Action by the United States Trust Company of New York, as substituted trustee, against Philip V. R. Stanton, to foreclose a mortgage. From a judgment of the general term (21 N. Y. Supp. 229) affirming part of a judgment of the special term, disallowing a counterclaim, defendant appeals. Affirmed.

Philip V. R. Stanton, in pro. per. Edward W. Sheldon, for respondent.

**ANDREWS, C. J.** The United States Trust Company, as substituted trustee under the last will and testament of Gilbert W. Bowne, deceased, brought this action to foreclose a mortgage executed to the original executors and trustees by the defendant, Stanton. Among other defenses, Stanton set up a counterclaim for services as attorney rendered on the retainer of the original executors and trustees in divers suits and proceedings in the business of the estate, all of which services were rendered prior to the substitution of the plaintiff. The trial court found the rendition of the services, and their value, and that the bond and mortgage had been fully paid thereby; but the court refused to render judgment for the balance of the counterclaim against the plaintiff, as demanded by the defendant. The decision was clearly right. The plaintiff had entered into no contract with Stanton. The alleged services were rendered under a contract with its predecessor in the trust. That contract bound the former trustees individually, and though the services were rendered for the benefit of the trust estate, they were not rendered under such circumstances, so far as appears, as to create a

charge thereon, which could be enforced by Stanton. *Austin v. Munro*, 47 N. Y. 360; *New v. Nicoll*, 73 N. Y. 127.

The plaintiff, when it succeeded to the trust, did not assume any obligation created by any contract between the former trustees and Stanton, and none was imposed by law. If any equitable ground exists for charging the trust estate for the value of the services rendered by Stanton, no such ground appears in the record; and, assuming it to exist, it would furnish no reason for charging the plaintiff personally with the debt, which is what the defendant, Stanton, sought to do in demanding an affirmative judgment against the plaintiff for the excess of the counterclaim over and above the amount applied in satisfaction of the mortgage.

The case of *Davis v. Stover*, 58 N. Y. 473, is not an authority for the contention of the defendant. In that case a defendant was permitted to set off against a debt owing by him to the insolvent bank the value of services rendered on the employment of the receiver, which the receiver might properly have paid out of the trust estate. Nor does the statute of counterclaim permit an affirmative judgment for the excess in a case like this. The plaintiff is a trustee, and sues as such, and by subdivision 3 of section 502 of the Code a demand against the plaintiff personally cannot be set up as a counterclaim, and by the same section only so much of a demand existing against the person whom the plaintiff represents, or for whose benefit the action is brought, as will satisfy the plaintiff's demand, can be allowed as a counterclaim.

The question as to the correctness of the judgment, so far as it applied so much of the value of the services as was necessary in satisfaction of the mortgage, is not involved. We think the part of the judgment from which an appeal was taken, denying the right of the defendant, Stanton, to a judgment against the plaintiff personally for the excess, was right, and it should therefore be affirmed. All concur.

(139 N. Y. 645)

**PEOPLE v. CANNON.**

(Court of Appeals of New York. Oct. 24, 1893.)

**CRIMINAL LAW—INSTRUCTIONS.**

The court has the right to tell the jury as a matter of law that the evidence on the part of the prosecution, if they believe it, makes out the crime charged.

On motion for reargument. Denied.

For opinion on appeal, see 34 N. E. Rep. 759.

**PECKHAM, J.** A motion is made in this case for a reargument, grounded upon the failure of the court to notice an exception taken to the charge of the judge upon the question of the duty of the jury. It is said that the opinion just delivered herein shows that the charge is erroneous in principle, and therefore the conviction must have been reversed if the court had not overlooked the exception.

The exception was not alluded to in any of the briefs of counsel, and was not discussed upon the argument. The evidence in this case is contained almost wholly in a statement of facts agreed upon by counsel for the respective parties, and set forth by the authority of a written stipulation, which is contained in the record. Among other things, it admits the possession of the bottles by the defendant of the kind and character mentioned in the statute, and that the owners had never given any written or oral consent that such bottles could be taken or sold or otherwise disposed of or trafficked in. There is also the oral evidence of a witness as to finding the bottles on the premises of the defendant, and there is the oral evidence of the defendant himself, which, in substance, corroborates the evidence of the people. There is no evidence in explanation or contradiction of the facts thus agreed upon, nor is there the slightest contradiction or explanation of any of the evidence given on the part of the people; but, on the contrary, it is in reality corroborated by the evidence of the defendant.

The question of the burden of proof or the presumption to be indulged in from the fact of possession was not in the case, because the facts agreed upon stated that the owners of the bottles had never given any consent to their sale or to any traffic in them. The question of the constitutionality of the acts, apart from this presumption, was the sole question presented or argued in this case, and it was the desire of both counsel, as expressed to the court and as appears from the record, "to get the case in such a way that the question raised might be presented to the court having power to pass upon and determine it; that is, the constitutionality of the statute." Under these circumstances, and when the judge came to charge, he said to the jury that "the real question upon the undisputed facts in the case (for there is really no dispute as to any material fact relied upon by the people) is as to the constitutionality of these two acts of the legislature. The real question to be determined in this case is a question of law. It is one for the determination of the court; and for the reasons that I have already assigned in your hearing I shall hold them constitutional. *If you believe the facts as they have been established here, both by the testimony of the two witnesses who have been examined, and also by the testimony contained in the written stipulation which has been read to you, and which forms a portion of the evidence in this case, then it is manifest that the defendant has violated the provisions of the statute, and it will be your duty to convict him.* On the other hand, if you disbelieve this evidence, and it is entirely uncontradicted, you would have the right to acquit this defendant. But you have no absolute right to disbelieve the statement of facts, which are conceded on both sides to be true and correct. You will render a verdict convicting this defendant or acquitting him." The defendant's counsel then excepted to that portion of the charge of the court wherein

he stated as is above set forth in italics. The counsel now claims this charge thus excepted to was erroneous under the opinion delivered in this court in this very case. Counsel quotes from that opinion that portion which deals as to the other cases, (which were argued at the same time with this,) with the effect of the statute making the possession by a junk dealer, or dealer in second-hand articles, presumptive evidence of the unlawful use, etc., of the bottles. The opinion states that such a provision does not really change the burden of proof, and that the court could not legally direct a conviction, even if the evidence on the part of the people were neither contradicted nor explained, and that the jury would have a right, after a survey of the whole case, to refuse to convict, unless satisfied beyond reasonable doubt of the guilt of the accused, even though the statutory prima facie evidence were uncontradicted. I think there are two answers to this motion. In the first place, I am clear that the exception did not raise this particular question. It did not raise it in this case because the question was not in it. It was not in the case for the reason that the agreed facts admitted what the statute allowed the jury to infer from the fact of possession. The whole course of the trial, the facts as agreed upon, and the expressed desire of both counsel for the people and for the defendant, to have the case so treated as to enable them to raise the main constitutional question, conclusively show that the exception was taken in the course of the attempt to raise such question, and not to the point as to the right of the court to charge as it did as to the duty of the jury to convict if it believed all the evidence. If that had been the point, the stipulation should have been amended, and ordinary fairness would have then required the counsel for defendant to specify the ground of the exception, in order that the attention of the court might be turned to it, and the matter decided with reference to that point. But I think there is nothing in the opinion in this case which is inconsistent with the charge of the court as given. The record shows that the whole question of guilt or innocence was submitted to the jury, and it was stated that the jury might convict or acquit the defendant, leaving full power in the jury to decide that question. The statement regarding the duty of the jury to convict was predicated upon the belief by the jury of the facts as they were established both by testimony and by the stipulation, and it was stated by the court that, if the jury disbelieved the evidence, it would have the right to acquit. The court then added that the jury "had no absolute right to disbelieve the statement of facts, which are conceded on both sides to be true and correct." Where both parties to a criminal action—the people and the defendant—have through their respective counsel stipulated in writing as to the existence of certain facts, and have embodied such facts in a written statement, which has been put in evidence, each party has the right to claim that the jury ought to be bound by those facts so far

as they go, and the court is entirely justified in so instructing the jury.

The statement in the opinion in this case that the court could not legally direct a conviction even if the evidence on the part of the people were neither contradicted nor explained, and that in such event the jury would have the right, after a survey of the whole case, to refuse to convict, unless satisfied beyond a reasonable doubt of the guilt of the defendant, is not at all inconsistent with the charge in this case. There was no direction to convict in this charge. A direction to convict leaves no discretion with the jury, and the verdict is entered under the direction of the court. It was in regard to the power of the court to give any such direction in a criminal case that the expression was used and the right of the jury to give the verdict was asserted. In this case, where the substantial part of the facts was contained in an agreed statement thereof, and where the oral evidence was not contradicted or explained, and where, indeed, the evidence of the defendant tended to corroborate the evidence of the people, the court had the right to tell the jury (as, in substance, it did) that if it believed all the evidence, oral as well as written, it ought to convict, but that it had the right to disbelieve the oral evidence, although uncontradicted; and that, as to the agreed statement of facts, it had no absolute right to disbelieve it, and upon the whole case it must bring in a verdict of acquittal or conviction. The substantial right of trial by jury in all criminal cases provided for by the constitution is not to be frittered or explained away, and that right continues all through the trial, and up to the time when the jury has, upon its own motion, and not under any direction of the court, come to the conclusion to convict the accused. This right is not touched, however, by the court when it gives instructions as to the result of the evidence if believed by the jury, so long as the power is left to that body to decide. In other words, the court has the right to tell the jury as matter of law that the evidence on the part of the people, if believed, makes out the crime described in the indictment. The court, in this case, upon the whole charge, committed no error, and we think the motion for a reargument must be denied. All concur.

(139 N. Y. 482)

#### THORN v. BEARD.

(Court of Appeals of New York. Oct. 24, 1893.)

#### COSTS—WHO LIABLE.

1. The assignee of a claim as collateral who does not authorize an action brought thereon by the assignor, nor take any part in the litigation, is not liable for costs, under Code Civil Proc. § 3247, providing that "where an action is brought in the name of another by a transferee of the cause of action, or by any other person who is beneficially interested therein, \* \* \* the transferee or other person so interested is liable for costs \* \* \* as if he was the plaintiff." 24 N. Y. Supp. 621, affirmed.

2. The assignor of a claim as collateral sued thereon and obtained a judgment, which was reversed on appeal, and on the second trial defendant had judgment. The judgment was never assigned to the assignee, but before the reversal an agreement was made between him and the assignor, under which, by virtue of his interest in the claim, he was to be paid the amount due on the judgment "when collected." He had not authorized the action, and took no part therein. *Held*, that he was not liable for costs, under Code Civil Proc. § 3247, which provides that "where, after the commencement of an action, the cause of action becomes, by transfer or otherwise, the property of a person not a party to the action, the transferee, or other person so interested, is liable for costs \* \* \* as if he was the plaintiff." 24 N. Y. Supp. 621, affirmed.

Appeal from supreme court, general term, second department.

Action by William I. Thorn against Oliver T. Beard. Plaintiff died, and Mary I. Thorn, his executrix, was substituted. The complaint having been dismissed, and judgment for costs rendered for defendant, he moved for an order requiring one Peter D. Hoyt to pay the same. An order of the special term denying the motion was affirmed by the general term, (24 N. Y. Supp. 621,) and defendant appeals. Affirmed.

The facts appear in the following statement by EARL, J.:

On the 3d day of January, 1888, William I. Thorn, being indebted to Peter D. Hoyt, for the purpose of securing the payment of the indebtedness, assigned to him a demand which he claimed to have against the defendant, Oliver T. Beard. Thereafter, in May, 1889, Thorn commenced an action against Beard upon his demand, and in November, 1889, he recovered a judgment thereon for \$1,800 and costs. Beard appealed from that judgment to the general term, and while the appeal was pending there Thorn died, and his executrix was substituted as plaintiff in his stead. In May, 1891, the judgment was affirmed at the general term. 14 N. Y. Supp. 339. In June thereafter Hoyt commenced an action against Mrs. Thorn, the executrix, alleging the assignment of William I. Thorn to him of his claim against Beard, and the recovery of judgment thereon, and he prayed judgment of the court establishing his right to the judgment, and that the costs and counsel fees due to any person therein might be adjusted. Thereafter Hoyt and Mrs. Thorn entered into an agreement adjusting the amount of his interest in the judgment, and it was therein stipulated that one of the plaintiff's attorneys, Morschauser, had a lien upon the judgment to the extent of \$750, which should be paid to him, and that the balance of the judgment and interest should be paid to Hoyt "when collected;" and it was provided that judgment might be entered upon the agreement. In April, 1892, Beard appealed from the judgment to the court of appeals, and there the judgment was reversed, and a new trial granted, (32 N. E. Rep. 141,) and upon the new trial the complaint was dismissed, and Beard had judgment in his favor for \$728.60 costs. Beard then made a motion for an order requiring Hoyt to pay his costs, under



section 3247 of the Code. Further facts are stated in the opinion.

Oliver T. Beard, in pro per. Hackett & Williams, for respondent.

EARL, J. Section 3247 provides as follows: "Where an action is brought in the name of another by a transferee of the cause of action, or by any other person, who is beneficially interested therein; or where, after the commencement of an action, the cause of action becomes, by transfer or otherwise, the property of a person not a party to the action, the transferee, or other person so interested, is liable for costs in the like cases, and to the same extent as if he was the plaintiff; and where costs are awarded against the plaintiff the court may, by order, direct the person so liable to pay them." So far as there is any conflict in the affidavits read upon the motion, we must take the facts to be as stated in the affidavits on the part of Hoyt, and from his affidavits it appears that he did not commence the action in the name of Thorn, nor did he authorize or procure its commencement, and at no stage of the litigation did he carry it on. He cannot, therefore, be made liable for costs under the first clause of the section on the ground that, as transferee of the cause of action, or as one beneficially interested therein, he brought the action in the name of Thorn. Nor can he be made liable under the second clause of the section on the ground that after the commencement of the action the cause of action became, by transfer or otherwise, his property. The judgment was not assigned to him, and he never owned it. He had an interest in it to the full amount due thereon—above \$750—by virtue of his assignment of the claim, which sum of \$750 was payable out of the judgment to another party, and the balance of the judgment payable to him was to be paid "when collected." So we have a case where a claim was assigned to Hoyt to secure a debt to him from the assignor, where the litigation over the claim was carried on from beginning to end by the assignor, and his executrix after his death, Hoyt taking no part in the litigation; and such facts, in our opinion, do not make him liable for the costs recovered by the defendant in the action under the section of the Code cited. The order of the general term should be affirmed, with costs. All concur.

(139 N. Y. 480)

#### HUERZELER v. CENTRAL CROSS-TOWN R. CO.

(Court of Appeals of New York. Oct. 24, 1893.)

#### CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action to recover for the death of a child five years old, killed by the cars of defendant street-railroad company, it is a question for the jury whether its mother was negligent in permitting the child to be in the street for a few minutes under the circumstances proven. 20 N. Y. Supp. 676, affirmed.

Appeal from common pleas of New York city and county, general term.

Action by Fritz Huerzeler against the Central Cross-Town Railroad Company to recover damages for the death of his child five years old. From a judgment of the general term (20 N. Y. Supp. 676) affirming a judgment of the special term in favor of plaintiff for \$2,000, defendant appeals. Affirmed.

Wolff & Hodge, (Robert Sewell, of counsel,) for appellant. Russ & Heppenheimer, (Henry Schmitt, of counsel,) for respondent.

EARL, J. This action was brought to recover damages for the death of the plaintiff's infant daughter, caused upon the defendant's railway track in the city of New York, through the negligence of the driver of the horses attached to one of its cars. At the close of the evidence the trial judge charged the jury, and there were many requests by both sides to charge, some of which were granted and some refused. After the charge was finished, and the jury had retired, the counsel for the defendant excepted as follows: "To the granting of the requests on the other side, and a refusal to charge those of mine that were not charged;" and there was no other exception to the charge or refusal to charge. It is conceded by the learned counsel for the defendant that this general exception was wholly insufficient to present any question for review in this court, and so we have uniformly held. *Smedis v. Railroad Co.*, 88 N. Y. 13; *Newall v. Bartlett*, 114 N. Y. 399, 21 N. E. Rep. 990; *Read v. Nichols*, 118 N. Y. 224, 23 N. E. Rep. 468. It is therefore not important to criticise the charge, or to determine whether the trial judge committed any error therein. The case is before us precisely as if the whole charge had been omitted therefrom. The main exception, therefore, which presents any question of law to us, is the one taken to the denial of the defendant's motion to dismiss the complaint on the ground that there was no negligence chargeable to the defendant, and that there was no proof of the absence of contributory negligence. We have read the evidence, and are satisfied there was sufficient bearing upon the negligence chargeable to the defendant for submission to the jury. That fact being established, the defendant could defeat the plaintiff only by showing—the child being non sui juris—that her mother was negligent in permitting her to be in the street, and, that fact being established, also that there was such conduct on the part of the child contributing to the accident as would have defeated an action by her if she had been an adult. It was not negligence, as matter of law, for the mother of this child to permit her to be in the street, and so we have several times held. *McGarry v. Loomis*, 63 N. Y. 104; *Kunz v. City of Troy*, 104 N. Y. 344, 10 N. E. Rep. 442; *Birkett v. Ice Co.*, 110 N. Y. 504, 18 N. E. Rep. 108. We will not repeat the evidence bearing upon the question of the mother's negligence. We will simply say that upon that evidence it was a question of fact for the jury to determine whether the mother was negligent in permitting this child to be in the street for a few minutes

under the circumstances disclosed. That question having been determined in favor of the plaintiff, if there was any mere negligence on the part of the child contributing to the accident, that does not shield the defendant from liability, its negligence having been established. The question of damages is not before us. There was sufficient evidence in the case upon the question of damages for the jury. *Houghkirk v. Canal Co.*, 92 N. Y. 219. The exceptions to rulings upon questions of evidence point out no error, and need no particular attention. The judgment should be affirmed, with costs. All concur.

(139 N. Y. 486)

**DOLBEER v. STOUT.**

(Court of Appeals of New York. Oct. 24, 1893.)

**RES JUDICATA—STAY OF PROCEEDINGS.**

Plaintiff, assignee of a claim of L., sued defendant to recover for storage of goods. Defendant had sued L. for damages for negligent storage. *Held* that, as the judgment in favor of defendant in the action against L. would not be res judicata as to plaintiff in this suit, being res inter alios acta, an order staying plaintiff's suit is erroneous. 19 N. Y. Supp. 820, reversed.

Appeal from superior court of New York city, general term.

Action by Frazier M. Dolbeer, assignee of a claim of F. C. Linde & Co., against John Stout, to recover \$4,811.46 storage charges. Stout had sued F. C. Linde & Co. to recover \$19,546.09 damages for negligent storage of goods. From an order of the general term (19 N. Y. Supp. 820) affirming an order of the special term staying the action, plaintiff appeals. Reversed.

Edward S. Clinch, for appellant. Thomas J. Farrell, (George F. Martens, of counsel,) for respondent.

**ANDREWS, C. J.** The plaintiff was not a party to the action brought by the defendant Stout against F. C. Linde & Co. for damages for the breach by Linde & Co. of the contract of storage. This action, though growing out of the same contract, is for a different cause. The plaintiff is the assignee of Linde & Co., and, as such, claims to recover storage charges under the contract. A recovery by Stout in the action against Linde & Co. would not conclude the plaintiff in this action, nor would it be evidence against him of a breach of the contract by Linde & Co. The defendant in this action may allege and prove the nonperformance by Linde & Co. of their contract, and counterclaim any damages he may have sustained thereby to the extent necessary to defeat a recovery by the plaintiff. But judgment in the other action in favor of the plaintiff therein against Linde & Co. would be res inter alios acta. It would not operate as an estoppel upon the plaintiff, nor would he be bound by any adjudication in that action of fact or law. Judgments are binding upon parties or privies, but the plaintiff in this action would be neither a party nor privy to any judgment rendered in

the other action. The legal and equitable rights of the defendant are fully protected by his being permitted to set up and establish his claim for damages in answer to the claim for storage. We think that the court had no power to stay the plaintiff's suit under these circumstances. The defendant, if compelled to try the two actions, may be subjected to the expense and inconvenience of a double litigation of questions of fact. But, as the result of the first action would not be a relevant fact in the trial of the second action, a temporary stay until the determination of that action will not relieve the defendant from this embarrassment. We find no authority justifying the staying of proceedings in one cause until the determination of another cause pending in another court, where the party against whom the stay is sought is neither a party nor privy to such other action, and would not be bound by any adjudication therein. Where the decision in one action will determine the right set up in another action, and the judgment on one trial will dispose of the controversy in all the actions, a case for a stay is presented; but the power exercised by the special term in this case is, so far as we can ascertain, without precedent, nor does it seem supported by reason. See *Travis v. Myers*, 67 N. Y. 542; *Third Ave. R. Co. v. Mayor, etc.*, 54 N. Y. 159; *People v. Wasson*, 64 N. Y. 167; *De Groot v. Jay*, 30 Barb. 483. The plaintiff here, having no interest in, and not being a party to, the other action, could not intervene therein, and by the order in question the trial of this action may be postponed indefinitely, awaiting the trial and determination of another action, the result of which will in no way affect his rights. We think the order of the special and general terms should be reversed, with costs, and application denied. All concur.

(139 N. Y. 534)

**REID v. MAYOR, ETC., OF CITY OF NEW YORK, et al.**

(Court of Appeals of New York. Oct. 24, 1893.)

**STATUTES—RETROSPECTIVE EFFECT—ACTION FOR NEGLIGENCE.**

Laws 1891, c. 128, § 7, providing that the trustees of the New York and Brooklyn bridge shall succeed to the liabilities of the cities of New York and Brooklyn, and all claims for negligence which heretofore might be prosecuted against such cities shall be prosecuted against such trustees, does not defeat an action against such cities, for personal injuries received on the bridge, pending at the time of the passage of the act. 22 N. Y. Supp. 623, affirmed.

Appeal from supreme court, general term, first department.

Action by Mary Reid against the mayor, aldermen, and commonalty of the city of New York and the city of Brooklyn to recover damages for injuries received on the Brooklyn bridge. From a judgment of the general term (22 N. Y. Supp. 623) affirming a judgment of the special term in favor of plaintiff for \$3,000, defendants appeal. Affirmed.

William H. Clark and Almet F. Jenks, (D. J. Dean, of counsel,) for appellants. Charles J. Patterson, for respondent.

GRAY, J. The plaintiff, having suffered personal injuries while a passenger in a car upon the New York and Brooklyn bridge, brought this action to recover damages against the municipalities named, as the owners of, and controlling, the bridge structure. The action was commenced in 1890, and in 1891 an act was passed (chapter 128, Laws 1891) which provided that "neither the mayor," etc., "of New York, nor the city of Brooklyn, shall be liable hereafter for any matter \* \* \* growing out of the New York and Brooklyn bridge. \* \* \* The trustees of the New York and Brooklyn bridge shall succeed to all liabilities of the two cities growing out of the bridge, and all claims and demands growing out of the bridge upon contract, and for negligence and for wrongs, which heretofore might be prosecuted against the two cities, or either of them, shall be prosecuted against the trustees of the New York and Brooklyn bridge, and they shall be liable therefor in their corporate capacity," etc. When the cause came on for trial a motion was made to dismiss the complaint upon the ground that under the said act of 1891 the trustees of the bridge had succeeded to all the liabilities of the defendants, and that they, and not the defendant cities, were liable to the plaintiff. That objection to the maintenance of this action presents the only question argued here.

That the two cities were properly made defendants in the action cannot be disputed, but it is, with great seriousness, insisted that, because of the language in the act of 1891 which I have quoted, the defendants were relieved from the liability under which they were to the plaintiff, and that such liability had been shifted to the bridge trustees. The argument is made that the provisions were absolute in their nature, with respect to the cessation of liability on the part of the cities, and that the legislature had thereby shifted the existing liability. The position of the defendants is exceedingly technical, and we are wholly unable to concede any force to the argument made. The plaintiff had a remedy against these defendants, of which she could not be deprived. The undertaking was to carry the plaintiff safely, and for the results of the negligent performance of that undertaking the plaintiff had a remedy against the defendants, which she could and did enforce by the commencement of this action. We may say that the right of action was the plaintiff's property. To hold that her remedy was taken away, and thus her pending action defeated by this legislation, would be giving a latitude of interference beyond any justification in authority. The construction contended for is as unnecessary as it seems strained. In providing that the bridge trustees "shall succeed to all liabilities of the two cities," etc., the intention of the legislature is plain enough. The cities, through their ownership of the bridge, rested under

every liability which the obligation and duties of ownership might give rise to. The bridge trustees were substituted in the place of the cities as the parties to be responsible thereafter for breaches of contract or for torts, and they succeeded to whatever liabilities the cities might come under by virtue of their ownership. The succession of liability was prospective, and obviously meant that they came into the place of the cities with respect to whatever causes of action might arise, and which, but for the act, would be enforceable against the cities.

We think the judgment should be affirmed, with costs, and that this is a case in which the penalty of 10 per cent. damages should properly be enforced, under section 3251, Code Civil Proc. subd. 5. All concur.

(139 N. Y. 422)

#### In re CITY OF BUFFALO.

(Court of Appeals of New York. Oct. 10, 1893.)

#### CONSTITUTIONAL LAW — EXTENDING POWER OF COURT—CONDEMNATION PROCEEDINGS.

The superior court of Buffalo having territorial jurisdiction coextensive only with the city limits, Laws 1887, c. 557, purporting to confer on that court jurisdiction of proceedings to condemn, for park purposes, lands outside the city, is inoperative and void. 18 N. Y. Supp. 771, affirmed.

Appeal from superior court of Buffalo, general term.

Proceeding by the city of Buffalo to acquire lands for park purposes. A judgment at special term (15 N. Y. Supp. 858) confirming the taking of certain lands in West Seneca owned by Miles Wasson was reversed at general term, (18 N. Y. Supp. 771,) and the city appeals. Affirmed.

George M. Browne, (W. F. Mackey, of counsel,) for appellant. Tabor, Sheehan, Cunneen & Coatsworth, (John Cunneen, of counsel,) for respondent.

GRAY, J. This is an appeal from an order of the general term of the superior court of Buffalo which reversed an order of the special term confirming the reports of commissioners in proceedings by the city of Buffalo to ascertain the compensation to be paid to the owners of lands within that city and the town of West Seneca, appropriated for park purposes, pursuant to chapter 557 of the Laws of 1887. This respondent, Wasson, was a resident of the town of West Seneca, and, when the motion for the confirmation came on to be heard, he objected that the court was without jurisdiction. He says that the act of the legislature could not confer jurisdiction upon the superior court to determine the compensation to be made for taking land not situate within the limits of the city of Buffalo.

In deciding the question thus raised, we must consider what were the provisions of the act, and whether, in attempting to vest in the superior court the power or jurisdiction to entertain the proceedings for the ascertainment of the compensation to be made to owners of lands outside of the city, the legislature was without au-

thority, under the constitution, to do so. By the first section of chapter 557 of the Laws of 1887 the park commissioners of the city of Buffalo were authorized to select and locate such grounds in the Thirteenth ward of the city, and in the town of West Seneca, adjoining that city, as might be, in their opinion, proper and desirable to be reserved for one or more public parks, and to locate and lay approaches thereto and streets connecting with the existing system of public parks. The second section provided that, before the lands shall be taken, the common council of the city shall by resolution declare that the city has determined to appropriate the said lands for the purposes aforesaid. The same section provides for a notice to be published by the city of an application to the superior court of Buffalo for the appointment of three commissioners to ascertain and report the just compensation to be paid to any person owning or having an interest in the property. Subsequent provisions of the act prescribe the proceedings to be taken by the commissioners, and such as should be had in the court named, upon the filing of their report, with respect to its confirmation, to the persons to whom the compensation is to be paid, and to cases where, there being adverse claimants to the money, a determination of their rights is to be made by the court. The superior court of the city, upon which the act thus attempted to confer the jurisdiction to entertain these proceedings, and to hear and determine the various questions which might arise, either upon the coming in of the commissioners' report, or because of what had been done in the matter, was originally created as a local court of record, the jurisdiction of which was confined to the determination of "local actions arising in said city, and not elsewhere." When first created by the legislature, in 1839, it was as a court of civil jurisdiction, to be called the "Recorder's Court of the City of Buffalo." The constitution of 1846 defined the powers and jurisdiction of the several courts, and confirmed and continued all local courts established in any city and village in the powers and jurisdictions then possessed by them. In 1854 the legislature changed the name of this court to the "Superior Court of Buffalo," and enlarged its jurisdiction so as to include, among others, actions or proceedings for the recovery of real property, or which affected any rights or interest therein, provided the cause of action arose, or the subject thereof was situate, in the city of Buffalo. In 1869, by an amendment of the judiciary article of the constitution, the superior court of Buffalo and the local courts in the state were continued "with the powers and jurisdiction they then severally had, and such further civil and criminal jurisdiction as may be conferred by law." There was subsequent legislation respecting this court, but none which it becomes necessary to notice here. What has been described is sufficient for the questions to be discussed. It is certain that, outside of the act in question, under which the lands were appropriated, there can be found no law warranting the superior court of

Buffalo in entertaining jurisdiction over the owner of lands situate outside of the limits of the city of Buffalo. Its jurisdiction was local, and confined to the territorial limits of the city. If jurisdiction has been conferred upon it, by the act of 1887, to entertain these proceedings and to determine all questions which may arise in their progress, then the exercise by the legislature of such a power must find its warrant either in the proposition that the appropriation and condemnation of lands for this public use were purely and continuously a legislative proceeding, for the conduct of which, power was delegated to the court named, acting therein not judicially, but exercising, in a supervisory way, control over the legislative proceeding, or otherwise the proposition must be established that the power of the legislature to vest this extraterritorial jurisdiction in the court named, so as to extend it to and over the owners of lands outside of the city limits, was one which the constitutional amendment of 1869 authorized when it continued local courts in the jurisdiction then possessed, and "such further civil and criminal jurisdiction as may be conferred by law."

The latter proposition may first be dismissed as untenable. It was really involved and decided in the decision of the case of *Landers v. Railroad Co.*, 53 N. Y. 450. It had been argued there that the legislature was authorized to enlarge the jurisdiction of the city court of Brooklyn, one of the local courts mentioned in the constitution, so as to permit its process to extend beyond the city limits, or throughout the state; but this court held that the terms in which the authority for enlarging the jurisdiction of the court was given did not imply an authority to confer jurisdiction, either of subjects, or causes of action, or persons, outside of the boundary lines of the city of Brooklyn, or in any respect to make it aught else than a local court, as it was originally organized, and as it was continued upon the adoption of the amended judiciary article. It was said that "the terms 'civil' and 'criminal,' when used in reference to jurisdiction, or judicial proceedings generally, had respect to the nature and form of the remedy and the cause of action, or occasion for instituting legal proceedings;" and, again, that "when the constitution speaks of further civil and criminal jurisdiction it has respect to the object of the jurisdiction, and not to the territory or persons of suitors." The opinion, delivered by Judge Allen, very elaborately discussed the question of the power of the legislature to confer jurisdiction upon the constitutional local courts over causes of action originating outside of the territorial limits of the tribunal and decided it adversely to that contention. Its reasoning is sufficient to dispose of the proposition here.

It is rather upon the first proposition that, as I understand his opinion, the learned judge at special term has rested his decision. It was his opinion that the power exercised by the court was not judicial, but administrative; that there was no cause of action to adjudicate upon, and no judicial proceeding was involved.

He held that the court takes no property by force of the exercise of judicial power, and determines no right with respect to such taking, but exercises a "supervisory control of a proceeding instituted by the sovereign power," and performs such duties as are incidental to the taking. He holds that the court is not required to act judicially with respect to the proceedings called for by the act; and he also suggests that, if the judicial power be invoked, nevertheless, as the power was to be exercised in the process of a resumption of the possession of lands for public uses by the people, through its representatives in the legislature, it might be competently exercised *pro tanto*. The learned judge, apparently not looking beyond the aspect of the whole matter as one for the taking of lands for public purposes by the right of eminent domain, considers the successive steps following upon the selection by the city, and required to consummate the taking, as but parts of the legislative action, and the court designated in the act as acting incidentally in the matter as the mere hand or administrator of the sovereign power. We are unable to agree with him in his view. The difficulty with it is that it incorrectly defines the legislative action. What the legislative body has done is to delegate power to take lands to certain municipal officers, and to direct them to bring the proceedings for condemnation in a court where, as between the city and the landowners, the latter may have their day for the hearing of their objections. The lands may be regarded as appropriated to the public use described when the officers vested with the power to select them have performed that duty; but it is readily conceivable that questions other than such as relate to the regularity of procedure may arise touching the validity and the mode of the exercise of the power, or the rights of individuals, which the tribunal must pass upon with judicial force. The power of the tribunal in such respects must necessarily be independent and exercised judicially. The exercise of the undoubted right to appropriate private property to public uses, under that power of eminent domain which resides in the legislature, as representing the people of the state, is subject to certain limitations imposed by the constitution and restricting the powers of the legislative body, and which operate to secure to the property owner the right to have all questions which are referred to a tribunal determined by a tribunal which is competent, as possessing the vested jurisdiction over him and his estate. The power to select or to locate the lands to be used may be delegated; but the proceedings which are instituted thereupon in a court for the purpose of determining the question of just compensation, and for carrying into effect the legislative provisions, must be conducted in a court, the jurisdiction of which extends over the subject-matter. The requirements of the constitution that no person shall be deprived of property without due process of law, and that no private property shall be taken for public use without just compensation, mean and exact that the proceedings

to determine the just compensation to be paid to land owners shall be in a court of competent jurisdiction, whose process, reaching to the person, brings him into a forum where the question of compensation shall be duly adjudged. To delegate that determination to a local court possessing no extraterritorial jurisdiction in the case of nonresidents was an unauthorized act. It devolved upon it duties which were plainly judicial in their nature, and of a scope involving more than mere ministerial or administrative action. The constitution provides that the just compensation for the taking of private property is to be made "by a jury, or by not less than three commissioners appointed by a court of record." It is obviously intended that the court of record shall be one of competent jurisdiction, as that, if the act had provided the determination should be by a jury, the jury should be a body composed as such bodies usually are by law. If the legislature requires the resort to the agency of a court of record to determine the compensation to be made in the case of the taking of lands, it must designate a court which, with respect to the subject-matter and persons, is competent, as possessing lawful jurisdiction over them. That is the natural and proper sense in which the constitutional requirement as to a court of record should be read.

The difference of views in this case has arisen in the failure to observe the distinction between the exercise of the legislative power in the appropriation of the lands to a public use, and the proceedings which are taken subsequently, for the purpose of making compensation. There is no question about the power of the legislature to authorize such an appropriation, and to prescribe the manner in which the selection or location of lands may be made; but, for the determination of all questions as to which the owners have a right to be heard, it is a constitutional, and therefore a fundamental requirement, that they shall be remitted to a court within the jurisdiction of which they and their properties are. That the proceedings in question are judicial in their nature is a question about which we entertain no doubt. The questions which might be raised for determination, whether relating to the constitutionality of the act itself, or to the procedure prescribed, or to the value of the land and the award of compensation, its amount, and to whom due, are such as are of judicial cognizance. In the brief of the respondent's counsel, cases are cited to establish that proposition, which need not be particularly referred to here. In *Monongahela Nav. Co. v. U. S.*, 148 U. S., at page 327, 13 Sup. Ct. Rep. 622, it was very recently held by the United States supreme court, with respect to certain legislation determining the measure of the compensation, that "the legislature may determine what private property is needed for public purposes, that is a question of a political and legislative character; but, when the taking has been ordered, then the question of compensation is judicial. The constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry." In

DIII. Mun. Corp. § 619, the same view is taken. It is the correct and sound view. When the legislature has authorized an appropriation of private property for public purposes and remits the matter of compensation to the court, it intends that a proceeding judicial in its nature shall be set on foot, in which every question may be raised by the landowner, and there and then determined, which affects his rights. What is the reason for requiring a notice to be given of the application to the court for a confirmation of the commissioners' report, except that thereby an opportunity is afforded for parties interested in the matter to appear and to be heard in objection, before a tribunal which has been vested with authority to determine and to adjudge upon the questions and issues raised by their objections? Any other view tends to a subversion of the constitutional rights of the landowner and deserves no encouragement from the courts. The conclusion we have reached is that for the reasons stated, as to this respondent, chapter 557 of the Laws of 1887 was inoperative and void.

We have not overlooked the cases of *In re Church*, 92 N. Y. 1, and of *In re Mayor of New York*, 99 N. Y. 569, 2 N. E. Rep. 642, referred to by the learned judge at special term. In the first case the present question was not decided, and the second case is not in point, inasmuch as the tribunal there appointing the commissioners was a court of general jurisdiction, possessing power and authority competent for the purpose. The order of the general term should be affirmed, with costs. All concur.

(139 N. Y. 524)

**PEOPLE ex rel. CLANCY v. BOARD OF SUPRS OF WESTCHESTER COUNTY.**

(Court of Appeals of New York. Oct. 24, 1893.)

**BOARD OF SUPERVISORS—ELECTION—CONSTITUTIONAL LAW.**

An act adopting or amending a city charter, though it provides for the election of a supervisor for each ward instead of one for the whole city, as before, is not an act "providing for the election of members of the board of supervisors," within the meaning of Const. art. 3, § 18, prohibiting the passage of a special act for that purpose.

Appeal from supreme court, general term, second department.

Mandamus on the relation of Jeremiah Clancy to compel the board of supervisors of the county of Westchester to recognize relator as a member. From a judgment of the general term affirming an order granting the writ, defendant appeals Affirmed.

Wm. H. Robertson and Wm. Romer, for appellant. Joseph H. Daly, for respondent.

**FINCH, J.** By an act of the legislature amending the charter of the city of Yonkers (Laws 1892, c. 54, § 4) it was allowed a supervisor for each ward, to be "elected by the electors of their respective wards." At the annual town election in 1892 no su-

pervisor for the whole city was elected, and Jacob Read, who was chosen the previous year, claimed to hold over, and be and remain the sole supervisor of the city; but on the last Tuesday of March in that year the relator was duly elected supervisor of the Fourth ward, by virtue of the amendment of the charter allowing a supervisor for each ward. The Revised Statutes provide, and the county act of 1892 (chapter 686, art. 2, § 10) substantially repeats, that the board of supervisors shall consist of the supervisors of the cities and towns in each county. The relator, therefore, if legally elected a supervisor for the Fourth ward of the city, became, under the general statute, a lawful member of the board of supervisors of Westchester county, and entitled to a seat in that body. When the board met, Jacob Read appeared and claimed to be recognized as the sole supervisor of Yonkers, upon the ground that the charter amendment of 1892, giving supervisors to the several wards, was in violation of the constitution, and null and void. The board, acting upon that theory, refused to admit the relator, and denied his right to act with them, although he appeared and demanded his seat, and Read was recognized as supervisor of Yonkers by reason of his holding over in default of a successor duly elected. The relator therefore applied to a special term of the supreme court for a peremptory mandamus requiring the board to recognize him as a supervisor of the city of Yonkers, and permit him to act as a member of the board. The writ was awarded, whereupon the defendant appealed to the general term, which affirmed the order, and the board then took an appeal to this court.

The sole question thus presented is whether the act of 1892, amending the city charter, is constitutional. In defending their position the board rely upon article 8, section 18, of the constitution, which commands that "the legislature shall not pass a private or local bill in any of the following cases," one of which is "providing for election of members of board of supervisors." It is not altogether easy to understand what this provision was intended to forbid. Members of the board of supervisors are never elected as such, but hold that office and perform its duties under a general law, and by force of their election as supervisors of separate towns or cities. We shall better understand what the prohibition was intended to cover if we first consider the situation as to supervisors of towns, and then as to supervisors of cities. The constitution provides (article 2, § 5) that "all elections by the citizens shall be by ballot, except for such town officers as may by law be directed to be otherwise chosen." Here was permission for the legislature to authorize the election of town supervisors, not only by ballot, but after the old town meeting fashion of calling for the yeas and noes, or by a show of hands or other division. As to some town officers, the statute still permits these ancient methods of choice. The legislature ordained (1 Rev. St. pt. 1, c. 11, art. 1, tit. 3) that the supervisor should be elected by ballot,

and also other named town officers, and then the law proceeds thus: "All other town officers shall be chosen either, 1, by ballot, 2, by ayes and noes, 3, by the rising or dividing of the electors, as the meeting may determine." So that, under the fundamental law, it was competent for the legislature to permit the election of a supervisor by either one of the three specified methods of voting, so far as towns were concerned.

The constitution further provided, (article 3, § 22,) in constituting the board of supervisors, that it should be "composed of such members and elected in such manner and for such period as is or may be provided by law;" that is, what members should constitute the board, the manner of their election, and their terms of office were details committed to the discretion of the legislature, and that body could enact laws providing for the election of supervisors by ballot, or ayes or noes, or an actual division, and could fix their terms of office. It could also, as it did, determine the times and places of holding such elections. 1 Rev. St. pt. 1, c. 11, tit. 2, art. 1, §§ 1, 2. Now, all these details could be, as they had been, properly regulated by general laws applicable to all the towns alike, and great mischiefs would result if, by the operation of local laws, all uniformity should be lost, and each town be suffered to go its own independent way; and hence it was that in 1874 the discretion of the legislature in these respects as to the important office of town supervisor, which had been exercised by general laws, was required to be so exercised in that manner only, and never by mere local bills. The prohibition, therefore, had a wide range of application to town supervisors, and prevented the passage of local bills giving one town power to choose its supervisor by a different mode of voting, at a different dictation of time and place, and for different official terms from other towns of the state.

If, then, the constitutional provision related to city supervisors, it would be natural to confine it to a similar class of details. But I do not think it relates to them at all, because of the manner in which they come into existence. Cities acquire their corporate life by force of special, several, and purely local acts of the legislature, which creates and frames them in the regular exercise of governmental functions. They have never been created by general laws, and cannot easily or prudently be organized in any other method than by special and local enactments. It may be possible to frame some general law under which cities could be organized, but difficulties would spring up in many directions, and the probable result would be some broad and general outline still requiring to be supplemented by more or less of special legislation. Wards would be unequal, and to give a supervisor in all cases to each might in some instances give the city more power in the county than would be just, or more even than was desired. But, conceding the possibility, it had never been realized or attempted to be realized when

section 18 of the constitution was adopted, and cities had always been organized by special charters. The constitution permitted that mode of organization, for in requiring villages to be chartered by general laws, and omitting cities, it recognized the propriety and necessity of leaving the latter to be organized by local laws. But that permission must necessarily extend to and cover all the proper subjects of a city charter, and among them are, undoubtedly, the division into wards, and the allowance of a supervisor in each, or in so many as should be prudent and satisfactory. A charter which left that out, and excluded the city from having a supervisor at all, would be a maimed and imperfect exercise of the power of city organization. And a law which so creates and charters and organizes a city is not, within the constitutional meaning, a local law "providing for the election of members of the board of supervisors," because, as a local law for the organization of a city government, it divides the municipal area into wards, and gives each its own supervisor. Any other view brings the constitutional provisions into discord and contradiction. To uphold the contention of the defendant will compel us to say that what the constitution permits to be done by a local law it also forbids to some extent by mere indirection and inference; that its authority to organize city governments is maimed and distorted by a prohibition applying to one of its necessary and customary details; and that the framers of the constitution meant not only to prevent one group of obvious evils, but in the process to introduce and set in operation another. A general law for the organization of cities, if possible, would be quite likely to prove inadequate. A city on the seaboard has necessities widely different from one inland, and the care of a large population is quite unlike that of a small one. The work is best done by a local charter, and to say that because of that the framers of the constitution, and the people in adopting it, meant to deprive a city of its ward supervisors, and, as a consequence, of adequate representation in the county legislature, and that, too, not directly, but through an inference from a prohibition having its own proper field of operation, is to misapprehend the constitutional intent, and set the instrument in some degree at war with itself. The legislative and judicial construction has been very generally in the direction of that which we here adopt. Cities all over the state have been supplied with supervisors by the local law of their charters, and, while consequences should never frighten us from seeking out and declaring the truth, they are sometimes valuable aids in ascertaining what that truth really is. The courts have many times, in the construction of section 18, been required to prefer the spirit and intent of the law to its rigid and arbitrary letter; and in one case, at least, the necessity of local legislation to accomplish a lawful and useful result was deemed a sufficient reason for holding that the prohibition of section 18 was not



intended to apply, and should not apply, to prevent the desired result. In re Union Ferry Co., 98 N. Y. 150. And so, taking into view all the provisions relating to the general subject, we are of opinion that an act adopting or amending a city charter, although it provides for ward supervisors, is not an act "providing for the election of members of the board of supervisors," notwithstanding the fact that under a general law such supervisors become ex officio members of such board. It follows that the peremptory mandamus was properly allowed, and the order should be affirmed, with costs. All concur.

(139 N. Y. 644)

**PEOPLE ex rel. McGRATH v. BOARD OF SUP'RS OF WESTCHESTER COUNTY.**

(Court of Appeals of New York. Oct. 24, 1893.)

Appeal from supreme court, general term, second department.

Mandamus on the relation of Thomas F. McGrath against the board of supervisors of Westchester county. From a judgment of the general term (23 N. Y. Supp. 419) affirming an order granting the writ, defendant appeals. Affirmed.

PER CURIAM. Order affirmed, with costs, on authority of People v. Same Defendant, 34 N. E. Rep. 1106.

(139 N. Y. 644)

**PEOPLE ex rel. McPHERSON v. BOARD OF SUP'RS OF WESTCHESTER COUNTY.**

(Court of Appeals of New York. Oct. 24, 1893.)

Appeal from supreme court, general term, second department.

Mandamus on the relation of William H. McPherson against the board of supervisors of Westchester county. From a judgment of the general term affirming an order granting the writ, defendant appeals. Affirmed.

PER CURIAM. Order affirmed, with costs, on authority of People v. Same Defendant, 34 N. E. Rep. 1106. All concur.

(146 Ill. 603)

**JOLIET STEEL CO. v. SHIELDS.<sup>1</sup>**

(Supreme Court of Illinois. June 19, 1893.)

**MASTER AND SERVANT—NEGLIGENCE—EVIDENCE—FELLOW SERVANTS—INSTRUCTIONS—HARMLESS ERROR.**

1. A steel manufacturing company was in the habit of running molten steel into iron molds, which would stand upright when empty but were apt to fall over when the steel, after hardening, was left inside of them. After the steel cooled enough to retain its shape, the molds were usually removed, and placed on end in another part of the mill. When the steel stuck to the mold, the mold was laid on its side, to prevent its falling. Held, that evidence that plaintiff was injured by the falling on him of a mold in which the steel still remained, the mold having been removed to the place where empty molds were kept, and left there standing upright, without any attempt to

ascertain whether it stood firmly, was sufficient to make out a prima facie case of negligence against the company. 45 Ill. App. 453, affirmed.

2. Men employed by a steel manufacturing company to keep in repair the railroad tracks in the mill, who do their work while the workmen who make steel in the mill are away, are not the fellow servants of such workmen. 45 Ill. App. 453, affirmed.

3. Where, in an action by a servant against his master for personal injury, there is a verdict for the plaintiff, and it clearly appears that the employe whose negligence caused the injury was not the plaintiff's fellow servant, giving an instruction which erroneously limits fellow servants to persons in the same line of employment is harmless error. 45 Ill. App. 453, affirmed.

Appeal from appellate court, second district.

Action on the case by Benjamin Shields against the Joliet Steel Company. Plaintiff obtained judgment, which was affirmed by the appellate court. Defendant appeals. Affirmed.

Garnsey & Knox, for appellant. J. W. Downey and Haley & O'Donnell, for appellee.

CRAIG, J. This is an appeal from a judgment of the appellate court for the second district, affirming a judgment of the circuit court of Will county, rendered against appellant in favor of appellee in an action to recover damages for the loss of a leg while the appellee was engaged in the service of the appellant. The case has been twice tried. The first judgment was reversed on the ground that the declaration was insufficient. Steel Co. v. Shields, 184 Ill. 209, 25 N. E. Rep. 569. After the cause was remanded the declaration was amended, and a second trial resulted in a judgment for \$5,000 for the plaintiff, which was affirmed in the appellate court. 45 Ill. App. 453. The opinion of the appellate court contains a full statement of the facts, and it will not be necessary to repeat them here. It was averred in the second count of the declaration: "And for that, whereas, on, to wit, the 10th day of August, A. D. 1887, the defendant was possessed of and operating a certain mill known as a 'converting mill,' at the county aforesaid, in which converting mill molten steel was poured from certain ladles into certain large molds, and said molds were by the servants of defendant placed and deposited in various positions upon the floor of said mill, and on, to wit, the date aforesaid, plaintiff was in the employ of defendant, and it was, among other things, the duty of plaintiff to repair a certain railroad track within said converting mill; and the plaintiff avers that it was then and there the duty of the defendant to keep all appliances and material near to said railroad track in a secure and safe condition, so that the same should be reasonably safe for employes who in the discharge of their duties were engaged in working upon said railroad track; and on, to wit, the date aforesaid, the plaintiff was in the discharge of his duty aforesaid, and in the exercise of ordinary care and caution engaged in repairing said railroad track

<sup>1</sup> Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

within said converting mill; and on, to wit, the date aforesaid, the defendant, by its agent and servants, who were not then and there fellow servants of the said plaintiff, nor consociated with him, the said plaintiff, in the performance of his duties for the said defendant, carelessly and negligently placed and deposited a certain iron mold, filled with steel, and of great weight, to wit, of the weight of three tons, upon one end and leaning against certain other molds near to said railroad track, and in an insecure and unsafe position, and suffered and permitted the same to remain in such unsafe and insecure position for, to wit, the period of three hours; and while the plaintiff was so engaged in repairing said track said iron mold, by reason of its unsafe and insecure position, slipped and fell upon said railroad track, and upon the right leg and foot of the plaintiff, crushing and breaking the foot, ankle and bones of plaintiff's leg in such a manner that the same had to be amputated below the knee joint, by means of which," etc. Under this and other counts of the declaration which were similar, it is first contended that no negligence on the part of the defendant was proven, and hence no recovery could be had. It is said in the argument that the evidence merely discloses the fact that an accident happened; that the mold fell, and plaintiff was injured; and from this it is argued that no negligence was established. As between master and servant, it may be conceded that no presumption of negligence arises on the part of the master from the mere fact that the servant has been injured while in his employ. *Railroad Co. v. Houck*, 72 Ill. 287; *Kuhns v. Railway Co.*, 70 Iowa, 561, 31 N. W. Rep. 868; *Elevator Co. v. Neal*, 65 Md. 438, 5 Atl. Rep. 338; *Sack v. Dulesse*, 137 Ill. 139, 27 N. E. Rep. 62; *Provision Co. v. Hightower*, 92 Ill. 139. In an action of this character it is necessary to aver and prove negligence on the part of the defendant, and, if the record discloses the fact that plaintiff merely proved the falling of the mold and the injury, the judgment could not be sustained. But from a careful examination of the evidence found in the record we do not think the position of counsel is borne out by the facts as detailed by the witnesses.

The Joliet Steel Company, as appears from the evidence, has in its mill yard and buildings constituting the plant about 18 miles of railroad tracks. The plaintiff was foreman of a gang of men who had charge of these tracks, and it was his duty to keep the tracks in repair. Where tracks running into a building needed repairs it was usual to make such repairs after the men working in the building had quit work, and the repairs on what was known as the "Converting Mill" had always been made on Sunday, when no one was working in the building. In the converting mill steel was made from cast iron into ingots. Molds were provided in which the ingots were cast. The appellate court, from the facts in the record here, gave a condensed description of the molds and their use as follows: "These molds were of cast iron, ranging in height

from four to six feet, open at both ends, about eighteen inches square at the bottom, and tapering very slightly to the top, and weighing about a ton each. Each mold was set in the casting pit on a square plate of iron, which was concave on the upper surface, making the ingot when cast convex on the bottom. They each held, when full, about a ton of steel. The ladle was calculated to hold about seven tons, and to fill a set of the molds at each charge, but it sometimes happened that the last mold would be partially filled, and this was called a 'butt mold.' Adjacent to the pit was a large crane, and, after the steel had set in the mold so that it would retain its shape as an ingot, the molds were pulled off from the ingots by means of the crane, and the ingots were left in the casting pit, still at a white heat. The molds were then swung around, and placed on a bed made of railroad iron, for the purpose of cooling them off." It also appeared from the evidence that a railroad track of the company ran within two or three feet of this place where the molds were placed. After the mold was removed from the ingot, being square in the bottom, it would stand firmly, and was not liable to fall over; but if the mold for any reason could not be withdrawn from the ingot, the bottom of the ingot being rounded, it would not stand like an empty mold. It often occurred that a butt mold could not be withdrawn, and on Saturday, July 9, 1887, when those in charge undertook to remove the mold from the last heat, they found one mold containing a butt which could not be removed. The empty molds were removed by the use of the crane, and raised out of the pit, and placed standing in the railbed. The mold containing the butt was also hoisted, and left standing with the empty molds. After the men in the mill had quit work and left the mill, the plaintiff came in to repair a rail near where the molds were standing, and he had only removed a few shovels of dirt from the defective rail when the butt mold fell over in the track, and crushed his leg.

As respects the empty molds, there was no negligence in placing them as they were placed, because, when empty, they would stand firmly, and were not liable to fall, and thus endanger any person who might be required to labor near where they were placed; but it was different in regard to the butt mold. James M. Paten, who was working in the mill when the plaintiff was injured, and who was familiar with the method adopted in disposing of the molds, testified: "Molds that would not draw, they would take them out, and put them in the bank, and, if they could not knock the butt out, they laid them upon the side by the wall crane. They laid them flat down." The evidence of this witness was corroborated by others. It is therefore apparent that the rule adopted and carried out in the mill in regard to butt molds was to lay them down. On this occasion, however, the custom which had been adopted was not observed, but a butt mold, rounding on the bottom, was left by the men standing

on one end, with the empty molds. Within 20 minutes after it was thus left standing it fell over on the plaintiff. Here was evidence from which the jury might properly find that the servant of the defendant in charge of the molds was guilty of negligence, which resulted in the injury complained of. Had the prevailing custom in the mill in regard to butt molds been adhered to, it is apparent from the evidence that the accident resulting in the injury would not have occurred.

It is also claimed that the court erred in giving instruction No. 1 for the plaintiff, and refusing Nos. 7 and 9 for defendant. These instructions relate to the law on the question of fellow servants. In the first part of the one given, fellow servants are limited to persons in the same line of employment. We do not regard this as an accurate statement. Persons may be fellow servants although not strictly in the same line of employment. One person may be employed to transact one department of business, and another may be employed by the same master to transact a different and distinct branch of business; but, if their manual duties bring them into habitual association, so that they may exercise a mutual influence upon each other, promotive of proper caution, such persons might be regarded as fellow servants. *Rolling-Mill Co. v. Johnson*, 114 Ill. 64, 29 N. E. Rep. 186. But if the statement of the law of fellow servants found in the instruction was inaccurate, and if the court also erred in refusing the two instructions of defendant on the same subject, we do not regard the ruling in the instructions sufficient ground to reverse the judgment. The plaintiff, as said before, was foreman of a gang of men whose duty it was to keep in repair the various tracks belonging to the defendant. They had nothing to do with the workmen who were employed in the converting mill, who were making steel from iron. The duties of the two sets of men never brought them together in the discharge of their respective duties. So far as appears, they never met; indeed, their duties were as disconnected as if they were employed by different masters, and performed their labor in shops having no connection whatever with each other. There was, therefore, no evidence in the record tending to establish the relation of fellow servants between the plaintiff and the servants of the defendant who had charge of the molds, and the court could not be required to give any instructions on this subject. All that was asked on that subject ought to have been refused, but the one given could not mislead the jury, although it did not contain an accurate statement of the law. The judgment of the appellate court will be affirmed.

On Rehearing.

(Oct. 25, 1893.)

**PER CURIAM.** In the petition for a rehearing it is claimed that the servants of the defendant on the day of the accident placed the molds in the same position that they had previously done; that the custom of the mill was fully observed in this

particular, and that the court in its opinion has misapprehended the evidence on this branch of the case. We will briefly refer to some of the evidence bearing on this question. Paten testified that he was present when the mold which injured the defendant was placed near the tracks defendant undertook to repair. He testified that when the draw gang lowered the mold they took the chains off and left it. Then followed the following questions and answers: "Did this draw gang do anything to this mold except unhook from it, and leave it there? Not that I saw. Did you see anybody around this mold after the chain was loosened from it? No, sir. What was the usual position in which they placed butt molds, or molds that would not draw? Molds that would not draw, they would take them out, and put them on the bank, and, if they could not knock the butts out, they laid them one side there with the wall crane. In what position did they lay them,—as to laying them down or standing them up? Laid them flat down. Question 91. Have you seen many butt molds, or molds that would not draw, laid out there at the time you worked in the mill? Answer. Yes, sir; I have seen quite a few. Q. 92. You may state as to whether they stood them up or laid them down. A. I said if they would not draw they would take and lay them down, and if they stood them up they would let them stand. Q. 93. By laying them down you mean by setting them down on end? A. Laying them flat down. If they would not stand up, they would lay them flat down. If they stood up, they would let them stand,—stand for once they got time to drop them." The witness also testified as follows: "Did you notice where the empty molds were placed that evening? They were placed on the east side. How near this railroad track? Well, about three feet and one-half from it. Q. 57. Were they standing up or lying down? A. They were standing at the time I seen them. Q. 58. What was the usual position in which they placed the empty molds? A. They always stood them up. Q. 62. Was there any butt mold on that bed that evening? A. Well, that was the only butt mold I seen. The last mold that was laid on there was the only butt mold I seen. Q. 63. Was this butt mold laid—how near the empty mold? A. Laid the butt mold alongside of it. Q. 77. Did you see this butt mold placed out there? A. Yes, sir; I did. Q. 81. Did you see the crane deposit the mold in that place? A. Yes, sir. Q. 82. What was done with it then? A. Well, when the mold was lowered there, they took the chains off it." Butler testified that when a butt mold did not stand right, or the gang hands who lowered it had any doubt about it standing, they would pull it down with steel or iron hooks. Then followed the following questions and answers: "Question 225. The hooks were drawn by the men? Answer. Yes, sir; drawn by the men. Q. 226. How many would pull it by the hooks? A. Supposed to be three men in the draw gang. Q. 227. Three men were supposed, as I understand you, to take hold of the

hook, and pull on this mold, and pull it down onto the floor? A. Either one of the three. Q. 228. Either one of the three? A. Yes, sir. Q. 229. If it appeared to be standing all right, and not leaning any way, was it the habit to pull on it with this hook at all? A. It used to be. I have often seen them do it,—pull most any of the molds if they doubted they was not perfectly,—any mold with a butt in it. Q. 230. Would they pull it down if they doubted it? A. Yes, they would do it. They would pull it down if it didn't stand up in pretty good shape. They would lay it down." From the evidence of the first witness above mentioned the jury might reasonably conclude that the practice of the defendant company was not to leave a butt mold standing, but to lay it down, so that no one might be injured whose business required him to pass near where the mold was placed; and in this case the servants of the defendant lowered the mold, removed the chains, and left it standing, disregarding the usual practice. From the testimony of the other witness referred to above it appears, and the jury had the right so to find, that it was the habit of the gang men who lowered a butt mold to pull on it with hooks, and ascertain if it would stand, and, if it would not, then lay it down. In this instance no such precaution was taken, the mold being lowered, chains removed, and no effort whatever made to determine whether it would stand or fall. From what has been said it seems plain there was evidence before the jury tending to prove that the servants of the defendant did not handle the molds in the same manner that they had previously done, and hence were guilty of negligence. If the evidence tended to establish negligence, then the court did not err in refusing the instruction requiring the jury to find for the defendant. The petition for a rehearing will be denied.

(146 Ill. 533)

**WABASH WESTERN RY. CO. v. FRIEDMAN.<sup>1</sup>**

(Supreme Court of Illinois. March 25, 1893.)

**CARRIERS—INJURIES TO PASSENGERS—PLEADING AND PROOF.**

1. Where, in an action for personal injuries, the declaration alleges that the plaintiff was a passenger on defendant's train between certain stations, and the proof shows that plaintiff was a passenger between two other stations, the termini alleged being the intermediate stations between which the accident happened, the variance is not fatal, the declaration being sufficient as a declaration upon defendant's common-law liability as a carrier. Per Magruder, J., dissenting.

2. An allegation that plaintiff "was hindered and prevented from transacting and attending to his business and affairs, and lost and was deprived of divers great gains, profits, and compensations which he otherwise would have made and acquired," is a sufficient allegation of special damage to justify the admission of evidence that plaintiff at the time of his injury was receiving a salary of \$3,000 per an-

num as a traveling salesman. Per Bailey, C. J., and Magruder and Baker, JJ., dissenting.

On rehearing. Denied.

For former opinion, see 30 N. E. Rep. 353.

MAGRUDER, J., (dissenting.) It seems to me that the petition for rehearing in this case has demonstrated beyond question the right of the appellee to a rehearing. First, the declaration is sufficient as a declaration upon the common-law liability of the carrier; second, the declaration alleges that the plaintiff "was hindered and prevented from transacting and attending to his business and affairs, and lost and was deprived of divers great gains, profits, and compensations, which he might and otherwise would have made and acquired." This was a sufficient allegation of special damage to justify the admission of evidence that plaintiff at the time of the injury was receiving a compensation for his services as a traveling salesman of \$3,000 per annum, under the decision made in *City of Bloomington v. Chamberlain*, 104 Ill. 268. In the latter case the allegation in the first count of the declaration was that "plaintiff was limited from transacting her business and affairs and deprived of large gains and profit which she otherwise would have earned," and, in the second count, "that she had been rendered unable to earn or make for herself a living, and had been deprived of large gains and profits which she otherwise would have earned." Under these allegations the plaintiff was there permitted to testify that she had taught school at \$50 per month. If the law is a science of precedents, no instance can be found where a precedent so exactly fits a subsequent state of facts as the *Chamberlain Case* fits the facts disclosed by the record in the case at bar upon the second point here designated.

BAILEY, C. J., and BAKER, J., concur.

(146 Ill. 533)

**MILLER v. WILSON.<sup>1</sup>**

(Supreme Court of Illinois. March 31, 1893.)<sup>2</sup>

**CONFLICT OF LAWS—STATUTE OF FRAUDS—PAROL CONTRACT FOR SALE OF LAND.**

A parol contract for the sale of land in another state, executed in that state, is enforceable in Illinois in the absence of any proof that the laws of such state require such contracts to be in writing, since a contract valid where executed is enforceable, even, though it would be invalid if executed in the state in which suit is brought. 42 Ill. App. 332, reversed.

Appeal from appellate court, second district.

Assumpsit by Matthew M. Miller against Robert R. Wilson. Plaintiff obtained judgment, which was reversed by the appellate court. Plaintiff appeals. Reversed.

The other facts fully appear in the following statement by CRAIG, J.:

This was an action of assumpsit brought by Matthew M. Miller against Robert R.

<sup>1</sup> Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

<sup>2</sup> Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

<sup>3</sup> Rehearing pending.

Wilson to recover a balance due on the purchase price of certain lots in Clay Centre, Kan., under an alleged contract of sale made by Miller to Wilson. The declaration contained two special counts and the common counts. The first special count was, in substance, as follows: That on the 21st of October, 1887, at Clay Centre, Kan., plaintiff sold defendant lots 5, 6, and 7, block 1, Miller's addition, in consideration of \$1,000, as follows: \$100 down, and \$900 to be paid January 21, 1888. That defendant paid plaintiff \$100, and the plaintiff made the following memorandum in writing of the sale, in the defendant's presence and at his request, and signed by plaintiff and delivered to defendant, who accepted and received it as a true memorandum of the contract. That the name of defendant was written in the body of said memorandum, and adopted as his signature thereto, which memorandum is as follows, to wit: "Law office of M. M. Miller, Clay Centre, Kansas, Oct. 21, 1887. Received of R. R. Wilson \$100 in cash, in consideration of which, and a further payment of \$900, to be paid on or before 21st of January, 1888, I agree to convey to him by warranty deed lots five, (5,) six, (6,) and seven, (7,) in block one, (1,) of M. M. Miller's addition to Clay Centre, Kansas. M. M. Miller." That though plaintiff was on, etc., at, etc., ready and willing and tendered and offered to deliver to defendant a warranty deed conveying to defendant the lots aforesaid, and requested defendant to pay plaintiff said \$900, yet defendant refused to accept the deed or pay the said sum of \$900. The second count set out more fully what was alleged to be a written memorandum of the contract, but it will not be necessary to set out the count here. The defendant pleaded the general issue and several special pleas, among which was the second: "That the supposed contract mentioned in the declaration was made concerning the sale of lands and tenements, and that no memorandum or note thereof was made in writing and signed by the defendant, or any other person lawfully authorized in writing to sign the same, according to the statute in such case made and provided." To second plea plaintiff replied that the several contracts and writings in said declaration were signed by the defendant according to the form of the statute in such cases made and provided, etc. On a trial of the case before a jury the plaintiff recovered a judgment for the amount claimed. The defendant appealed to the appellate court, where the judgment was reversed, and, as the court found the facts different from the finding of the circuit court, it recited in its final judgment the facts found, as follows: "(1) That the only cause of action on which a recovery is sought by appellee is the breach of an alleged contract of appellant for the purchase of real estate. (2) We find that such contract was not in writing, and that there was no memorandum or note thereof in writing, signed by appellant. (3) We find the only memoranda in writing signed by appellant were a letter written on the 24th of October, 1887, and a note written by him on the 23d of January,

1888, and that they were insufficient to charge and render liable the appellant under the statute of frauds. That the said letter is as follows: 'Windsor Hotel, Omaha, Neb., Oct. 24, 1887. Col. M. M. Miller—Dear Sir: Should I take a notion to buy the lot adjoining the three I bought, what would be your lowest price for it? I feel that I paid a pretty good price for the three lots, and would like a back lot if you can let me have it low enough. 120 by 140 is a small farm for \$1,000. Please advise me at Hanover, and oblige, yours, respectfully, R. R. Wilson.' That the said note is as follows: 'Monday Morning, 6:30, Jan. 23, '88. On account of sickness and disappointment in not having received funds ordered to meet this Saturday, I forfeit the above \$100, and relinquish all claim in the above lots. R. R. Wilson,'—which note was attached to the following receipt executed by appellee: 'Clay Centre, Kan., Oct. 21st, 1887. Received of R. R. Wilson \$100 in cash in consideration of which, and the further payment of \$900 to be paid on or before the 21st of January, 1888, I agree to convey to him, by warranty deed, lots 5, 6, and 7, of block one, in M. M. Miller's addition to Clay Centre, Kansas. [Signed] M. M. Miller.' (4) We find that the parol evidence in the record was incompetent to connect and aid the said receipt, letter, and note to make out a valid contract under the statute of frauds, and also insufficient, and we reject the same as evidence."

E. L. Bedford, for appellant. William Spensely, for appellee.

CRAIG, J., (after stating the facts.) Conceding the facts to be as found by the appellate court and recited in its judgment, the question is whether the judgment rendered by that court is one unauthorized by the facts. The contract sued upon was executed in Kansas, it related to lands in Kansas, and the appellate court reversed the judgment rendered in the circuit court on the contract on the ground that there was no memorandum signed in writing by the defendant, and that the contract was within the statute of frauds of this state, and hence an action could not be enforced upon it. It will be observed that the statute of frauds of Kansas, where the contract was executed, and where the property sold was located, was not pleaded, but the plea of the defendant set up the statute of frauds of this state. It will also be observed that the record contains no evidence whatever that the state of Kansas has enacted a statute of frauds, or that there is any law in that state requiring a contract relating to the sale of lands to be in writing. If, therefore, the contract in question was valid in Kansas, (and it must be so held in the absence of a law in that state to the contrary,) and is to be controlled by the laws of that state as to its validity, then the judgment of the appellate court was erroneous; on the other hand, if the contract is to be governed by the laws of this state, where the action was brought upon it, then the decision of the appellate court was correct. The ques-

tion, therefore, to be determined, is whether the *lex loci contractus* is to control, or whether the contract shall be governed by the *lex fori*. As a general rule, a contract valid in the state where it is executed may be enforced in another state. Thus, in *Roundtree v. Baker*, 52 Ill. 241, this court held, where an instrument executed in the state of Kentucky prior to the abolition of slavery for the purchase price of a negro slave sold there was sued upon in this state, that the contract, being valid and enforceable where it was made, will be enforced in our courts under the law of comity, notwithstanding such a contract could not have originated here, by reason of slavery being prohibited in this state. It is there said, "It is a general rule that we look to the law of the place where the contract is entered into, and not where it is to be enforced, to ascertain its validity; not only so, but in expounding its terms and conditions." Suth. St. Const. § 471, says: "The laws which exist at the time and place of the making of a contract determine its validity, construction, discharge, and measure of efficacy for its enforcement. A statute of frauds embracing a pre-existing parol contract not before required to be in writing would affect its validity." It is a familiar rule that the laws existing at the time and place of the execution of a contract enter into and form a part of the contract. Thus, in *Edwards v. Kearsey*, 96 U. S. 595, it is said: "It is the settled doctrine of this court that the laws which subsist at the time and place of making a contract enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This rule embraces alike those which affect its validity, construction, discharge, and enforcement." A very interesting case on this subject is *Cochran v. Ward*, (Ind. App.) 29 N. E. Rep. 795; and, as the opinion in that case refers to and quotes from a number of authorities, we quote from the language of the opinion: "In the case of *Low v. Andrews*, 1 Story, 38, it was held that a contract for the sale of goods in France, if valid there, would be enforced in this country, though within the statute of frauds here. In *Scudder v. Bank*, 91 U. S. 406, it was held that, in an action upon the parol acceptance of a bill of exchange to be performed in Missouri, the statute of frauds of the place of the contract should control, as it affected the formality necessary to create a legal obligation. The case of *Kling v. Fries*, 33 Mich. 277, was an action in Michigan upon a contract for the sale of goods in Ohio. It was held the Ohio statute of frauds applied. The case of *Houghtaling v. Ball*, 19 Mo. 84, was an action in Missouri upon a contract for the sale of wheat to be delivered in the state of Illinois. It was decided that the Illinois statute of frauds obtained. The case of *Anderson v. May*, 10 Helsk. 84, was an action in Tennessee upon a lease for lands in Arkansas. The court decided that the statute of frauds of the latter state should be allowed to control the contract. *Denny v. Williams*, 5 Allen, 1, was an action in Massachusetts upon a contract for the sale of wool in New York,

and the defendant set up the New York statute of frauds. The court held the answer good, saying as the contract was made in the city of New York, and was to be performed there, the laws of the state of New York must govern as in respect to its construction and performance. The supreme court of Louisiana, in *Vidal v. Thompson*, 11 Mart. (La.) 23, said an instrument, as to its form and the formalities attending its execution, must be tested by the law of the place where it was made. In *Pickering v. Fish*, 6 Vt. 102, the court used this language: 'As to the requisites of a valid contract, the mode of authentication, the forms and ceremonies required, and, in general, everything which is necessary to perfect or consummate the contract, the *lex loci contractus* governs, though with respect to conveyances or other contracts relating to real estate the statutory regulations of the place where such estate is situated must be observed.'

As observed before, the contract involved was executed in Kansas, related to property in that state, and was to be performed in Kansas. Under the authorities cited, the laws of Kansas entered into and formed a part of the contract, and if the contract was valid in that state, although it may be prohibited by our statute of frauds, our courts, under the doctrine of comity, on an action on the contract could no less than enforce it. If the laws of Kansas rendered the contract void or voidable for the reason that it related to lands and was not in writing, that was a matter the defendant was bound to plead and prove. As was held in *Smith v. Whitaker*, 23 Ill. 367, a contract made in another state or in a foreign country will be presumed to be made in accordance with the laws of the place of its execution, and a violation of those laws, if relied on as a defense, must be pleaded and proved. Here the defendant interposed a plea of the statute of frauds, but did not set up that it was the law of or a statute in Kansas. In the absence of an averment that the statute was one of another state, we will presume it was the statute of our own state. But if the defendant had pleaded the statute of Kansas he would occupy no better position, for the reason that no proof whatever was introduced tending to show what the statute or law of Kansas was. From what has been said, if we are correct, our statute of frauds, relied upon by defendant, was no defense. The judgment of the appellate court will be reversed, and the judgment of the circuit court will be affirmed.

(126 Ind. 421)

#### WOODRUFF v. BOWEN.<sup>1</sup>

(Supreme Court of Indiana. Oct 20, 1893.)

DANGEROUS PREMISES—FIREMEN—BUILDING ORDINANCE.

1. A fireman in the course of his duty goes on the roof of a building on fire as a mere licensee, and not as of right or by invitation of the owner.

2. The owner of a business building reasonably safe for the ordinary purposes of commerce is not obliged to strengthen it against extraordinary emergencies, such as the addi-

<sup>1</sup> Rehearing denied.

tional strain caused by throwing large quantities of water on the merchandise therein to check a fire.

3. A city ordinance made it unlawful to build or keep any unsafe building within the city, and required the owners to make such building safe within 12 hours after notice from the chief fire engineer; any building likely to fall or take fire being deemed "unsafe," within the meaning of the ordinance. *Held*, that the ordinance was designed to protect citizens and persons on business from the danger of falling buildings, and the city from that of fire, and did not regard the safety of firemen working at a fire.

Appeal from circuit court, Marion county; E. A. Brown, Judge.

Action by Mrs. Nancy E. Woodruff, administratrix of the estate of Henry D. Woodruff, deceased, against Silas T. Bowen, for damages for the death of plaintiff's intestate by defendant's negligence. Judgment for defendant. Plaintiff appeals. Affirmed.

H. N. Spaan and W. A. Ketcham, for appellant. Howland & Howe and Duncan & Smith, for appellee.

COFFEY, J. This was an action in the Marion county circuit court, brought by the appellant against the appellee, for actionable negligence resulting in the death of the appellant's decedent. The suit was brought for the benefit of the widow and children of the deceased. The complaint is in two paragraphs, to each of which the court sustained a demurrer. This ruling of the circuit court is assigned here as error. The able counsel for the appellant has prepared a synopsis of the complaint, the correctness of which is not disputed by the appellee, and for that reason we adopt it as a correct statement of the contents of the complaint. It is as follows: The first paragraph alleges that the decedent, Henry D. Woodruff, was in the employ of the city of Indianapolis as a fireman, and as such belonged to the organization known as the fire department of the city, which in turn was composed of a body of men duly appointed and acting under a code of rules, whose duty it was to put out any and all fires occurring within the limits of the city, the apparatus therefor being furnished by the city, and the compensation to the firemen and the cost of the apparatus being paid out of the city treasury. That as such firemen the deceased and his comrades were bound, whenever the alarm of fire was sounded, to attend and do all in their power to put out the fire, and while so doing were under the direction of the officers of the fire department. That on the 17th of March, 1890, a fire broke out in a building owned by the defendant, situate on Washington street, and deceased, with other firemen, in response to the alarm, went to the building to put it out. In attempting to so do, under the control and command of the chief of the fire department and his assistants, in the discharge of his duties as fireman, and under the orders of the officers of the fire department, he had gone upon the roof of the building, and while there in the course of his employment, it being a proper place for him to heat the time when the accident occurred, and while

he believed, and had reason to believe, that it was reasonably safe for him to be on the roof in company with the other firemen, the roof and other portions of the building, without warning, gave way, and precipitated the deceased and 11 other firemen into the basement of the building, midst the falling and burning debris of the roof, which caused the death of the deceased and his 11 comrades. That he was killed without any fault or negligence on his part, but because of the negligence of the defendant, as follows: The defendant, for a long time prior to the 17th of March, had been a resident of the city, had owned the building, and, in common with other citizens of the city, enjoyed the benefits and protection afforded by the fire department. At the time, and for a long time before that, he knew and had known that it was the duty of the deceased and his comrades to respond to alarms of fire, and to attempt to put out any fire that might break out in his building. The building was situate in the business center of the city, and in its most frequented portion, and defendant knew that it was in constant danger of catching fire, either by accident or design. The defendant as a resident of the city, and as a constituent part of the government, and as entitled to the protection of the fire department, invited the decedent and his comrades, in their capacity as firemen, into and onto the building. That at some time prior to the fire the defendant, as the owner of the building, had leased the same to the Bowen-Merrill Company, who were in possession at the time of the fire under the lease, but long before then, and before the execution of the lease, the defendant had changed, enlarged, and repaired his building; but when he built it, and at the time of the accident, it had a substantial-appearing iron front, and the deceased believed, and had reason to believe, that the building was as substantial as it appeared, but in fact it was a remodeled building, made much larger and higher than it was originally, and when defendant remodeled and rebuilt it he did not increase the strength of the foundation walls, and the whole building, back of the imposing iron front thereon, was insufficiently built and insecure, while having the outward appearance of strength to the deceased and others whose duty called them to the same. During the time while the building was being occupied by the Bowen-Merrill Company as a tenant of the defendant, the defendant was the president and chief executive officer of the company, and owned \$35,000 out of the total capital of \$80,000, and during the entire continuance of the lease the right was conceded to him by the company to come upon the premises, and to make thereon such improvements and repairs as he might deem necessary for the protection and preservation of the building. That in remodeling the building it was built unsafely,—the walls not strong enough, the foundation not sufficient to meet the exigencies and requirements for which the building was intended and used. That defendant knew when he leased the building that the company would place, and did place, in it a



stock of stationery, books, etc., and he also knew that the building was not strong enough to bear the weight of such stock. He also knew at the time when he executed the lease, and at the time when the deceased was killed, that the building was not strong enough, and was so insecurely built that it would not stand the weight of the stock and any additional strain that might be put upon it in case of fire by the weight of the water which would be thrown upon the stock to put out the fire, and at the time of the fire the weight of the stock and the weight of the water, because of the weak and insufficient character of the building and foundation walls, gave way. That the building was so weak, insecure, and unsafe as to be dangerous to all who might go about it in case any additional weight might be placed upon the same as in case of fire. At the time of the death of the deceased, defendant was receiving rent for the building. Deceased did not know of the unsafe and negligent construction and condition of the building at and before it fell. That deceased left a widow and four children under nineteen years of age. The second paragraph thereof states substantially the same facts as the first, with the following additions: The building was 35 feet in front and 120 in depth. That it had been on fire several times during the last 10 years, and to secure himself from loss by fire at the time of the occurrence of the fire, and for a long time before that, defendant had carried \$12,000 fire insurance on the building. That on the 28th of April, 1873, the city of Indianapolis passed an ordinance in which it was provided, among other things: "It shall be unlawful for any person to construct, erect or maintain any unsafe, insecure and dangerous wall, building or structure within the limits of this city, and it shall be the duty of all persons owning premises upon which there is any dangerous, unsafe and insecure wall or building, to make the same safe and secure, either by properly repairing the same or by rebuilding the same within twelve (12) hours after receiving notice from the chief fire engineer. \* \* \* Each and every day in which such wall or building is permitted to remain unsafe, dangerous and insecure after the receipt of notice as herein provided, shall be held and taken as a separate and distinct violation of this ordinance, and as such punished. \* \* \* Sec. 6. Any wall, structure or building likely to fall, or to take fire, shall be taken and deemed to be unsafe and insecure within the meaning of this ordinance. All brick walls less than one foot in thickness, and which form a part or are intended to form part of a building more than two stories in height, shall be deemed unsafe and insecure." This ordinance was in force from its passage until after the fire, and deceased in his lifetime, and the defendant, knew that it was in force. When the defendant became the owner of the premises, they were occupied by two storerooms, two stories in height, with walls on either side, and a continuous wall in the center contributed to the support of the roof and floors sufficiently to support the building in its then condition.

After defendant became the owner, and after the building had been in existence for over 40 years as originally built, the defendant, being desirous of increasing the capacity and area of his premises without materially increasing the expense, added two stories to the two stories then existing, taking out the center wall above the basement, and without strengthening or adding to the capacity or strength of the east and west walls, or without adding anything to the foundation under the center walls, and supporting the new building thus erected in the center with iron and wooden pillars, upon which, in connection with the side and end walls, the floors of the second and third stories rested, and by which they were all supported. That by the manner of construction the smaller weight before had been distributed throughout the entire length of the foundation of the center wall, but was very greatly increased by the additional size and weight of the building, and, by the substitution of columns for a solid wall, the added weight, instead of being distributed along the entire length, as it had been theretofore, was concentrated upon a few spots upon which the pillars rested, thus producing an unequal pressure at these places, and diminishing the bearing strength of the foundation upon which the pillars rested. That in making this improvement the defendant took away the original front wall, which indicated to the observer the character of the building, and substituted a substantial, strong, and imposing iron front for the entire height of the four stories, and thus gave to the building, which was in fact weak and insufficient to bear any great weight, the appearance of being a sound, substantial, and permanent improvement, capable of sustaining not only the building and its contents, but of being safe in case of fire or other accident which would cause unusual weight to be borne by the building. That it was known to the defendant at the time of the fire that the building and its walls, more especially the foundation under the center columns, was unsafe, insecure, and dangerous, and likely to fall and take fire, but that was not known to, but was concealed from, the deceased and the officers of the fire department, and they were prevented from ascertaining the defective, insufficient, insecure, unsafe, and dangerous character of the foundation because of the fact that it was underneath the floor, and not to be seen by any one entering the premises in the ordinary course of business, and the deceased and the officers of the fire department were thrown off their guard, and prevented from ascertaining the condition of the building, walls, and foundation, by the outward appearance of strength and sufficiency given to it by the iron front; and ever since the remodeling, rebuilding, and enlargement of the building upon his premises the defendant had continued to maintain it in the unsafe, insecure, and dangerous manner named, contrary to the provisions of the ordinance, well knowing that with any extra weight, as in case of any accident, or in case of fire, it would be insufficient to stand the

strain, and so fall. When the fire broke out in the building, water was thrown upon the stock in order to put out the fire; and the weight of the stock, together with the weight of the water, and the unsafe, insufficient, insecure, and dangerous character of the building, walls, and especially the foundation walls, caused it to give way without being weakened or impaired at all in their bearing strength by the fire which was burning.

It is contended by the appellant: First, that the owner of a building in the heart of a populous city owes it as a duty at common law, independent of any statute or municipal ordinance, to keep such building safe for purposes other than the requirements of trade and commerce; that such duty is comprehensive enough to embrace the safety of firemen and other officers whose duty, in the event of a contingency, may require them to be in and about the building; and that the complaint in this case shows a breach of this duty on the part of the appellee, resulting, proximately, in the death of the appellant's decedent. Second, that it appears from the allegations in the complaint that the appellee maintained the building therein described in violation of the ordinance of the city of Indianapolis therein set out, the immediate result of which was the death of the appellant's decedent, and that he is for that reason liable for the resulting damages. On the other hand, it is contended by the appellee Bowen—First, that, whether he is to be regarded as the owner or occupant of the building described in the complaint, the decedent entered it as a mere licensee, and that he was not guilty of any actionable breach of duty to him; second, that whether he be regarded as the owner or occupant of such building, and whether he be deemed to have invited the decedent to enter the building, he was not guilty of any actionable breach of duty to him; third, that he was not guilty of any actionable breach of duty to the decedent imposed by any municipal ordinance; fourth, that the negligence set up in the complaint was not the proximate cause of the death of the appellant's decedent; fifth, that, the building described in the complaint being in the exclusive possession of the appellee's tenant, the decedent cannot be deemed to have entered by his invitation or license, and hence he is not liable.

It is conceded that the decedent, at the time of his death, was lawfully in the appellee's building. It is important, however, to determine whether he was there under an invitation from the appellee, either express or implied, or whether he was there as a mere licensee. This is important for the reason that the appellee would owe him a much higher duty if he was there by invitation than he would owe him if he entered under no other authority than that of a licensee. It is true, the complaint alleges that the appellant, "as a resident of the city, and as a constituent part of this government, and as entitled to the protection of the fire department, invited the decedent and his comrades, in their capacity as firemen, into and onto the building." But we do not

understand this allegation as intending to convey the idea that any personal or express invitation was given. The pleader evidently intended, we think, to charge that there existed a general implied invitation from the citizens of the city, including the appellee, to the firemen belonging to the fire department, to enter their houses in case of a conflagration, for the purpose of extinguishing the fire. This allegation, therefore, does not enable us to determine whether the deceased was in the house of the appellee by invitation or as a licensee. Judge Cooley, in his valuable work on Torts, divides licensees into three classes. Of the third class he says: "The third class of licensees comprehends those cases in which the law gives permission to enter a man's premises. This permission has no necessary connection with the owner's interest, and is always given on public grounds. An instance is where a fire breaks out in a city. Here the public authorities, and even private individuals, may enter upon adjacent premises, as they may find it necessary or convenient in their efforts to extinguish or arrest the spread of the flames. The law of overruling necessity licenses this, and will not suffer the owner of a lot to stand at its borders, and exclude those who would use his premises as vantage ground to stay the conflagration. Indeed, it sometimes becomes necessary to destroy whole blocks of buildings to stop the spread of fire, and the sufferer, instead of looking to the officials who command it, or the parties who execute their commands, must seek redress at the hands of the state itself, and accept what the state awards." Cooley, Torts, (2d Ed.) p. 367. We think Judge Cooley, in the above extract, states the law correctly. It does not appear from the complaint before us that the deceased entered the house of the appellee, where he lost his life, by invitation, either express or implied, but it does appear that he entered under a license given by law for the purpose of extinguishing a fire raging therein at the time. It is unnecessary, under this state of facts, to inquire what duty the appellee would have owed the deceased had he entered the building under an invitation, or to inquire whether the premises were in the sole possession of a tenant of the appellee, as the case must turn upon the duty which the appellee owed the deceased at the time he entered under a license given by the law. We do not believe it can be successfully maintained that the appellee owed to the deceased, who entered his premises under a license created by an overruling necessity, a higher duty than if he had entered under an express license granted by him. In the case of *Reardon v. Thompson*, 149 Mass. 267, 21 N. E. Rep. 369, it was said: "No doubt a bare licensee has some rights. The landowner cannot shoot him. He cannot lawfully set spring traps for him. The licensor is liable, even to a licensee, if he is guilty of what the civil law terms 'dolus.' But beyond this the licensor owes the licensee no duty,—certainly not the duty of active diligence to see that no harm come to him; and when the latter, without any invitation, and pursuant to

a mere licensee, enters the former's premises, he takes the risk of whatever dangers may be there. The law is so laid down in the text books, and is established by a multitude of decisions." Mr. Pollard, in his work on Torts, (page 426,) says: "In the language of continental jurisprudence there is no question of culpa between a gratuitous licensee and the licensor, as regards the safe condition of the property to which the license applies. Nothing short of 'dolus' will make the licensor liable." To substantially the same effect are Ray, Neg. 23; Parker v. Publishing Co., 69 Me. 173; Railroad Co. v. Bingham, 29 Ohio St. 369; Larmore v. Iron Co., 101 N. Y. 391, 4 N. E. Rep. 752; Victory v. Baker, 67 N. Y. 366; Thiele v. McManus, (Ind. App.) 28 N. E. Rep. 327; Lary v. Railroad Co., 78 Ind. 323; Railroad Co. v. Griffin, 100 Ind. 221; City of Indianapolis v. Emmelman, 108 Ind. 530, 9 N. E. Rep. 155; Railway Co. v. Barnhart, 115 Ind. 399, 16 N. E. Rep. 121. The question of the liability of the property owner to a mere licensee was very recently fully considered by this court in the case of Farls v. Hoberg, (Ind. Sup.) 83 N. E. Rep. 1028. In that case, after a careful review of the authorities, the conclusion was reached that one entering a store on his own private business, by a way not used by customers, was a mere licensee, and that the owner of the store owed him no duty. We think that the authorities fully establish the rule that the licensor owes to the mere licensee no duty except that of abstaining from any positive wrongful act which may result in his injury, and that the licensee takes all risks as to the safe condition of the premises upon which he enters. To the question now under discussion, decisions based upon express statutes or ordinances, as well as decisions based upon the fact that the injured party entered the premises under an invitation, express or implied, are not applicable. We are of the opinion that the owner of a building in a populous city does not owe it as a duty, at common law, independent of any statute or ordinance, to keep such building safe for firemen, or other officers who in a contingency may enter the same under a license conferred by law. It seems to be settled, however, that such duty may be imposed either by statute or by an ordinance adopted for that purpose. Willy v. Mulledy, 78 N. Y. 310; Parker v. Barnard, 135 Mass. 116; Ryan v. Thomson, 38 N. Y. Super. Ct. 133; Luddington v. Miller, 36 N. Y. Super. Ct. 1.

It remains, therefore, to inquire whether the appellee is liable for the injury of which complaint is made, by reason of the ordinance of the city of Indianapolis set out in the complaint. In the case of Willy v. Mulledy, supra, a statute provided that the owners of a designated class of buildings in the city of Brooklyn should provide the same with fire escapes. It was held that this statute was intended for the benefit of tenants, and the owner of a building of the class named who failed to comply with the statute was liable to a tenant who was injured by reason of such failure. In the case of Parker v. Barnard, supra, there was a statute which pro-

vided that, in any store or building in the city of Boston in which there was placed a hoistway or elevator hole, such hoistway or elevator hole should be protected by a good and substantial railing, and good and sufficient trapdoors with which to close the same, and that the trapdoors should be kept closed at all times except when in actual use by the occupant of the building. It was held that this statute was intended for the benefit of all persons lawfully entering such a building, and that for this reason a police officer who entered after night in the discharge of his official duty, and was injured by reason of a failure to comply with the statute, might recover, although he was a mere licensee. In the case of Ryan v. Thomson, supra, there was an ordinance of the city of New York similar to the statute mentioned in the case of Parker v. Barnard, and it was held that such ordinance was intended for the benefit of firemen, police officers, and others who in the performance of their duties might be called upon to enter such houses after night, and that a policeman injured by reason of a failure to comply with the ordinance might recover. In the case of Luddington v. Miller, supra, a statute of the United States provided for private bonded warehouses. The statutes and the regulations of the treasury department place such warehouses under the control and management of the warehousemen who owned the same, so far as the supervision and management of the hatchways were concerned. It was held that if such warehouseman negligently left open a hatchway in a passageway over which a custom officer would pass in the discharge of his duties at such house, by reason of which the officer was injured, he might recover for such injury. The ordinance under immediate consideration is fully set out in the complaint, a synopsis of which is above set forth. There is nothing in the ordinance to indicate that the common council, at the time it was adopted, had in mind the safety of firemen in case of a fire occurring in the city. It was evidently its purpose to protect the citizens and those whose business required them to be in the vicinity of walls and buildings liable to fall and do them injury, and also to protect the city against fire by reason of structures liable at any time to take fire. That the common council did not have in mind the kind of wall described in the complaint is evidenced by the fact that the ordinance in question requires the owner of any dangerous, unsafe, or insecure wall or building to make the same safe and secure either by properly repairing the same, or by rebuilding the same, within 12 hours after receiving notice from the chief fire-engineer. Such provision, together with other provisions in the ordinance, indicate, we think, that the common council was legislating with reference to walls and buildings in immediate danger of falling, or in immediate danger of taking fire. In this case, so far as it appears from the facts alleged in the complaint, the appellee had erected a building which, under ordinary circumstances, was reasonably

safe for the purposes of commerce and trade. It became unsafe only by reason of the fact that it was stored with stationery by a tenant, and by reason of the fact that in an extraordinary emergency large quantities of water were thrown into and upon the building, thus putting it to an extraordinary strain. We do not think the ordinance before us was intended to apply to a building of this character. The appellee, in the construction of his building, was not, in our opinion, bound to anticipate extraordinary events, but, if he constructed a building which was ordinarily safe under ordinary circumstances, he was not acting in violation of the terms of this ordinance. This case has been ably argued orally, in open court, and briefed on both sides with unusual care and ability; and after a careful consideration of all that has been said, and a careful examination of all the authorities cited, we have been forced to the conclusion that the complaint before us does not state facts sufficient to hold the appellee liable for the injury set up in the complaint, either under the common law or the ordinances of the city of Indianapolis. It follows from this conclusion that the circuit court did not err in its ruling, and that its judgment should be affirmed.

(135 Ind. 393)

# PETTIT v. STATE.

(Supreme Court of Indiana. Oct. 19, 1893.)

## HOMICIDE—AFFIDAVIT FOR CONTINUANCE—ABSENT WITNESS—SUFFICIENCY—EVIDENCE

1. On a prosecution of a man for the murder of his wife, an affidavit was filed for a continuance on account of the absence of a witness. The affidavit anticipated the theory advanced by the prosecution, that defendant administered strychnine to deceased, and that he was led to do so by loss of affection for her, and infatuation for another woman, and also anticipated much of the evidence offered to support the theory. The affidavit further stated that the absent witness was an aunt of deceased, with whom she had exchanged visits within the two years preceding her death, and who for six years before that had lived near defendant and deceased, and was almost a member of the family, and that she would testify to their affection for each other, and that defendant was not intoxicated and elated on the day of his wife's death, as alleged by the prosecution. *Held*, that this was ground for a continuance.

2. The affidavit for a continuance further alleged that the absent witness would testify that deceased had complained before the alleged poisoning of having felt unwell for some time, and of having pains in her back, head, and neck, accompanied by dizziness, all of which were symptoms of malaria, as would be proved on the trial, and that defendant needed this evidence for the purpose of asking hypothetical questions of the medical witnesses to be produced on both sides. *Held*, that this evidence was not shown to be immaterial for the purposes of the affidavit because the latter did not allege that deceased died of malaria.

3. A statement in such an affidavit that the absent witness would testify that she saw the body of deceased after death, and, in contradiction of witnesses for the prosecution, that there was nothing unnatural in its appearance or position, is not to be excluded from consideration as merely stating a conclusion.

4. An affidavit for a continuance, in a

homicide case, to procure the evidence of an absent witness, showed that the subpoena for such witness was sent to the proper sheriff more than 30 days before the day set for trial, and that defendant, a few days later, learning of her absence from home, wrote to ask the sheriff if she had been served; that two weeks after its issuance the writ was returned not served; and that then defendant took steps to get her address, and on obtaining it, 13 days before the day set for trial, wrote to her in Oregon, where she was, asking her to return for the trial. The mere traveling to where she was, and returning, would have occupied nine days, if defendant had sought to obtain her deposition, and he was without means, and in jail. *Held*, that defendant showed proper diligence.

5. It is no ground for refusing an application for a continuance to procure the evidence of an absent witness as to certain facts that, on a former application for a continuance to procure the evidence of other witnesses to prove such facts, he swore that he could not prove them by any others whose testimony could so easily be procured.

6. It is proper to show that a witness for the prosecution had said to certain persons who spoke of going on defendant's bail bond that he would not have any sympathy for them if they lost the whole amount for which they became bound thereby.

7. On the prosecution of a husband on a charge of having killed his wife as the result of a loss of affection for her, and infatuation for another woman, an affectionate letter written by the wife to the husband is admissible to disprove the existence of such a motive for committing the crime.

8. Statements in an affidavit for change of venue as to bias and prejudice in counties other than the one from which the change is sought may be stricken out, on motion, in the discretion of the court.

9. On the prosecution of a husband for the murder of his wife, the fact that the state introduced evidence of specific acts of unkindness on the part of defendant towards his infant daughter does not justify the admission on his part of general evidence that he was kind to the child.

Appeal from circuit court, Montgomery county; E. C. Snyder, Judge.

William F. Pettit was convicted of murder, and appeals. Reversed.

R. P. De Hart, Austin L. Kumler, Thos. F. Gaylord, Thomas F. Davidson, Jere West, and Thos. A. Stuart, for appellant. Atty. Gen. Smith, Winfield S. Moffett, A. B. Anderson, and George P. Raywood, for the State.

HACKNEY, J. The appellant was charged by indictment in the Tippecanoe circuit court with the murder of his wife, Hattie E. Pettit, by administering to her quantities of strychnine. The venue of said cause was changed to the circuit court of Montgomery county, where, on the 20th day of November, 1890, after a trial occupying six weeks, he was convicted, and his punishment fixed at imprisonment for life. He appeals to this court from the judgment of the lower court, and many questions are presented for review. We are asked to pass upon the sufficiency of the evidence to warrant a conviction, and we have read much of the evidence, though it covers several thousand pages of typewritten record. The prosecution rested upon circumstantial evidence involving the appellant's loss of

affection for his wife, and his infatuation for Mrs. Whitehead, a widow with means and the prospect of an inheritance of a considerable sum. This line of evidence necessarily brought forward the relations existing between the appellant and his wife during the period of their married life; also, the acquaintance, association, and conduct of the appellant and Mrs. Whitehead during a period of two years or more, including their meetings in public and in private at Shawnee Mound, the place of their residence, at Indianapolis, and other places; also, his conduct after the death of his wife, both before and after the burial of her remains. The charges against him upon the evidence included neglect of his wife and his home; relations with Mrs. Whitehead that, if not criminal and if not affectionate, were at least of a very intimate social character,—of a character that he, as a minister of the Gospel, could not indulge, in justice to the ties which, before the God he professed to worship, bound him to Hattie E. Pettit. That 10 or 12 days before his wife's death he bought strychnine of a druggist, under unusual circumstances and conduct. His wife did not feel well. He gave her tea, of the taste of which she complained. Almost immediately following the drinking of a portion of the tea, she was violently ill, with symptoms indicating strychnia poisoning. After vomiting, she became better, and expressed the belief that she had received poison, and that it might have been in the tea. Later, and during her illness, he gave her a capsule, the contents of which are in dispute, and following this she was again violently ill, with symptoms of strychnia poisoning. He gave her other medicines claimed by the state to have contained strychnia. That the condition of the limbs and parts of the body after death indicated strychnia poisoning. His conduct with the family of Mrs. Pettit, in promising to explain to them her death, and hastening away from them without doing so, when he had had three weeks' leave of absence granted by his church,—and other circumstances which we will not repeat. We do not say that these circumstances were given without attempted explanations, denials, and excuses, but they were of such strength and character that, in our opinion, they formed a proper case for the jury. If the evidence of the state was believed, the probabilities of guilt were strong, if not conclusive. But the conflict in the evidence, its weight and effect, were properly questions for the jury, and we will not consider them.

One of the alleged errors of the circuit court was in denying the appellant a continuance of the trial of the cause, as applied for on the 7th day of October, 1890. The cause had been set for trial on the 8th day of October, 1890, and when the 7th day of that month had arrived the appellant filed his affidavit and motion for such continuance, in which it was shown that appellant was charged with having feloniously caused the death of his wife, Hattie E. Pettit, by administering to her a certain poisonous drug, called "strych-

nine," at affiant's home, in Shawnee Mound, Tippecanoe county, Ind. That affiant and one Elma C. Whitehead were jointly indicted for the murder of said Hattie Pettit. That they severed in their defense, and afterwards a nolle prosequi was entered in said cause against said Elma C. Whitehead in the Tippecanoe circuit court, and the said case, as to her, was then ended. That affiant is not guilty of the crime charged against him, and, if he can have a reasonable time given him to secure the attendance of his witnesses at the trial of this cause, he will be able to prove his innocence, and that he cannot safely go to trial in this case, at this term of court, because of the absence of an important and material witness, Emeline C. Ford. That he was married to his said wife on January 27, 1881, in the state of New York. That one child was born to them of their said marriage. That, for about six months after their marriage, affiant and wife lived at and near West Monroe, N. Y., and for the next six years they resided in St. Joseph county, Ind. That affiant and wife came from St. Joseph county to Shawnee Mound, Tippecanoe county, Ind., to reside, and resided there from that time until the death of his said wife. That said Mrs. Ford now resides, and for more than 10 years last past has resided, in the city of South Bend, St. Joseph county, Ind., but is now temporarily away from home, on a visit at East Portland, Or. That said Mrs. Ford is the aunt of said Hattie E. Pettit, and was for a long time almost a member of affiant's family. That the relations between Mrs. Ford and affiant's family were of the most intimate character, and that she was a warm friend of affiant's wife. That when affiant and wife came to Indiana, in July, 1881, they went to the home of Mrs. Ford, and remained there until some time in August following, when they secured rooms about three blocks from the home of Mrs. Ford; and from that time, during all the time they lived in South Bend, Mrs. Ford was frequently at affiant's home, and affiant and family frequently at Mrs. Ford's. That Mrs. Ford frequently saw affiant and wife together, and that she is familiar with, and knows, the relations that existed between affiant and his wife, the manner in which he treated his wife, and her conduct towards him. That in May, 1889, Mrs. Ford visited affiant's family at Shawnee Mound, and affiant's wife visited in South Bend in June, 1889, and shortly before her death, and was frequently at Mrs. Ford's home, and that Mrs. Ford's knowledge and means of observation of the conduct and relations between affiant and his wife continued down to the time of the death of Mrs. Pettit. That it will be claimed by the state upon this trial that the married life of affiant and his wife had not been happy, and that affiant did not love his wife; that on the day of her death the conduct of affiant was unseemly, unnatural, and showed an indifference to the death of his wife; that he was on said day under the influence of intoxicants. And for the purpose of showing a motive for the commission of said crime the state will claim that, prior to

the death of his wife, affiant had become infatuated with the said Elma C. Whitehead, and had ceased to love his said wife, and desired to be rid of her. And affiant swears that said matters are not true. That affiant expects to prove by said Mrs. Ford, and she will so testify, that she had the aforesaid means of knowledge of the relations existing between affiant and wife, and of their conduct towards each other; that she had a personal knowledge of the manner in which affiant treated his wife during all of his married life, and of the conduct of his said wife towards affiant; and that affiant at all times treated her in a kind, loving, and affectionate manner, and their conduct was at all times kind, loving, and affectionate towards each other; that affiant and his said wife did love each other, and that affiant and his wife frequently, in her presence, spoke of each other in a loving manner, and frequently used terms of endearment towards each other, and that affiant always spoke of his said wife in terms of praise, and never found fault with the conduct of his said wife. That said Mrs. Ford arrived at affiant's home, at Shawnee Mound, on the day of the death of affiant's wife, and remained there until the morning following; and said Mrs. Ford will testify that during most of said time she was in the presence of this affiant, and frequently conversed with him, and had abundant opportunities to observe the appearance and conduct of affiant, and that the appearance and conduct of affiant at said time was natural and becoming, and was that of a devoted husband, and that he was not under the influence of intoxicants during said time. And affiant swears that the facts which will be testified to by said Mrs. Ford are true. That it will be claimed by the state upon said trial that affiant's conduct and relations with the said Elma C. Whitehead on the day of his wife's death were unbecoming, and too intimate, but that the same are not true, and that Mrs. Ford will testify that, from the time of her arrival at Shawnee Mound, she (Mrs. Ford) occupied a room directly opposite, and but a few feet distant from, the room occupied by affiant, and that no one could approach the opposite room without attracting the attention of Mrs. Ford thereto, and that during her stay at the residence of affiant she was in and about the house at all hours, and that she witnessed nothing unbecoming or too intimate in affiant's manner or deportment towards Elma C. Whitehead. That the state will claim on said trial that the appearance of affiant's wife after death indicated terrible suffering, and her body and hands were drawn into a position that was unnatural, and such as generally follows a death caused by strychnine; but the affiant says the same is not true, and that said Mrs. Ford will testify that she saw the face, body, and hands of affiant's wife after death, and that there was nothing unnatural about the appearance or position of her face, hands, and body. That one of the important and material questions on the trial of this case will be whether said Hattie E. Pettit took or was given strychnine shortly before

her death, and, if so, whether it was given or taken accidentally. That affiant will claim on said trial that his wife had, prior to her death, scattered strychnine through the cupboards, closets, and dishes of her house for the purpose of driving away rats, and that, if she took or was given strychnine, it was given or taken accidentally. That it will appear in the evidence on said trial that a cat and two dogs were poisoned at affiant's house, at Shawnee Mound, during his wife's lifetime, with strychnine, and that the state will claim that affiant administered said poison to said cat and dogs by way of experiment, so as to observe the effects of strychnine; but affiant says he did not administer said poison. That he expects to show by said Mrs. Ford that affiant's house, at Shawnee Mound, was overrun with rats, and that Mrs. Pettit obtained and used strychnine to rid the premises of said rats; that Mrs. Pettit told Mrs. Ford on her visit at Shawnee Mound about the cat and dog having been poisoned, and that she (Mrs. Pettit) had poisoned them herself, in her efforts to rid the house of rats, and told Mrs. Ford of the way she had scattered the poison about her house, and that Mrs. Ford said to her that that was a dangerous way to rid herself of the vermin. That Mrs. Ford will testify that about the 14th of June, 1889, Mrs. Pettit went to South Bend on a visit, and during that visit Mrs. Pettit told Mrs. Ford about the second dog having been poisoned, which poison Mrs. Pettit herself had set out, and that she (Mrs. Pettit) also told Mrs. Ford, during this visit, that she had scattered strychnine in different parts of the house just before leaving home on this last visit, just before her death, and that Mrs. Ford expressed a fear that some of the family would get some of the poison. That another material question in this trial will be whether affiant's wife died from acute malarial poisoning or other causes, and that it is necessary, in order to determine this question, to ascertain the condition of Mrs. Pettit's health before her death, and that affiant expects to show that Dr. J. W. Yeager, the physician who attended Mrs. Pettit during her last illness, frequently stated that she was suffering from malarial poisoning, and said Dr. Yeager gave a certificate to the board of health that Hattie E. Pettit died of malarial poisoning; but that affiant is informed that said Dr. Yeager now intends to testify on this trial that Hattie E. Pettit did not die of malarial poisoning, but from strychnine poisoning. That it is therefore important for affiant to prove that his wife was suffering from malaria. That affiant will have medical witnesses on said trial, and is informed and believes, and so states, that the state will have medical witnesses on said trial, and that, to enable him to propound hypothetical questions to said witnesses, and thereby obtain the opinions of said witnesses as to whether his wife did die from malaria poisoning, it is necessary and material for him to show and prove the condition of his wife's health, and the ailment she was complaining of, at and just prior to her death, and that affiant expects to prove

by Mrs. Ford, and she will so testify, that, while on her last visit to Mrs. Ford, Mrs. Pettit stated to her (Mrs. Ford) that she had not felt well all spring, and that a few days before Mrs. Pettit's return home, shortly before her death, she complained of not feeling well, and then complained of exciting dizziness and pains in her back, head, and neck; and that affiant can prove these facts by no other witness than Mrs. Ford. That the said symptoms are symptoms of malaria, and that the medical witnesses produced at said trial will so testify. That it will be claimed by the state, as affiant is informed and believes, that the taking of his wife's remains to New York state to be buried, on the day following her death, was hasty and unnatural, and done to conceal the commission of the crime charged. That affiant expects to prove by said Mrs. Ford, and that she will so testify if produced as a witness, that affiant and Mrs. Ford had a conversation regarding this matter, and affiant stated that his wife, on the Sunday before her death, requested that if she should die she should be buried by the side of her father, and that Mrs. Ford said, and will so testify, that he owed more to affiant's family than to any one else, and that he should take the remains to New York as soon as possible, as the weather was very warm, and that with the best of care the body would not keep long, and that the remains ought to look as natural as possible, for the friends in New York to see. That the state will claim that the packing of the trunks by Mrs. Whitehead for himself and child, for their trip to New York with the body of his wife, was unnatural, and showed an improper relation between them. That Mrs. Ford will testify that affiant said to Mrs. Whitehead, in Mrs. Ford's presence, that as she (Mrs. Whitehead) knew where everything was, she should pack his little daughter's trunk, and things to be taken east, as she was to remain in New York with her aunt, and that most of little Dine's clothes were taken to the room where Mrs. Ford and Dine were, and there packed by Mrs. Whitehead. That the state will also claim that the telegrams affiant sent to relatives and friends, announcing his wife's death, were unnatural and untrue, and that Mrs. Ford will testify that said telegrams were prepared and read over to her, and talked over with her, before they were sent to the telegraph office. That affiant caused a subpoena to be issued by the clerk of Montgomery county on September 5, 1890, and sent to the sheriff of St. Joseph county, for said Mrs. Ford, a copy of which subpoena and return of the sheriff is set out in this affidavit. That said subpoena was issued and sent to St. Joseph county, where Mrs. Ford resides, more than 30 days before the time this case was set for trial, and that affiant at that time believed that said Mrs. Ford was in South Bend, and that said subpoena would be served, and that she would be present at the trial at this term of court. That, a few days after said subpoena was sent, he learned, for the first time, that Mrs. Ford was away from home, and affiant wrote to the sheriff of St. Joseph county, asking if

the subpoena had been served, and, if not, why not, but that said subpoena was not returned until September 19, 1890; and that he is informed and believes that Mrs. Ford left home shortly before the subpoena was issued. That he then caused a letter to be written to South Bend to ascertain when Mrs. Ford would return, where she was, and where a letter would reach her, and was advised she would probably not be home until late in the fall, and that thereupon he (affiant) caused a letter to be written to Mrs. Ford, stating that the case was set for trial October 8th, and asking that she return for said trial, and asking that she telegraph immediately upon receipt of said letter whether or not she would be present, and that said letter was written immediately upon receiving Mrs. Ford's exact address, and on September 25, 1890, as affiant is informed and believes, and that said letter was, as affiant is informed and believes, placed in an envelope, stamped, sealed, and addressed to the address given him, and placed in the post office at Lafayette, Ind., but that no letter or telegram or word was received from Mrs. Ford in answer to said letter, as affiant is informed and believes. That affiant had no information that Mrs. Ford was away, or that she was going away. That his counsel saw Mrs. Ford before said subpoena was issued, and talked with her regarding the facts to which she would testify, and that she did not advise said counsel that she was going away. That she knew she was expected to testify as a witness to the facts set out herein, and promised said counsel to attend the trial of this cause, and that, immediately upon hearing that she was away from home, affiant set about endeavoring to have her return to this trial. That affiant is informed and believes that said Mrs. Ford is simply away temporarily, and will return home in a short time; but that since the issuing of said subpoena he has learned that she will not return before about the last of November next. That he cannot state the exact time of her return, but that he can obtain her presence at the next term of this court. That affiant is a poor person, without means, confined in jail since December, 1889, and has done all he can to procure the presence of said Mrs. Ford as a witness at this trial. That the absence of said Mrs. Ford has not been procured by any act or connivance of this defendant, nor by others at his request, nor with his knowledge or consent. That said witness will testify to the facts hereinbefore stated, and that affiant believes them to be true, and that he is unable to prove said facts by any other witness whose testimony can be as readily procured.

Counsel for the appellee inform us that the continuance was denied on two grounds: "First, because the affidavit did not show that the testimony of the witness would be material or competent; and, second, because it did not show due diligence to procure the testimony of the witness." These grounds of objection to the affidavit, counsel for appellee ably endeavor to maintain, but we find it our duty to dissent from their contention as



to each objection. It will be observed that the affidavit anticipates the line to be pursued by the prosecution in seeking a conviction, and that the line so anticipated was that Mrs. Pettit died from strychnia poisoning; that the deadly drug was administered by appellant, that his motive was in the loss of affection for his wife, and the possession of an infatuation for Mrs. Whitehead. Each of the elements of the case so anticipated, it was further anticipated, was in part to be established by various facts and circumstances claimed by the prosecution to exist. As to each of such facts and circumstances, it was the right of the appellant to offer proper evidence in denial or in explanation, or to raise a reasonable doubt. He was required to anticipate the case of the state, and to prepare, as far as possible, his evidence to meet it. If any part of his evidence was temporarily beyond the jurisdiction of the court, his only remedy was to apply for a continuance; and if, in his application, he showed all that the statute required of him, no discretion of the court, no misjudgment, no misapprehension of the facts stated, could deprive him of such continuance. While we cannot, for the purpose of judging of the sufficiency of his affidavit, go to the evidence to learn whether he correctly anticipated the case to be relied upon by the prosecution, and while the lower court was required to consider the motion upon the facts, alone, as stated in the affidavit, we have looked into the evidence to learn if he was harmed by the ruling. We find, not only that he correctly anticipated the elements of the case, but he correctly anticipated, in many respects, the evidence which would be offered to sustain such elements; and, if the evidence of the absent witness was proper for any of the purposes we have mentioned, he has been harmed by the denial of his application.

One circumstance alleged to have been relied upon by the state was that of the appearance of the body. The hands and face of the remains of Mrs. Pettit were drawn out of natural position, and thereby indicated the unnatural condition which follows a death caused by strychnine. The affidavit stated that the absent witness would "testify that she saw the face, body, and hands of affiant's wife after death, and that there was nothing unnatural about the appearance or position of the face, hands, and body." The only reason given by the state for the exclusion of this statement is that it is not a statement of facts, but is a mere conclusion. As to whether the hands, face, and body were unnatural in appearance or position became an important circumstance, and one afterwards proven and relied upon by the appellee. How should the nonexistence of such condition be proven, if not by a statement that there was nothing unnatural in the appearance or position of the face, hands, and body? To have stated that the hands were straight, or that the face was not distorted, or that the body was not out of line, would have been, as to each, but a mere conclusion, in the same sense that the evidence proposed would have been a conclusion. The exist-

ence of unnatural conditions may admit of detail in giving descriptive facts, but the absence of such condition can best be proven in negative form, and not by detailing those conditions which, being present, leave the inference of an absence of the condition claimed to be present. This must be true in all inquiries involving matters of common observation. If it were otherwise, it could be objected that a condition of darkness could not be proven except by showing the absence of light, cold could not be shown except by proving the absence of heat, and that a color might not be identified except by proof of its constituent shades. All are subject to the objection that they are conclusions, if the proof offered is objectionable, and any of the methods suggested for proving the conditions supposed would be subject to the same objection, and therefore no method of proving any such fact, however important, could be freed from such objection. The value of the negative fact, and the impracticability of establishing it by positive or affirmative facts, render the denial of its existence necessary. This may not be the rule where the negative fact is the subject of special learning or scientific knowledge, but it must be the rule where such fact is a matter of common observation, and within the knowledge alike of the learned and unlearned.

As another material question upon the trial, it was alleged that the prosecution would offer evidence tending to show a death by strychnine poisoning, and that the absent witness would testify that after the 14th day of June, 1889, and before the alleged poisoning, Mrs. Pettit had stated to the witness that she (Mrs. Pettit) had not felt well all spring, and that only a few days before her death she had further complained of then not feeling well, and of existing dizziness, and pains in her back, head, and neck. The relevancy of this evidence was shown by the statement that the conditions so complained of by Mrs. Pettit were symptoms of malaria, and that medical witnesses would so testify upon the trial; further, that both he and the appellee would produce medical witnesses upon the trial, and that he must secure this evidence to be enabled to submit such symptoms in the hypothetical questions to be propounded to such witnesses, and thereupon obtain opinions as to whether death was the result of strychnine, or malarial poisoning. All that is claimed by the appellee against this evidence is the following: "In order to show that it was material to inquire into the question of malaria at all, it was necessary that appellant should allege in his affidavit that Mrs. Pettit died from that cause, and not from strychnia, as alleged in the indictment. This is not claimed in the affidavit, and it is very evident that a person suffering from malaria may be murdered by the felonious administration of strychnia, as well as a person in good health. He says he wishes to propound hypothetical questions to experts on this point, but does not allege that any one of them will testify that the symptoms of the ailment from which she died were

those of malaria. For all that is shown by the affidavit, the experts may have answered that they were not the symptoms of malaria." It was not essential to the materiality of the offered evidence that it be shown that Mrs. Pettit died of malarial poisoning, and not from strychnia. Considering the sufficiency of the affidavit in this respect, the evidence offered may be viewed as if the witness were before the court on behalf of the defendant. If the evidence tended to show a death from malarial poisoning, it was admissible. Whether it was sufficient to prove such death was a question of its weight, and not of its admissibility. Its weight was a question for the jury, and it was not necessary that it should be found that death resulted from malarial poisoning, but it was quite sufficient if from it the jury should entertain a reasonable doubt as to the death from strychnia. Counsel are mistaken in the assertion that it does not appear that the experts would testify that the symptoms proposed to be proven were those of malaria.

A further showing was that the appellee would rely upon testimony that on the day of his wife's death the appellant was under the influence of intoxicants, as a circumstance indicating a want of respect for her, and as evincing an indifference to her death. The opportunities of the absent witness to know of his conduct on the day of the wife's death were shown, and it was alleged that she would testify that his conduct was not unbecoming, and that he was not under the influence of intoxicants. To this question the appellee has made no argument, and the appellant but suggests the admissibility of the proposed evidence in contradiction of a witness who testified for the appellee that on that occasion the defendant was jolly, and she believed him under the influence of liquor. If the evidence of the appellee's witness was competent, the contradiction proposed was equally competent, and, the evidence having been admitted, the proposed evidence could not have been rejected, if for no other reason than that one introducing incompetent evidence cannot object that, having opened the door to the admission of such evidence, his adversary avails himself of the same privilege. But we may not hold the proposed evidence material by searching the record beyond the affidavit. We can only say that a reference to the record fails to disclose that the appellant was not harmed by the refusal of his application. Regarding the question of the materiality of the evidence proposed as waived, excepting in so far as it would have contradicted evidence not subject to our inspection, we do not pass upon the question.

One of the vital elements of the appellee's case, in fact, and in the anticipation of the appellant, as alleged in his affidavit for a continuance, was that the appellant entertained no affection for his wife, and much of the evidence proposed was competent and material upon this question. The relationship of Mrs. Ford to Mr. and Mrs. Pettit, the acquaintance and association shown, gave her peculiar knowledge of the treatment by Pettit of his wife.

Counsel for appellee concede that evidence of the character proposed was competent upon the question of motive, but they say that the facts alleged show no opportunity to know anything of his treatment of her for two years, while the Pettits resided at Shawnee Mound, excepting that period covered by the visit of unknown duration which was paid by Mrs. Ford to the Pettits in May, 1889. The affection entertained by him for his wife during the six years of his residence in South Bend, and his treatment of her during the visit of Mrs. Ford, however short that visit, were proper circumstances to go to the jury, and their weight was not a question for the court. If the witness had not seen the Pettits during the last two years of Mrs. Pettit's life, it was proper to prove his affection for his wife before locating at Shawnee Mound, that the jury might weigh, with the other evidence, the presumption of a continuation of that relation which had existed prior to that period. It was only upon this theory that the appellee was permitted to prove by the witness Hickman conversations with Pettit in 1883 as to his neglect of his wife, and his agreeing with his mother and sister in their controversies with his wife.

We have shown sufficiently the error in holding that the proposed evidence was not material, and it remains to determine whether it was shown that the appellant was diligent in his efforts to procure the evidence of the witness before applying for the continuance. The subpoena was issued and sent to the proper sheriff on the 5th of September, 1890, more than 30 days before the day set for the trial. Within a few days he learned that the witness was away from home, and he thereupon wrote to the sheriff to learn if she had been served with said writ. That on the 19th day of September, the writ was returned not served. That thereupon he took steps, by writing, to learn her whereabouts, and as to when she would return, and where a letter would reach her. That immediately upon receiving the information sought, and on the 25th day of September, he wrote to her at East Portland, Or., where she was visiting, and urged her to return for the trial, and requesting an answer by telegraph. It thus appears that he first learned her whereabouts on the 25th day of September. Up to this point there is little room for the charge of negligence. He was certainly as diligent as could reasonably be required. But appellee's counsel urge that he should have procured an order of court for the taking of her deposition, and then have proceeded to East Portland, and secured her testimony. Taking the time necessary in preparing for such mission, giving the required notice, and in reaching that distant point, omitting the intervening two Sundays, and taking the deposition, and returning it for filing at least one day before the day on which the cause stood for trial, would have required extraordinary diligence, if not impossible haste. The court knew judicially that the distance to East Portland from Crawfordsville was 2,898 miles, and that by the ordinary

course and methods of travel it required within a few hours of five days between the two points, or at least nine days' continuous travel, in going to and returning from East Portland. If notice of the taking of depositions could have been given on the 25th day of September, the day of the discovery of the whereabouts of the absent witness, and excluding the day of the giving of notice, and one of the two Sundays intervening between that date and October 7th, the day upon which the deposition was required to be filed, and but ten days remained in which to go to Portland, secure the attendance of the witness, take the deposition, and return for the trial, including one of said two Sundays. Diligence could not be made to depend upon such narrow margins of time. He was without means, and confined in jail. Such steps require not only means, but willing assistants. It might be argued that assistance could have been procured by order of court, but to seek that aid would only consume further time necessary for the long journey. We cannot believe that he failed in diligence.

We are urged to consider against the application the fact that the appellant had at a previous term of court applied for a continuance to obtain the evidence of other witnesses, who, it was alleged, would testify to his affection for his wife, and that in his said application he had sworn that he could not prove the same facts by any other witness, whose testimony could be as readily procured. This would be but another method of considering counter affidavits, when, as we have said, the application is the only test of the appellant's rights. See *Cutler v. State*, 42 Ind. 244; *Ealinger v. East*, 100 Ind. 434. But to permit the trial court to consider the former affidavit relating to the proposed evidence of witnesses other than the witness for whose evidence a continuance was sought, would place that court in the position of deciding, without information, that the defendant had not been mistaken in his belief as to the proposed evidence of such other witnesses, or that he had in said former affidavit sworn falsely, and that such affidavit could be considered in impeachment of the latter application. Whatever the rule where both applications are for the taking of the evidence of the same witness, we cannot adopt the rule here urged. We conclude that the continuance should have been granted.

To one Switzer, an important witness for the appellee, the following question was asked upon cross-examination: "Question. I will ask you to state if you didn't have this conversation with them [Julian and Wallace] at that time and place, or this in substance: 'Pettit is going to get out on bail. The justice of the peace says the case is bailable. But who will go on his bond?' Julian says, 'I will go on it for \$4,000,' and Wallace says, 'I will go on it, too,' and you said, 'I wouldn't have any sympathy for you if you lost it all,' and Julian said, 'All right, you will not have to pay it.' Did you not have that conversation? Answer. That is not correct. Q. Or in substance? A. Part of it

is correct, and part is not." At the proper time, Julian and Wallace were called on behalf of the appellant, and were asked severally the following question: "Question. I will ask you whether or not, on the next day after the trial, the preliminary trial of Pettit, at Lafayette, that you met Mr. Switzer about a quarter of a mile north of Mr. Kincaid's,—you and Mr. Wallace,—and whether or not, upon that meeting, Mr. Switzer said to you, 'Pettit is going to get out on bail. The justice says the case is bailable. But who will go on his bail?' To which you replied, 'I will go on for \$4,000,' and Wallace said, 'I will go on, too,' to which Switzer responded, 'I would not have any sympathy for you if you lost it all,' to which you said, 'All right, you will not have to pay.' That, or that in substance?" The appellee's objection to this question was sustained by the court, and that ruling is urged as error. The appellant contends that the statement of Switzer to Wallace and Julian was one of hostility or ill will towards him, while the appellee insists that it was but an expression against the practice of becoming surety, and not an evidence of feeling or interest against Pettit. No objection is made to the form of the question, but it is expressly stated that the question, with the questions immediately preceding it, was in proper form. It is also conceded that if the conversation sought to be proven involved an expression of ill will or a feeling of hostility against Pettit, it was competent. Such is the rule as held in *Scott v. State*, 44 Ind. 400; *Johnson v. Wiley*, 74 Ind. 233; *Stone v. State*, 97 Ind. 346; *Ford v. State*, 112 Ind. 373, 14 N. E. Rep. 241; *Skinner v. State*, 120 Ind. 133, 22 N. E. Rep. 115; *Staser v. Hogan*, 120 Ind. 220, 21 N. E. Rep. 911, and 22 N. E. Rep. 990; *Schultz v. Railroad Co.*, 89 N. Y. 242; *Starks v. People*, 5 Denio, 106; *Geary v. People*, 22 Mich. 222; *Phenix v. Castner*, 108 Ill. 213. The conversation, in our opinion, involves an effort on the part of Switzer to deter Wallace and Julian from becoming surety for Pettit; and, if this conclusion is correct, it involves the indirectly expressed belief of Switzer that, if released upon recognizance, Pettit would not remain and confront the charge against him, but that the sureties upon the bond would have to respond to a forfeiture. Such conclusion implies, not only the belief that Pettit was guilty as charged, but that he was dishonest in not intending to remain and defend the charge, but to leave his sureties to meet the stipulations of the bond. Whether this effort to deter Wallace and Julian from becoming sureties, and whether the conclusions and implications following, were from malice or interest, were questions for the jury. The feeling manifested was not that of a disinterested or sympathetic heart, but was that of a meddler, and not the ordinary conduct of one wholly disinterested and unbiased. The degree of interest, bias, or malice could be judged only by the jury, and the evidence should have been admitted.

Another question arising upon the record is as to the alleged error of the court in rejecting, as evidence for the defendant,

a letter from Mrs. Pettit to her husband, containing expressions of endearment. It is urged by appellant's counsel that the letter was admissible, both in rebuttal of the theory of the husband's loss of affection for his wife, and in contradiction of Hickman as to complaints of the wife heretofore given, and of Wilson that Pettit was neglecting his wife, in being from home days at a time without advising her of his whereabouts. The record does not disclose that the court permitted evidence of complaints by Mrs. Pettit. On the contrary, such evidence was expressly excluded. The evidence of Hickman and Wilson was of conversations between Pettit and themselves. The letter, therefore, was not admissible in contradiction of those witnesses; but, from our view of the question, it was proper to have admitted in evidence the letter of the wife to the husband. The relations existing between the deceased and her husband were naturally, and, by the theory of the state's evidence, necessarily, the foundation upon which the guilt of the defendant was to be determined. While indifference or even ill treatment by the husband does not necessarily destroy all the affection of the wife for him, yet the degree of that affection must, to a greater or less extent, depend upon his treatment of her. The relation of husband and wife is peculiar, in that all of the interests of life concern them alike, and are so inseparable from their thoughts of and affections for each other that it cannot be said, as a matter of law, that the estrangement of the husband necessarily destroys the affection of the wife for him. It necessarily follows that the existence of affection for him does not of itself preclude the loss of affection by him. Where the relation is the subject of inquiry, and where it becomes proper to investigate the treatment of one towards the other with a view of determining that relation, it is proper to canvass the treatment of the other towards that one. The treatment by each of the other casts a light into the otherwise dark recesses of the heart of each. The strength of that light is a subject for the jury, and may not be determined as a question of law. The letter of a wife, with whose murder her husband was charged, though written to a third person, was held admissible "to disprove the existence of the motive to commit murder, which the testimony for the state conduced to establish." *State v. Leabo*, 84 Mo. 168. In that case the letter contained statements of the kindness of the husband. We are not required to hold that declarations or letters to third persons are admissible, but we do hold that communications between the husband and wife are an index to the relations existing between them.

It is contended that the court further erred in striking out parts of defendant's affidavit on motion for a change of venue from Tippecanoe county. The action complained of was in sustaining a motion by the prosecuting attorney, and the matter was not actually removed from the affidavit. The allegations thus withdrawn from consideration related to a state of feeling existing against the defend-

ant in Montgomery county, and were included in the affidavit for the purpose of enabling the court to exercise its discretion as to what county the cause should be sent to upon the change prayed. It is first urged that the application for a change of venue was not sworn to, as modified by the action of the court in so sustaining said motion, and that, therefore, the action in granting the change was erroneous. The theoretical alteration of the affidavit did not alter the verification of the facts not so stricken out, nor did it vary, change, or modify the facts so remaining. However, permitting the change to be granted without asking to withdraw or amend the application was a waiver of the charge that the application was incomplete as granted. Secondly, it is insisted that the court erred in refusing to entertain the facts so stricken out, and to consider them in determining what its discretion as to the change of venue should be. Upon the motion the facts were brought to the attention and knowledge of the court, and in passing upon the application we must presume that the court had not been divested of that knowledge, and we will treat the ruling upon the motion as amounting only to an expression of the court's unwillingness to be governed by the request of the defendant when its discretion should be exercised. Such statements in affidavits are not binding upon the courts, and, if they may be disregarded in passing upon the applications, they may be stricken out, upon motion, without error. *Insurance Co. v. Naugle*, 130 Ind. 79, 29 N. E. Rep. 303.

The state offered evidence tending to show that the appellant had not entertained proper affection for his little daughter. The evidence arose incidentally, and related to specific acts. Its admissibility is not before us. In defense the appellant introduced the testimony of a witness, Willie Reese, that appellant was kind to the child. This evidence, on motion of the prosecutor, was by the court stricken out. This was not error. His relations to the child were not the proper subject of investigation, and the specific acts offered by the state could not be answered by general conduct.

There are other questions discussed, but having concluded that the judgment of the lower court cannot stand, and that upon another trial such questions will not necessarily arise, we do not consider them. The judgment of the circuit court is reversed, with instructions to grant a new trial, and the warden of the state's prison north is directed to return the appellant to the custody of the sheriff of Montgomery county.

(135 Ind. 297)

STULTS v. FORST et al.

(Supreme Court of Indiana. Oct 18, 1893.)

CLAIMS AGAINST DECEDENT'S ESTATE — FILING — FINAL ADJUDICATION.

1. Where, owing to a defect in the sale of a decedent's land, the purchaser gets no title, the purchaser's claim on account of purchase money paid, even if founded on a vendee's

lien, is a claim against the decedent's estate, which must be enforced by filing a claim therefor as provided by Rev. St. 1881, § 2310.

2. On the filing of a claim against a decedent's estate, an issue was formed against it, and was submitted to the court for trial, which, after taking it under advisement, dismissed it. *Held*, that the dismissal not being without prejudice, and none of the circumstances existing which, under the provisions of Rev. St. 1881, § 333, authorize a dismissal without prejudice, the decision was a final adjudication of the claim, which, not having been set aside or appealed from, would bar its further prosecution.

Appeal from circuit court, Huntington county; Joseph S. Dailey, Judge.

Action by Harmon W. Stults, administrator, against Alfred Forst and others. Judgment for defendants. Plaintiff appeals. Affirmed.

G. W. Stults, Cobb & Watkins, and Sayler & Sayler, for appellant. J. B. Kenner and J. C. Branyan, for appellees.

HOWARD, J. The facts in this case, as found by the court, and not questioned by the parties, are as follows: (1) That Conrad Forst died in Huntington county, Ind., intestate, on May 15, 1873, leaving as his heirs at law his widow, Sarah Forst, and their children, the appellee Alfred Forst and others, and seised in fee of certain described real estate, being 80 acres of land in said county. That one John Stults was appointed administrator of said estate, and there being no assets in his hands to pay certain indebtedness of the estate, in pursuance of a petition and order of court, he sold the undivided two-thirds of said land to pay such indebtedness. (2) That said sale was made after due and proper notice, on the 17th of April, 1878, to one Joseph C. Best, a son-in-law of the administrator, for \$1,600. That the administrator reported the payment of the purchase money to court, executed to the purchaser a deed for the land, and on the 15th day of October, 1878, made his report in final settlement of said estate, and was discharged from his trust. (3) That on the 18th day of February, 1879, Joseph C. Best conveyed said land to John Stults, said former administrator, and immediately thereafter said Stults entered into possession of said real estate. (4) That on the 29th of October, 1880, in a suit brought by Sarah Forst, widow aforesaid, against John Stults, Joseph C. Best, and others, upon a complaint in the Huntington circuit court, wherein it was alleged that the sale made by John Stults, administrator, to Joseph C. Best, of said land, which was afterwards sold by said Best to said Stults, was a fraudulent and sham sale, and that the same was the result of a collusion between said Stults and Best to defraud the widow and heirs of said decedent; that it was a sale by the administrator to himself,—to which complaint an answer in general denial was filed,—said sale was by agreement set aside, and held invalid, which agreement was so made by the parties after it was ascertained by them that the land had been wrongfully described in the notice of sale. (5) That a part of the

prayer of the complaint mentioned in the last finding was that the final settlement made by said administrator, John Stults, be set aside, and the estate of said decedent be reinstated. That, pending such further administration, John Stults died, on November 4, 1881, and Harmon W. Stults, the appellant, was appointed administrator of the estate of the said John Stults. (6) That on the 19th day of January, 1882, William Brown was appointed administrator de bonis non of the estate of Conrad Forst, and on the 2d day of September, 1882, the appellant, as administrator of the estate of John Stults, filed a claim in the Huntington circuit court against the estate of Conrad Forst, in which claim appellant demanded \$2,029.32, principal and interest of purchase money paid for said land, the sale of which had been set aside as aforesaid. That said \$2,029.32 was and is the identical matter claimed by the complaint in this case. That on said claim an issue was formed, and the same was at the January term, 1886, of said court, submitted to the court for trial, a jury being waived, and the court took the same under advisement until the 18th day of February, 1886, and, being fully advised in the premises, dismissed the claim, and the costs thereof were charged to the claimant, appellant herein. That this judgment of dismissal has never been appealed from, modified, vacated, or in any manner set aside, but is still in full force. (7) That the claim set out in the preceding finding is the identical claim on which recovery is sought in this case, and the parties are the same. (8) That on the said 2d day of September, 1882, the appellant filed a complaint against said William Brown, administrator de bonis non of the estate of Conrad Forst, to compel him to execute a deed to the heirs of said John Stults for the undivided two-thirds of said real estate, and said Brown, administrator, filed his demurrer to said complaint, which demurrer was sustained by the court. On an appeal from this ruling to the supreme court, the judgment of the lower court was affirmed. *Stults v. Brown*, 112 Ind. 373, 14 N. E. Rep. 230. (9) That on the 20th day of February, 1886, during the pendency of said appeal in the supreme court, the said Brown filed his final report and resignation as such administrator de bonis non, which report and resignation were at the time accepted and approved by the court, and said administrator discharged upon the payment by the heirs of certain debts and costs of administration, appellant's said claim not being included in said debts. Since said resignation and final report, there has been no administrator of said estate. (10) That the heirs of Conrad Forst paid off all the debts and costs of administration so ordered when said report and resignation were accepted and approved, but did not pay the claim in suit. (11) That, out of the moneys reported as received from Joseph C. Best, John Stults, as administrator, before July 1, 1878, paid judgments of record against Conrad Forst, his decedent, amounting to \$690.44, and that prior to said sale to said Best he had overpaid on

claims against said estate the sum of \$75. That prior to said July 1, 1878, said Stults, administrator, paid out of moneys reported from said sale of real estate on alleged claims against said estate the further sum of \$840.40, but that none of such claims, except the judgments aforesaid, were of record. That said claims were not filed as claims against said estate, nor had they been allowed by the court or by the administrator of record, and nothing appears to show whether the alleged claims were valid claims against said estate, or not, except the receipts for the payment thereof. (12) That the claim sued on in this cause accrued within 15 years prior to the commencement of this suit, which was begun on the 10th day of January, 1889. That no part of the claim sued on herein accrued within the period of six years prior to the commencement of this action. (13) That on April 15, 1882, in a proceeding for partition in the Huntington circuit court by Sarah Forst, widow, against the children of said decedent, there were set off to the widow, in severalty, in lieu of her undivided one-third interest in said land, 26 $\frac{1}{2}$  acres off the west side thereof, leaving subject to any claim appellant may have 53 $\frac{1}{2}$  acres off the east side. (14) That John Stults paid in discharge of judgments mentioned in finding No. 11 the aggregate sum of \$690.44, which, with interest, amounts to \$1,125.41, no part of which was ever repaid to him or to appellant. (15) That after said claim was dismissed, as set out in finding No. 6, and after said administrator de bonis non had been discharged, the appellee Alfred Forst, in good faith, purchased of the widow of Conrad Forst, and of the children of said decedent, except the undivided two-twenty-sevenths part thereof owned by the minor appellees, all the real estate referred to in finding No. 1. That at the date of said purchase the claim in suit was not pending, but that said Alfred Forst then knew that the same had not been paid. Upon these findings of facts the court found conclusions of law as follows: "Upon the foregoing facts the court concludes that the law in this case is with the defendants; that the plaintiff herein ought not to recover, and that the defendants are entitled to judgment in their favor against the plaintiff for costs; and that this action cannot be maintained against the children and heirs at law of Conrad Forst, deceased." The errors assigned and discussed by counsel relate wholly to the correctness of the conclusions of law.

Counsel for appellant lay stress on certain statements made in the opinion of this court on the former appeal. *Stults v. Brown*, supra. That was a suit for specific performance, to require the administrator to execute a deed to the heirs of John Stults for the land which he had intended to sell as administrator to Joseph C. Best. The court held that the demurrer to the complaint was well taken; that the complaint did not state facts sufficient to entitle the appellant or the said heirs to an order on the administrator for a deed; that they were not entitled to a deed on a sale which had been found in-

valid by the court. Nothing further than the ruling upon the demurrer to the complaint was before this court on that appeal. The complaint was held insufficient, and nothing more was decided, or could be decided. What was said in that opinion, by way of suggestion, however, that "upon a petition showing the same facts as those stated in the one before us, and showing, in addition, a denial of the lien, and a refusal to enforce it, the appellants would make a prima facie case entitling them to an order directing the appellee to sell the land," is rather an intimation from the court that any claim which appellant or the said heirs might have was in the nature of a claim against the estate of Conrad Forst, and that on the allowance of such claim by the administrator or by the court an order might be had for the sale of the lands of said decedent to make assets for the payment of such claim. But the facts shown in the findings in this case present very different questions. A right is one thing. A remedy is quite another. If appellant and the heirs of John Stults had the right claimed in the former appeal, and also claimed in this appeal, it would seem that the remedy suggested in that opinion was the very one sought by them in filing their claim against the estate of Conrad Forst, as set forth in finding 6 in this case. That the filing of the claim, and its submission to the court for trial, resulted in its disallowance and dismissal, is not an indication that they did not in that case pursue the proper remedy, but rather that the right itself did not exist. The statute for filing claims against a decedent's estate, in force at the time of bringing this suit, and also at the time of bringing the former suits involving the same claim, section 2310, Rev. St. 1881, (Elliott's Supp. § 385,) contains the following provisions: "No action shall be brought by complaint and summons against the executor or administrator of an estate for the recovery of any claim against the decedent; but the holder thereof, whether such claim be due or not, shall file a succinct and definite statement thereof in the office of the clerk of the court in which the estate is pending. \* \* \* And if not filed at least thirty days before the final settlement of the estate, it shall be barred, except as hereinafter provided, in case of liabilities of heirs, devisees, and legatees." Section 2442 of said Revised Statutes provides that: "The heirs, devisees, and distributees of a decedent shall be liable, to the extent of the property received by them from such decedent's estate, to any creditor whose claim remains unpaid, who, six months prior to such final settlement, was insane, an infant, or out of the state; but such suit must be brought within one year after the disability is removed; provided, that suit upon the claim of any creditor out of the state must be brought within two years after such final settlement." If this claim had never been filed against the estate of Conrad Forst, it would seem that these sections of the statute would be conclusive against appellant. His claim, as against the heirs, does not fall within any of the exceptions made by the statute; and one

who, without excuse, by reason of some statutory disability, fails to file his claim against a decedent's estate before final settlement is barred of any right of action against the heirs. *Railroad Co. v. Heaston*, 43 Ind. 172.

Counsel, however, insist that this is a suit on a vendee's lien, and therefore well brought. We are at a loss to know how this contention, even if well founded, can avail appellant. We do not doubt that a suit to enforce a vendee's lien, based upon a purchase made in good faith at an invalid sale of real estate, may, as in the case of a purchase at an invalid tax sale, be brought in 15 years from the time when the right of action accrued. *Montgomery v. Aydelotte*, 95 Ind. 144. But such question does not arise in this case. The decedents' estate act provides specially for the collection of claims against estates, and the remedy there provided must be pursued. All claims, whether due or not, must be filed in the office of the clerk of the court in which the estate is pending. Section 2310, *supra*. And as to liens, it is provided in the same section that, "if the claim be secured by a lien upon all or any part of the real or personal estate of the deceased, such lien shall be particularly set forth in such statement, and a reference given to where the lien, if of record, will be found."

It remains only, therefore, to inquire whether the claim as filed by appellant against the estate of Conrad Forst, as set forth in the sixth finding of the court, has been finally adjudicated. Counsel for appellant say that there has been no adjudication of the claim. In the sixth finding of the court, it is said that on the 2d day of September, 1886, the appellant filed a claim for \$2,029.32, which was and is of the identical matter claimed in this case, against which claim an issue was formed, and the same was at the January term, 1886, of said court submitted to the court for trial, a jury being waived, and the court took the same under advisement until the 18th day of February, 1886, when the court, being fully advised in the premises, dismissed the claim, and charged the costs against appellant and that this judgment has never been appealed from, modified, or vacated, or in any manner set aside, but is still in full force. And in its seventh finding the court said that said claim, as set out in the sixth finding, is the identical claim on which a recovery is sought in this case, and that the parties are the same. These findings seem to us to show a final adjudication of the claim. If the administrator, through mistake, out of moneys received on an invalid sale of his decedent's property, had paid certain judgments of record against the decedent, he was entitled, on proper showing, to file his claim for reimbursement against the estate for such mistaken payments, made in good faith. This he did. His claim was submitted to the court, duly tried, taken under advisement, and decided against him. That judgment stands unappealed from. The representative of the administrator cannot now bring another suit on the same matter against the heirs of the estate. There

must be some end to the litigation, some final settlement of the estate. But counsel say that the findings show only a dismissal of the claim. This is to dispute about words, rather than to reason upon things. Perhaps the more appropriate word to have used would be disallowed, instead of dismissed, although the term "dismiss" is quite commonly used to show the rejection of a claim against an estate. Section 333, Rev. St. 1881, provides for the cases in which an action may be dismissed without prejudice. None of the cases mentioned in that section existed in the trial and decision of this claim. The section concludes that "in all other cases, upon the trial the decision must be upon the merits." And so, in this case, the decision was upon the merits. Certainly, there was no voluntary nonsuit, and under our practice the court had no power to order an involuntary nonsuit. *Williams v. Port*, 9 Ind. 551. Indeed, the disposition made of the claim by the court had none of the characteristics of a nonsuit, but had all those of a judgment on the merits. Neither party asked for a dismissal, nor was the claim dismissed by the court without prejudice. An issue was formed; the cause was submitted to the court for trial; the court took the case under advisement, and after several days, being fully advised, dismissed or disallowed the claim, charging the costs to the claimant. This judgment was never set aside, and never appealed from. It is clear that there has been a final adjudication of the case upon its merits. Even if the judgment of dismissal were not a final adjudication, however, but authorized the refile of the claim, as we do not think, still the appellant could not recover, for the reason that such claim could not be filed against the estate after 30 days before the final settlement, and the claim does not fall within any of the exceptions authorizing suits against heirs and distributees. We do not say that there may not be cases where equity would interfere in favor of a claim brought after the settlement of an estate, even if the claimant were not authorized by the statute to bring suit against the heirs or devisees, but we do not think that this is such a case. In the settlement of this estate, and the payment of claims, the provisions of the law were in many respects not complied with. The sale to his son-in-law by the administrator, and the resale soon after to the administrator, while not necessarily collusive or fraudulent, was, to say the least, of questionable propriety. Then it appears that this decedent died May 15 1873; that the administrator was appointed June 10th thereafter; that the invalid sale of real estate was made April 17, 1878; and that the estate was finally settled February 20, 1886. It is not the policy of the law that estates should remain so long in the hands of administrators, subject to possible mismanagement and neglect, and to almost inevitable waste. The ancestor's property should be placed in the hands of its owners with as little delay as may be. The claim in this case shows very little equity or diligence. The court did not err in its com-



clusions of law upon the facts found. The judgment is affirmed.

DAILEY, J., took no part in the decision of this case.

(135 Ind. 195)

### STATE v. SARLLS.

(Supreme Court of Indiana. Oct. 17, 1893.)

#### EMBEZZLEMENT—INDICTMENT—DEMAND.

Rev. St. § 1944, provides that any agent, clerk, servant, or employe, who shall appropriate moneys in his control, belonging to his employer, is guilty of embezzlement. Section 1945 provides that attorneys, and "persons engaged in making collections for others," who, having under their control moneys belonging to their employer or client, on reasonable demand, refuse to pay over the same, are guilty of embezzlement. An indictment charged that the accused, being the employe, clerk, servant, and collector of F. and M., for the collecting and keeping of the accounts of bills and accounts due belonging to said F. and M., did receive and take into his possession, from the moneys of said F. and M., etc. *Held* not bad for uncertainty as to which crime was charged, as the words "collector" and "collecting" did not charge a crime under section 1945, so as to make a demand necessary; that section applying to persons in the nature of independent contractors, not servants or employes.

Appeal from circuit court, Posey county; R. D. Richardson, Judge.

Indictment of Roy Sarlls for embezzlement. Indictment quashed. The state appeals. Reversed.

John W. Spencer and Seth Leavenworth, for the State. Walter S. Jackson, for appellee.

DAILEY, J. On the 29th of November, 1892, the grand jury of Posey county returned into court an indictment charging the appellee, Roy Sarlls, with the embezzlement of \$31 of the funds of William Ford and Braddock McGregor. Appellee moved the court, orally, to quash the indictment, alleging for cause that said indictment, on its face, charged the defendant with embezzlement under section 1945, Rev. St. 1881; that said indictment contained no allegation that reasonable demand had been made of the appellee by his client or employer, or persons designated by them to receive the same. The appellant claimed, in substance, that the indictment, on its face, was a good and sufficient charge of embezzlement, under section 1944, Rev. St. 1881, that it was drawn upon said section, and therefore no averment of demand was necessary. The court sustained appellee's motion to quash, to which ruling and judgment appellant at the time excepted, and appealed to this court. But one question arises for consideration under the assignment of error in this case: Did the court err in quashing the indictment? The charging language of the indictment is: "That Roy Sarlls, on or about the 15th day of November, 1892, at said county, being then and there the employe, clerk, servant, and collector of William Ford and Braddock McGregor for the collecting and keeping of the accounts of the electric light bills and accounts due, and then and there belonging to said Ford and

McGregor, did then and there receive and take into his possession, from the moneys of said Ford and McGregor, to which the said Roy Sarlls then and there had the control and possession by virtue of his employment, and whilst so employed as aforesaid, the following property, to wit." Here the indictment describes the property taken as money, and states the denomination of each bill and piece of coin, "to the possession of all and each of which the said William Ford and Braddock McGregor were then and there entitled, and did then and there feloniously and fraudulently take, purloin, secrete, and appropriate to his own use the moneys aforesaid," etc. The appellee, in support of the rulings of the court below, contends that the indictment is bad for three reasons: "First, for uncertainty, second, because it shows upon its face that it was returned under section 1945, Rev. St. 1881, which defines embezzlement by attorneys at law and collectors; third, that, showing on its face that the offense charged was against the provisions of section 1945, Rev. St. 1881, the indictment was bad for not alleging that a demand had been made as required by that section."

In 2 Bish. Crim. Law, § 832, we have the following clear doctrine upon the interpretation of terms: "The most frequent terms to indicate the person embezzling are 'agent,' 'servant,' and 'clerk.' We saw in 'Statutory Crimes' that according to an old doctrine now exploded in England, and not uniformly followed in this country, where a statute enumerated several things in words so broad in meaning as to overlap one another, the less specific are narrowed in the interpretation to permit this overlapping. 1 Bish. St. Crimes, § 247. Now, the words of our principal statutes are 'agent,' 'servant,' 'clerk,' and if the exploded doctrine were to be applied to them the person offending could be deemed to belong to one of these classes, not to two or all, and the pleader must select, at his peril, one, and only one, which the count should charge him as being. But the author is not aware that any attempt has been made to apply this doctrine to these statutes; consequently, if the pleader is satisfied the defendant is either an 'agent,' 'clerk,' or a 'servant,' he selects the term which pleases him best. Then, should the proofs sustain the allegation in this respect, all is well, though it should appear that one of the statutory terms would be equally appropriate." It is a rule of construction in this state that when a statute makes it a crime to do any one of several things mentioned disjunctively, all of which are punished alike, the whole may be charged conjunctively in a single count. The indictment, excepting the word "collector," does not use a single term or expression of section 1945, nor does the word "collector" appear in the body of that statute, its only use being in the title. The language of that section is "any attorney at law or person engaged in making collections for others." If a person engaged in making collections for others is a collector, by an equally fair interpretation a "clerk," a "servant," "an employe," "or keeper of accounts"

so engaged may be collectors; and a collector may be servant, clerk, employe, and keeper of accounts. Section 1945, supra, by its terms, clearly aims at that class of persons or collectors who, as a profession, for fee or percentage, collect generally for the public. It recognizes their right to mix the money thus collected with their own or other funds, by making a demand necessary before the crime is complete, and in charging an offense under this section the fact of demand must be averred in the indictment. The section means, in this respect, just what it says, and is capable of no other construction. Gillett, in his work on Criminal Law, (section 410, p. 333,) says: "Persons working on commission are not ordinarily servants, for the reason that such persons have the right to mix the money received with their own moneys, and perhaps for the reason that such persons may travel when and where they please, and are not sufficiently under the control of the employer." The descriptive features in the indictment designating the character in which he acted as collector exclude the idea that the charge is predicated on section 1945. But section 1944 aims at a different class; clerks, servants, and employes, having the right to the possession of their employer's money only for the purpose of immediately depositing it in a certain and designated receptacle. With this class the right of possession is only momentary, with no right to mingle the funds with their own. To what class the defendant in this case belongs can only be determined from the language of the indictment, on its face. It is conceded by the appellee that "had the pleader been content with the general allegation that the defendant, as the servant, clerk, and employe of Ford & McGregor, embezzled money belonging to that firm, then the indictment would have been certain; but, when the allegation was followed by a specification as to the particular capacity in which the defendant acted, it at once became uncertain which of the two offenses was charged." We think the indictment is not artistically drawn, but under section 1736, Rev. St. 1881, the words used must be construed in their usual acceptation in common language; and applying the rule laid down in *McCool v. State*, 23 Ind. 127, "that no greater certainty is required in criminal pleading than in civil," the charge clearly places him in the class designated in section 1944 by describing him as a "clerk," "servant," "employe," "collector," and "keeper of accounts" for an electric light company. These terms are readily interchangeable and overlying, and in this instance derive a common character and meaning from their relative positions in, and the formation of, the entire sentence. Neither was appellant bound to use the precise words of the statutes, but other words conveying the same meaning may be used. Rev. St. 1881, § 1737. In 2 Bish. Crim. Law, § 333, he suggests "that, in every relation on which embezzlement may be predicated, the position of the person embezzling must have a correlative; that is, there cannot be a clerk without an employer, a servant without a

master, an agent without a principal." In Gillett's Criminal Law, supra, citing from Wharton, the author says: "The term 'servant' may include employes, \* \* \* cashiers, collectors. \* \* \* A person has been held a clerk who was employed to keep accounts, and pay money thereon." "The word 'employe' \* \* \* means a person employed." "In general, the term 'agent' designates those employments where the persons exercising them are not under the immediate control of the superior." Adopting these definitions, and applying these tests of its sufficiency, we think the indictment sufficient to advise the defendant that he is being prosecuted under section 1944, supra. The terms in the charge, "and collector of William Ford and Braddock McGregor for the collecting and keeping of the accounts of the electric light bills and accounts due," etc., immediately follow, and are used in direct connection with, the words, "employe," "clerk," and "servant," and explain appellee's peculiar relation as such. If the language quoted could be treated as surplusage, the motion to quash should not prevail. By statute, "surplusage" or "repugnant allegation" does not render an indictment insufficient, "when there is sufficient matter alleged to indicate the crime and person charged." Clause 6, § 1756, Rev. St. 1881; *State v. McDonald*, 106 Ind. 233, 6 N. E. Rep. 607; *Myers v. State*, 101 Ind. 379; *State v. Judy*, 60 Ind. 138. It is a general rule, irrespective of statute, that surplusage does not vitiate, and, to aid the sense, it may be rejected. *State v. Judy*, 60 Ind. 138. Judgment is reversed, with instructions to the circuit court to overrule the motion to quash the indictment.

(135 Ind. 323)

## POOL et al. v. DAVIS et al.

(Supreme Court of Indiana. Oct. 17, 1893.)

ACTION TO QUIET TITLE—CROSS COMPLAINT—DEED ABSOLUTE AS MORTGAGE—FORECLOSURE BY HEIRS—FINDINGS—DELIVERY—BURDEN OF PROOF—PRESUMPTION—PAYMENT—NEW TRIAL AS OF RIGHT.

1. In an action by a wife to quiet title, a cross complaint alleged that plaintiff's husband owned a certain farm, and one G. another, of which the land in dispute was a part; that such husband was indebted to defendants' ancestor on a note; that the husband and G. exchanged farms, and, by agreement between plaintiff and such ancestor, part of G.'s land was conveyed to plaintiff, and the part in dispute was conveyed to defendants' ancestor as security for such note; that the latter paid certain taxes on the land conveyed to him; that afterwards plaintiff and her husband, by false representations, procured from G. the deed under which she claims title to the land in dispute; and that such ancestor died intestate leaving defendants as his only heirs. Treating the deed to him as a mortgage, they ask that it be foreclosed, and implead plaintiff's husband. *Held*, that such cross complaint is not open to the objection that it shows such deed was executed to secure the husband's debt, and included the wife's land, which gave her the position of surety.

2. In such case the court found in detail the facts alleged in the cross complaint, and the balance due on the indebtedness of the husband to deceased, and decreed that defend-

ants should have a lien on the land in dispute for such sum, senior to plaintiff's title, and that the latter should otherwise have her title quieted. *Held*, that the findings were responsive to the issues.

3. A finding of the execution of a deed alleged in a pleading includes not only the writing and acknowledging of the deed, but its delivery, also.

4. Where the issue as to the delivery of a deed is made by plaintiff's answer to a cross complaint, the burden of such issue, beyond the proper presumptions arising from the fact of possession, rests on plaintiff.

5. Where the evidence shows that the grantee named in a deed had it in his possession, and procured it to be recorded, delivery will be presumed.

6. Where, in an action to quiet title, defendants, by cross complaint, ask the foreclosure of a mortgage on the land in dispute, but concede plaintiff's claim of title, and the judgment quiets the title in plaintiff subject to the lien of defendants' mortgage, plaintiff is not entitled to a new trial as of right.

7. The fact that such cross complaint alleges the payment by the mortgagee of taxes which were not covered by the mortgage does not make it demurrable.

8. On the back of a note sued on was an entry as follows: "January 5, 1882, received a deed for 311 33-100 acres of land," (describing it.) *Held*, that such entry did not show payment of the note.

9. Where, in an action to foreclose a mortgage which is in the form of a deed absolute, the theory of the case, as made by defendants and as tried, is that the land never passed to the grantee, it cannot be claimed by them on appeal that the deed was received by the grantee as payment.

10. The heirs of a deceased mortgagee, who died intestate, may maintain an action to foreclose the mortgage where there are no debts against, and no administration on, the estate.

Appeal from circuit court, Starke county; George Burson, Judge.

Action by Pawlawna Pool against Charles Davis, Jr., and others, to quiet title to certain real estate, in which defendants, in a cross complaint, asked the foreclosure of a mortgage in the form of a deed absolute on the premises in dispute, and impleaded Robert L. Pool, plaintiff's husband. From a judgment foreclosing the mortgage, and making it a lien on the land senior to plaintiff's title, she and Robert L. Pool appeal. Affirmed.

Henry R. Robbins, for appellants. Albert I. Gould and Jas. W. Nichols, for appellees.

**HACKNEY, J.** This action was by the appellant Pawlawna Pool, by complaint in the usual form, to quiet the title to a tract of 311 acres in Starke county, as against the appellees. The appellees answered in general denial, and by a cross complaint in two paragraphs sought affirmative relief against said Pawlawna Pool and her husband, Robert L. Pool. The first paragraph of cross complaint alleges that in January, 1879, Robert L. Pool owned a farm in Ohio; that one Goodheart owned 411 acres in Starke county, Ind., of which the 311 acres here involved were a part; that at the same time said Robert L. Pool was indebted to Charles Davis, as evidenced by his promissory note, in the sum of \$1,200; that the said Pool and Goodheart exchanged their said lands; and, by

agreement between the appellants, said Charles Davis, and said Goodheart, 100 acres of the Starke county lands were conveyed by Goodheart to Pawlawna Pool, and the remaining 311 acres were conveyed to said Davis as security for said \$1,200 indebtedness, and for no other purpose; that said Davis paid certain taxes on the lands so conveyed to him; that the appellants thereafter, and by false representations, procured Goodheart to make to Pawlawna Pool the deed under which she claims title to said 311-acre tract. It is also alleged that said Charles Davis departed this life intestate, leaving the appellees as his only heirs at law, and leaving no indebtedness whatever, and that his estate had not been administered upon, but that said indebtedness and security became their property by virtue of such heirship. Treating said deed as a mortgage, it is asked that the same be foreclosed in the amount of said indebtedness, with interest, and Robert L. Pool is impleaded. The second paragraph of cross complaint is of the same character as the first, and pleads another indebtedness as a part of that secured by the deed to Davis; but, as the court's findings are manifestly upon the first paragraph of cross complaint, it is unnecessary to further notice said second paragraph.

It is insisted that the first paragraph of cross complaint was insufficient, and that appellants' demurrer should have been sustained to it—First, because, as claimed, it was apparent that the deed was executed to secure a debt of the husband, Robert L. Pool, and included the land of the wife, which gave her the position of surety; and, second, because the cross action is not by an administrator of the estate of Charles Davis. The cross complaint will bear no such construction as that contended for, as will appear from the synopsis we have given of it. It treats the land as that of the husband, whose debt is secured. The misconstruction of the cross complaint can only be excused by a possible grafting of the theory of the appellants' answer setting up a purchase by Pawlawna, her coverture, and the consequent suretyship of pledging her lands to secure the debt of her husband. As to the second objection to the cross complaint, we regard it as equally untenable. *Salter v. Salter*, 98 Ind. 522, and cases therein cited. In the special finding asked by the appellant Pawlawna Pool, the court finds in detail the facts pleaded in said first paragraph of cross complaint, and that the balance owing upon the indebtedness of Robert L. Pool to Charles Davis is \$1,425.39. Upon such facts the court concludes that the appellees should maintain a lien in said sum against said lands, senior to the title of said Pawlawna Pool, and that said Pawlawna should otherwise have her title quieted. No exceptions were taken to the conclusions of law, and the further questions made in this court arise upon the overruling of motions for a new trial as for errors occurring upon the trial, and as of right under the statute. Rev. St. 1881, § 1064.

The first cause assigned for a new trial was that the findings of the court are not

responsive to the issues. Without considering whether this assignment is known to our practice as a cause for new trial, we unhesitatingly conclude that the cause is not well founded in fact, and that the findings in no respect depart from the issues as made upon the complaint and cross complaint. It may be true, as argued, that Davis could not take from Goodheart or Robert L. Pool a lien upon the lands of Pawlawna Pool, but under the cross complaint it was an issue that Robert L. Pool exchanged his lands for the tract in suit; that with the knowledge, at least, of Pawlawna, the deed was made to Davis; and that, by fraudulent representations, Pawlawna's deed was procured long thereafter. When the appellees concede that the title of their ancestor was only a security, it was not for them to question the ownership of Pawlawna further than to show that it was with knowledge of, and subject to, the lien of Davis. It was not necessary, as argued, that they should set aside her deed, nor to show that she received the conveyance without consideration,—a fact which, however, is expressly found by the court, and also appears by the fact that the consideration was the land and the note of Robert L. Pool. After such concession by the averments of the cross complaint, the burden of the issue, and the only contested ground, was that made by the cross complaint and the answers thereto, namely: Was there a debt? Had it been paid? Was Pawlawna surety for such debt?

In rebuttal testimony, Pawlawna Pool offered to introduce the evidence of her husband, Robert L. Pool, to which objection was made by the appellees, and the objection was sustained. The record discloses no question to or offer to prove by the witness, and the competency of the witness or the relevancy of his evidence is not argued. It is urged that the proper questions were asked and steps taken to save the ruling, but that the court misstated the action by the bill of exceptions. The bill of exceptions, as the appellants bring it to us in the record, is the only source to which we can refer for the adjutant of differences of this character. The objection stated is as to the competency of the witness, and not as to the admissibility of his evidence, and usually no offer to prove is necessary. *State v. Thomas*, 111 Ind. 515, 13 N. E. Rep. 35. But as the appellants have not discussed the question as an error, but have been content to criticize the claimed action of the court in misstating the action had, we cannot review the ruling, and it is treated as waived.

One of the findings of fact is that Goodheart executed a deed to Davis for the 311 acres of land, and the appellants attack this finding—First, as not equivalent to a finding of a delivery of the deed; and, second, because there is no evidence of a delivery of the deed to Davis. The issue as to delivery was made by the answer to the cross complaint in pleading the non-delivery of the deed, and any burden of this issue beyond the proper presumptions from possession rested upon the appel-

lants. If the burden is not discharged, the appellants cannot charge the fact to the weakness of the appellees' case. Contrary to the contention of appellants, it is our opinion that the finding of the execution of the deed includes not only the writing and acknowledging of the deed, but also its delivery. While the evidence is meager, it does show that Davis had the deed in possession and procured the recording of it. From this fact, delivery is presumed, and the absence of evidence to the contrary will not strike down this presumption. As to the weight and credibility of the evidence of delivery and of nondelivery, the lower court having passed upon it, we cannot disturb the finding.

In discussing the alleged error in overruling the motion for a new trial because the finding was contrary to law, the appellants' counsel devotes much space in his brief, but his argument is upon the false assumption that the transaction between Goodheart and the Pools made Pawlawna Pool the owner of the 311-acre tract of land as against Charles Davis. The facts found not only show that the equitable title to the land was in Robert L. Pool when the deed was made to Davis, he having purchased it in his own right, and having paid for it from his own resources, but that the deed to Pawlawna was procured by gross misrepresentation which, if permitted to prevail, would amount to an unconscionable fraud upon Davis. As against Davis, it is not only not her land, but she has no cause for complaint that he or his heirs did not seek to set aside the deed to her. Upon this false assumption, counsel has further built a structure for her relief, in the contention that a mortgage of her lands constituted her a surety for her husband, and that therefore the mortgage was void. There is no claim, under the pleadings that she did not join in the mortgage, and that, treating the lands as belonging to her husband, her life estate interest in the land should be protected against the claim of Davis. Without intimating an opinion upon such a condition, we would feel that such a claim by her would possess more merit than the claim here insisted upon.

Finally, it is contended that the court erred in overruling the motion for a new trial as a matter of right. Upon the issue of the complaint the plaintiff succeeded. By the theory of the cross complaint the claim of title by the plaintiff was conceded. As we have already said, the only issue controverted upon the trial was as to the existence of a mortgage lien prior to conveyance to the plaintiff. The judgment was in favor of the title alleged in the complaint, but in favor of the mortgage sought by the cross complaint to be foreclosed. Upon the issue adjudged against Mrs. Pool, no question of title was involved. That issue embraced a substantive cause of action, in which a new trial as a matter of right is not given by the statute. In *Wilson v. Brookshire*, 126 Ind. 506, 25 N. E. Rep. 131, it is said: "The rule is that where a cause proceeds to judgment which embraces a substan-

tive cause of action, in which a new trial as a matter of right is not allowable, then, even though it embraces other causes in which a new trial as a matter of right is allowable, the policy of the law is to regard the cause of action as controlling in which a second trial as of right is not permitted. *Bradford v. School Town of Marion*, 107 Ind. 280, 7 N. E. Rep. 256; *University v. Conard*, 94 Ind. 353. Notwithstanding the cross complaint, in which one of the appellants asked to have his title quieted, there were other substantive causes of action embraced in the judgment, upon which a new trial as of right was not allowable." In the separate brief of Robert L. Pool, the sufficiency of the cross complaint as to him is attacked for some of the reasons urged by Pawlawna Pool, which have been considered by us.

It is further contended that the cross complaint is bad because the items of taxes alleged to have been paid by Davis were not properly covered by the mortgage. Even if this were true, the pleading would not be bad for having included such items. The only objection to the items, either as a part of the pleading or as included in the judgment, is by demurrer to the pleading. An entry on the back of the note sued on in the cross complaint was as follows: "January 5th, 1882, received a deed for three hundred and eleven 33-100 acres of land in the county of Starke, state of Indiana, the west half of section four, in township thirty-four, range one." This, it is urged, showed a payment of the note, and therefore no cause of action was alleged. This contention has no merit, as it is apparent that the entry is but a memorandum of the transaction, and not as a payment; but, if a payment, we are unable to say that the value of the land, actual or estimated, was equal to the indebtedness. This entry was not made part of the pleading by any reference. The question of payment arose upon the answers, and the burden rested with the appellants. The theory of the case, as the parties made it and tried the cause, was that the land never passed to Davis, and it cannot now be claimed that a different theory shall prevail. We find no error in the record, and the judgment of the circuit court is affirmed.

(159 Mass. 514)

# DURKEE v. INDIA MUT. INS. CO.

(Supreme Judicial Court of Massachusetts.  
Suffolk. Oct. 19, 1893.)

## MARINE INSURANCE—MISSTATEMENTS IN APPLICATION.

1. St. 1887, c. 214, § 21, declaring immaterial misrepresentations by the assured or his agent, unless made with actual intent to deceive, or effective to increase the risk of loss, applies to marine insurance.

2. On the issue whether the broker's misrepresentations of the then situation of the ship proposed for insurance was material to the risk, on account of the prevalence of storms in those waters after a certain season of the year, a vessel owner, called by plaintiff as an expert, cannot testify to his experience in insuring a similar vessel of inferior class to

plaintiffs, in the same waters, at the same time of year, and that he paid a lower rate of premium than plaintiff.

3. Whether or not the broker's misrepresentations were such as to avoid the policy issued through him, the question whether the insurer had notice of the true facts before the loss occurred was immaterial.

Report from superior court, Suffolk county; Edgar J. Sherman, Judge.

Action by A. R. Durkee against the India Mutual Insurance Company on a policy of marine insurance on the bark *Aspatogon*. Defendant set up misrepresentations in the application made by H. C. Knight, the broker. Said application was by letter dated June 16, 1890, and contained the following sentences: "Beg to state that Mr. Durkee is the managing owner of this vessel, controlling five-eighths himself, and has no other insurance on hull." "Date and place last heard from, at Trinidad." It appeared that the vessel had sailed April 19th from Brunswick, Ga., to St. Lucia, arriving May 23; that she did not start again till July 5th, and arrived at Port of Spain, Trinidad, July 8th; that August 14th she sailed for Philadelphia, but on August 21st, having sprung a leak by a "tide rip," she was abandoned 25 miles south of the island St. Thomas. It was admitted that plaintiff has \$6,800 other insurance on the hull, \$1,800 of which had been procured by Mr. Knight himself. Defendant insisted that this misrepresentation was material to the risk, as was the other in regard to the bark's arrival at Port of Spain; the latter, on account of the prevalence of hurricanes in the West Indies during August and September, which she would have avoided had she reached Trinidad by June 16th. On this issue was received the evidence of Mr. Herbert C. Hall, a vessel owner of Boston, testifying as an expert in behalf of plaintiff, as follows: He was part owner of the bark *Arlington*, built in British provinces, and about the size of the *Aspatogon*, and 20-23 three years old, rating 5/6 l. l., the second class in French veritas, which was a poorer rate than the *Aspatogon* had. That in May, 1887, he took out a policy upon her from Demarara via Trinidad, with a cargo of asphalt to a port north of Hatteras, and was due at Trinidad at the same time of the year that the *Aspatogon* was due, and that the premium paid for said insurance was 2 per cent., the rate on the policy in suit being 2½. The evidence as to this policy taken out by witness on the *Arlington* was objected to by defendant, but admitted by the court, and defendant excepted. On plaintiff's cross-examination of Mr. John H. Dane, defendant's president, who had testified that before the loss he had no notice of the date of the bark's arrival at Port of Spain, witness produced copies of the *Maritime Register* and *Boston Daily Advertiser* received at defendant's office between May 28th and August 27th, containing advices of the movements of said bark. The jury found specially that neither misrepresentation was material, and that defendant had notice before the loss of the time when the bark reached Trinidad. They also found that the probable

risks of the voyage to Philadelphia were not different in kind or degree from what they would have been if she had been at Trinidad on June 16th, and that her sailing from Trinidad was not unreasonably delayed. The court ordered a verdict for plaintiff, and defendant excepted. The case is reported on the exceptions. Reversed.

Eugene P. Carver and Edward E. Blodgett, for plaintiff. L. S. Dabney, for defendant.

MORTON, J. We think it is clear that there must be a new trial in this case on account of the testimony of Hall concerning the premium which he paid at another time on another vessel. It related to a matter that was wholly collateral. It introduced a distinct issue, which was not involved in nor pertinent to any issue on trial, and which the defendant could have had no just ground to anticipate, and was wholly incompetent. *Woolen Co. v. Proctor*, 7 Cush. 417; *Aldrich v. Pelham*, 1 Gray, 510; *Lane v. Railroad Co.*, 112 Mass. 455; *Hatt v. Nay*, 144 Mass. 186, 10 N. E. Rep. 807.

The remaining questions relate principally to certain alleged material misrepresentations. At the argument it was suggested from the bench whether St. 1887, c. 214, § 21, did not apply. Counsel were not then prepared to argue the question, and at the request of the court subsequently furnished briefs upon it. We think, upon examination, that the statute applies to marine insurance companies, and that it renders immaterial misrepresentations in regard to policies of insurance by the insured or his agent unless they are made with actual intent to deceive, or unless the effect of them is to increase the risk of loss. *Ring v. Assurance Co.*, 145 Mass. 426, 14 N. E. Rep. 525. The act is entitled "An act to amend and codify the statutes relating to insurance;" that is, all insurance. Section 1 provides that the words "insurance company" shall include "all corporations, associations, partnerships, or individuals engaged as principals in the business of insurance," and defines the words "net assets" when applied to marine insurance companies. Section 2 provides that "all insurance companies now or hereafter incorporated \* \* \* may exercise the powers and shall be subject to the duties and liabilities provided by this act." Section 11 provides the manner in which the liability of insurance companies upon contracts of insurance relating to marine risks shall be computed, and also contains other provisions in regard to marine insurance companies. Under the caption, "Provisions Common to All Companies," which forms a part of the statute, is section 21, which is as follows: "No oral or written misrepresentation made in the negotiation of a contract or policy of insurance by the assured, or in his behalf, shall be deemed material or defeat or avoid the policy or prevent its attaching, unless such misrepresentation is made with actual intent to deceive, or unless the matter misrepresented increased the risk of loss." There is nothing in this section which, in

terms, exempts marine insurance companies from its operation, and there is nothing in the nature of its provisions which should not apply to them equally with other insurance companies. Further on in the chapter (section 52) follow provisions applying specially to "marine and mutual fire and marine companies," without anything to indicate that the provisions of section 21 do not affect them. A similar section in the Public Statutes, (chapter 119, § 181,) taken from St. 1878, c. 157, § 1, was applicable, by its terms, to fire and life insurance companies only. It would seem that in amending and codifying, in St. 1887, the law relating to insurance, the legislature saw no reason why those provisions should not be extended to all insurance companies, and provided by section 21 that they should. We think that such is the effect which must be given to that section.

As the terms of the report require that the verdict shall be set aside, and a new trial granted, if there was any error in admitting any of the evidence excepted to by the defendant, it is not necessary to consider whether the questions put to the jury, and their answers, established that there was no actual intent to deceive on the part of Mr. Knight; assuming that he was the defendant's agent, and that the misrepresentation did not increase the risk of loss.

We have not considered the question of the admissibility of the *Maritime Register* and the *Boston Advertiser*. Upon a new trial it will be immaterial whether the defendant's officers knew that the bark had arrived at Trinidad July 8th. If the alleged misrepresentations were made with actual intent to deceive, or if they increased the risk of loss, it is of no consequence whether the officers of the company afterwards knew when the vessel reached Trinidad. In either case the policy would be avoided. *Ring v. Assurance Co.*, supra. If they were not made with intent to deceive, and did not increase the risk of loss, it is also of no consequence whether the officers of the defendant company did or did not know of arrival of the bark at St. Lucia. Verdict set aside, and new trial granted.

(159 Mass. 587)

#### SPAULDING v. W. N. FLYNT GRANITE CO.

(Supreme Judicial Court of Massachusetts.  
Hampden. Oct. 19, 1893.)

#### MASTER AND SERVANT—DEFECTIVE APPLIANCES—OWNERSHIP.

1. The fact that a quarry company does not use its own cars to run its product to the railroad, but the railroad's own cars, and that it has to take what cars it can get, does not exempt it from liability to one of its workmen injured by the defects of such a car.

2. A workman running a car loaded with stone by gravitation on a down grade is not negligent in failing to jump off directly he sees that there is something the matter with the brake.

Exceptions from superior court, Hampden county; Justin Dewey, Judge.

Action by William H. Spaulding against

the W. N. Flynt Granite Company for damages for personal injuries by defendant's negligence. Judgment for plaintiff. Defendant excepts. Exceptions overruled.

Robinson & Robinson, for plaintiff. J. B. Carroll, for defendant.

HOLMES, J. This is an action for personal injuries. The plaintiff was a workman employed by the defendant, and was directed to run a car loaded with stone down from the defendant's quarry to where the car would be taken away by an engine on the Boston & Albany Railroad. The track over which he was to pass descended gradually, so that the car moved by gravitation. After starting, the plaintiff found that he could not control the car with the brake. It ran away with him, ran into some other cars, and the plaintiff's foot was crushed by the stone. The plaintiff's evidence tended to show that the brake was defective. The defense mainly relied on is that the car was furnished by the Boston & Albany Railroad; that the defendant had to take what it could get; and therefore that it ought not to be held to the rule as to furnishing proper instrumentalities, but only to the duty of inspection, as in the case of cars received from connecting lines to be forwarded. *Mackin v. Railroad Co.*, 135 Mass. 201; *Keith v. New Haven & Northampton Co.*, 140 Mass. 175, 180, 3 N. E. Rep. 28. The judge before whom the case was tried ruled otherwise, and the defendant excepted. There are also the usual suggestions that the plaintiff was negligent, or took the risk, and that the defendant used due care.

There was no ground for ruling that the plaintiff was negligent. It would be absurd to require him to abandon his post and jump from the car at the first instant that he saw that there was trouble with the brake. If at any later moment it would have been prudent to do so, the jury might have found that, as he testified, his foot was so caught that he could not. We cannot say that it necessarily was negligent to let the brake off a little at the very beginning, even if the car moved gradually before the plaintiff did so, but the defendant's witnesses testified that the car did not move until the brake was loosed. If the brake was defective, and the rule as to furnishing proper instrumentalities applies, there was evidence that the defendant had not satisfied that rule, but might have discovered the defect. If it should be found not to have done so, of course the plaintiff did not take the risk of its negligence. The jury were instructed that if the plaintiff undertook to inspect the car himself he relieved the defendant of its duty.

With regard to the main question above mentioned, we are of opinion that the exception or distinction established by *Mackin v. Railroad Co.*, does not apply, and that the ruling was correct. Whatever may be said of a car received by a railroad only for the purpose of being forwarded, and not used by it at all in the process, (*Coffee v. Railroad Co.*, 155 Mass. 21, 23, 28 N. E. Rep. 1128,) this car was

used by the defendant as one of the instruments of its business. When that is the case it does not matter whether the defendant owns the thing used or borrows it. The responsibility of the master to his servants is the same either way.

It is true that the plaintiff testified that the defendant had to take whatever car was brought to it. But, even assuming that he is to be held to this statement on a matter probably not within his personal knowledge, he did not mean that the defendant was bound to use any car furnished it, but only that it had to take that or nothing. Probably, if the defendant had seen fit to furnish its own cars, it could have done so. Certainly it was at liberty to carry the stone to the railroad by other means if it preferred. Even if the course of business adopted was the only one commercially practicable, there was nothing to hinder the defendant from seeing that the cars furnished it were put into proper condition before they were used.

Exceptions overruled.

(160 Mass. 1)

CABANA v. HOLYOKE CONCLAVE,  
NO. 20, KNIGHTS OF SHER-  
WOOD FOREST.

(Supreme Judicial Court of Massachusetts.  
Hampden. Oct. 20, 1893.)

CORPORATIONS—ACTIONS AGAINST—PROOF OF INCORPORATION—DEMAND.

Under Pub. St. c. 167, § 87, providing that when a party is sued as a corporation the fact of incorporation shall be taken as admitted unless defendant files, within 10 days from time for answer, a demand for proof, and section 89, extending the provision to civil actions before police courts, where, in a police court permitting oral answer, defendant goes to trial without filing such demand, or asking delay after joining issue for the purpose of filing it, defendant waives the right to demand proof.

Report from superior court, Hampden county; Justin Dewey, Judge.

Action by Israel Cabana against Holyoke Conclave, No. 20, Knights of Sherwood Forest, brought in the police court of Holyoke, where there was judgment for plaintiff, and defendant appealed to the superior court, where there was verdict for plaintiff; the court ruling that plaintiff was not obliged to prove defendant's incorporation, no demand for this having been made in the police court, though a demand was made within five days after answer in the superior court. At defendant's request, the case is reported to the supreme judicial court, the verdict to stand if such ruling is right; otherwise, to be set aside. Verdict to stand.

William H. Brooks, for plaintiff. A. L. Green, for defendant.

ALLEN, J. The writ described the defendant as a corporation. By Pub. St. c. 167, § 87, when a party is sued as a corporation such fact shall be taken as admitted, unless the defendant files in court, within 10 days from the time allowed for answer, a special demand for proof



thereof. By section 89 this provision is made applicable to civil actions before police courts. The rules of the police court of Holyoke did not require an answer in writing, but the oral pleading was a joinder of issue, and stood in the place of an answer. *Wilbur v. Taber*, 9 Gray, 361. The statute clearly implies that the special demand for proof should precede the trial; otherwise, it would be useless. By going to trial without filing such demand, or asking delay after joining issue for the purpose of filing it, the defendant waived the right to take this objection. The leg-

islature no doubt intended to make an effective requirement that a defendant wishing to rely on such a misdescription should give early notice thereof to the plaintiff; otherwise, the defendant might lie by in the police court, and go to trial upon the substantial merits of the case, and omit all intimation of this objection till after the entry of an appeal in the superior court. That is just what the defendant did in this case. The ruling that the plaintiff was not bound to prove the defendant's incorporation was right. Verdict to stand.

END OF CASES IN VOLUME 34.







